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Horror stories about divorce and child custody 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.

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

The loosening of bonds between parents and their children and the increasing government control over children has reached crisis 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, parental kidnappings, fatherless children, child abuse, foster care, adoption markets, educational failure, violent crime, substance abuse, psychotherapy, psychotropic drug use, escalating medical costs, sex trafficking, child soldiers – all these are the consequences of family dissolution and the loosening bonds between children and parents.

Growing government intervention into family life and the separation of children from parents by government authority is a trend that demands urgent attention. How the government involves itself in private family life, how it assumes control over children, how it distributes children among parents and other parties – these are matters with profound implications not only for family policy but for freedom.

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

This can not continue. Changes in the law and policy governing divorce, child custody, and other aspects of family policy recent decades have created a crisis of the family whose media manifestations are only a superficial indication of the problem. Even today, these matters are poorly understood by the public, policymakers, journalists, even by legal practitioners and scholars.

Until recently, free societies dealt with this matter with a principle that, while it might be violated, was never renounced: Parents control and speak for their minor children. This guarantee for parental authority ensured the integrity of the family unit as an entity 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.

> 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.

Shell is not correct about the facts: Many governments today have moved toward precisely this practice. But she is completely correct about the consequences.

This paper argues that the procedures and practices governing child custody determinations are seriously flawed and demand urgent reform. While not everyone will agree with my prescriptions, what is of the utmost urgency is that we stimulate a debate over issues that affect the lives of tens of millions but are determined, often behind closed doors, by the power of very few.

National debates on divorce and child custody have begun in Canada, Britain, Australia, Italy, Belgium, and elsewhere. In the US, individual states have begun to follow suit. It is time to address and debate these issues nationally.

What Precisely Is "Custody"?

The word "custody" has become commonplace. We speak about "winning custody" and "losing custody" as if it were a harmless game. Yet "custody" has become 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.

In addition, child custody is now something of an experimental legal laboratory, where legal innovations are introduced, some of which are positively dangerous for a free society.

An award of "custody" is a government intervention into private family life and the parent-child relationship. While we speak of a parent "winning" or "losing" custody, what we actually mean is the government assuming control over someone'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 not the right to parent one's children; it is the power to prohibit someone else from parenting his or her children. It strips parents of the right to be with their children and to make decisions about them, and it marshals the penal apparatus to keep parents away from their children. Custody is only partly about children, therefore; it also confers formidable power on grown-ups.

What we term "custody" means the power to criminalize parenthood. 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 have their relationship with their children criminalized and can be turned into criminals or quasi-criminals entirely through the actions of others in ways they are powerless to avoid. 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 through 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 and effectively ejected from the family, and in almost every case the judge will grant the request. It is not necessary that the parent be found unfit, that he or she commits a crime or violates the marriage agreement, or that the parent even agree to a divorce.

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. Yet with the advent of unilateral or "no-fault" divorce in the 1970's, that power has been transferred to state officials. This government seizure 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 this control over the children, and sever the relationship between the children and a legally unimpeachable parent, not by the mutual agreement of both parents but at the mere request of one.

The clichés and euphemisms of divorce have left us all ready to accept the loss of fundamental rights and responsibilities over our private lives without realizing the full implications. 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.

But this begs critical questions. We do not normally call in government officials whenever two people disagree about a private matter. Government agents are not necessarily disinterested parties. They have a tangible interest in declaring such a breakdown, for it rationalizes a major extension of state power. Through children, the modern state once again achieves its most coveted and dangerous ambition: to assume control over the private lives of its citizens.

Through "no-fault" divorce, one parent can now declare unilaterally that the marriage has "broken down" and petition government officials to move in and summarily

remove the other parent without that parent having done anything legally wrong. But if disagreement between parents is sufficient grounds for the government to intervene and remove one parent, then the most effective method for the parent who seeks to have the other removed is to be as disagreeable as possible. The government can then reward the divorcing 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 not usually charged with any legal infraction (or at least nothing for which evidence will be presented), he will find it impossible to defend himself. If allegations of abuse are made, he is not likely to be formally charged but will simply be kept from his children. The case against him will not be built on evidence of any legal transgression but will consist entirely in how he conducts his private life. "The authorities will act quickly to 'protect' your children from you," writes Jed Abraham. "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 surveillance and control from the court. He will be told when he may see his children, what he may do with them, and where he may take them. He may be denied access to their school or medical records and have no voice in any decisions regarding their health or education. He will be told what religious services he may (or must) attend with them and what subjects he may discuss with them in private. He will be told how much he must pay to other adults for their

maintenance, and the money will be deducted automatically from his paycheck. He can be ordered to work certain hours and at certain jobs, the earnings from which will be confiscated. The days and hours he is authorized to see his children may conflict with his employment, but each time he wants them changed he must petition the court and pay more fees. If he loses his job or falls ill he will be declared a felon and jailed for failure to pay child support. His visits with his children can be monitored by court officials and restricted to a "supervised visitation center," for which he will pay and where he and his children will be watched and overheard throughout their time together. His financial records will be demanded and examined by the court and his bank account may be raided. Anything he says to his spouse can be used against him in court. He can be ordered to sell his house and turn the proceeds over to attorneys and others he has not hired. His children can be used as informers against him.

As for the children, they become effectively wards of the court. They can be placed in daycare or other institutions without the non-custodial parent's consent, and he can be ordered to pay for it – above the regular child support. 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. "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 simple and seemingly harmless formulation of events, so

common as to be mundane. 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 an assortment of government directives controlling his movements, finances, and personal habits – directives that apply to no one but him – is from this point also grounds for criminal prosecution. In effect, the court has legislated a personalized criminal code around this parent, subjecting him to criminal punishments for doing what anyone else may do, such as speaking with his 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, privacy, and freedom without any of these constitutional protections. "Criminals, killers, and rapists are presumed not guilty in the absence of evidence to the contrary," says one grandmother, pulled into a custody battle in New Hampshire, "but fathers fighting for custody are assumed guilty." Once Americans have children, they forfeit their constitutional rights.

Is the Problem Gender Bias?

Because the evicted parent is usually the father, one hears complaints that justice in custody procedures suffers from "discrimination," "gender bias," and "sexism." A very strong bias against fathers is undeniable. Yet this constitutes a superficial understanding

of the problem.

Gender discrimination in custody awards is now prohibited in virtually all jurisdictions, and courts have held statutes discriminating in favor of mothers in custody cases to be unconstitutional. No official figures are available on the gender division in custody awards in any jurisdiction I know of, even though it would be a simple statistic to compile. Yet despite formal legal equality between parents, it is generally agreed that some 85-90% of custody awards go to mothers. One survey of the academic literature concludes, "it appears that, over all, mothers obtain sole physical custody ten times more often than fathers." One study in Arlington, Virginia found that over eighteen-months maternal custody was awarded in 100% of decisions.

Sanford Braver found that mothers are much more likely to report being satisfied with the terms of divorce and even acknowledge the bias.

This imbalance is often attributed to simple, old-fashioned 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." At first glance, 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. "We see bizarre cases where abusive and violent mothers are given child custody,'" writes attorney Peter Jensen. "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. "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 his colleagues at a judges' training seminar in 1994. "Throw him out on the street. ... We don't have to worry about the rights."

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, "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 almost never temporary. Once she has custody 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 false charges, delays the proceedings, and obstructs his efforts to see his children, the more likely she is to win sole custody. The more belligerence she displays and the more litigation she creates, the more grateful the courts will be for the business she brings. She can then claim rich financial rewards.

Any restraint the father shows is likely to cost him dearly, as most discover too late. On the other hand, belligerence and aggressive litigation on his part may carry enough hope of reward to keep him involved. Some counsel fathers that the game is so rigged that their best chance is to imitate the techniques of mothers: If you think she is planning to snatch, snatch first. Then conceal, obstruct, delay, and so forth. "If you do not take action," author Robert Seidenberg advises, "*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 snatches first survives.

Far from merely exploiting family breakdown after the fact then, family law has turned the American family into a game of what we in political science call "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 counselors the truth has long been known to be the opposite. In the largest federally-funded study ever on these issues, Sanford

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."

And the bottom line is the children: After analyzing 21 wide-ranging variables, the Brinig-Allen study concludes that the parent who anticipates gaining custody is the one most likely to file for divorce. "We have found that who gets the children is by far the most important component in deciding who files for divorce."

The implications are profound. If the same parent who initiates the divorce can expect to get 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. Gender bias alone is not an adequate explanation for the explosion of divorces that are depriving children of fathers. More important are fundamental conflicts of interest in the family law system. Though apologists do not hesitate to promiscuously invoke both traditional stereotypes about motherhood and modern ideas of women's rights, what really drives the custody machinery is money and power. "Fights over control of the children," reports one divorce insider, "are where most of the billable hours in family court are consumed."

Courts today effectively offer parents – usually but not necessarily mothers – a tempting package of financial and emotional incentives to file for divorce. As one lawyer told a client who asked him to stop a divorce, "There's too many people making too much money in the divorce business."

Parental Rights or "Best Interest of the Child"?

An unresolved dilemma lies at the heart of the child custody problem. It is not which parent or parents should have custody. It is the more fundamental question of who has ultimate control over children, their parents or the government. This question is of central importance, not only for family policy but for essential questions of our democracy and freedom: How secure is the private sphere of life, and how far into private homes does the authority of the state go?

The fundamental rights of parents to the "care, custody, and companionship" of their children has been recognized for centuries as being virtually "sacred," in the words of one ruling. Fundamental to this principle is that parents decide what is best for their children, unless they forfeit that right through some legal misconduct. Yet today, the fate of children is being determined according to "the best interest of the child" and other criteria which transfer control of children from their parents to state officials. These criteria are being used to override and discard parents' traditional rights to the care, custody, and companionship of their children.

The two principles are fundamentally irreconcilable. Either parents have a fundamental right not to have their children taken away without cause, or government has the power to remove them without showing any such cause. Either parents are the ultimate authority to decide what is best for their children or government officials are. The implications extend well beyond questions of family law, with consequences that are creating a mounting crisis for our constitutional government.

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The 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 by the Supreme Court and other federal courts as one of the most fundamental rights of Americans. Numerous judicial decisions have held that parenthood is an “essential” right, that “undeniably warrants deference, and, absent a powerful countervailing interest, protection.” 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 “sacred” and “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.”

The age-old principle stipulating, in the words of Justice Byron White, a "realm of family life which the state cannot enter” is a direct threat to the *raison d’etre* of family law as presently constituted, whose very existence is predicated on precisely the opposite principle: that no realm of life is too private for the intervention of the state.

Fundamental to this principle is that, unless and until they have done something to forfeit the right to make this determination, parents decide what is best for their children. “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.”

None of these decisions affirming the right of parents to be left in piece with their children ever included any exception in the case of divorce. Yet today this principle is simply ignored. Indeed, family law today operates on principles that are directly

antithetical to these traditions and precedents of Common Law and proceeds from precisely the 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."

The implications are much larger than simply family law. A very fundamental shift has taken place here in the power of government over private life, without the slightest opposition 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 – not necessarily by open defiance but simply by exercising the ordinary duties of parenthood – become criminals, and those acts of parenthood become crimes. Parenthood itself is criminalized.

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 *Denver Post* columnist Al Knight, "it is code for the best interests of the mother." Feminists lend support to this interpretation. "What is in the best interests of your children is this," publisher and television personality Judith Regan publicly instructs a private citizen from the pages of *Newsweek* magazine. "You should act according to the best interest of your wife." Courts themselves have held that "what is good for the custodial parent is good for the child."

Yet the most telling case against the "best interest of the child" standard is that it

transfers from parents to the state the power to define this best interest, over the objections of parents who have done nothing to forfeit the right to decide for themselves what is best for their children. 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. "Children could be given over to any set of new parents who offer a more advantaged upbringing." Blumner is writing about adoption, but the principle is the same – with precisely the consequences she predicts already being realized – for parents in divorce cases. 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.

"The law, thankfully, is otherwise," the court concludes. Not for divorced parents. The court has succinctly described precisely the custody principles of divorce court.

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' decision-making 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 we equip judges and other officials with the power to make decisions about the best interest of other people's children, it may become the best interest of the officials. Family court judge Robert Page has acknowledged as much. "I represent your

kids, but I don't want to," he tells a Jersey magazine. "Because I don't love your children. I don't even know them. 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 incentives to remove children from parents. "It provides what might be called hair-trigger litigability," writes Walter Olson. "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 for determining guilt or innocence, fault has become a subjective free-for-all, cynically couched in terms of what officials claim is for the benefit of children they do not know and about whom, as Judge Page confesses, they do not care.

The "best interest" transforms courts from dispensers of justice into dispensers of social science, as determined by forensic "experts" who are often employed by or around the courts as "custody evaluators." In pursuit of the nebulous "best interest," the judge may dispense entirely with questions of justice (which is normally what courts are for) in favor of quasi-scientific 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, often colored by political ideology. "Family lawyers…maintain that justice has no place in their courts where their decisions are driven instead by questions of 'need,'" writes Melanie Phillips. "Family court judges thus preside with equanimity over injustice, having turned themselves into a division of the therapy and social work industries."

Psychologist Sanford 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,” Braver 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 obvious one-sidedness of evaluators’ recommendations to “gender bias,” but pecuniary interest among his colleagues in the psychotherapy professions may be involved. He reveals as much when he quotes a professional custody evaluator to the effect that “almost all” his business would be lost were there a simple presumption of shared parenting.

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In an attempt to reconcile egalitarian principles with a preponderance of sole mother custody, some have devised another standard, different from both the traditional rights of parents and the “best interest of the child.” The term “primary caregiver” has become popular in family court to rationalize removing children from fathers.

Like many legal innovations implemented with no public debate, this raises serious questions. Not necessarily the most important is again 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 attorney Ronald Henry. “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
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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, there is a more serious objection to the "primary caretaker" doctrine. This is the assumption that it is a legitimate role for government officials to look into private homes and pass judgement not on legally actionable offenses but on how citizens conduct their personal lives. It allows the officials to place a government imprimatur on how family members divide the household labor and generally order their personal affairs. If officials do not approve of what you do within your home, this doctrine provides a rationalization to take away your children. So evidence and witnesses must be provided documenting which parent does what 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 impossible for officials to determine who is the "primary caregiver" of children without conducting a highly intrusive inquisition into what people do in the privacy of their homes. That family courts already conduct such inquisitions does not, in itself, justify the development of a legal theory rationalizing such practices.

This is a prescription for government so invasive of private life that the term "totalitarian" cannot be avoided. No parent can possibly assume the burden of proof to justify how they choose to raise their children, and none should have to. What we are describing here is the use of the criminal justice system to enforce a political ideology within private homes.

For centuries, Western law has operated on the principle that no parent owes

anyone an explanation of how they choose to raise their children or how they conduct their private lives. No parent who has not been charged with legal wrongdoing should ever be summoned to court to render an accounting of how they manage their personal affairs as a price for being permitted to keep their children. The burden of proof should be on the government to demonstrate why they are removing someone's children, not on the parent to prove why he should be allowed to keep them. If we permit this logic to continue in the nation's courts, no private sphere of life is possible.

Reform

Immediately upon the filing of a divorce petition, standard practice throughout the US and elsewhere 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 contact subjects that parent to arrest. The government and the divorcing parent assume no burden to prove that the sequestered 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 segregated parent.

Judges should not have this power, and it should be categorically curtailed. No government official should have the power to summarily separate a child from a parent who has committed no legal offense and not been proven unfit. The argument that such separation is only "temporary" is spurious. The very act of forcibly separating parent and child is a violation of constitutional rights and places the burden of proof and the financial burden on the parent whose children have been removed. No parent should be

required to prove why their children should be returned. The burden of proof should be on the government to demonstrate why it is forcibly separating parent and child, even "temporarily." A divorce petition does not change this; it is only a piece of paper and does not eliminate the need of children for their parents. Regardless of any legal filing, children should remain with both their parents until one has been shown to be unfit, with solid evidence produced. The burden of proof – and a rigorous one – should be on a parent, official, or any other party who requests that the government remove a child from a parent.

Similar principles apply to permanent custody arrangements. *Judges should not have the power to sever relationships between parents and their children without a compelling reason involving the guilt or unfitness of that parent.*

Is this practical? If the parents no longer reside together, does a judge not have to decide where the children will live, at least until the matter is sorted out?

Yes, it is entirely practical. And no, a judge does not "have to" criminalize the relationship between parent and child and order one parent to stay away from his children on pain of incarceration at the mere request of the other parent or because of a divorce petition that has nothing to do with any guilt of the segregated parent.

Spousal separation should not automatically be treated as an unquestioned given, to which the left-behind parent and the rest of society must adjust. Separation from the marital home is a deliberate act that abrogates a legal agreement. Parents who marry and beget children assume obligations, and both have rights and responsibilities. The desire of one party to arbitrarily renege 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 and seek an indictment. In the absence of such evidence, a spouse always has the option of departing from the marriage and home alone.

Moreover, it seems plain – and I am aware of no legal analysis establishing the contrary – that judges in fact do *not* have this legal authority, that summarily separating parent and child is unconstitutional according to the precedents cited above, that it is an abuse of judicial power, and that it is illegal. Strictly speaking, therefore, no legislation should be required to preserve the rights of parents; litigation requiring courts to adhere to their own precedents should, in theory, be sufficient to protect parents and children.

I recognize that such a principle is unlikely to be recognized and that judicial practice is supported by statutory provisions. Therefore, legislatures must act when the judiciary does not, as some are beginning to do.

As the connected crises of the family, marriage, and fatherless children continue to mount, some jurisdictions are debating reform of the divorce and custody laws that would preserve the constitutional protections of both parents and of children and prevent the loss of one parent. These laws are usually referred to as “joint custody” or “shared parenting.”

For reasons described above, laws governing child custody can only be based on the principle of justice and parental rights to their children. They cannot be based on questions of mental health. To turn the judiciary into an instrument of psychotherapy is to pervert our entire system of justice and to invite tyranny of the most invasive kind.

The premise justifying current practice governing child custody is that judicial officials possess specialized expertise authorizing them to determine what is best for

other people’s children. This determination automatically overrides the wishes and actions of parents who have been neither convicted nor accused of any wrongdoing.

These professionals suggest (but seldom assert explicitly) that preserving both parents unrestricted access to their children following marital breakup or unwed childbearing is somehow detrimental to children. *They have never succeeded in demonstrating any such harm. Not a single study has ever demonstrated that single-mother homes are better for children than allowing children to have both parents.* What they have succeeded in doing is radically shifting the terms of debate from the traditional protections for family integrity and parental rights to the mental condition of children and their own capacity to determine it.

These professionals invoke an extensive literature from the mental health and social science fields. This voluminous literature is predicated on the assumption that it is legitimate (and possible) for scholars and professionals to decide “scientifically” what is best for children that are not theirs, whom they do not know or love, and for whom they bear no responsibility.

Yet professionals are not unaffected by self-interest, and their opinions should not be considered conclusive. These are issues of public interest in which the public has a legitimate say. They are also issues that involve personal and family privacy and constitutional protections so fundamental that neither are they necessarily to be determined wholly by interest group competition or even popular majority. As Supreme Court justice Robert Jackson stated, “One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, *and other fundamental rights* may not be submitted to vote; they depend on the outcome of no elections." It is a long-

recognized principle of Western jurisprudence and, I believe, the unstated assumption of most people that the rights of parents over the upbringing of their children are among these rights. Courts are charged with resolving questions of justice and punishment – not social science – and when courts and penal institutions are involved, justice is a consideration we ignore at our peril.

The reigning assumption that the bond between parents and their children should rest on something as variable and tenuous as the opinions of advocacy groups or social science "experts" is troubling. The views of scholars are notoriously subject to not only intense disagreement but also change and the whims of academic fashion. While scholars and advocates are entitled to their opinions, parents are entitled to their children.

The literature on divorce and custody in particular is highly convoluted, often riddled with undefined and impenetrable jargon, and so internally contradictory that it can be read to justify almost any position. Research that purports to be scientific is itself highly politicized and often subject to political manipulation. As researcher Richard Gelles recently commented, "Family courts are the epicenter of junk science."

Most parents, divorced or not, would be horrified at the thought that the care and custody of their children is subject to modification on the word of "experts" or even the whims of public opinion. Few whose children have been removed from their homes, care, and custody without any finding that they have done anything legally wrong are likely to acquiesce in that action because a court-appointed psychologist insists that it is "in the best interest" of their children. For that matter, few are likely to do so even were a democratic majority to agree with the experts. No responsible parent would or should relinquish their children if they have not been given legitimate reasons why they must do

so. To force parents to accept the confiscation of their children on the opinion of government-paid experts is to invite serious trouble.

Unfortunately, this is precisely where we are today with respect to custody practice. Experts paid by courts or by litigants who are ordered by courts to pay them, along with social scientists who work on government grants, have a tangible personal stake in justifying the separation of children from their parents when this is the conclusion desired by the officials and agencies that employ them.

Questions concerning how children "adjust" and how they "fare" in specific circumstances are subject to infinite variation. These are vague and subjective determinations, and the assumption that it is possible to measure and quantify concepts like an individual child's "adjustment" and "self-esteem" is highly questionable. Children's emotional, psychological, moral, spiritual, or educational formation is traditionally determined foremost by their parents and by the larger environment chosen for them by those parents. It is simply not possible to separate this formation from the context in which it takes place. The family has been every civilization's primary vehicle for transmitting values, knowledge, and culture from one generation to the next. Parents whose children have been arbitrarily removed will naturally regard their children as having been violated and abused.

Accordingly, the issue is not individuals or groups who, in the opinion of some, are said to be less than perfect parents. All parents are imperfect. The issue is the legal circumstances under which government officials may intervene into private family life to take away their children and criminalize their association. If human imperfection is grounds for coercive government intervention, then no private life is possible.

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Evidence indicates that the practice of summarily separating children from the non-divorcing parent and placing them in the custody of the divorcing parent is largely responsible for the runaway divorce rate and that curtailing this practice will reduce divorce in the first place. "If a parent is able to forecast that they have total ownership of the child post-divorce…as usually happens in sole custody, there is little deterrent to divorce," writes John Guidubaldi of John Carroll and Kent State Universities. Margaret Brinig and Douglas Allen have shown that the parent who anticipates gaining custody of the children is the one most likely to initiate divorce. They conclude from this that reforming custody practice to prevent the eviction of fathers would result in fewer divorces. Empirical evidence suggests that divorce rates decline in jurisdictions where courts preserve custody of children with both parents. A study by Guidubaldi and Richard Kuhn found that states with higher levels of joint custody awards "have shown significantly greater declines in divorces." Overall divorce rates declined nearly four times faster in states where both parents' rights and roles are preserved compared with states where the father is forcibly removed. A large factor, the researchers believe, is that joint custody "removes the capacity for one spouse to hurt the other by denying participation in raising the children."

Proponents of sole custody seem to find this a cause for regret and claim that it "traps women [but not men apparently] in bad marriages." This is meaningless. A marriage is what two people make it. No one in our society today is forced to marry and commit themselves to the lifetime legal bond it entails. For centuries objective standards existed for a legally recognized transgression nullifying a marriage, such as adultery or
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desertion. With such standards no longer recognized, a "bad" marriage becomes a purely subjective determination that effectively abolishes marriage as a legally binding contract. Protecting faithless behavior – and worse, using it as a rationalization to confiscate the children of the parent that is *not* faithless – renders all our professed concern for children mere posturing.

From the standpoint of children's well-being, most people recognize that reducing divorce is desirable in itself. There is little disagreement that the most emotionally traumatic threat to children's well-being is divorce itself. Judith Wallerstein and Sandra Blakeslee have called divorce the "single most important cause of enduring pain in a child's life." "The most striking response among the six-to-eight-year-old children was their pervasive sadness," write Wallerstein and Joan Kelly. "The impact of separation appeared to be so strong that the children's usual defenses and coping strategies did not hold sufficiently under the stress. Crying and sobbing were not uncommon."

Overwhelmingly this adverse response proceeds from the loss of one parent. Wallerstein and Kelly found that children of divorce "expressed the wish for increased contact with their fathers with a startling and moving intensity."

> Particularly striking…was the yearning for the father. More than half of these children missed their father acutely. Many felt abandoned and rejected by him and expressed their longing in ways reminiscent of grief for a dead parent.

Wallerstein and Kelly have described that children report dissatisfaction with the amount of time they see their fathers. "We have repeatedly described the dissatisfaction of so many youngsters who felt they were not seeing their fathers often enough," they write.

It might be replied that children are not the best ones to assess their own needs. Indeed, the opinions of both “experts” and children themselves are, for different reasons, suspect. Perhaps the most reliable “expert” testimony comes from children of divorce once they have grown up and can articulate their traumas and needs maturely. "Our participants, who have lived through their parents' divorces and have now entered young adulthood (and college) have given us their 'expert' advice,” one research team found. “Seventy percent of them, men and women alike, believe that living equal amounts of time with each parent is the best arrangement for children.”

The effects extend beyond the emotions of children and manifest themselves in social pathologies that affect all of us. Katerine Kersten of the Center on the American Experiment, writes, “Children of divorce are at far greater risk for a host of ills than their peers from intact families,” including crime, drug and alcohol abuse, depression or hyperactivity, and aggressive or impulsive behavior.”

> Children of divorce tend to have intercourse earlier, to have more sexual partners and sexually transmitted diseases, and a greater number of out-of-wedlock births.... Children of divorced parents tend to perform more poorly in math and spelling than their peers from intact families…. These children have significantly higher high-school dropout rates and lower rates of college graduation…. Divorce frequently impedes a child's ability to sustain family life as an adult. It tends to weaken parent-child relations, diminish trust of others, promote destructive ways of handling conflict, change children's expectations of marriage, and lead to higher rates of cohabitation and divorce as children reach adulthood.

Again, these pathologies are tied largely to the loss of the father. The social science data unequivocally demonstrates that the best environment in which to raise children is an intact, two-parent family. Virtually every major social and personal pathology of our time: violent crime, drug and alcohol abuse, truancy and poor school performance, unwed pregnancy, suicide and other psychological disorders – all correlate

more strongly to fatherlessness than to any other single factor, surpassing race and poverty. The overwhelming majority of prisoners, juvenile detention inmates, high school dropouts, pregnant teenagers, adolescent murderers, and rapists all come from fatherless homes. So important is this factor that children from affluent but separated families are much more likely to suffer these problems and get into trouble than children from poor but intact ones, and white children from separated families are at much higher risk than black children in intact families. The connection between single parent households and crime is so strong that controlling for this factor erases the relationship between race and crime and between low income and crime.

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There is evidence that the emotional problems inflicted on children by divorce are exacerbated by the practice of forcibly separating them from one of their parents. Here are some findings of major studies:

- "Single custody subjects evidenced greater self-hate and perceived more rejection from their fathers than joint physical custody subjects," one full-length scholarly study concluded.
- "Children in joint custody families had fewer behavioral adjustment problems with externalizing behavior than children in mother custody families," another academic study concluded.
- "Children from intact families reflected the most positive father relationships, followed by children in joint custody, with children in single custody scoring considerably lower than the other two groups."
- "Children in joint custody had higher feelings of self-worth than children in sole maternal custody," according to Sanford Braver and his research team.

Such examples could be multiplied almost endlessly. In a survey of scholarly studies, Robert Bauserman reports that children in joint-custody arrangements are consistently
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found to have fewer behavioral and emotional problems, higher self-esteem, and better family relationships and school performance than those in sole-custody situations:

> Children in joint physical or legal custody were better adjusted than children in sole-custody settings, but no different from those in intact families.

Several studies found that increased and reliable visitation by the non-custodial parent (usually the father) predicted positive adjustment of children."

Again, one might reasonably wonder, what precisely is meant by terms like "adjustment," "antisocial behavior"? Are these not highly subjective terms, and can they be quantified? This is a reasonable objection, and why, once again, we cannot base our discussion on psychological assessments.

The case for allowing legally innocent parents to keep their children should not rest on psychological studies of children's mental conditions as a result of divorce imposed upon them and one of their parents. No burden of proof should be required to show that children "fare" or "adjust" well to being allowed to remain with their parents. The burden of proof should be on those who claim that children are better served by removing them from their parents. This has never been remotely proved.

Indeed, the most telling fact from the world of mental health may be that no scientific data has ever demonstrated that children suffer mentally or emotionally by being permitted to keep both their parents than they do by having one parent removed. As William Bender has pointed out, "even those researchers who currently oppose joint custody do not argue that sole custody leads to better adjustment of the children (one can find little evidence for that proposition)…. [They] merely argue that children in sole custody do not do any *worse* than children in joint custody."

Parenting is a complex and evolving experience, involving the interaction of countless factors, including changing personalities and relationships and emotions: not only love but trust, loyalty, morality, experience, authority, and more – all of which are unique in every family and between any two members of a family. There is no such thing as a "best" parent apart from these considerations, and no outsider can observe and evaluate these things without changing them in the process. This is precisely why, for centuries, we have left parents to speak for and make decisions about their own children without government interference.

Especially troubling is the suggestion that the mental state of children can be quantified in isolation from the moral element that parents impart to their children. This problem is succinctly conveyed in a slogan that is very popular among professionals who work in child custody: "Children First!" proclaims license plates in Virginia and police cars in the District of Columbia. But as any parent will attest, this is not necessarily a healthy message to impart to children. An essential element of child-rearing is to teach children that they do not necessarily come first, that they must learn to put the needs of others before their own desires. Indeed, children who learn to do so are almost certainly better "adjusted," to use the clinical term.

The only objection based on mental health grounds that divorce and sole custody proponents raise seems to be largely theoretical: that after parents divorce and live apart, children are traumatized by "going back and forth" between two homes. Wallerstein writes, "Joint custody arrangements that involve a child going back and forth at frequent intervals are particularly harmful to children in a high conflict family. … However, the

same arrangement might be very beneficial for a child of the same age in similar circumstances whose parents get along well."

Yet Wallerstein never provides any evidence or the promised "research findings" to demonstrate precisely how or why "going back and forth" is "harmful" beyond the harm inflicted by the separation itself. [?] We are told that children need "uniform routines" but different forms of instability are never weighed or assessed, nor are the sources of instability identified. "Going back and forth" is allegedly "disruptive," [?] but apparently a broken family and being cut off from one of one's parents is not disruptive. The trauma of having two homes is never weighed against the trauma, which Wallerstein herself describes elsewhere, of losing a parent altogether.

Wallerstein also writes that "some children" find continued life with both parents "burdensome" because they "feel disorganized." One might ask here how many parents, even in intact families, would describe their children as well organized. Wallerstein's standard of evidence on this point seems to be "I have talked to teachers who say..." We are told that children "often feel" this and that. For example, "They feel lonely." Making public policy on the basis of what one adult (even an "expert") claims that someone else's child "feels" is, at the very least, questionable.

Children today – especially those in single-parent homes – typically spend many hours in daycare centers while their mothers work. No objection is raised by the defenders of divorce and sole custody to placing children in the care of strangers in a daycare center for 8 to 10 hours each day, nor does anyone object to "going back and forth" from a mother's residence to such a center; indeed, the same feminist groups lobby strenuously for both sole mother custody and government-provided daycare. Neither

does anyone, to my knowledge, suggest that such going back and forth justifies forcibly removing the children from the care of their mothers. In fact, there is mounting evidence that farming out children to this kind of institutionalized care may have seriously detrimental effects. Yet time with the child's own father is deemed "disruptive."

A very peculiar logic appears to be operating here, resulting perhaps from a selective slice of evidence. Given the finding of Brinig and Allen that the parent given sole custody is the one most likely to have filed for the divorce in the first place, it seems disingenuous to allow one parent to unilaterally inflict divorce on the children and the other parent – the greatest disruption and threat to stability in a child's life – and then claim that allowing the children a continued life with their other parent would violate their need for "uniform routines."

Further, if "going back and forth" is inherently harmful for children when there is "high conflict," it is never explained precisely why the same arrangement becomes "very beneficial" for a child without such conflict. A political agenda appears to make paramount the interests not of the children but of the custodial parent.

Wallerstein consistently blames the effect of divorce on a subsequent custody arrangement. Thus a boy says he likes being with his Dad and wants to see him more and also complains about having to go back and forth in order to do so. Wallerstein's conclusion is not to blame the parent who inflicted the divorce on the boy but the one who is trying to see him and to satisfy the boy's desire to see more of his father. The boy, we are told, "doesn't seem so happy about the joint custody." But these are Wallerstein's words, not the boy's. Perhaps what he is not so happy about is the divorce. But Wallerstein will not question this. "Racer is a poster child for a lot of children in

joint custody."   No, he is a poster child for a lot of children in divorce. But the right to divorce with sole custody is one Wallerstein refuses to question; only the right to see one's child when the other parent divorces.

Similar fallacies and platitudes in the ostensibly scientific literature suggest "that joint custody works best when both parents want it and agree to work together" but it "is unworkable for uncooperative parents." This tautological reasoning extends similar arguments invoked as self-justification for divorce. After all, if an intact family or continued shared parenting after divorce require "agreement" and "cooperation" between parents, the most effective method for the parent who expects exclusive custody to sabotage either is to be as disagreeable and uncooperative as possible. "It is…possible for a mother who wishes to exclude a father from a significant co-parenting role to create a conflictual situation in a variety of ways…and end up with sole custody of her children," writes family scholar Michael Friedman. The circular logic becomes palpable in light of the fact that almost all divorce-related conflict is precisely over the children: "At the center of most post-divorce conflicts involving children is the issue of custody/access." To make conflict over custody and access grounds for denying custody and access is obviously to reward the parent that creates conflict by trying to impede the other's custody and access.

The idea that marital conflict justifies both no-fault divorce and single-parent custody is obviously self-justifying for the parent creating the conflict. "Those of us serving as mediators, evaluators, and special masters have noted a fair number of cases in which one parent is…clearly more responsible for creating conflictual situations to which

the other must respond," writes one practitioner. "In such cases, it is perhaps unfair to reflexively label the couple as in high conflict, rather than focus on the 'troublemaker.'"

This idea of that parents should lose their children because they or their former spouse are "uncooperative" is another bizarre and a striking example of how the platitudes of psychotherapy readily translate into dysfunctional and even repressive public policy. First, the concept of "cooperation" is meaningless aside from the question of what one is cooperating with. No parent can be expected to cooperate willingly in the confiscation of his children. To arbitrarily take away someone's children and then justify that action because the parent in question refuses to "cooperate" with the removal of his children is logic that can only be described as Kafkaesque.

The entire point of arrangements such as marriage and shared parenting is that they require parents to cooperate and compromise (and to set an example of such for children); allowing one parent to simply eliminate the other removes any constraint on that parent to moderate his or her behavior. Indeed, it is an argument against marriage itself.

For this reason it is not clear that allowing both parents access to children rather than giving one parent a monopoly over the children and the power to exclude the other parent increases parental conflict. More likely, it is the opposite: Arbitrarily taking away a parent's children is the very cause of conflict. As Ron Henry has argued: "Which is more likely to create conflict – a situation in which both parents are told, 'Relax, you're not going to lose your role as a parent,' or a situation in which the court says, 'I'm going to pick a winner and pick a loser. Choose your weapons and come out fighting, the last one left standing is the winner.' Sole custody determinations… are the source of the

conflict."

In fact, shared parenting has repeatedly been demonstrated to reduce parental conflict for precisely this reason. Judith Seltzer of the University of Wisconsin concluded that joint custody, even when imposed over the objection of one parent, reduces post-divorce conflict. A team headed by Sanford Braver found that, "Both child support compliance and paternal visitation were highest in those cases where joint custody was awarded against the mothers' wishes but in conformity with the fathers' wishes." Another scholar concludes that "Joint custody is also the preferred option in high conflict situations because it helps reduce the conflict over time – and that is in the best interests of the children."

There is also something ill-defined about using "conflict" as a rationalization for removing children from their parents, with no consideration of the nature of the conflict or who is perpetrating it. Conflict is part of human existence, and coping with it is part of the process of maturation and, indeed, of civilization itself. As Henry has stated, "All parents should try to minimize conflict, but conflict occurs even in intact families. Is the solution to marital conflict to have more divorces so that one parent can be eliminated and with him all conflict? Ultimately, this is an argument against marriage and the family itself. By this logic we should encourage more single parenthood as a virtue for its own sake."

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A more serious objection is that sole custody protects women and children from "abuse." The National Organization for Women asserts that allowing children to see their fathers after divorce "is dangerous for women and their children who are trying to leave or have left violent husbands/fathers." This too is nonsense. No one advocates that spousal or child abusers should retain custody of children – except, ironically, the advocates of sole custody.

It is well established that the vast majority of child abuse takes place in single-mother homes. Physical abuse of children is committed mostly by mothers, not fathers, and they are usually single mothers, with married fathers the least likely abusers. Sexual child abuse is almost always committed not by a biological or married father but by a paramour of the single mother. Sole custody is therefore almost never a refuge from child abuse. On the contrary, sole mother custody is by far the most dangerous form of custody for children. Overwhelming evidence also suggests that most of the hysteria in recent years over domestic violence and child abuse is generated directly for the purpose of obtaining sole custody of children. In other words, sole custody is corrupting the criminal law. Indeed, divorce advocates have developed such a loose definition of "violence" that the term even includes fathers who resist divorce or the loss of their children through peaceful, legal means. A NOW resolution asserts that fathers' groups who object to the loss of their children are "using the abuse of power in order to control in the same fashion as do batterers."

This advocacy by feminist groups is ironic. Those who thought that feminists wanted fathers to be more involved in child-rearing might be forgiven for wondering why they oppose shared parenting. At one time feminists did advocate joint custody, and

some remain consistent. Karen DeCrow, past president of NOW, says that "part of ending sexism involves eliminating the inhuman practice of awarding a parent 'visitation' to his or her own child."

Protecting Parental Rights

Taking the logic of shared parenting further, some comprehensive combination of divorce and custody reform could return justice to the courts and with it the long-established principle that legal innocence is sufficient grounds for simply 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, we must replace the vague, subjective, and permissive "best interest of the child" criterion with a more precise policy explicitly and categorically stipulating what decades of constitutional case law has long asserted: that no child may 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 legal right, it need not necessarily follow that that right entails immunity from all its consequences or the power to shift the liabilities and costs onto an innocent parent. 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 right to marshal the courts, police, and prisons to criminalize parents who do not cooperate. There is nothing authoritarian about requiring parents who choose 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 the departing or guilty parent has put his or her own wishes before the needs of the children and is therefore less fit and responsible than the parent who remains faithful to the family. On the contrary, it is the current practice of ignoring justice and allowing that burden to be imposed on the parent who remains faithful that has produced dangerous intrusions into private life.

Such a policy would mean that "custody" would not be actively awarded 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, "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. "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 of the Michigan Libertarian Party. Yet we could greatly 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 innocent or does not wish to divorce], 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, custody reform will obviate the need for most coerced child support. The precise purpose of child support has never been made clear or publicly debated. Most people assume coerced child support is for parents who have abandoned their children or at least agreed voluntarily to live apart from them. It was never intended to subsidize the forced removal of children from innocent parents or to force parents to pay for the stealing of their own children. *The precise purpose of "child support" must be publicly debated and determined, and enforcement programs must be narrowly designed and restructured to serve only that purpose.*

Divorce practitioners now invariably resist all these substantive reforms with the same refrain: that they "may" trap women in "abusive" marriages. In the case of physical violence, this is clearly not true, since physical violence has long been recognized as legitimate grounds for divorce. In fact very few marriages, "good" or "bad," are characterized by violence at all.

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. The solution is to demand from the criminal justice system a clear distinction between behavior that is criminal and behavior that is private. One of the nation's leading authorities 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 of law and those not formally charged can be left in peace with their children until evidence of criminality is presented against

them. 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 our 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 social work professor 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," is what endangers both civil liberties and families.

Theoretically, new laws should not be necessary to protect the rights of parents and children. Enforcing existing civil rights and civil liberties – including the Bill of Rights and case law recognizing parental rights – should be sufficient to protect the rights of citizens to their children, property, and freedom.

Realistically, however, there is a need for legislatures to protect the bond between parents and their children. The most direct and immediate means of achieving this is by a rebuttable presumption of shared parenting. This would mean 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.

Even this, however, may not be enough.

Some states have been debating statutes or constitutional measures to guarantee parental rights. This must become a national debate, and federal measures too could reinforce recognized rights without necessarily establishing new ones.

If the US Constitution needs an amendment today to protect family integrity from pressures that could not have been foreseen two centuries ago, the most direct and comprehensive approach would be an amendment guaranteeing the privacy and inviolability of the family and codifying traditional rights of parents to the care and custody 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 an amendment would also reinforce the marriage bond in the most critical cases – those involving children – without the allegedly intolerant or exclusionary implications of other proposed measures.

Recently, Congress began debating the Parental Rights Amendment, that declares, "The liberty of parents to direct the upbringing and education of their children is a fundamental right." 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 to Americans, and it should serve as the starting point for a long overdue national debate.