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AND YOU THOUGHT YOU WEREN'T BRINGING ANY BAGGAGE TO YOUR MARRIAGE

BRYAN HARPER

From an economic standpoint, marriage is inherently efficient, and divorce is inherently inefficient. Divorce economics point to human capital as a possible solution. Yet human capital is unconstitutional and irrational in the context of divorce. Love and affection are the only foundations for an efficient marriage.

Marriage is a legal relationship, but it is a personal, physical, and often religious relationship as well. Regulating or legally defining such a relationship is invasive, difficult, and easily discriminatory.¹ This article will discuss the ideas of marriage, divorce, and their problems and resolutions primarily from an economic standpoint. Starting with the notion that marriage can be looked at in terms of economics leads to two different versions of an “economically efficient” marriage. Divorce scenarios result in economically inefficient and unfair burdens, the majority of which are borne by women and children. For economists, human capital could represent one potential solution to the problems of divorce. Unfortunately, as this article will argue, the properties of human capital render it both unconstitutional and economically inefficient in divorce, based on economists’ own efficiency measurements. This leaves us to examine things more basic to the marriage and divorce problem, such as the reasons we marry in the first place.

According to Ann Laquer Estin, “Economists argue that their analytical tools are appropriate to the family as well as the market because in both settings individuals make choices in a context of scarce

resources.”² Gary Becker, noted family behavioralist, amplifies these economic principles:

When men and women decide to marry, or have children, or divorce, they attempt to raise their welfare by comparing benefits and costs. So they marry when they expect to be better off than if they remain single, and they divorce if that is expected to increase their welfare.³

Becker’s theory, sometimes referred to as the “new home economics,” depicts a household as a firm that combines the resources available to it—the time of household members and various market goods—to produce the desired outputs or commodities it desires.⁴

There seem to be two different notions of an economically efficient marriage. The first may be classified as the traditional or 1950s marriage, while the second represents the present-day, less rigid form of marriage. A closer examination of these will allow an explanation of marital economic efficiency.

Specific gender roles characterized marriage in the 1950s. In the “Leave it to Beaver” model, Ward Cleaver leaves the home to work and provide for the family. The model assumes he is best suited for the workplace. June Cleaver, on the other hand, stays home with the children, makes a mean apple pie, and repairs scrapes and cuts in a traditionally feminine manner. Economists use comparative advantage in production of children and other household commodities to explain these roles. This “specialization and division of labor” implies that one spouse must choose the household and the other must choose the marketplace.⁵ This theory assumes that women, by virtue of their biology, possess a “natural comparative advantage over men in the household, as opposed to market production and that men enjoyed a correspondingly natural comparative advantage.”⁶

Conversely, the present ideal might best be characterized by a less rigid understanding of traditional gender roles. “Margaret Brinig . . . has suggested that the standard [historically based] economic account fails to consider important psychological costs associated with specialization.”⁷ These refer to things such as women who would like to be working, men who would like to work less, either spouse spending

more or less time with the children, and so forth.⁸ Perhaps then, “an efficient union would entail both partners having significant ties to the paid labor force and spending significant time with their children.”⁹ All facets of married life can thus be enjoyed by both partners in amounts they so desire. Key to this ideal is individual choice, its importance in the family, and its subsequent constitutional efficiency. Present-day ideals seem to embrace an individual’s right to choose while recognizing that men and women may desire something other than historical gender roles.

The Supreme Court has upheld individuality within the bounds of marriage. In *Griswold v. Connecticut*, the Court concluded that couples have a constitutional right to obtain and use contraception.¹⁰ Justice Goldberg’s opinion “emphasized also the personal liberty guaranteed by the Constitution that allows individuals within a marriage to make choices about family planning.”¹¹ In *Eisenstadt v. Baird*, the Supreme Court asserted that “it is the right of the individual, married or single to be free from the unwarranted governmental intrusion into matters so fundamentally affecting a person . . . as to whether to bear children.”¹² And in *Roe v. Wade* the Court noted that “women have certain individual privacy rights that may be expressed by terminating a pregnancy.”¹³

These three decisions have reasserted a “jurisprudence of decisional autonomy that extends to the individual within a marriage.”¹⁴ Parenthood is a choice specific to the wills of either spouse. No longer do the courts seem reluctant to acknowledge the individual right to choose different paths in a marriage. These examples will be referred to later in this article.

Having discussed marriage and its subsequent efficiency in these two scenarios, it seems natural to continue with a discussion of divorce. First, however, a presentation of the present divorce model’s effects on women seems appropriate.

According to a recent California study, the standard of living for women after divorce decreased by seventy-three percent, while the standard of living for men actually increased by forty-two percent.¹⁵ In addition, financial awards to women at the time of divorce seem to greatly devalue their marital contributions. In studying divorce, Katharine Baker and Lenore Weitzman note this economic disparity at divorce: divorce proceedings undeniably benefit the husband.¹⁶

One response to this apparent economic injustice during divorce is joint ownership of human capital. Human capital is defined as “the investment of time and money in self development to enhance skills and abilities, which are a source and form of wealth.”¹⁷ Economists assert that human capital and any wealth generated by it may be shared, similar to other marital properties, by divorced spouses in amounts corresponding to their needs.

To determine how to divide human capital, economists examine a woman’s contribution to the marriage and any increase to human capital regardless of whether she worked outside the home. All marital assets, human capital included, are pooled in divorce and split based upon need. This practice exposes a “need” to call it jointly owned. Charles Reich summarized one scenario of human capital in his 1990 article “The New Property after 25 Years.” He puts forth an example of a husband and wife who have no resources at the time of divorce except the husband’s professional degree. He further expands this scenario by outlining the wife’s choices to further her husband’s goal of obtaining this degree. These choices include foregoing her own education and subsequent career, working to pay expenses, and reducing her own standard of living for a period of time. He argues that it is unjust not to calculate this form of “property” in divorce settlements.¹⁸

Furthermore, women consistently bear the majority of the costs and labor associated with child rearing or “household production,” complicating the divorce scenario. Regardless of her reduced ability, a woman is expected to earn and provide “without financial transfers from her husband.”¹⁹ The assumption is that if she is granted joint ownership of her husband’s human capital her ability to provide would not be as reduced. Hence, her burden at the time of divorce would be more fair.

Yet there are complications in the designation of human capital as a jointly ownable resource. First, the Thirteenth Amendment and a discussion of the philosophical ideas of personhood and self-constitution leads to an examination of how joint ownership undermines present-day constitutional efficiency within marriage, as is evident from the three Supreme Court decisions cited above. Additionally, Kaldor-Hicks and Pareto economic efficiency norms function at the time of marriage, but erect barriers to a joint ownership mandate at the time of divorce.

In *Severs v. Severs*, the Court ruled that the Thirteenth Amendment prohibits a husband from paying his wife a portion of the value of his license or degree, since it could subject the husband to involuntary servitude.²⁰ If enhanced earning capacity were considered property, the husband would be locked into his current career, thus negating his right to choice. “[The Court] opines that it would be unfair to force the husband to remain in a career he does not like, or to continue paying based upon the value of that career.”²¹ In *United States v. Kozminski*, the Court limited involuntary servitude to actual physical or legal coercion.²² A court’s decision in favor of joint ownership of human capital would be understood as “legal coercion” and, hence, unconstitutional.

Margaret Radin comments on this situation in her article “Reinterpreting Property”:

To make the degree holding spouse . . . compensate his former spouse for the development of his own abilities is problematic for his personhood too. He is at least (symbolically) locked into the career projected at the time of divorce, and indeed locked into the marriage itself in a sense. . . . He is locked for life into the career he chose during marriage, because his ex-wife shares forever the self he was then. That perhaps is too much entrenchment in context to be consistent with personhood as we now conceive it.²³

Economic efficiency norms, tests which determine whether or not an action is economically efficient, are central to both economics and law with regard to marriage and divorce. As the aforementioned marital ideals are rooted in this theory, it seems only appropriate to ensure that divorce maintains an equal level of efficiency.

Kaldor-Hicks efficiency norms, or predetermined values for material or nonmaterial concepts, seem to make the marital contract enforceable.²⁴ They require that divorce be handled in a manner akin to tort law, using liability rules that define marriage entitlements financially.²⁵ Under Kaldor-Hicks efficiency, all aspects of marriage would be given a value and, at the time of divorce, payment would be calculated based on predetermined values.

The daunting nature of the Kaldor-Hicks endeavor is obvious. It is difficult to accurately and fairly value all aspects of the marital union. Moreover, if ever accomplished, Kaldor-Hicks divorce efficiency

represents a definite and undeniably heavy judicial presence in divorce proceedings. Most legal and economic theorists agree that this is most certainly not an efficient use of the social property inherent in the judicial system.²⁶ Notwithstanding, placing a value on human capital and assuming its ability to be split or jointly owned denies the previous paragraphs' suppositions of the importance of individual autonomy and the rights inherent in the Thirteenth Amendment.

Pareto efficiency is achieved exclusive of any defining body. It is the result, when applied to divorce, of "husbands and wives [behaving] as rational, self-interested bargainers [who] will avoid arrangements that entail serious financial risks."²⁷ Central here is the idea of rationality in divorce proceedings.

Deeply felt emotions seem to negate any rationality and necessitate third party negotiations during divorce settlements. Even more, human capital is still seen as individual property: "Law students, both male and female, married and single, tend to regard their . . . law degrees as uniquely the product of their own talents and labors, both before and during law school."²⁸ This only supports the supposition that a "rational" divorce is an oxymoron, something impossible, especially where human capital is concerned.

So it seems that we are inevitably caught between a rock and a hard place. Though marriage has the potential for economical efficiency, it can also result in divorce, which is economically inefficient. We are left with little to support the idea of marriage, let alone entering into it before completion of our own human capitalistic endeavors, if only in an effort to potentially reduce future divorce complications. Strict calculation of efficiency provides little incentives for marriage.

Most couples do marry "because they love each other and want to spend the rest of their lives together."²⁹ Marriage, divorce, and human capital issues could be defined, discussed, and dealt with in an easier manner if couples heeded Margaret Brinig's advice: "Not business or money, but wedlock is what the parties [should] contemplate. They are, or should be, motivated by love and affection to form a mutual and voluntary compact to live together as husband and wife, until separation by death, for the purpose of mutual happiness, establishing a family, the continuance of the race, the propagation of children, and the general good of society."³⁰

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Notes

¹Katharine K. Baker, "Contracting for Security: Paying Married Women What They've Earned," *University of Chicago Law Review* 55 (fall 1988): 1194.

²Ann Laquer Estin, "Economics and the Problem of Divorce," *University of Chicago Law School Roundtable* 2 (1995): 520.

³Gary S. Becker, "Nobel Lecture: The Economic Way of Looking at Behavior," *Journal of Political Economics* 101 (1993): 385.

⁴Estin, "Economics," 521, note 12.

⁵Estin, "Economics," 554.

⁶Jana B. Singer, "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony," *Georgetown University Law Journal* 82 (September 1994), 2430.

⁷Singer, "Alimony and Efficiency," 2439.

⁸Singer, "Alimony and Efficiency," 2439.

⁹Singer, "Alimony and Efficiency," 2439.

¹⁰Jane Biondi, "Who Pays for Guilt? Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes, and Economic Consequences," *Boston College Law Review* 40 (March 1999): 621.

¹¹Biondi, "Who Pays for Guilt," 621.

¹²Biondi, "Who Pays for Guilt," 621.

¹³Biondi, "Who Pays for Guilt," 621.

¹⁴Biondi, "Who Pays for Guilt," 621.

¹⁵Baker, "Contracting for Security," 1193.

¹⁶Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985).

¹⁷Joyce Davis, "Enhanced Earning Capacity/Human Capital: The Reluctance to Call it Property," *Women's Rights Law Reporter* 17 (spring 1996): note 1, 109.

¹⁸Charles Reich, "The New Property After 25 Years," *University of San Francisco Law Review* 24 (1990): 226–27.

¹⁹Estin, "Economics," 554.

²⁰Davis, "Enhanced Earning Capacity," 125.

²¹Davis, "Enhanced Earning Capacity," 125.

²²Davis, "Enhanced Earning Capacity," 128.

²³Davis, "Enhanced Earning Capacity," 125.

²⁴Estin, "Economics," 519.

²⁵Estin, "Economics," 519.

²⁶Estin, "Economics," 519.

²⁷Estin, "Economics," 565.

²⁸Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 93 (spring 1997): 125.

²⁹*World Book Encyclopedia*, 1985 ed., s.v. "marriage."

³⁰Margaret F. Brinig, "Comment on Jana Singer's 'Alimony and Efficiency,'" *Georgetown Law Journal* 82 (September 1994): 2463.