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THE LAW & ECONOMICS OF MARRIAGE

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FAMILY LAW in the PAST

- Traditionally, family law perceived of the family as a unit (for historical, cultural and economic reasons).
- For the purposes of the law, this unit was presumed to be both indissoluble and homogeneous.
- The legislator organized family life around a central ideal, which was procreation, and around a simple basic rule: the predominance of the husband/father in the family unit.
- Family members were ranked according to an unchanging hierarchy, which dictated their respective rights and obligations.
- Women and children were at the bottom of the hierarchical ladder, with rigid roles that were socially constructed and reinforced by other social institutions like religion and education.

FAMILY LAW NOW

- In recent decades family law around the world has been transformed.
- All Western nations and a great number of other countries have enacted new family laws that are predicated on the fundamental principle of gender equality and are informed by the provisions of the international conventions relating to family life.
- These legislative changes have gone hand-in-hand with the growing complexity of family life. In all market-oriented societies, this unprecedented variety of family forms is closely interrelated with larger social trends like:

  - **Change: the increasing participation of women in the labor force**

THE ECONOMICS OF THE FAMILY: THE WORK OF GARY BECKER

- In the 1960s, Gary Becker began to publish his pioneering work which applied the tools of economics to the study of the family.
- Becker was the first to draw parallels between the economics of the household and the economics of firms.
- He was awarded the Nobel Prize in Economics (1992)
- His "theory of the household" marked the birth of a new area of study which became known as the ***New Home Economics.***
- NHE has produced a rich body of literature that connects the monetized economy of the public sphere and the non-monetized economy of the household.

KEY ASSUMPTIONS

- Family members are rational utility-maximizers: it is assumed that family members on average, will do their best to make themselves happy with whatever means are available to them.

- Resources are limited and thus individuals are required to make choices under constraint. Family members ***optimize*** (i.e. try to achieve their objectives given their limitations: limited time, money, energy, or information).

- The household is like a small factory: it produces goods and services that are valuable to its members and to the economy.

The concept of “full income”

- For Becker, household resources are measured by what is called ***full income***, which is the sum of money income and that forgone or "lost" by the use of time and goods to obtain utility.

- Therefore, when one spouse stays out of the job market to raise children or manage the household, the opportunity cost of the time is what is given up, and presumably the use of this time in the household is more valuable than whatever would be gained (financially or otherwise) if that spouse had remained in the labor force.

Explaining the sexual division of labor

In his *Treatise on the Family*, he explains that the sharp sexual division of labor in all societies between the market and household sectors is partly due to the gains from specialized investments, but also partly due to intrinsic differences between the sexes:

[W]omen invest mainly in human capital that raises household efficiency, especially in bearing and rearing children, because women spend most of their time at these activities. Similarly, men invest mainly in capital that raises market efficiency, because they spend most of their working time in the market. Such sexual differences in specialized investments reinforce any biologically induced sexual division of labor between the market and household sectors and greatly increase the difficulty of disentangling biological from environmental causes of the pervasive division of labor between men and women.

(Becker 1991: 39)

Becker’s Marriage Model

- Optimal assortative mating forms the basis of this “specialization and trading” model of marriage
- Single men and women are seen as trading partners who choose to marry only when both partners believe that they will be better off married than single.
- Thus, *ceteris paribus*, the gains to marriage are greatest when a man and a woman each specialize in different tasks (the man in the labor market and the woman in the home), and trade on their comparative advantages.
- This model, which emphasizes the economic specialization of spouses, has been supported by empirical evidence demonstrating that many couples actually practice assortative mating.

(Becker, Theory of Marital Search, 1973, 1974)

Economic position and marriage

- Previous studies of the economic context of marriage had focused primarily on the effects of good economic prospects on marriage.
- In recent years, there has been a shift of attention to the importance of women's labor market position and economic prospects for marriage formation.

- Prominent theories in the literature converge in suggesting that:
  - a husband's resources are inversely related to dissolution
  - a wife's resources are positively related to marital dissolution

ANALYZING MARRIAGE MARKETS

- The neoclassical economic theory of marriage is based on two assumptions:
  (1) Each person makes his or her choice as a rational utility-maximizer; in other words, each person tries to make the best possible match for himself or herself.
  (2) The marriage market is competitive (to the extent that all men and women are substitutable to some degree).

- Based on these assumptions, and because there is a large number of potential mates, economic theory suggests that ***assortative mating*** will take place – people will tend to choose marriage partners with roughly similar levels of benefits to offer their partners (e.g. wealth, earning ability, or education) and will also tend to share equally the returns generated by their marriage.

The crucial role of information

- More recent, refined marriage models focus on the significance of information in marriage markets.
- The success of the matching process in the marriage market depends both:
  - ✓ on the number of potential partners
  - ✓ on the reliability of information about important characteristics of both the searcher and the potential partners

ASIMMETRIC INFORMATION:

Adverse selection and Moral Hazard

The moral hazard

- The role of surprises in marital dissolution: Surprises consist of changes in the predicted earning capacity of either spouse.
- An unexpected increase in the husband's earning capacity reduces the moral hazard, while an unexpected increase in the wife's earning capacity raises the moral hazard.
- Couples sort into marriage according to characteristics that are likely to enhance the stability of the marriage.
- The moral hazard is increasing with the duration of marriage, and the presence of children and high levels of property stabilizes the marriage.

Fertility and female wage rates

- Economists predicted that a rise in the mother’s wage rate is likely to be associated with lower fertility.
- According to one econometric estimate, a 10 percent rise in female wages would lower the birth rate by between 8 and 17 percent (while a similar rise in the male wage rate would raise the birth rate by between 10 and 13 percent).
- These predictions have been validated by empirical research and an illustrative example is the decline of fertility in the Mediterranean countries.
- Decreasing fertility not only creates imbalances in the current marriage market, but it also affects family formation and future fertility patterns.

Why do people decide to divorce?

- Couples divorce when they no longer believe they will be better off by staying married (Becker 1991).

- Couples divorce when the wife has financial autonomy and can exit the marriage first. In most countries of the West, women have increasingly initiated divorce proceedings.

- Couples divorce when divorce law provides the breaching party an easy exit to marriage by lowering the transaction costs.

The effects of no-fault divorce

- One point of consensus in the L&Econ literature is that the switch to no-fault divorce lowered the transaction costs of divorcing and thus reassigned the property rights within marriage.

- Under fault regimes, the spouse who most wanted to exit the marriage had to “purchase” the right to exit.

- Under the current no-fault laws, the spouse who least wants the divorce either must pay the other to stay, or, in most cases, is simply not able to prevent the divorce from occurring.

- Thus, no-fault divorce has had a negative impact on the economic well-being of the spouses who wish to stay married (predominantly wives in traditional, long-duration marriages).

No-fault divorce and divorce rates

- Several cross-state studies that have isolated the effect of the legal variable from other demographic factors, find that no-fault divorce has raised divorce rates significantly:
- The basic argument is that transaction costs involved in divorce are quite high and that the advent of no-fault laws lowered them considerably
- For example, because marital property cannot be easily defined and valued, or because child support payments are difficult to enforce.

The accumulation of human capital during marriage

- The human capital accumulated by homemakers is **marriage-specific (or home-specific)** and thus not portable; by contrast, human capital accumulated by wage-earners (earning capacity) is **entirely portable** and not marriage-specific.
- Since full-time homemakers have specialized in domestic labor during marriage, the dissolution of marriage often means an end to their occupation.
- This occupation, though invaluable to the welfare of the national economy, accrues no health, retirement, or unemployment benefits.
- Displaced homemakers find it difficult to get employment after divorce, because they lack vocational skills and experience, and also because of their age.
- Divorced housewives seeking to enter or re-enter the labor market in a part-time job but facing demand side constraints for their employment constitute a large reserve labor force

Marital Opportunism

- The types of resulting opportunistic behaviour that could be predicted in a marriage involve situations where one spouse leaves shortly after the other has worked to allow his or her graduate education,

- Other types of marital opportunism include: leaving a spouse for someone in better health; divorcing and marrying again for money; leaving an older spouse for someone younger and more desirable; divorcing to escape from poverty; or deserting a family at a time of economic problems (such as unemployment or collapse of a business).

How can spouses and children be protected from the opportunistic spouse?

- **Greater use of mediation in divorce proceedings**
- Legislators should encourage **private contracting between the spouses** (the private ordering of the consequences of marriage and divorce.
- **Covenant marriage legislation** and other initiatives to promote marital stability by restoring confidence in marriage as a serious commitment that cannot be unilaterally and opportunistically revoked.
- **Joint custody** as the default rule in custody proceedings
- **Compensatory spousal support** as a protective mechanism for wives in traditional marriages

Does divorce law affect the divorce rate?

- Several L&E researchers have provided cross-country analyses of how the legal rules regulating the division of property at divorce affect the decision to divorce, to marry, to have children in or outside marriage, to supply labor, and to choose a mate.

- Application of marital bargaining theory suggests that shifting from a consent divorce regime to no-fault unilateral divorce laws should not affect divorce rates.

- Some economists posit that no-fault divorce has brought about no significant change in the divorce rate, because marriages only end when it is efficient for both spouses to divorce (which depends on alternatives to marriage, and not on the divorce regime).

NEW CHALLENGES FOR MARRIAGE LAW

- non-traditional family forms

- the rights of same-sex partners

- medical advancements (esp. in reproductive technology)
  - ✓ in vitro fertilization
  - ✓ posthumous reproduction
  - ✓ the cryopreservation of embryos
  - ✓ sperm and egg donation
  - ✓ surrogate motherhood
  - ✓ the cloning of human cells

COHABITATION

- The main substitute for marriage
- Cohabitation is related to issues that may be crucial for determining family policy, such as financial obligations to partners, inheritance rights, and health and social security benefits.
- Over the last three decades, the dramatic rise in cohabitation has intrigued social scientists. Both in the U.S and Europe
- Empirical studies show that premarital cohabitation serves as "trial marriage" ("a period of learning")

EXPLAINING INCREASED COHABITATION

- For L&E scholars, the significant growth of cohabitation is in large part a response to the lack of flexibility in traditional Western marriage laws.
- Cohabitation is perceived to have fewer costs than marriage
- A growing number of individuals may choose to cohabit because the current unilateral divorce regimes offer insufficient protection for marriage-specific investments and sacrifices Increased cohabitation may be related to unfavorable economic circumstances
- Increased cohabitation is also the result of government policies

FAMILY LAW and NEW CHALLENGES

- Redefinition of terms used traditionally in family law
- New legal definitions (e.g. of terms relating to maternity and paternity) and the crafting of new model statutes
- Through the increasing contractualization of family law (a greater reliance on the principles of contract law)
- Through expansive interpretations of family law statutes that are ideally based on economic analysis or otherwise apply and/or make use of empirical data from the social sciences

The tension between rules and discretion

- Family law is characterized by more discretion than any other field of private law.
- The standards in family law for allocating family assets, deciding child custody and visitation, child support and alimony have traditionally been characterized by broad discretion.
- Advocates of discretion: Legislatures should leave the leaving the delicate and difficult process of fact-finding in family matters to flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines.
- BUT uniformity of standards facilitates enforcement.

SAME-SEX COUPLES: A L&E APPROACH

- Persons involved in a homosexual living arrangement experience the same costs and benefits of legal marriage.
- Introduction of “alternative living arrangement” to respond to their request of equal treatment.
- Same-sex couples can create a more economically efficient partnership by using existing contract law to gain the legal benefits awarded to married couples. However:
  - many benefits of marriage, such as employer medical benefits and tax deductions, simply cannot be gained by private contract
  - without recognition of status, courts may not enforce contracts for short-term relationships because they may resemble contracts for sex
  - any ambiguities in the contract do not have the benefit of developed case law
- Such costs make private contract a poor substitute for state recognition of same-sex marriage.
- Same-sex couples also incur heavy transaction costs when adopting or seeking custody of children.

FUTURE DIRECTIONS

- Law and Economics approach helps
- Legislative initiatives should be scrutinized under the lens of economic theory -in terms of the incentives they generate and their long-term consequences BUT with some caveats
- The Unification and Harmonization of Family Law in Europe (“Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses”)