



(De-)Regulating the Family

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Uncategorized

We have previously noted the deregulation of family life that began in the middle of the last century, and thought it worth thought that it would be useful to summarize what happened and what social scientists have learned about the effects of these changes. To be clear about terminology, by “deregulation,” we are referring to the diminution in the role that government plays in deciding who can marry, who can divorce, and under what circumstances.

In the 1950s some state legislatures began to repeal laws restricting marriage between racial groups. These anti-miscegenation laws were eliminated nationwide in 1967 by the Supreme Court ruling in *Loving v. Virginia* (388 U.S. 1), which argued that marriage was “one of the ‘basic civil rights of man.’” This ruling was just as important not only for laying a legal foundation for inter-racial marriage, but also because in this decision the Supreme Court stated that marriage was a fundamental right. This set the stage for further deregulation of marriage.

Soon thereafter laws were struck down barring those deemed “unsuitable,” from marrying. For example, Texas had refused to grant a marriage license to anyone behind on child support payments. Subsequent Supreme Court rulings eliminated many of the legal distinctions that had previously given children born in marriage greater rights and connection to their parents.

States also began to reduce their role in divorce proceedings. In the 1950s, most states required evidence of marital fault before allowing a marriage to be dissolved. Couples who both wanted to divorce could usually divorce even without a marital fault—they would simply agree to fabricate evidence of such a fault. Truly adversarial situations were more difficult. A judge might have found been persuaded by a robust defense, finding no evidence of fault when there truly was a marital fault, or might have found evidence that both parties were at fault and thus, in the absence of an innocent party, disallow the divorce.

Rather than simply allowing consenting parties to divorce without requiring evidence of fault, many states, somewhat unintentionally, moved to allowing unilateral divorce—a situation where a divorce could be grant upon the request of either spouse, regardless of the wishes of his or her partner. Many states also removed fault as a consideration in property division and some states changed laws governing property division subsequent to divorce.

Researchers have now had decades to study the effects of such policies. Somewhat surprisingly there has been little empirical analysis examining the effects of the right to marry on marriage or the equalizing of rights between illegitimate and legitimate children on the growth in out-of-wedlock childbirth. Most of the research has focused on the change in divorce laws. One reason for this is that the move to unilateral divorce provides a useful “natural experiment”, as research compare family outcomes in states that changed their divorce laws at different points in time. Since experiments provide the best test grounds for disentangling causation from correlation it is no surprise that many empirical researchers started plowing these grounds.

This research finds that restricting access to divorce by requiring evidence of fault or mutual

consent had little impact on the divorce rate. This is surprising to many, but less surprising to economists, who are well-schooled in thinking about efficient bargaining. Most couples, even in the midst of acrimony, want to find a way to reconcile if they can, or divorce if they should. While thinking about marriages as involving bargaining may seem odd to some people, the insights are quite simple: it is easy to imagine that most people do not want to stay in a marriage when their spouse really wants out. Similarly, it seems plausible that a spouse who is interested in leaving could be convinced to stay by their spouse's effort to improve the marriage. Returning to the language of economics, this suggests that the couple stays together if it is efficient for them to do so.

While the empirical literature on the effects of divorce reform has been quite heated, it is worth emphasizing that the similarities in all of this research: the debate in the empirical literature was whether unilateral divorce had no effect on the divorce rate or a small effect on the divorce rate.

But even if there were only small effects on divorce rates, there the movement to unilateral divorce may have had big effects on other outcomes. In the few cases where spouses cannot come to agreement on their own, when one spouse holds out no matter what, there is often a dysfunctional or even violent relationship at the heart of the problem. Indeed, our research finds that the movement to unilateral divorce laws caused an important decline in domestic violence and female suicide. Prior to unilateral divorce women were literally dying to get out of their marriages. Given that fault-based divorce always allowed women to present evidence of domestic violence, we can conclude that the reduction in violence was fundamentally about the movement toward unilateral rather than mutual consent divorce.

This distinction between the average married couple, the average divorced couple, and the couple whose divorce would be impacted by a requirement of mutual consent divorce is important. Couples in the latter group are likely very different than even the average couple divorcing. Yet if children are likely to benefit from any marriage being held together it is likely to be a marriage where both parents are amicable, communicate easily, and are willing to negotiate. However, these couples are less likely to be affected by a removal of unilateral divorce.

It is easy to see why some advocates want to repeal unilateral divorce-after all, unilateral divorce renders the marriage contract unenforceable. And without binding contracts couples face a different set of incentives. Research has shown that couples who marry under unilateral divorce invest less in their marriage-an outcome that is particularly problematic for those interested in promoting marriage! Yet, one of the investments that they cut back on, or at least postpone making, is children. This means that children are less likely to experience a divorce since many of these couples will now divorce before having children rather than after having children. Indeed, since the late 1960s the average number of children involved in each divorce has fallen sharply.

Forcing couples to honor their contract to stay together unless both parties want out is not the only way to protect "innocent" parties from losing their investment. Property settlement laws can take fault into account even when fault is not needed to grant the divorce. Judges can recognize investments that are made such as spousal support during the early years of a career when hard work and sacrifice are rewarded by higher salaries later in life. Couples can write explicit contracts discussing how they plan to make their investments and share the returns down the road.

We thereby stick by our claim that re-regulation of families-referring to the proposals to change divorce laid out by Norval Glenn and other advocates-could do more harm than good to American families. Moreover, this is a conclusion driven by careful empirical research, and not the conclusion of any specific theories of how families can or should work.

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