

Marriage Contracts and the Law-and-Economics of Marriage: an Austrian Perspective

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Abstract

Marriages and firms share many characteristics in common. Both institutions deal with a set of promises between two parties and therefore need contracts to encourage individual parties to stand by their promises and commitments. Despite these similarities, in most countries marriage laws are statutory laws that have little in common with commercial contract laws. We present the Chicago and neoclassical perspectives on Law-and-Economics, with a special emphasis on marriage laws. According to this framework, it is possible to explain the way traditional marriage laws have regulated exchanges between husbands and wives in Western countries such as France, when these countries were patriarchal societies.

We also consider the case of egalitarian marriage, and show some of the limitations of any statutory marriage laws. We then present a critical perspective on the Law-and-Economics literature on marriage. Our critique is based on the economic literature by Austrian economists and by public choice theorists. We emphasize the knowledge problem, the problem of interest, and the problems associated with government monopoly in coercion. Our concluding section presents some suggestions regarding a legal system inspired from international commercial contract law. By not giving any particular government a monopoly on the power to enforce marriage contracts such system would avoid some of the problems found in the systems of statutory laws currently regulating marriage and divorce in the Western world.

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1. Introduction

Nobel Laureate Gary Becker (1997) suggested that divorce laws be replaced by compulsory private marriage contracts. He argued that such privatization of marriage law would force couples to address the consequences of a breakup before the bitterness sets in. The same idea can also be found in a 1981 book by Leonore Weitzman (*The Marriage Contract*) and in Bertrand Lemennicier (1988). Lemennicier (1988) offered an economic interpretation of traditional French family law--a statutory law--and pointed to the law's failure at recognizing the legitimate interests of couples who wish to organize their relationships by private contracts differing from the statutory law.

In France and other Western countries, the last decade has witnessed a massive flight from marriage. Unwed cohabitation being the major alternative to traditional legal marriage, we can interpret the growth of cohabitation in the West as a response to a lack of flexibility in the traditional Western marriage laws and therefore as an invitation to question statutory marriage laws.¹ In 1999, eighteen years after the publication of her book, Weitzman's proposal to replace traditional legal marriage with a private contracting process is an increasingly attractive policy choice. Nevertheless, there is a lot of resistance to such an option. The analysis we offer here helps understand why we hear so few voices defending the idea of privatization in marriage.

Most law-and-economics literature dealing with contracts studies commercial contracts. The law-and-economics literature on marriage and divorce overlooks many of these similarities, even though the ties binding commercial partners are very similar to the ties binding partners in marriage. Awareness that both firms and households deal with production and coordination of productive processes goes back at least to Ancient Greece. The fact that the term 'economics' is based on the Greek word for household 'oekonomos' indicates that there is nothing new in establishing parallels between home production and commercial production or between trade

within the household and trade among firms. Recent discussions of the parallels between the economics of households and the economics of firms have been promoted by the New Home Economics pioneered by Jacob Mincer (1962, 1963) and Gary Becker (1965). Firm/household parallels have been applied to the economic analysis of marriage e.g. by Becker (1981), Grossbard-Shechtman (1984), Robert Pollak (1985), Paula England and George Farkas (1986), Elizabeth Peters (1986), and Lemennicier (1988).

Part of the Law-and-Economics literature on marriage has been devoted to the analysis of intra-marriage conflicts involving production in marriage. This literature has emphasized the often observed incompatibility between spouses' private goals and the best interest of the household, using the term 'opportunistic' to describe behavior that promotes a married individual's interest but not necessarily that of the spouse (see e.g. Lloyd Cohen 1987, June Carbone and Margaret Brinig 1991, and Brinig and Steven Crafton 1994). This literature can be categorized as both normative and positive. Some of the positive Law-and-Economics literature on marriage analyzes effects of divorce laws on marriage, divorce, labor supply, etc. (see e.g. Peters 1986, Allen Parkman 1992, Douglas Allen 1998, Leora Friedberg 1998).

As normative discourse, one of the goals of the Law-and-Economics literature has been to make enforceable promises between spouses more efficient. They have compared various statutory divorce laws from a point of view of Pareto efficiency. Family law has also be analyzed as a means to minimize transactions costs or agency costs (see Steven Cheung 1972 or Gillian Hamilton 1999). This literature tends to overlook the fact that statutory divorce laws clearly establish some sort of property rights in marriage.²

Written in societies governing marriage with statutory laws, this literature tends to take it for granted that divorce laws are imposed through a state monopoly of justice. It generally does not question the use of a coercive monopoly of justice as a means of enforcing individual promises. This

literature typically makes a strong assumption that is questioned by both the Austrian economic literature and the public choice literature, namely that government intervention dealing with failures surrounding voluntary exchanges is costless and therefore any improvement according to the criteria of evaluation (let us say Pareto efficiency) is worth implementing. However, if one considers the possibility of political and legal failure, then it is not so evident that a more Pareto-efficient law or policy is necessarily in society's best interest. That policy or law will only be worthwhile if the cost of implementation is smaller than the benefit from such implementation. It is not enough to say that "*our belief* is that many regulations of the family improve the efficiency of family activities " as stated by Becker and Kevin Murphy (1988). Men and women of various generations compete politically over the control of a coercion monopoly. Their promotion of their own interests led by a "visible hand" does not necessarily lead to "good" results for all.

Any law enforcement implies the use of coercion. Coercion can be implemented through a private system of justice or through a monopolistic public system. In a public monopoly, those who decide what promises should be enforceable and how to enforce them are the producers of justice, i.e. judges or lawmakers. In a private system of justice without monopoly of coercion the parties decide what to enforce and how. Various systems of law enforcement may compete, as is the case with international commercial law.

In this paper we question a fundamental assumption underlying the Law-and-Economics literature on marriage and divorce: the assumption that there are no costs of enforcing statutory laws. Instead, we argue that such laws based on public coercion are costly and likely to exacerbate some of the problems inherent in exchanges in marriage. Following the Austrian economic literature, we propose alternative criteria for establishing optimal laws regulating marriage and divorce. We argue that costs of enforcing laws should be taken into account.

In their capacity of social engineers, judges and/or legislators are faced with three problems emphasized by Austrian economists: limited knowledge in a dynamic world, the existence of special interests, and the possibly negative side-effects of the social engineer's coercive power. As is the case with laws regulating other types of transactions, laws regulating marriage and divorce should aim at coordinating subjective plans and expectations of the parties involved in marital transactions. The people themselves should have the power to tell what promises should be enforceable and what kinds of means should be used to enforce them. A legal system inspired from commercial contract law and keeping the coercive power of the state at a minimum is likely to solve these problems better than the systems of statutory laws currently regulating marriage and divorce in the Western world. Coexistence of a number of institutions governing marriage, such as traditional religious laws or customs on marriage and divorce, is preferable to a government monopoly on coercion.

Our paper is organized as follows. First, we analyze transactions that possibly call for marriage contracts. These transactions involve joint production in marriage or voluntary exchange in marriage. We present the Chicago and neoclassical perspectives on Law-and-Economics, with a special emphasis on marriage laws. According to this framework, it is possible to explain the way traditional marriage laws have regulated exchanges between husbands and wives in Western countries such as France, when these countries were patriarchal societies. Example 2, marriage in a patriarchal agricultural society, is presented in detail. When we also consider Example 3, the case of egalitarian marriage, the picture becomes more complicated. Not only do existing statutory laws apply little to Example 3, but the complexity of contemporary choices makes it doubtful that any statutory marriage law may apply. Furthermore, choices may be changing rapidly, e.g. as a result of changes in marriage market conditions.

We then present a critical perspective on the Law-and-Economics literature on marriage. Our critique is based on the economic literature by

Austrian economists and by public choice theorists. We emphasize the knowledge problem, the problem of interest, and the problems associated with government monopoly in coercion. Our concluding section presents some suggestions regarding a more competitive legal system inspired from international commercial contract law.

2. Why Marriage Laws?

This section presents an economic analysis of marriage and of the need for laws that may possibly regulate or organize exchanges in marriage. Problems may arise whenever two parties engage in a voluntary exchange dealing with production or consumption. Consider the following example of exchange in marriage.

Example 1: the case of Lisa and Michael. Assume the following interaction between Michael and Lisa, both undergraduate students in economics. Michael wants to pursue a doctorate in Law-and-Economics. He proposes to establish a marriage contract with Lisa, an undergraduate student. She will abandon her studies and work in the labor market to finance his PhD. She will also spend time and effort taking care of his health, inciting him to work more on his thesis, inviting the thesis supervisor....³ Michael promises to compensate Lisa by sharing the additional income that he will make after he obtains his degree, so that her welfare will be far superior to the welfare she could get by remaining single and obtaining a Master degree. However, a Ph.D. is an investment embodied in Michael's human capital. If he leaves Lisa for another woman, it is the new wife who will profit from the Ph.D. not the one who has invested in Michael's degree.

Table 1 *Marriage contract , promise keeping and investment in human capital : the dilemma*

| | | |
|-----------------|-----------------|-----------------------|
| | Michael | |
| Lisa | Keeps promise | Fails to keep promise |
| Invests | V/2, V/2 | w, V |
| Does not invest | v, v | v, v |

Table 1 presents the choices confronting Lisa and Michael. The bold letters are Lisa's options, v being the welfare that both can get if they obtain a Master degree (Michael's alternative if Lisa does not help him get a PhD). $V/2$ is the present value of the income Lisa gets with Michael⁴ if he succeeds and redistributes part of his income to Lisa as a return on her investment in Michael's Ph.D. By definition $V/2$ exceeds v . If Michael keeps his promise (to offer a compensation equivalent to $V/2$) she benefits from the marriage contract. But if Michael does not keep his promise, i.e. breaches the contract, Lisa loses all her investment. She gets w , an income far less than v the wage she can command on the labor market with a Master degree, for she abandoned her studies before reaching this level and she knows she is capable of obtaining the higher degree) (i.e., $w < v$). In that case she does not invest. From Michael's point of view if Lisa invests, his best strategy is : "don't keep promise". If she does not invest, he loses nothing. A dominant strategy for Michael is to fail to keep his promise. Lisa, knowing that the best strategy for Michael is to cheat on his promise, does not invest. Both either stay single or, if married, do not invest in Michael's Ph.D. An opportunity for profit is lost if $V > 2v$. The outcome of the interaction is not Pareto efficient, in the sense that both husband and wife can be better off (as measured by their own standard of value or judgement) without making anyone worse off.

A contract between two persons is a set of promises between a promisor and a promisee. When drawing a contract both the promisor and the promisee want to enforce that contract, in the hope that the future actions of

the other partner will further their respective goals. As stated by Charles Fried (1981): "The institution of promising is a way for me to bind myself to another so that the other may expect a future performance" It is a moral obligation. Following Robert Cooter and Thomas Ulen (1997) contract law is concerned with the following two questions:

- 1) What promises should be enforced? The ethical standard advanced by Cooter and Ulen is that Pareto-optimum promises should be enforced.
- 2) How should these promises be enforced if people fail to keep their promises?

There are various ways to increase the likelihood that promises in marriage will be enforced. One way to impose a cost on her husband in case he fails to keep his promises is for the wife to have children and threaten him with the potential loss of his children if he leaves her (e.g. for another woman). Children then become hostages. Another way that a person can protect her investments in a spouse is by requiring that the spouse take an insurance contract such that the insurance will pay her a capital if the spouse doesn't keep his promise. In some Western countries, divorce laws have chosen a third way of enforcing promises in marriage: they require Michael to compensate Lisa in case of no performance, leaving it up to the judges to try and calculate the exact amount of damages needed to restore the promisee's position to the level that she would have enjoyed if the promise had been kept. If mutual consent is not expected in case of divorce, Michael is less likely to keep his promises and Lisa is less likely to invest in his PhD.

Michael and Lisa's marriage is one of many possible exchanges occurring in the framework of marriage. It involves production in marriage (e.g. production of Michael's human capital or production of children) and consumption in marriage. In the case where Lisa invests in Michael's career and Michael shares his higher income with her, there is a transfer of income from Michael to Lisa, enabling Lisa to obtain more private consumption goods. To the extent that they have children, the couple also jointly enjoys

the children born to the marriage. A critical factor influencing Lisa and Michael's well-being is their individual share of their combined income.

This example can be rephrased in a manner more consistent with the language that economists use when analyzing firms and consumer behavior. Were a marriage like a firm, we would say that when she contributes to Michael's career at the expense of her own, Lisa is working for Michael. This work has been called spousal labor in Grossbard-Shechtman (1993). 'Spousal labor' includes all kinds of services supplied by one spouse and benefiting the other spouse, including various aspects of homemaking, gardening, and many services that have market substitutes.

Spousal labor can be a labor of love, depending on the worker's motivation. Work in marriage is more likely to be a labor of love if the worker also benefits from the work, as is often the case with reproduction, child rearing, and companionship. These activities typically do not have good market substitutes. Grossbard-Shechtman (1999) uses the term WIM (Work-In-Marriage for work on the production of a spouse's private goods, and WOC (Work-On-Commonwealth) for work on jointly consumed public goods.

To the extent that work is not performed out of love for the beneficiary, a worker expects to be compensated for the time spent at work. In the example of Lisa and Michael, marriage production of a good privately consumed by Michael who embodies the added human capital. Since Michael can benefit from this capital inside and outside the marriage, he has a demand for Lisa's spousal labor contributing to his human capital. He is expected to be willing to compensate her for her labor. Lisa's supply of labor involves an opportunity cost, for she had to give up other valuable activities such as the pursuit of her own studies. A spousal worker expects to receive a compensation covering at least the opportunity costs of work. As pointed out in Grossbard-Shechtman (1984), there are good reasons to believe that competitive markets for spousal labor exist.⁵ Consequently, the actual compensation that Lisa receives for contributing to Michael's human capital

is expected to be partially determined by the aggregate demands and supplies of spousal labor. Many factors are expected to influence markets for spousal workers, including institutional factors (see Grossbard-Shechtman and Shoshana Neuman 1998).

Why is there a need for marriage laws? A number of answers have been given to that question. We use the terms of spousal labor supplied by men or women to rephrase some of the answers found in the literature.

*The Chicago Law-and-Economics Approach.*⁶ This approach emphasizes the importance of transaction costs in explaining institutions. It is rather difficult to talk about transaction costs in the case of marriage. Usually you only have two people concerned, implying that bargaining costs are low. The agency cost does not seem so high either. In contrast to a labor contract, the voice option is easy to implement. All these transaction costs seem insignificant. The Coase theorem is the foundation of this style of Law-and-Economics and seems most applicable to the case of marriage. According to the Coase theorem, property rights in marriage do not affect efficiency in marriage (see Becker 1981). A logic conclusion of this statement is that marriage law does not matter and should not exist. The evolution of cohabitation (see Rand Ressler and Melissa Waters 1995), which is associated with female labor force participation and divorce rates, is consistent with this conclusion. To show this, let us get back to our example of Lisa and Michael.

The Coase theorem is illustrated in the following case related to Example 1. It is assumed that transaction costs are zero and there is no income redistribution effect. Assume that the difference between $V/2$ and w is \$100,000. This is the damage imposed by Michael on Lisa if he fails to keep his promise. With contractual law and perfectly expected damages he has to pay \$100,000 to Lisa. If cohabitation without marriage carries no rights in case of broken promises, Lisa will lose \$100,000 if she invests in Michael's Ph.D. Assume that to protect the investment now embodied in Michael, Lisa produces three children. She knows that these three children

will dissuade Michael from breaking the relationship, for both of them know that if he quits Lisa will obtain custody of the children. Assume Lisa's opportunity cost of having three children is \$50,000. Ignoring other factors, she will accept to transfer custody to her husband or to someone else for more than \$50,000. Michael has an alternative: to buy an insurance contract costing \$30,000 that will cover Lisa's loss if he fails to keep his promise.⁷ If there are no transaction costs and no income redistribution effects, whether there is a marriage contract or not has no impact on the outcome of the cooperation: both Michael and Lisa will buy the insurance contract which is the least costly means to face the risk of a failure to keep promises. Law does not matter and should not exist.

Now in an environment where transactions costs, agency costs or opportunity costs are high and where income redistribution effects are significant then whether Lisa pays \$30,000 or Michael pays \$30,000 is not the same thing and it will affect reservation prices (see Mario Rizzo 1990). The allocation of property rights in marriage then has consequences for the outcome of cooperation. In this case the law matters.

Why would there be positive transaction costs? The concept of transaction cost is a little bit fuzzy. For example Lloyd Cohen (1998) considers that transaction costs are high not in terms of carrying a marriage contract, but because it is costly to search for a marriage partner. He views the human capital assets of wives and husbands as not having the same time profile of growth and depreciation. To the extent that the wife's human capital consists principally of her reproductive capacity there are high agency costs if men want to control their wife's body which includes the capacity to reproduce. Under such circumstances women's value in the marriage market relative to men's typically decreases with age faster than men's, so that there is a higher cost of exit for women than for men. These high transaction and agency costs have been used by Cohen and others to justify why the state interferes in cases of divorce. However, this approach has not been used to question the privacy doctrine at the basis of U.S laws about marriage and

divorce. Accordingly, the state does not regulate the duties and rights of partners within the marriage as long as the marriage is ongoing.

The Neoclassical Approach to Law-and-Economics. Another way to justify marriage law is to focus on the cost of writing a perfect contract. This is the typical neoclassical perspective. Imagine that both husband and wife draft a perfect contract. That perfect contract is complete. Every contingency is anticipated, all relevant information has been communicated to both partners. Husband and wife are rational human beings with stable preferences. The parties negotiate the contract freely, both consenting to the terms of the contract. Assume also that neither the husband nor the wife has any monopoly power in the marriage market and that no third party is affected by the marriage contract at the moment it is concluded. If all these assumptions hold, the contract has no gaps. Therefore, the parties do not need the State or the courts to supply default terms.

Conversely, marriage contracts are imperfect when any of the following applies: the parties are irrational, one partner is mentally deficient, preferences are unstable (e.g. because one of the partner is too young), all the contingencies are not anticipated (e.g. one of the partner finds another spouse at work or becomes insane), all the relevant information is not communicated to both partners, one of the partners knows that he is incapable of having children but does not tell the other, there is a mutual mistake (e.g. a man thinks he is marrying a girl but in fact he is marrying a boy), men have monopoly power in the marriage market and contracts are made under duress, or contracts are constrained by parents. Third parties are affected by the contract or breach of contract when children are present. All these imperfections create a need for intervention by courts or the State aimed at correcting contract failures and regulating marriage contracts.

Table 2 explains various aspects of statutory marriage laws in terms of the neoclassical approach to Law-and-Economics (see Cooter and Ulen 1997 Table 6.1 p. 192).

Table 2 *The neoclassical perspective on marriage laws*

| Assumptions | Contract doctrine |
|--|---|
| Irrationality | Incapacity (No marriage before 18 for the man and 15 for the woman, mental illness) |
| Unstable preferences or weakness of the will | Incompetency (the man spends too much of his income) |
| Constrained choice | Coercion, duress (shotgun marriage) |
| Lack of information | Fraud, mutual mistake, failure to disclose (error on the person) |
| Monopoly power | Necessity (lack of income redistribution between partners) |
| Third parties | Unenforceability (already married) |
| Breach of marriage by mutual consent | Obligation to perform |

Unlike the former ones this approach says nothing about what kind of promises should be enforced.⁸ It says when a promise should not be enforced. But in contrast to the former approach this argument offers an explanation for a large number of concepts found in marriage law. However, other terms are in contradiction with this approach. Consider French marriage laws (see Appendix A). How do you account for the statutes regarding abortion, divorce, wife's work without the husband's consent, or divorce by consent? If both approaches can explain why countries have statutory marriage laws and changes in such statutory laws, then these approaches fail to explain why people have rejected legal marriage in favor of cohabitation and no coverage by any law. Before delving into a critique of these approaches, let us examine how these two approaches help explain some of the evolution in French statutory marriage laws.

Example 2: Marriage in a patriarchal agricultural society. Assume the following environment. Men own all property and the only way for women to get bread and butter is by living with their parents, a husband, or in a convent.⁹ The only way for men to promote and preserve the lands from

which they derive their wealth is through having a family with a great number of children surviving to adult age. Men will then compete amongst each other to have the right to use a woman's body to produce a great number of children and have this woman raise the children when their care is time intensive. The main reason that men want to marry is so that they can benefit from the production and education of a great number of children, in turn a demand derived from their desire to create and preserve wealth. It is assumed that only wives can supply the services needed for reproduction and education of children. These services have an opportunity cost based on the value of time of a woman who stays with her parents or joins a religious order. Assume this cost is low.

The production of children occurs when people are fertile. For women, this typically implied marriage at a young age.¹⁰ In such traditional society, the main reason women wanted to marry was their need for income and the basic necessities this entailed. Women would therefore prefer to marry men who have more current or future wealth to share with them. Now men are likely to be wealthier at older ages in terms of monetary and physical capital, while at younger age their wealth is more likely to take the form of human capital. There thus is a discrepancy between the life-cycle productivity of husbands and wives: the wife is more productive early in her life cycle while the husband's productivity is likely to occur at an older age (see also Grossbard-Shechtman 1982). We can say that the value of women's productive services in such marriage is highest when she is young while men's ability to pay for these services is highest later in his life cycle, long after the investments were made.

In this cultural context there is no insurance market for either men or women. Men can not protect themselves against a wife's failure to keep her promises regarding her reproductive and educational contributions. Women can not protect themselves against a husband's failure to keep his promises regarding his future wealth and his willingness to share that wealth. Agency costs are very high.

Under these circumstances a marriage contract can significantly reduce agency costs. The set of rights and obligations will be something like this:

. The man will ask for exclusivity in sexual access to his spouse. He wants his own children, not the children of another man. He will also ask for control of the woman's body so that the marriage be "consumed" through frequent sexual relations, thereby increasing the likelihood that he obtains the number of children he desires.

. At the same time the woman asks a wage for covering her present opportunity cost of time and a future compensation both as a payback for her investment in the husband's assets and as security when her body has lost all value in the eyes of alternative men and her expected wage for spousal labor is expected to be low. As a result, she may ask for an indissoluble marriage contract or a monetary compensation if the contract is terminated at the man's will.¹¹ Such a contract looks like a franchise contract with a strong asymmetrical set of rights and obligations between spouses (see Lemennicier (1988), chapter 5).

Looking at the marriage contract from this perspective provides a straightforward and simple explanation for most family laws embedded in the French civil code written before the 1960s (see Appendix). The apparent harshness of the contract results from the fact that men's demand for spousal services is strongly oriented towards the use of the woman's body which is by nature under the control of the wife's free will. The legal power that men obtained over their wife's body--including the only recently abolished prohibition on women to obtain an abortion without their husband's consent--was a way to counteract the natural property of the wife over her own body.¹² The asymmetrical formal relationships typical of a patriarchal system reveal that in societies placing so much emphasis on reproduction, the weakest party in unregulated marriages may have been the man. As a result, men needed to develop such a formal and cumbersome apparatus to enforce their wife's promises (see below).

In contrast to the patriarchal society described in Example 2, the goal of many modern couples is to establish egalitarian marriages.

Example 3: Contemporary egalitarian marriage. Assume a marriage where in addition to being productive in reproduction and raising children, the wife is also highly productive in the labor market, her productivity being equal to that of men. Assume also that wealth is not coming from land but from human capital embodied in both men and women. Consequently, both men and women prefer to have fewer children than in the agrarian society of Example 2. These children will be of higher quality, implying the need for larger investments of parental time to the extent that there are no good substitutes for parental love. This leads to a higher premium on parental intelligence and skills, including communication skills and the ability to coordinate one's own parental investments with those of the spouse. Such process often involves joint production of various aspects of child quality. Child quality is then a public good from the marriage's perspective.

Even though the market has developed commercial substitutes for many of the services that women provided in societies such as Example 2, men continue to have a demand for many homemaking services supplied by a wife. In addition, women employed in the labor force have a demand for homemaking services supplied by a husband. Many dual-earner couples continue to produce many services in the home, even though commercial substitutes for most of these services are available (see Joni Hersch 1997). In part, this occurs because production in the marital home reduces transaction costs, an argument similar to the 'raison d'être' of the firm (see Pollak 1985). Time-saving home production technologies may have increased the productivity of time spent in homemaking. As long as cloning technologies are not perfected and widely used, men continue to need women's bodies to reproduce themselves. Exclusive intimate relations are often valued by both men and women, as a requirement for a loving relationship between equals. Men's concern with establishing their paternity has become less central to marriage.

Whenever spousal labor services are exchanged, there will be gains from marriage. Similarly to any situation where trade occurs, such trade involves some degree of specialization. Specialization in a modern couple typically does not take the form of overall corner solutions, where one spouse does all the homemaking and the other all the paid work. However, specialization frequently occurs in the sense that one spouse may do all the cooking while the other may do most of the driving. We thus disagree with often made statements about the disappearance of gains from marriage in dual-earner couples (e.g. Becker 1981). We agree that the nature of marriage has shifted away from an emphasis on reproduction and provision of material needs towards an emphasis on other services such as health maintenance and entertainment. However, the large amount of valuable home production observed in modern dual-earner couples and the gender asymmetry in this production indicate that specialization between wife and husband continue to create gains from marriage and that spousal labor--especially the wife's--continues to be an important aspect of marriage.

Specialization and trade occur after mutually acceptable terms of trade have been established. To the extent that competitive markets for spousal services operate, quasi-wages for spousal labor will be established not above the maximum compensation that the spouse on the demand side is willing to pay and not below the minimum compensation that the spouse on the supply side expects to receive. This quasi-wage will be higher the higher the demand for the service and the higher the opportunity costs expressed in the supply of labor. In examples 1 and 2 where the man was the major earner in the marriage, husband and wife needed to agree on how he would compensate his wife for her spousal labor and/or reproductive services. Even in the example of the patriarchal agrarian society women experienced opportunity costs of producing spousal labor and therefore they (and possibly their legal guardians) expected an adequate compensation for spousal labor.¹³

The analysis of a modern marriage such as Example 3 is conceptually very similar to the analysis of Example 2. When both men and women work

outside the home and possibly earn equal salaries it is still the case that marriage involves mutually beneficial and voluntary transactions to the extent that all parties are rational (in the sense of being primarily interested in their own well-being) and marriage involves exchanges at terms of trade that are in the acceptable range for both partners in the exchange. This implies that if a man wants to use a wife's spousal labor to frequently organize parties for colleagues (or any other task) he needs to offer her a compensation high enough to entice her to prefer this marriage opportunity over alternative uses of her time. With labor force participation being a major alternative use of time, he needs to offer a quasi-wage at least as high as her wage in the labor force plus the difference in the value of marginal utility of the two forms of labor. The same is true of a woman who wants to use a husband's spousal labor as a father, a cook, or any other task. Excellent employment opportunities and freedom of choice between a career in the work force and in homemaking imply higher opportunity costs of time and minimum compensations for spousal labor in Example 3 than Example 2.¹⁴

Another feature shared by most individuals considering marriage regardless of the institutional setting in which they live is that marriage market conditions influence the benefits individual men and women are likely to derive from marriage.¹⁵ Today men and women have many choices of allocation of time as singles or as couples. Each individual's opportunities in marriage are influenced by many marriage market factors such as the ratio of men to women in a marriage market and the options men and women have to earn a living in the labor market. (see David Heer and Amyra Grossbard-Shechtman (1981) and Grossbard-Shechtman (1993) for a discussion of sex ratio effects on marriage market opportunities).¹⁶

In most industrialized countries today marriages such the ones described in examples 1, 2, or 3 co-exist.¹⁷ Given the variety of possible exchanges between husbands and wives both employed in the labor force and having equal opportunities, the marriage laws adapted to Example 2 are not expected to fit marriages such as Example 3. Another problem with statutory

laws adapted to one situation such as Example 2 is that a unique statutory marriage law may not apply to all members of a society or to all age cohorts in the same society (see Heer and Grossbard-Shechtman 1981 for a discussion of cohort variations in sex ratio and the effects of such variations on marriage markets).

The dramatic drop in marriage rates experienced in Western European countries such as France reflects the lack of adaptation of statutory marriage laws to changes in the nature of marital exchanges and in the preferred terms of trade between spouses. The French civil code stated rules and regulations that were well adapted to the equilibrium terms of trade in markets for women's spousal labor in the patriarchal agrarian society that France was in the nineteenth century. These same rules are probably far from the mutually acceptable terms of trade that most women and men would negotiate in France today. The old set of rights and obligations governing marriage in the "ancient regime" have become obsolete. For instance, limitations on divorce and on the freedom to establish separate living arrangements make little sense today.

Given that they only have a choice between statutory marriage laws adapted to a patriarchal agrarian society and rejection of marriage, young generations do not bother to marry and prefer to cohabit. We expect that the young French (and many other Westerners) would behave differently if they had a wider range of choices. In the United States, where each state has its own marriage and divorce laws and a wider range of choices of marriage regimes are available, avoidance of marriage has not reached the same proportions as it has in France. However, in the United States reliance on statutory state laws also severely constraints the feasible set of mutually beneficial transactions in marriage and we estimate that marriage rates are considerably lower than what they would be had there be less rigid regulation of marriages in the form of statutory state laws set by state lawmakers.

It is not simply that the statutory laws of a patriarchal society do not fit contemporary France or any other country. The problem goes beyond the specifics of the particular statutory law that lawmakers put in place. Even when the power of the state is used to replace archaic laws with a set of new statutory laws of marriage and divorce, there are problems associated with any standard statutory law applicable to all couples in a particular territory. These problems have not been identified by scholars working in the tradition of existing Law-and-Economics research programs. Instead, some Law-and-Economics scholars (e.g. Cohen (1987) and Brinig and Crafton (1994)) have recommended less flexible statutory divorce laws in the hope that such laws will eliminate what they call 'opportunistic' behavior.¹⁸ Furthermore, these research programs suffer from some basic problems that are not limited to applications dealing with marriage.

3. A Critique of Law-and-Economic Research Programs of Marriage

According to critics trained in Austrian economics, Law-and-Economics research programs are generally faced with three basic problems: the knowledge problem, the problem of interest, and the problems associated with government monopoly in coercion. These criticisms also apply to the Law-and-Economics analyses of marriage.

The knowledge problem. Both the Chicago research program and the neoclassical research program in Law-and-Economics commit some sort of "nirvana fallacy". The neoclassical research program commits that fallacy by developing the idea of a perfect contract and forgetting that there is no free lunch in life. The assumptions used in neo-classical analysis--rationality, stable preferences, satisfactory levels of information on all contingencies, a competitive environment, etc.--are not simply given assumptions defining a perfect contract. Each one of these features can only be obtained as the outcome of an interaction process that consumes resources and is therefore costly. It

could be rational to be rationally ignorant about contingencies or characteristics of the partner. Having stable preferences is not without costs.

Another assumption of neo-classical economic analysis is that third parties are not affected by a particular action. Trying to prevent third parties from being affected by our own action assumes that we are able to plan all the intentional and unintentional effects of our action on all other individuals concerned. This implies a tremendous amount of knowledge on the part of each individual. Again, we can not escape the fact that accumulation of knowledge is costly.

To the extent that all these prerequisites to a contract are the outcome of individual action based on a subjective value judgement then we need to (1) raise the question of optimality and (2) recognize that the optimal amount is purely subjective and differs from person to person. If the optimal amount of rationality is zero for the promisee how would a judge be able to know that the promisor and the promisee failed to satisfy all the assumptions of a perfect contract?

When we discuss transaction or agency costs we are committing the same fallacy: we imagine costs to explain something that we do not understand (for instance, marriage law as a statutory law) or do not want to understand (the role of the legislator or of the judge as a "bad" in producing law). That economists apply their imagination to find costs that can possibly explain why governments intervene in marriages implies a sense of superiority on the part of economists. Why should practitioners of our profession be able to discover what costs prevent parties to a contract from seizing valuable opportunities? In the case of Lisa and Michael, the costs include the cost of finding and negotiating an insurance contract to protect her investment embodied in Michael. How does the economist know that such a contract cannot be written? And why cannot it be written? And if Judge Richard Posner is right and it is the function of law enforcement to mimic an efficient and equitable contract, then why do Posner and others assume that the law has no cost? What about agency costs and coercion

costs? How does a judge assess these costs? What if the costs are purely subjective? When minimizing transaction costs, which costs does the judge choose, the costs incurred by the husband or those incurred by the wife? If these costs are subjective costs, he is doing something that he has no right to do: comparing the utility of husband and wife.

From an Austrian perspective, the neoclassical and Chicago Law-and-Economics research programs fail because of *the knowledge problem*. When a judge, legislator, economist or any other expert plays the role of social engineer or central planner they have the pretence of knowing how to correct discrepancies that the individuals themselves either do not see or can not solve. The social engineer is seeing the perfect contract free from any costs, sees what the partners are doing, and guides them. Whether it deals with business or marriage, whether it is determined by states or by a central government, whether the system is British, American, or French, legislation is not an end in itself, but rather a process.

The Austrian perspective places more weight on individuals and tries to avoid legislative intervention whenever possible. It recognizes that the parties to a contract know best what kind of promises should be enforceable. They have superior knowledge regarding the subjective costs of their actions as well as the benefits they expect from the behavior of their partner. From such an Austrian perspective, freedom to draft a contract should be given to the parties themselves. The parties will then use the contract as a discovery procedure.

If all judges were influenced by the Law-and-Economics movement and decided to enforce promises according to an efficiency principle, the law will become uncertain and unpredictable because of the knowledge problem. The idea here is the following. These economists will look at all the precedents in common law and will explain these precedents in terms of a hidden rule, e.g. "maximize wealth of the parties to the contract". Then a new case occurs. Does the judge have to resolve this case following the rule just discovered?¹⁹ Assume that all judges do what the economist preaches. Then

the hypothesis of the economist is super-imposed on the law. This does not mean that after this change the common law will become "efficient". First the hypothesis could be wrong, in which case the self-fulfilling prophecy is a disaster. Second, even if the hypothesis is true, each judge will try to interpret the general principle when applying it to a particular case. But as each case is different and mobilizes a huge amount of specific knowledge, the resulting judgement may be wrong because the information on which the judgement is based is wrong or falsified. Diversity of judgements, non-visibility of the principle (by nature hidden and not perceived by the victim to the conflict), and errors will hurt the coordination of expectations as well as the certainty and predictability of the law. Fortunately, most judges do not care about Law-and-Economics.

Classical law was very well aware of these difficulties. This is why it conceived of contracts where

- 1) the ends or motives of the contract are indifferent to the judge and legislator
- 2) consent is crucial both when entering or exiting a contract and when specifying its terms.
- 3) the terms of a privately negotiated contract have to be followed not only by the parties but also by judges and lawmakers
- 4) there are no effects on third parties.

Which promises are not enforceable? Notice how we have changed the question. We now ask the question in a negative way, not in a positive way. In contrast, when the Law-and-Economics movement uses the wealth maximization principle to define enforceable promises they define enforceable promises in a positive way. From an Austrian point of view or from the point of view of classical law, the judge or the common law searches for promises that should not be enforced, promises that destroy expectations or introduce incoherence or unpredictability in expectations. Austrian economists have used Friedrich Hayek's (1978) insights on competition to criticize the neoclassical and Chicago views of the "perfect

contract" free from failures and transaction costs. They do not consider it the law's role to mimic efficiency but rather to help people coordinate plans and expectations in an open-ended universe (see Roy Cordato 1992).

The problem of interest. When a right is assigned to one party, (e.g. the right to income or custody over children, or insurance protecting a spouse against a partner's failure to keep promises) the party involved will tend to make judgments and make decisions that are partial to its own interest at the expense of the other party's interest (see Randy Barnett 1998). When a "statutory law" mimics an "efficient" marriage contract it typically offers one party opportunities to exploit the contract to its own advantage. In a dynamic environment this introduces conflicts between partners. The problems created by conflicting interests are compounded because of the next problem characterizing the Chicago and Neo-Classical approaches to Law-and-Economics.

The problem of coercion and power. In both the neoclassical and the Chicago approaches to Law-and-Economics the means to enforce promises that people fail to keep stay ultimately in the hands of those in charge of enforcing the monopoly of coercion over a territory. Both approaches see the government as an efficient institution that uses coercion to offer individuals the possibility of being better off without making anyone worse off. They assume that a coercion monopoly has no costs.

The public choice approach has recognized the problems that arise when judges or politicians obtain a monopoly on the use of coercion. But the public choice approach has not really understood the problem of coercion and/or power and its impact on the dynamics of intervention. Barnett (1998) lists three difficulties with such monopoly on legal coercion. First, since the coercion monopoly has to be in the hands of an individual or group of individuals, how will these monopolists be selected? The best, is the typical answer, but the best according to what criteria? Election by peers? We know that bad women or men are more dangerous with the power to coerce than without it. What makes a person bad or good can be assessed in terms of the

ideas of justice they carry out. Bad ideas are more dangerous when they are propelled by force.

Here is an example related to French divorce laws. In France a majority of judges are women and a majority of trials deal with divorce.²⁰ If women are more impressed by psychology than men, and if they have been trained to think that women are always the weakest party in a marriage per se (in fact the weakest party in a contract is the outcome of the rivalry between men competing for women's favors and vice-versa) and that marriage is a contract where males exploit females, their judgment will be partial. Ideas have consequences.

Let us assume that the selection problem is solved. The judge is impartial and has a "good" view of what promises should be enforceable. How will she then deal with the *problem of interest* in a dynamic world? Bad people outside the monopoly of justice (gangsters, businessmen, wealthy people, government officials or politicians) may bribe and corrupt judges. Last but not least, a coercive monopoly of power contributes to the destruction of knowledge or prevents the emergence of new knowledge. The reason is that with consent we know that both partners expect to gain from the exchange (maybe ex-post they will fail to benefit) while with coercion only one partner may think he gains from the exchange while the other may think he will lose. Therefore ex-ante we cannot determine whether an exchange is Pareto-efficient. The party who expects to lose from the coerced exchange will try to avoid it by refusing to reveal information that may incite the other party to pursue a transfer benefiting from the use of public or private coercion. The coerced exchange also signals that the party who used the coerced exchange was not ready to pay the price required to obtain the other partner's consent, for that party had the choice of making an offer to get the consent of the other partner. This negative information on the party who uses coerced exchange signals that the price this party was ready to pay was less than the minimum price asked by the other partner. In that sense it is difficult to prove ex-ante that the terms of a transfer of rights are

efficient when the exchange is coerced by law. When the coerced exchange fails to produce the intended result, a dynamic of intervention contributes to an increase in "social disorder". A good illustration of such undesirable result is the question of child custody in a case of divorce.

Assume Lisa and Michael have divorced, that they can not negotiate over custody, and that Table 3 represents their conflict over the services produced by their child. We assume that, following French law, Lisa has obtained custody.

Table 3 *Conflicts over custody rights*

| | Michael | | | |
|------|---------|---------|--------------|------------------|
| Lisa | Dove | | Hawk | |
| Dove | $V/2+a$ | $v/2-a$ | $V/2, (0)$ | $v/2, (v-b)$ |
| Hawk | $V+a$ | $-a$ | $(\mu)[V-C]$ | $(1-\mu)\{v-c\}$ |

Michael has to pay a in child support to Lisa. In return, he has the right to visit the child. Define v as the value of services produced by the child as defined by Michael and V as the value of those services as defined by Lisa. Unfortunately for Michael, the child lives permanently with Lisa. The net benefit obtained by Michael when they fully cooperate and he pays child support is $v/2-a$ and could be negative if the ex-husband disagrees with the way the ex-wife is investing in the child. Lisa obtains a value $V/2$ from her investment in the child and a in child support.

Now both the ex-wife and the ex-husband can chose between two strategies: they can share custody and act as doves, or they can enter a fight and play a Hawk strategy. If Michael plays a Hawk strategy (he refuses to pay child support or kidnaps the child) his benefits from investing in the human capital of the child will be either $v/2$ (when he does not pay child support) or the entire benefit of his investment v at a cost of b (if he kidnaps the child). If Lisa plays the same strategy the result of the conflict is uncertain, Lisa suffers a cost C and Michael suffers a cost c . From Michael's

point of view, by definition, $v/2 > v/2 - a$ and $v - b$ could be also superior to $v/2 - a$. Then, if $(1 - \mu)(v - c)$ is less than $-a$, the dominant strategy for Michael is to play Hawk.

Lisa has two strategies : play Dove or play Hawk. By definition $V + a > V/2 + a$. If $(\mu)(V - C)$ is either negative or less than $V/2$, her behavior depends on Michael's strategy. If Michael plays Dove with certainty, her best strategy is to play Hawk. If Michael plays Hawk with certainty, the best strategy for Lisa is to play Dove. This is the paradox of this conflict. Even when the ex husband does not pay the alimony, the ex wife does not go to court and/or fight against her ex-husband. These results follow from the fact that Michael and Lisa can not negotiate over custody rights.

Since government intervention prevents a peaceful exchange, there is a non negligible probability that Michael's dominant strategy is to fight like a Hawk. He refuses to pay child support or kidnaps the child. A first intervention creates a problem with unintended consequences: the ex-husband's best interest is to refuse to pay child support or to kidnap the child. Given such undesirable consequences of unilateral legislation regarding child custody, the state has intervened by increasing the cost c of adopting such strategy, e.g. by establishing prison sentences if ex-husbands do not pay child support or kidnap the child. Simultaneously legislation has reduced the cost C of playing Hawk perceived by the ex-wife and has increased the probability μ that she wins the battle. Then the best strategy for the ex-wives is always to play Hawk. Based on that knowledge it follows that Michael's best strategy is to play either Dove or Hawk, depending on which of the two **negative** outcomes $-a$ or $(1 - \mu)(v - c) < 0$ causes the smallest loss.

Given a non negligible probability of divorce and the dominance of a custody battle strategy, the result of such additional intervention raising non-custodial fathers' costs is to reduce men's interest in investing in a child and in marriage.²¹

The public choice perspective: statutory law as protectionism against competition. The combination of a government monopoly on coercion and

the existence of interest groups leads to problems that have been emphasized in the public choice literature. The Law-and-Economics movement assumes that in a democracy there is some sort of efficient way to produce laws. This assumption is far from being self-evident. Pressure groups typically use their relative political power to pass laws that favor their own interests. In the case of marriage laws, this implies that the rights and duties (e.g. enforceable promises) in marriage do not necessarily favor marital stability or marriage efficiency for all. Rights and obligations favor the private interests of the pressure group that is politically more powerful at a particular moment. Interest groups putting pressure on lawmakers when they legislate family laws include religious groups and other pro-family groups, gays, and groups representing the interests of men as a group or women as a group.²² The outcome of such redistribution of rights and obligations can be harmful to the institution of marriage if the outcome is not a set of promises that one of the marriage partners expects from the other, and therefore that outcome has to be coerced upon such partners.

Consider the case of no-fault divorce laws.²³ In comparison to a situation where child support and alimony are linked to a fault in breach of contract, unilateral divorce and no-fault divorce laws increase not only divorce rates but also the poverty of divorced women. As fault is no longer necessary to obtain a divorce, unilateral divorce by men often penalizes spouses who like Lisa gave up on their own career and who therefore are likely to end up in poverty after divorce. However, women who anticipate such an outcome will under-invest in the marriage relationship: they will not want to raise children or sacrifice their own career opportunities for those of a husband (see Grossbard-Shechtman 1995). Consequently, divorce rates increase, adding more instability to marriage, an institution that is inherently unstable. It is clear that state intervention is not innocuous.

Now consider the introduction of divorce by consent when the initial regime is no-fault divorce. If custody automatically goes to mothers, men are constrained to buy out their freedom by alimonies or child support to their

ex-wives while the ex-wives keep their investment in their own children. The cost of exit from the contract could be too high if the monetary compensation is miscalculated.²⁴ Then men who anticipate the exit costs may not want to be married. They will prefer cohabitation. We will have the same results: under-investment in marital specific assets, possibly implying a reduced number of children and a lower level of well-being as a result of a loss in home production (including love and companionship). In a democracy political competition over the promotion of private interests thus pits one interest group against another.²⁵

It is noteworthy that the Law-and-Economics program has acquired prominence mostly in the U.S. While in the area of business law many U.S. Law-and-Economics scholars have integrated a public choice perspective with an economic perspective on the law, U.S. Law-and-Economics scholars writing about marriage have been quite silent about the problems with law and regulation that are typically discussed in public choice analyses.²⁶

4. Towards Private and Competitive (or Polycentric) Marriage Laws

One part of our thesis is that marriage laws are the outcome of the ideas and interests of the people who produce laws: judges and/or legislators in monopolized public legal systems, the private parties who depend on these laws, and the lawyers and interest groups who represent these individuals. Marriage laws based on the interference of a coercive state in the area of marriage therefore are bound to have undesirable consequences. We expect that a private and competitively produced law and order system will not suffer from some of these drawbacks. Thinking in such terms is foreign to most people, including lawyers and economists. One field of law where scholars are accustomed to think of freedom of contract within a private and polycentric system of law is international commercial law.

It is not actually possible to describe what kind of promises would be enforceable and what means of enforcement would be used in a private and competitive system of law, for one cannot describe what does not exist (as stated by Benson 1990). Nevertheless we present some tentative ideas based on historical or contemporary private systems such as religious marriages in modern countries.

Without state intervention marriage will be a private affair. Only the parties will decide what kinds of promises are enforceable. They will also choose the means to enforce the promises. To understand what that implies for marriage let us get back to the basic exchange between a man and a woman described in Example 1. Michael wants to marry for he has a demand for a basket of services that he cannot get on the market at a reasonable price: love, home production, rearing and raising children etc. Lisa is willing to supply such a basket in return for a monetary compensation and love. Let us call this compensation the quasi-wage for spousal labor y (see Grossbard-Shechtman 1984, 1993). The game is summarized in Table 4.

Table 4 *The basic exchange between a man and a woman*

| | Michael | |
|----------------------------|------------------------------|-----------------------|
| Lisa | Pays y | Does not pay y |
| Supplies the basket | $y - y_{\min}; y_{\max} - y$ | $-y_{\min}; y_{\max}$ |
| Does not supply the basket | $y; -y$ | $0; 0$ |

Assume that y_{\min} is Lisa's opportunity cost of providing the basket of services and y_{\max} the maximum monetary compensation that Michael is willing to transfer to his wife..

This is an ordinary contract that repeats itself each period of time. As we know from the prisoner dilemma if both parties anticipate the end of the interaction, a dominant strategy is not to cooperate. For the dilemma to be avoided it is crucial that this relationship does not end, i.e. the game is

repeated. This is the main reason why, ex-ante, marriage is celebrated under the assumption that it will last forever.

Given the importance of such expectations of marital stability, we expect a private system of justice to provide a strong formal apparatus (such as marriage ceremonies or consecrations in front of witnesses) to encourage the parties to pre-commit to a long-term relationship. The basic idea is that unless marriage partners anticipate cooperation to last they will not cooperate in the first period. Then the Axelrod (1984) 's theorem can work and a "tit for tat" strategy can be implemented inside the couple.

Without the coercive power of the state the means to enforce the promises rely on the threat of termination of the contract, as suggested by Benjamin Klein and Keith Leffler (1981). Three processes are available to enforce promises in the case of a marriage contract: ex-ante penalties and reputation, ostracism from the community, and ex-post arbitrators.

- 1) ex-ante penalties and reputation. As we have shown before in Example 1, to protect her investment in Michael's Ph.D. Lisa can buy an insurance contract, or the marriage contract can list the amount of money the husband must pay his wife upon divorce or death. This obligation can be guaranteed through a lien on the husband's assets. At the same time reputation and signals of honesty and commitment to marriage can be acquired through a lifestyle choice, such as a visibly religious life (see Lawrence Iannaccone 1994).
- 2) ostracism from the community. A community can make divorce an exceptional event by forbidding remarriage via an ostracism mechanism.
- 3) ex-post arbitrators. Even in a private system of law enforcement there is need for some kind of arbitrator or a judge who will try to resolve disputes in case they arise, including possible conflicts in case of divorce.

As suggested by Paul Milgrom, Douglas North and Barry Weingast (1990) we can learn from commercial law (the *lex mercatoria*) that a pure private system of justice could work without a coercive state. Individuals

would choose the institution or legal system by which they would want to enforce their contract.

The argument of P.R.Milgrom, D.C.North and B.R.Weingast is also applicable to marriage law. For instance, religious officials--such as Protestant ministers, Catholic priests, Jewish rabbis or Muslim imams--can play the role of arbitrators or judges. A person who wants to marry can go to a priest or rabbi and ask for information about a partner. In particular, they want to know if the partner is already married or has been married to someone else. It would be a major responsibility of the religious officials to keep track of such information, e.g. by questioning parents.²⁷ Now the marriage is performed in front of the religious official who certifies the contract and can help writing a document specifying a set of obligations to which both husband and wife are mutually beholden, as is the case with a Jewish marriage contract or *Ketubah* (see David Westfall 1994). After marriage, if one partner is not satisfied because the other partner does not keep his promises, he or she can return to the religious official, paying the cost of any judicial process. The victim will receive a compensation paid by the other partner if the plaintiff has been honest. The problem is how to create incentives so that the other partner will actually pay the compensation? Enforcement can be achieved by having the official record the guilty person's name and making sure that this person can not remarry after divorce. The partner will then pay the compensation in order to acquire the opportunity to remarry. This may require cooperation between officials of different religions and giving some authority to religious law enforcement officers.²⁸

5. Conclusions

Marriages and firms share many characteristics in common. Both institutions deal with a set of promises between two parties and therefore need contracts to encourage individual parties to stand by their promises and commitments. Both the Chicago and neoclassical perspectives on Law-and-Economics

explain many of the features of traditional marriage laws. Such statutory laws appear limited in their capacity to accommodate modern couples' needs to increase the likelihood that their partners keep their promises.

We present a critique of the Law-and-Economics literature on marriage based on the economic literature by Austrian economists and by public choice theorists. We emphasize the knowledge problem, the problem of interest, and the problems associated with government monopoly in coercion.

In line with international commercial law we suggest a private system of justice where individuals are encouraged to enter private marriage contracts and where a number of systems--including religious marriage systems--compete for the provision of contract enforcement services.

Our analysis of marriage and divorce comparing insights from Law-and-Economics, Austrian economics, and public choice analysis will hopefully be found to be useful. There is clearly a need for considerable further work on all the topics covered here. A better understanding of the issues we discussed can not only advance economic analysis but also help us design legal systems that facilitate the enforcement of promises in marriage and thereby encourage marriage and family stability.

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Appendix: French Marriage Law as Statutory law.

If you look at the French family law you will not be surprised to discover that you cannot marry before 18 years old if you are a boy and 15 years old if you are a girl. There is no marriage without the consent of spouses. Fraud and duress, as is the case with shotgun marriages, invalidate the contract. You cannot marry a man if you are a man (even if you change your sex) or your sister if you are a boy. The judge or the legislator is clearly interested not only in the sex of your partner but also in the biological links between partners. The legislator is interested in the goal of your marriage. You cannot marry just to acquire the citizenship, you are forced to consume a marriage or cohabitate. Polygamy is forbidden. One can not marry just for a short period to check if the relationship is satisfactory, as when an employer hires a worker on a short-term basis (such as three months) to check the worker out. The marriage contract is a long-lasting relationship: duration or permanency is a central characteristic of the marriage law. Normally you cannot have a love affair during your marriage. You can not just look at the marriage market and find out if there are better opportunities. Fidelity (or exclusivity) is an obligation. A married person can change her work habits without consulting with her spouse. Nor does she need to consult with him if she considers having an abortion, even if such decisions lead to the spouse' gains

from marriage becoming negative. One cannot break the contract for such default on the partner's part. During centuries marriage was indissoluble. Even today, the State imposes specific rules of divorce. Men are forced to redistribute money to their wife and to provide child support. This obligation to support is inherited by children after one dies.

In fact the so-called marriage contract in French law has nothing in common with a contract. By being directly involved in the contract's creation and dissolution and by heavily regulating the terms of marriage, the State denies people the right to freely contract in this area. In that process, the state also defines property rights within the contract (Douglas Allen 1990, Lemennicier 1988).

The following table summarizes French marriage law

Appendix Table: A Summary of Statutory Marriage Law in France

| | |
|--|--|
| Age at marriage | 18 for boys, 15 for girls (Article 144 du code civil) |
| Biological links | No marriage between persons of the same sex or of the same family (Article 161 du code civil) |
| Principle of consent | No marriage if no consent (article 146 du code civil) |
| Polygamy | Forbidden (Article 147 du code civil) |
| Celebration | Public in front of a mayor (Article 165 du code civil) |
| Opposition | The State as well as the family can oppose the marriage (Article 172 et 175-1 du code civil) |
| Obligation to take care of children | If there are children the married couple has a duty to feed and raise their children (Article 203 du code civil) |
| Obligation of children towards their own parents | Children have a duty to feed and help their parents if they need it (Articles 205 206 et 207 du code civil) |
| Alimony and child support | Always in proportion to needs and capacity to pay (Article 208 du code civil) |
| Rights and duties of | Fidelity, mutual help and joint decisions between spouses about |

| | |
|---|---|
| spouses: | moral issues, finances and education of children (Article 212 et 213 du code civil) |
| Cohabitation | Obligation to live together (Article 215 du code civil) |
| Debt solidarity | Spouses are liable for the debt of their partner (Article 220 du code civil) |
| Right to autonomy | The spouse can have his own bank account, work without the consent of his partner, and has a right over all his personal wealth. (Articles 221, 223, 225 du code civil) |
| Divorce | Divorce is possible by mutual consent, by fault, by absenteeism (6 years) or due to incapacity (Article 229 du code civil) |
| Expectation damages | In case of divorce by mutual consent or by fault the losing party has a right to a compensation that maintains the level of welfare obtained in the marriage. The monetary compensation takes the form of capital (exceptionally it is a rent). This monetary compensation is transmissible to the heirs. (Articles 266, 270, 273, 276 du code civil) |
| Obligation after divorce in matters of residence | Allocation of the residence to one of the spouse by the judge (Article 285-1 du code civil) |
| Education of children | Joint education (Article 287 du code civil) |
| Duty to contribute to the education of the children | Child support to children given to the spouse who has custody of the children (Article 288 et 293 du code civil) |

ENDNOTES

¹ The recent adoption by the French legislature of PACS (Pacte Civil de Solidarité) is also a sign of the timeliness of our ideas. This new law includes a reduction in the differences between cohabitation and marriage and the establishment of civil contracts for couples of the same sex. Our personal

values lead us to consider some of the effects of the demise of statutory marriage as undesirable.

² What the economic literature has not recognized sufficiently is that these rights are property rights on a human being, as stated by A. King (1982). From the point of view of natural law, it can be argued that the promises that should be enforced are the ones that are in accordance with "human nature or man's proper function" like in Aristotelian ethics. Murray Rothbard (1982), whose ethical views are grounded in natural law, explicitly wrote: "contract should only be enforceable when failure to fulfill is an implicit theft of property". A traditional deontological view about ethics and law says promises that should be enforced are the ones that (1) can be universalized; (2) can be compossible; and (3) treat individuals "always as an end and never as a means only", as is the case with Immanuel Kant (1783) or Robert Nozick's (1974) view of Kant: "they may not be sacrificed or used for achieving others' ends without their consent".

³ As pointed out by Linda Waite (1999) there is a thin line dividing 'productive incitement' from 'nagging', encouragement perceived with a negative connotation.

⁴ $V/2$ is chosen arbitrarily. Lisa's share of family income V/n has to exceed v . Furthermore, $(V/n)-v$ has to be large enough so that Lisa obtains a normal rate of return on her investment. Marriage market conditions are expected to influence share n .

⁵ Competition in spousal labor markets follows from the possibility of substitution between a number of potential spouses.

⁶ The Chicago Law-and-Economics research program is different from what is generally called the Chicago school of economics. The latter is generally associated with the work of Milton Friedman and his advocacy of free markets and monetarism.

⁷ This insurance contract is enforceable as the promise consists of a transportable title which can be sold to third parties.

⁸ Transaction costs or agency costs have implications regarding what kind of promises should be enforceable. For instance, obligation to perform in case of divorce.

⁹ The French often use the expression 'to marry God' when describing a woman's decision to join a Catholic religious order.

¹⁰ To the extent that women's major *raison d'être* is to produce children, their career in marriage could be compared to that of a football player: a relatively short career taking place at the beginning of one's lifetime.

¹¹ To keep her husband during her unproductive lifetime period, in this kind of society a woman may agree that he marries a younger wife (or wives). In polygamous societies women often appreciate that their co-wives are substitutes, not only in their reproductive capacity, but also as producers of meals, education, etc. (see Ronald Cohen 1971). In this kind of society it is also likely that women will be more likely to prefer marriage to rich old men than is the case in societies where women's reproductive capacity and men's

wealth are less important. Consequently, the age difference at marriage in such patriarchal societies tends to be higher than in societies where women have more means of survival.

¹² Prior to 1975 abortions were illegal in France.

¹³ This helps explain why in some societies men pay bridewealth payments at the time of marriage. These payments go to the women's legal male guardians. In other societies where a dowry is paid at time of marriage, the payment is mostly from the bride's father to the bride (see Maristella Botticini and Aloysius Siow 1999).

¹⁴ As usual, labor markets thus serve as a mechanism leading to better living conditions.

¹⁵ This idea was developed by Becker (see Becker 1981). Some marriage market analysis can also be found in the economic literature analyzing bargaining in marriage. This literature views marriage mostly as a bilateral monopoly but recognizes the influence of marriage market effects in case the partners consider remarriage (see Shelly Lundberg and Robert Pollak 1996).

¹⁶ Heer and Grossbard-Shechtman (1981) also explain the growth of the feminist movement in the late 1960s as a result of changes in the sex ratio and the consequent deterioration of women's position in marriage markets.

¹⁷ There still exists a minority of marriages where the housewife stays home. This can be called a traditional bourgeois lifestyle. Whereas traditionally dual-earner couples were found mostly in working class families, that life-style is now typical of most French couples.

¹⁸ We recognize individual self-interest as a natural starting point. To the extent that self-interest is combined with concern for the public goods of the marriage and/or altruistic preferences, it is not selfish. We also want marriage laws to encourage commitment in marriage, but do not think that more rigid statutory laws is the way to achieve voluntary commitment in marriage.

¹⁹ As suggested by Mario Rizzo at a recent conference on "Law and Coordination of Expectations" held at the University of Paris Dauphine and organized by the Centre Jean Baptiste Say (June 3, 1999).

²⁰ In France judges are trained at the Ecole Nationale de la Magistrature which has a monopoly on the training of judges. Therefore a few professors of law can influence a generation of judges who will impose their views on justice during their lifetime.

²¹ A similar analysis can be found in Yoram Weiss and Robert Willis (1985).

²² For more analysis of how interest groups influence marriage and divorce institutions see Heer and Grossbard-Shechtman (1981), Lemennicier (1988), Nancy Folbre (1994), and Lundberg, Pollak, and Terrence Wales (1998).

²³ In the following discussion it is assumed that women are more involved in homemaking than men and that men want to leave a marriage.

²⁴ If both partners bargain over the monetary compensation, the minimal compensation the wife will ask is such that she gets to the level of well-being that she would have obtained if she had never married (full insurance)

assuming she has invested in the marriage by sacrificing her time and career opportunities for the sake of her husband's. In contrast the husband will never pay a compensation above a maximum amount corresponding to the level of value of marginal productivity of the wife's work in marriage. Between these two limits a bargain seems possible. But this bargaining is possible only if the minimum compensation asked by the ex-wife is below the maximum that the ex-husband wants to pay. Both minima and maxima are purely subjective evaluations. Usually the law (at least the French law which does not accept unilateral divorce) sets the alimony following the idea that the level of well-being of the ex-wife will be maintained at its level during the marriage, taking into account the ex-husband's ability to pay.

²⁵ Another example of such demographically related legislation is legislation subsidizing fertility. Such family policy redistributes money from wealthy or low fecundity families to poor and high fecundity families.

²⁶ This may be related to the fact that most of these scholars do not have extensive training in economic analysis.

²⁷ Rabbis take this information gathering role very seriously. They also collect information on whether a person is Jewish, given Jewish prohibition on religious intermarriage.

²⁸ One of the reasons that the Jewish system of private marriage law is currently associated with serious problems of implementation (e.g. there are many cases of husbands who refuse to cooperate with a divorce procedure) is that Jewish religious officials have limited authority to enforce Jewish laws. In most countries, that authority is nil. In Israel, it is also seriously constrained by a state monopoly on coercion. If private religious law systems--including religious marital law systems--would be more widely accepted, religious officials would have more authority to enforce such laws.