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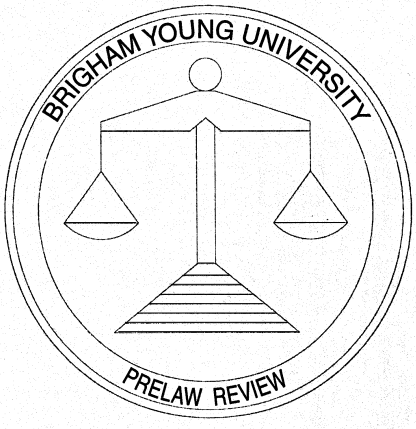
BRIGHAM YOUNG UNIVERSITY
PRELAW REVIEW

TO OUR READERS:

The *Brigham Young University Prelaw Review* is a student-written, student-edited journal published once a year by the Brigham Young University Prelaw Advisement Center. Since 1992, the journal has sought to provide BYU undergraduate students with a venue to publish budding legal scholarship. Circulation includes all American Bar Association accredited law schools, BYU prelaw students, and other interested readers. Submission is open to all BYU students. For detailed submission information please contact the Prelaw Advisement Center.

Contents represent the opinions of the authors and not necessarily those of the editors, advisors, Brigham Young University, or its sponsoring institution, The Church of Jesus Christ of Latter-day Saints.

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PRELAW REVIEW

VOLUME 13 ♦ 2000

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Introduction

Producing a scholarly undergraduate journal devoted to legal topics can be an engaging, yet problematic enterprise. Since serious treatment of the law is largely absent in most undergraduate curriculums, undergraduate authors approach legal research and writing with several limitations. Chief among these is the fact that any author attempting to construct an original, significant argument is hampered by an inadequate understanding of the law. It does not help that the editors are subject to the same problem. Although we recognize these and other inherent difficulties, we believe a publication of this type is valuable in many ways.

First and foremost, conducting legal research provides an avenue for undergraduates to better understand the law and its relationship to everyday life. Second, legal writing allows authors the chance to distill what they have read, carefully organizing their thoughts into logical, well-written arguments. Third, publishing as undergraduates not only gives authors a sense of accomplishment, but is an encouraging motivator for them to continue writing and publishing. Lastly, for those of our authors going on to law school or legally oriented professions, the legal research and writing performed for these articles provides valuable preparation.

We have chosen to follow tradition and devote the journal to one legal subject. In this issue, every article discusses some aspect of family law. We asked several interested authors to read Jana B. Singer's article "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," appearing in the spring 1997 issue of *Family Law Quarterly*. In her article, Singer examines several significant family law issues, including no-fault divorce; career enhancement of nondomestic parents; women and children in poverty; and the opportunity costs of domestic parenting. Authors were asked to take a position on one of these issues using legal journal articles and other authoritative sources for support. Of the articles written, the ones appearing in this issue are, in our opinions, the most informative. Readers will, of course, want to refer to the full text of Singer's article to resolve any contextual questions.

The opening of a new millennium provides an ideal opportunity to seek improvement. Readers of past issues will notice in this volume what we hope are several positive changes. In terms of content and scholarly quality, we tried to select articles that take courageous stances on interesting issues while representing opinions of authors from diverse backgrounds. Articles underwent a stricter editing process and were carefully source checked for accuracy. To aid in this endeavor, those of our editors with little or no editing experience were required to take a credit-carrying editing course taught through the Brigham Young University English Department. In addition, all of our work has been closely supervised by both a caring faculty advisor, Eileen Crane, and a competent and helpful production advisor, Linda Hunter Adams.
As for outward appearance, we have, for the first time, typeset the journal using professional typesetting software, rather than a standard word processor. This improvement, coupled with a more attractive cover and new logo design, is intended to give a professional appearance to the journal.

Finally, this publication could not exist without the generous financial sponsorship of people committed to student scholarship. We offer our sincerest thanks to the following at Brigham Young University: Honors and General Education, The David M. Kennedy Center for International Studies, and the Prelaw Advisement Center. We also wish to thank several commercial entities for their continuing support of our work. **Alexander's Digital Printing** and **Alexander's Legal Copy** (**www.alexanders.com**) consistently deliver a broad range of high-quality, affordable printing services. This journal is an example of their fine work. **Kaplan Educational Centers** (**www.kaplan.com**), world leaders in standardized test preparation, provide many BYU students with excellent LSAT training. **The BYU Bookstore** (**www.byu.edu/bookstore**) serves an important role in helping BYU students prepare for law school, assisting them with economically feasible ways to fulfill their personal computing and other educational needs.

We hope you enjoy the articles in this issue.

Matthew R. Connelly
Editor-in-Chief

Defining "Property": A Debate Dividing More Than Marital Assets

Julie A. Juhasz

Divorce law reforms are necessary to prevent unfair and arbitrary outcomes. Child support awards and property divisions both illustrate the sometimes capricious nature of divorce awards. A clearer definition of marital property is necessary to ensure justice and consistency.

Previous to no-fault divorce law reforms, marital misconduct determined child custody, property division, and child support payments.[1] Eliminating fault has largely been hailed as a step toward fairer, more objective judgments; its absence, however, and subsequent lack of foundational principles has led to seemingly arbitrary outcomes in other ways. Two divorce issues demonstrate the inconsistencies created by the no-fault system: child support awards and property division, especially human capital division.

Recent reforms have curbed inconsistency in the area of child support awards, including judicial guidelines for determining award amounts. These guidelines establish objective factors judges should consider in determining support amounts. Establishing guidelines in defining and dividing marital property similar to those provided for child support would alleviate the uncertainties and injustices present in current application of human capital division.

Eliminating Fault

No-fault divorce reforms sought to eliminate the subjective judgments that resulted under the fault system.[2] Fault considerations may not have provided the ideal impartial foundation for divorce decisions, but they did provide a foundation nonetheless. Jana Singer, though hardly a fault enthusiast, admits that the field of family law has been

searching for justifying principles since its rejection of marital fault.[3] To increase the objectivity of decisions, consistency and clarity need to be reestablished in divorce law. The controversial issue of human capital division emphasizes this need.

The question of whether education, degrees, job training, or professional licenses can be defined and divided as marital property has forced many scholars to reflect upon the legal meaning of property in light of a changing world economy.[4] The current world economy generally emphasizes knowledge, and values analytical and managerial skills above unskilled physical labor. Thus, the human capital acquired during marriage may be far more valuable than assets such as cars or savings accounts, making its inclusion or exclusion of major significance.[5] Yet most lawmakers and courtrooms have been reluctant to define human capital as divisible property. Defining the term *marital property* is a debate that has divided scholars and legal experts as often as it has divided assets. In the search for consistency and clarity, an analysis of marital property and comparison to the child support reforms may reveal solutions to the ongoing human capital debate.

Child Support Reforms

As mentioned, no-fault divorce theory yielded a system lacking consistent principles that dictate and justify divorce decisions, particularly in child support awards. Child support amounts were arbitrarily determined previous to the 1984 Child Support Enforcement Amendments. These statutes required states to specify guidelines for support awards.[6] This new uniformity was part of a number of measures intended to produce more consistent procedure, amounts and enforcement of child support payments. These reform measures were driven by several studies that unveiled the devastating effects such capricious award determinations were having on children. One Denver study reported awards ranging from six percent to twenty-six percent of the noncustodial parent's income.[7] This wide variation did not seem to correspond with any objective variables such as number of children, income level of the custodial parent, or the supporting parent's income in absolute terms.[8] The study also revealed that a shocking sixty-six percent of the fathers in the study made higher monthly car loan payments than child support payments.[9]

Child support is important because women and children are the parties most likely to be economically devastated by divorce.[10] Child poverty can be devastating in others ways, such as limited educational opportunities, higher rates of delinquency, increased teen pregnancy, and less access to healthcare.[11] Child poverty has grown over the last several decades, and many experts concur that "the case-by-case method for setting child support awards has contributed to this decline in children's standards of living."[12]

In 1984, Congress intervened on behalf of children to remedy the lack of statutory direction that arguably exacerbated the problems of child poverty. The Child Support Enforcement Amendments, effective October 1, 1987, set forth that

> each state . . . must establish guidelines for child support award amounts within the state . . . by law or by judicial or administrative action, and shall be reviewed . . . to ensure that their application results in the determination of appropriate child support award amounts.[13]

The Denver study concluded that the greatest determining variables in award amounts were seasonal variations, the representation of the respondent, and the attitude of the district attorney.[14] These subjective factors seem irrelevant to the best interest of the child or the family. The Child Support Enforcement Amendments required systematic methods to be developed, applied, and evaluated based upon objective standards without dictating to the states exactly what the methods should be. The tide is turning against growing child poverty and noncompliance of child support orders. Other measures aimed to reform child support and enforce compliance have been implemented. Many of these policies have been shown to be effective.[15] Uniformity in child support awards has been successful in improving court efficiency and enhancing the satisfaction for the parties involved.[16] Such judicial guidance could be equally helpful in establishing uniformity in human capital division and generally eliminating inconsistent and arbitrary outcomes.

Dividing Property—Arbitrary Decisions

Similar arbitrary application of no-fault divorce law persists in human capital division as marital property. Courts have implemented

three different methods for dividing marital property: strict title theory, equitable distribution, and community property theory.[17] Only Mississippi, South Carolina, and West Virginia continue to use a strict title division.[18] The other forty-seven states' laws have evolved to consider all property acquired during the marriage to be marital property, regardless of the name on the title. Yet even this more expansive definition of marital property does not explicitly allow for human capital division. The result is a great deal of legal chaos.

Some courts have allowed for human capital to be attributed as an investment of the marriage, rather than the sole efforts of one spouse. Other cases have refused to recognize human capital as shared property. In the 1983 case of *Woodworth v. Woodworth,* one spouse's juris doctorate was determined to be part of the couple's marital assets.[19] One year later, in a case involving a woman seeking similar compensation for her investments in her husband's Master's degree, the judge denied that the degree was divisible property.[20] The justification for dividing the law degree apparently seemed unjust to the judge who denied the latter woman compensation, even though she may have had reasonable expectation to be granted compensation based upon *Woodworth v. Woodworth.* This article does not seek to argue that one decision was right and the other wrong, but rather that each case seems unfair in light of the other. Human capital division is an area of divorce settlement that needs more uniformity and clarity.

At least three solutions would provide greater uniformity. The first is to maintain a traditional definition of property, considering human capital as an individual rather than a marital asset. This seems to remain the general preference of courts. Dividing human capital requires rough estimations of the value of the degree and difficult estimations of the supporting spouses' investments, including financial contributions, childcare responsibilities, and any foregone professional opportunities. Most judges have avoided this complicated type of estimation and division. A traditional definition of marital property does not allow for assets that are inseparable from the individual.[21] Human capital does not have all the traditional properties of assets recognized historically by the law. It cannot be inherited, sold, or in any other way transferred from one person to another. However, while human capital is not included in the current laws, neither is it explicitly excluded.[22] Maintaining

a traditional view of marital property would provide a solution to disparate rulings only if human capital were addressed directly and were clearly defined as nondivisible property.

A second viable solution would be to modify the law to clearly include human capital as property and specify procedures for dividing it. Many assert that traditional notions of property are inappropriate in today's economy.[23] The economy has undergone a significant change and "family law has not successfully acclimated itself to this change, and as a result, substantial injustices are being created in property settlements."[24] Klebanoff observed that the courts are more likely to classify the enhanced earning power of a spouse as marital property than the degree itself.[25] In both *Woodworth v. Woodworth* and *In re Marriage of Hortsmann,* the courts accepted division of future earnings.[26] Notably, the amounts were calculated differently in each case.[27] Thus, this definition permitted the consideration of spousal contributions while leaving the details of division to the discretion of the courts. Clarifying the definition of marital property to include human capital appears to be a more flexible alternative than excluding human capital entirely. Even so, the current law requires amending to provide courts with justification for dividing human capital fairly.

Jana Singer provides a third possibility she calls "income sharing."[28] This alternative would pool both spouses' incomes for some time following divorce. If expanded upon and accompanied with specific guidelines for implementation, this may also eliminate the current arbitrary outcomes in divorce decisions. Any of these three solutions would create a uniformity which would seem more equitable than the disarray observable in comparing cases such as *Woodworth v. Woodworth* with *Grosskopf v. Grosskopf.*

Conclusion

In the absence of fault from recent divorce proceedings, there is an observable lack of theoretical foundation. This has led to a greater need for judicial guidance in certain areas of divorce decisions. Establishing uniform methods for determining child support awards has focused the decision on objective and relevant considerations such as the child's needs and the parent's ability to pay. Similarly, greater statutory direction in defining marital property would establish greater consistency

and fairness for parties disputing human capital division. Contemporary scholars have expanded the term "property" in light of a changing world economy that values education and human capital. The law may accept or reject this new meaning, but certainly the change has necessitated clarification.

Julie A. Juhasz, originally from Meridian, Idaho, is a senior at Brigham Young University majoring in political science. After graduation, she plans to attend law school and work as a child advocate.

Notes

[1] *Uniform Marriage and Divorce Act. Uniform Laws Annotated 9A*, 1998.

[2] Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 31 (spring 1997): 120.

[3] Singer, "Husbands, Wives, and Human Capital," 121.

[4] Allen M. Parkman, "The Recognition of Human Capital as Property in Divorce Settlements," *Arkansas Law Review* 40 (winter 1987): 439.

[5] Parkman, "The Recognition of Human Capital," 466.

[6] *Child Support Enforcement Amendments. U. S. Code*, vol. 42, sec. 667 (1984).

[7] Lucy M. Yee, "What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court," *Denver Law Journal* 57 (spring 1979): 21.

[8] Yee, "What Really Happens in Child Support Cases," 37.

[9] Yee, "What Really Happens in Child Support Cases," 37.

[10] Judith Mitchell Billings, "From Guesswork to Guidelines: The Adoption of Uniform Child Support Guidelines in Utah," *Utah Law Review* (winter 1989): 863.

[11] Ross A. Thompson and Jennifer M. Wyatt, "Values, Policy, and Research on Divorce: Seeking Fairness for Children," in *The Postdivorce Family,* edited by Ross A. Thompson and Paul R. Amato (Thousand Oaks, CA: Sage Publications, 1999), 196.

[12] Billings, "From Guesswork to Guidelines," 865.

[13] *Child Support Enforcement Amendments. U.S. Code*, vol. 42, sec. 667 (1984).

[14] Yee, "What Really Happens in Child Support Cases," 37–38.

[15] Daniel R. Meyer, "Compliance with Child Support Orders in Paternity and Divorce Cases," in *The Postdivorce Family,* edited by Ross A. Thompson and Paul R. Amato (Thousand Oaks, CA: Sage Publications, 1999), 131.

[16] Billings, "From Guesswork to Guidelines," 871–72.

[17] Susan Klebanoff, "To Love and Obey 'Til Graduation Day: The Professional Degree in Light of the Uniform Marital Property Act," *American University Law Review* 34 (spring 1985): 841.

[18]Klebanoff, "To Love and Obey," 842fn.

[19]Allan Ashman, "Law Degree Is Valuable: $20,000 Property in Divorce," *American Bar Association Journal* 69 (October 1983): 155.

[20]*Grosskopf v. Grosskopf,* 677 P. 2d. 814 (Wyoming 1984), 822.

[21]Singer, "Husbands, Wives, and Human Capital," 131.

[22]*Uniform Marriage and Divorce Act: Uniform Laws Annotated 9A*, 1998.

[23]Parkman, "The Recognition of Human Capital," 439.

[24]Parkman, "The Recognition of Human Capital," 440.

[25]Klebanoff, "To Love and Obey," 851.

[26]Klebanoff, "To Love and Obey," 852.

[27]Klebanoff, "To Love and Obey," 853.

[28]Singer, "Husbands, Wives, and Human Capital," 131.

Human Capital and the Clean Financial Break

Nathan W. Andersen and L. John LeSueur

No-fault divorce does not properly compensate women for their efforts to raise children. Only by incorporating human capital in the divorce settlement can women be properly compensated for their investments.

In recent years courts have used the clean break philosophy to settle divorce, attempting to equally divide property accumulated during marriage. This approach allows both husbands and wives to walk away from divorce relatively free from long-term financial interdependence. However, many legal scholars claim that a clean financial break undercompensates women relative to men. This leads to the argument that a clean financial break is incompatible with equitable divorce settlements, causing some legal scholars to reject the clean financial break as the optimal method of adjudicating divorce. In an attempt to both maintain the clean financial break and provide more equitable settlements, some legal scholars suggest expanding the scope of property by viewing human capital acquired during marriage as an asset to be split between spouses upon divorce. The inclusion of human capital as property creates greater equality in divorce settlements while maintaining the benefits of a clean financial break.

The notion of a clean financial break first began when fault-based divorce was replaced by no-fault divorce. Prior to the 1970s, divorce was granted "only upon proof that one of the parties was at fault for having breached spousal duties."[1] Through this system, alimony was awarded more or less to the party that was at fault. Because of this system, fault-based settlements usually created a web of financial entanglements, prohibiting the couple from doing exactly what divorce intended

them to do—break all ties emotionally, physically, and financially. Milton C. Regan Jr., in his article "Spouses and Strangers: Divorce Obligations and Property Rhetoric," concludes that fault-based divorce "formally treated ex-spouses as ongoing family members whose claims against one another continued to reflect the fact of their marriage."[2] In 1970, California initialized no-fault divorce, completely eliminating fault as a consideration for determining alimony. According to Jana B. Singer, "facilitating a clean financial break replaced punishing a guilty spouse (or protecting an innocent one) as the overriding objective of divorce-related financial adjustments."[3] This change rid couples of life-long financial connections and enabled them to move on with their lives.[4] The transition from fault-based divorce to no-fault divorce established the clean financial break in divorce settlements, necessitating the courts to reexamine the definition of marital property.

While administering a clean financial break, courts must separate each spouse's personal property from jointly owned marital property. Once courts determine what constitutes marital property (usually defined as property acquired during marriage), they simply divide it between both spouses equally.[5] However, even this simple definition does not prevent disputes between spouses about whether certain assets are personal or marital property. Legal scholars have suggested that the boundaries of marital property become clearer when marriage is viewed in economic terms, with the market being the motivating force behind all marital interaction. Joan M. Krauskopf, a law professor at the University of Missouri at Columbia, writes:

> In economic analysis, the family is a decision making unit that operates to maximize the unit's utility in consumption and also in the allocation of human time and production activities. This view of the family is an application of the traditional economic theory of the firm.[6]

Krauskopf continues by suggesting that the traditional family unit is extremely efficient in allocating the family's resources—both time and money—in order to maximize returns. Although economic principles do not completely explain marital behavior, viewing marriage in economic terms can be helpful in deciphering marital property boundaries.

Currently, courts do not view educational degrees acquired by either spouse during marriage as marital property. Because of this, a clean financial break will undercompensate domestic spouses. The following scenario illustrates this inequity. Suppose a young couple, Tom and Sue, get married while both are still in college. Because of their limited budget, Sue quits school in order to support the completion of Tom's legal education. She financially provides for him during these years, driven by the hope of someday reaping the financial rewards of her husband's increased future income. However, shortly after Tom graduates from law school they divorce. At this point, Tom's future earning potential far exceeds his wife's. In addition, the couple's traditional property (cars, real estate, housing, and so forth) is extremely limited. If a clean financial break were to occur, dividing only their traditional property, Sue would be undercompensated relative to Tom. This simple example illustrates that, although a clean financial break is ideal, divorce settlements need adjustment in order to accommodate nontraditional forms of property. Krauskopf and other scholars have presented the human capital theory as the solution.

Human capital theory explains the wages of laborers as a function of the training they receive.[7] The origin of this theory dates back to the early 1960s when some economists realized "that a substantial growth in income in the United States remains [unexplained] after the growth in physical capital and labor has been accounted for."[8] In an effort to explain this rise in income, Gary S. Becker, one of the pioneering scholars of the human capital theory, pointed to the investments human beings make in themselves by receiving "schooling, on-the-job training, medical care," and so forth.[9] Becker called these types of investments "human capital investments." By including the growth in human capital with the growth in physical capital and labor, Becker successfully captured more of the rise in income experienced in the United States. As a result of this success, human capital theory has become very influential in explaining labor wages.

Additionally, some economists claim that human capital theory will continue to explain more and more of labor wages as our economy evolves. For example, Allen M. Parkman, Professor of Management at the University of New Mexico, claims that the primary sources of income "in a manufacturing and agricultural [economy]" are "physical

assets, such as houses and land, and financial assets, such as stocks and bonds."[10] Whereas in an economy dominated by a large service sector, "the primary income producing assets become the individuals themselves."[11] Thus, as our economy continues to become more and more service oriented, we should expect to see a decrease of investments in traditional types of capital and an increase of investments in human capital. This will make it even more important for the courts to recognize human capital as marital property.

Due to the work of human capital theorists, economists have broadened their definition of property to include human capital. For example, economists define investment as "anything that accumulates capital" and capital as "a stock of assets that yields a stream of income or utility over time."[12] If these definitions are used as the determinants of capital (property), then no distinction can be made between a person's investments in schooling and his or her investments in physical capital, such as real estate. The inability to draw an economic distinction between these two types of investments leads to the argument that courts should treat both types of investments equally when adjudicating divorces. Thus, in order for clean break settlements to be just, courts must broaden the legal definition of property to include human capital.[13] The example of Tom and Sue illustrates this point. A clean break settlement that does not grant Sue part-ownership of the human capital her husband acquired during their marriage will greatly undercompensate her for her investments in the marriage. However, courts have almost uniformly rejected the inclusion of human capital as marital property.

Regan suggests four main reasons why courts have not viewed human capital as marital property. First, the most common justification used by the courts is that, in their eyes, a degree such as a law or medical degree does not fall under the traditional definition of property because "it has no exchange value or any objective value on an open market."[14] For instance, it is impossible to buy, sell, or trade an educational degree for money or anything else. Regan explains it well when he states that a degree "cannot be assigned, sold, transferred, conveyed, or pledged."[15]

A classic example of this understanding is found in *Graham v. Graham*.[16] In this 1978 case, the Colorado Supreme Court held that the

husband's M.B.A. was not considered property because it did not have any open market exchange value.[17] Here the court correctly identifies the impossibility of separating human capital assets from their owners. However, even if human capital "cannot be assigned, sold, transferred, conveyed, or pledged,"[18] it can be rented. Fundamental to human capital theory is the concept that individuals who embody a set of skills can rent those skills to employers. If individuals could not rent their skills, there would be no justification for employers to pay higher wages to degree holders than to non-degree holders. In *Graham v. Graham*, the court argued that if something is not marketable, then it is not property. However, by failing to recognize that human capital can be rented to employers, the court mistakenly identifies human capital as not marketable. Thus, in this argument, the court fails to demonstrate that human capital is not property.

Secondly, Regan states that the courts are hesitant to identify human capital as property in divorce settlements because the "valuation of future earning capacity is highly speculative."[19] Although economists are fairly successful at valuing human capital assets across large samples of people, they are unable to pinpoint the exact future income a specific individual's human capital will produce. This is because future income is contingent upon many variables, such as luck or enthusiasm, which tend to balance out in large samples of people but greatly affect the income of specific individuals. Courts have argued that the speculation required to divide human capital assets provides justification for not dividing the assets at all. However, the courts have been willing to speculate the value of future incomes in tort cases for years.[20] Therefore, if courts wish to be consistent, they must not use this reason for not including human capital as marital property.

Part of the reason courts hesitate to speculate on future income is that, in a clean financial break, property settlements at divorce are not modifiable.[21] This inability to modify divorce settlements also leads to a third reason courts hesitate to classify human capital as property. Courts fear that ex-spouses, especially professionals, could be trapped in their careers due to heavy financial obligations, "and thus [be] severely restricted in the liberty to choose a more satisfying way of life."[22] Referring again to Tom and Sue, suppose Tom was required to provide a large payment to Sue in compensation for her investments in

his education. After being divorced for a year, Tom decides that he is unhappy as a lawyer and wishes to be a high school teacher. Because the earning capacity of a lawyer far exceeds the earning capacity of a teacher, Tom decides he is unable to both make the career change and fulfill his financial obligation toward his ex-wife. Some may argue that incorporating human capital as property threatens the freedom of people like Tom to choose their careers. However, trying to protect Tom's freedom to change careers jeopardizes Sue's investments. If courts agree that Sue has invested in Tom's human capital, they must agree that Tom has borrowed from Sue. Thus, Tom should be free to choose whatever career he wishes, so long as he reimburses Sue for her investment. Because Sue invested in Tom's human capital during the marriage—when the marital contract was in force—the need to protect Sue's prior investment outweighs the loss of Tom's ability to change occupations. Consequently, courts should not use this justification in attempting to separate human capital from marital property.

Lastly, some judges purport that even if human capital is property, it should not be considered marital property.[23] In the 1984 case *Sullivan v. Sullivan*,[24] Judge Kaufman stated that the future value of an educational degree "is entirely dependent upon the future efforts of the educated spouse."[25] Here, Judge Kaufman seems to imply that owning capital necessitates control over how that capital is used. However, the purchasing of stocks presents a case where individuals own capital but have no control over how that capital is deployed.[26] For example, an ordinary purchaser of Microsoft stock does not gain control over how that capital is used. Nevertheless, while Microsoft maintains the right to deploy their capital as they choose, individual stock purchasers are entitled to the returns on their investment. Thus, spouses' lack of control over their partners' human capital does not exclude them from owning the returns on their investments. Because courts assert that human capital is separate property, many women are not being justly compensated for their investments.

The clean financial break has advantages over other divorce philosophies because it bestows ex-spouses freedom from long-term financial entanglements. If a clean financial break is to provide equitable divorce settlements, human capital acquired during marriage must be viewed as marital property.[27] This inclusion promises to reward

domestic spouses more justly for their contributions to the marriage. Defining human capital as property promises fairness in divorce settlements much more than the current no-fault system.

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L. John LeSueur is majoring in economics with a minor in philosophy at Brigham Young University. He plans to begin law school this fall.

Notes

[1]Milton C. Regan, Jr., "Spouses and Strangers: Divorce Obligations and Property Rhetoric," *Georgetown Law Journal* 82 (1994): 2310.

[2]Regan, "Spouses and Strangers," 2312.

[3]Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 31(spring 1997): 120.

[4]Regan, "Spouses and Strangers," 2314.

[5]Allen M. Parkman, "The Recognition of Human Capital as Property in Divorce Settlements," *Arkansas Law Review* 40 (1987): 446

[6]Joan M. Krauskopf, "Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital," *University of Kansas Law Review* 28 (1980): 386.

[7]Jacob Mincer, "The Distribution of Labor Incomes: A Survey, with Special Reference to the Human Capital Approach," *Journal of Economic Literature* 8 (1970): 1.

[8]Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*, vol. 15 (New York: National Bureau of Economic Research, 1964).

[9]Gary S. Becker, *Human Capital*, 1.

[10]Parkman, "Recognition of Human Capital as Property," 439–40. Allen M. Parkman received his A.B. in 1962 from Brown University, his Ph.D. in economics in 1973 from the University of California at Los Angeles, and his J.D. in 1979 from the University of New Mexico.

[11]Parkman, "Recognition of Human Capital as Property," 440.

[12]J. Ronnie Davis and John F. Morrall III, *Evaluating Educational Investment*, (Washington, D.C.: Lexington Books,1974), 1.

[13]Achieving an equitable settlement is not the only reason courts should treat human capital as property. This conclusion can also be reached through an efficiency argument. In order to maintain a spouse's incentive to invest in the human capital of

his or her partner, governments must protect the spouse's right to the returns of the investment. Without this incentive, families will underinvest in human capital. Thus, families will lower the overall well-being of society by inefficiently investing their resources.

[14]Regan, "Spouses and Strangers," 2362.

[15]Regan, "Spouses and Strangers," 2362.

[16]*Graham v. Graham*, 574 P.2d 75 (1978).

[17]*Graham v. Graham*, 75.

[18]Regan, "Spouses and Strangers," 2362.

[19]Regan, "Spouses and Strangers," 2362. Here Regan references the Colorado Supreme Court's reaffirmation of Graham as cited in *In re Marriage of Olar*, 747 P.2d 676, 679–80.

[20]Regan, "Spouses and Strangers," 2363.

[21]Regan, "Spouses and Strangers," 2363.

[22]Regan, "Spouses and Strangers," 2363.

[23]Regan, "Spouses and Strangers," 2364.

[24]*Sullivan v. Sullivan*, 184 Cal. Rptr. 796–825 (1984).

[25]*Sullivan v. Sullivan*, 802.

[26]This assumes that there is another stockholder who owns at least fifty-one percent of the company's shares.

[27]Some may claim that the inclusion of human capital in divorce settlements does not go far enough to ensure that ex-spouses have equal standards of living after divorce. These critics might point to gender biases, such as the gender–wage differential, as a reason why gaps will likely occur in the ex-spouses' standards of living. Moreover, these people may call upon courts to offset this injustice while dividing property among divorcing spouses. However, expecting divorce settlements to counteract gender biases unduly places the responsibility of solving these injustices upon divorce officiators. Divorce courts should be expected to divide marital property only in a way that fairly compensates both spouses for their contributions to the marriage.

Divorce and Women

Syed Fahad Saghir

In dealing with divorce proceedings the legal system is inherently bent toward men. The law could make several important changes that might facilitate justice and equality in such cases.

Divorce is now a very prominent societal ill affecting millions of Americans and threatening to affect even more. Even though its adverse effects are now apparent, there has been tremendous growth in the number of divorces in the United States. Each year divorce terminates more than one million marriages. In fact, more than forty percent of marriages that took place during the 1980s are expected to end in divorce.[1] Divorce issues become important not only because they complicate the family system, but also because of their serious social and economic consequences in American life, particularly for women and children. Though divorce by nature is destructive, its detrimental effects are further aggravated by flaws in the judicial system. Certain divorce laws regarding division of property, alimony, and the system's limited definition of community assets have caused many women and children great and unnecessary hardships.

In 1969, California passed the first no-fault divorce statute in the United States. While the previous laws required some form of fault from a partner as grounds for seeking divorce, the new law only requires one partner to assert their incompatibility. Formerly, all financial and economic consequences were tied to fault, demonstrating bias against the victim of fault. The new law, however, seeks to distribute

wealth and income of divorcing parties on the basis of fairness and equity rather than moral history. Using mostly data collected close to the implementation of the new law, this article will demonstrate that, despite some positive developments, several changes are in order.

Research on marital property reveals that most divorcing couples have little or no property to divide. This is mainly because couples are relatively young when they divorce and, hence, are in the lower income groups. Therefore, sharing of community property has not been much of a source of disagreement. However, the family home has always been and continues to be divided property. Traditionally, since the woman was perceived as the innocent victim of divorce, and because she had decorated and maintained the house, she was awarded the family home. However, because of the equal division requirement of the Family Law Act,[2] the number of homes being divided equally has risen sharply, which generally means that the two parents maintain joint ownership or the house is sold and the proceeds shared equally. As a result of the new law, the percentage of women getting the greater part of home equity sharply declined from sixty-one percent in 1968, under the old system, to forty-six percent in 1977, under the new law.[3] Since women normally gain custody of children, there has been a greater displacement of women and children since the new law was passed.

Generally, alimony is awarded more in initial years of divorce than in later years, probably because alimony and child support are lumped together in an unallocated award. However, the trend of women receiving alimony is decreasing. A survey done in Connecticut's New Haven County shows that in the 1970s, fifty-one percent of divorced women received alimony compared to thirty percent in the 1980s. A closer analysis reveals that women in the highest income group who had been married for fifteen years or more received the highest award.[4] This probably means that women from lower income groups suffer the most and often live on the brink of poverty.

The equalization principle tends to even out the financial burden of one household becoming two, so that each member suffers a proportional reduction in standard of living. This law makes the father pay a certain amount to the mother for child support. However, this approach raises a debatable issue about how to evaluate costs of raising children. Should the costs be estimated using pre-divorce figures or the

expenses incurred after the divorce? The latter method can sometimes lead to a huge discrepancy, since costs often increase after divorce when the mother must look for employment and arrange for childcare.[5] Even though there has been a rise in the number of fathers gaining custody of children, child support awards are granted mainly to women. However, a look at the data reveals a great deal of injustice to women. The cost estimated by the U.S. Department of Labor in 1984 of raising a child in a two-parent urban family with a moderate budget was $5,951; for those with a low income budget the cost was $3,968. By contrast, the average child support granted in the 1980s was $2,657. This suggests that fathers paid less than half the expenses of raising their children.[6] Nan D. Hunter notes the following:

> Increasing rates of divorce will, over time, lead to a major transfer from men to women of the bulk of family care expenses. . . . The child support system thus contributes to the feminization of poverty, or the massive shift of women-headed households into the official zone of poverty.[7]

Even more poignant is the situation of the household incomes after divorce. A survey conducted in Los Angeles County in 1978 showed that the male post-divorce standard of living rose by forty-two percent, while that of women plummeted seventy-three percent.[8] Judges have always been wary of awarding more than fifty percent of the husband's income to his wife and children. Hypothetically speaking, suppose a husband's income is $1000. The judge awards $450 a month to the wife for herself and her two children. Prior to divorce, four people shared $1000, but now three people share $450 and the husband has $550 to himself. Additionally, he may save on taxes because of the support he provides, while the wife actually pays taxes on her support money. Such problems are further aggravated by factors such as inflation and non-compliance.

Another way divorce laws create injustice for women is by their refusal to recognize a professional educational degree as a community asset. Typically, such issues are raised when a spouse, usually a wife, supports the other spouse through school with hopes of a brighter financial future for the family. During this time, she often provides fi-

nancial support as well as some household services, which would otherwise have been provided by the husband. If divorce occurs once these tough days are over and the husband has acquired his professional education, the law refuses to recognize the role of the wife in the increased earning ability of her husband.

Another post-divorce problem facing women is entering the work force. A survey conducted in the early 1980s regarding divorced women showed that a mere thirty-two percent of women had worked full-time throughout their marriages. The rest had worked either part-time or full-time on an irregular basis, while the remaining sixteen percent had always been full-time homemakers.

The trauma is greatest for a woman when she enters the work force for the first time. Faced with the immediate pressure of finding a job, she is likely to accept the first job she is offered, which in most cases pays less than her skills should demand. This, coupled with the fact that jobs traditionally held by women are quite saturated, has caused wages in such occupations to be below average and has limited opportunities for professional growth.[9]

The increased rate of both divorce and participation of women in the labor market raises important issues regarding care and support of children. From 1970 to 1981 the number of children living with one parent increased by fifty-four percent.[10] Considering that most mothers gain custody of children and that they are mostly left impoverished after divorce, reduced economic circumstances would be a likely characteristic of children with divorced parents.

Following divorce, families normally change their residences, forcing children to change schools, social circles, and neighborhoods. Even if the child's past teachers or friends do not provide much support, the familiar environment of the school proves to be a powerful source of stability for the child. This sudden disruption causes the mental trouble of coping with changes and has an adverse effect on the child's mental abilities.

Part of the cause of the mental anguish for children is the fact that the newly-divorced mother has to seek employment. A mother's decision to work outside the home is based on factors such as her own needs, the needs of her children, and the needs of the family unit.[11] For mothers lacking an alternative source of income, the financial factor is particularly important. Although employment can bring self-

sufficiency, she may feel overburdened; and it may be difficult for her to find enough time for the emotional and physical needs of her children. Often the children are left with baby-sitters in the morning and are picked up after work. Upon arriving home, the mother again gets busy with household chores such as preparing dinner and cleaning house. Thus, the children suffer not only from less attention from their fathers, but also from their mothers.[12] Many children suffer even more because they were accustomed to a mother who was a full-time homemaker. Since an average American family does not have grandparents or other extended family members available (because of the hectic American lifestyle), and since fathers typically refuse to baby-sit, mothers generally shoulder all childcare responsibilities.[13]

The sudden decline in the standard of living of the post-divorce family does not go unnoticed by the child. He compares his present lifestyle to the kind his family enjoyed previously. He also feels resentment and a sense of deprivation by looking at the considerably higher current standard of living of his father or his father's new family. This, coupled with the psychological inaccessibility he feels toward his mother, is a cause of great mental disturbance for him, more so because of the rapid and simultaneous occurrence of these events.[14]

A correlation exists between experiences early in life and educational outcomes.[15] Children who experience divorce tend to perform poorly in their educational lives compared with contemporaries raised with both parents.[16] A recent study by the British National Child Development Study shows that the educational performances of girls from divorced families are influenced by the working status of their mothers. Girls with nonworking lone mothers are less likely to have high level qualifications than young women from intact families or those with a working lone mother.[17] There is a similar trend among boys, except that the likelihood of obtaining higher education is lower for boys with lone mothers, whether or not those mothers work.

Many surveys and studies provide evidence that the economic circumstances in adulthood differ significantly between children from disrupted backgrounds and those brought up in intact families. Maclean and Wadsworth, in their analysis of the British National Survey of Health and Development, found that adult men from disrupted family backgrounds were more likely to be unemployed and more likely to fall

in the lowest income bracket, when compared to men from intact families. A similar American survey shows that children of divorced parents were more likely to be "idle," meaning neither employed nor pursuing an education. Women from nonworking lone mother families are expected to have lower household incomes when compared with women from intact families and with women from working, lone mother families. Women from employed lone mother families tend to have economic circumstances not much different from their peers from intact families. Hence, in a girl's case, having an employed mother enhances prospects of high educational and economic achievement.

As young people grow they will marry and have children of their own. It is a well-established fact that people who marry early and bear children at a young age are at a greater risk of divorce. Research shows that young women from disrupted family backgrounds are more likely to cohabit and become pregnant at an earlier age than their contemporaries from intact families.[18] However, this research also reveals that the differences in giving birth to children outside of wedlock between those with lone working mothers and those with lone nonworking mothers are not as high as their educational and economic differences.

In light of the difficult circumstances in which most divorced women and their children live, there are a few judicial changes to recommend. First, the law should expand its definition of "community asset" to include career assets such as professional education or job training that the other spouse directly or indirectly helped to acquire. Second, since economic security is vital to the upbringing of children, the law should work to ensure that child support is reflective of the actual costs of raising children. Total costs should be divided equitably between husband and wife and should take inflation into account. To prevent the child from feeling a sense of deprivation, the child must be allowed to live the lifestyle of the wealthier of the two parents, if they are not equally wealthy. Also, if the father does not have the economic ability to provide the support his child needs, the government should intervene with financial support. The United States government ran into a surplus last year. There would be no better use of the excess funds than investing them in the future of young Americans.

Finally, the law should provide adequate financial security to women at the time of divorce, especially to those who have spent their

entire marriages as homemakers. Alimony assistance should cover a period long enough to allow women to obtain some sort of job training to enhance their employment opportunities. Older women who have remained housewives all their lives and who do not have a bright prospect of finding a respectable job, should receive enough spousal support to equalize the standard of living of both the spouses. According to the data, it is evident that having a lone working mother brings positive effects on the daughter's educational and professional prospects. Thus, the law should encourage divorced mothers to find employment. One way to accomplish this might be to further reduce taxes for divorced, working mothers.

Despite many needs for improvement, there is evidence that progress is occurring in at least one area of the law. A 1978 survey conducted by the U.S. Bureau of the Census revealed that only fifty percent of divorced women received funds for child support or alimony on time and that a quarter of them received less than the stipulated amount. Not surprisingly, there was little judicial interference with any noncompliance, mostly because people viewed it unwise to bring suit unless the amount due exceeded the cost of hiring a lawyer. To correct this problem, laws such as the one passed by the Utah legislature in 1997 have allowed courts to suspend the drivers licenses, professional or occupational licenses, and recreational licenses of a financially responsible parent if he or she has neither made timely payments nor has in good faith made any effort to do so.

It takes little more than a glance to discover that the law is bent toward men. Although the judicial system has come a long way toward providing greater justice for both members of divorce, there are still a number of changes that need to be implemented before our system can rightfully claim to be just.

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Notes

[1]Preston, "Estimating the Proportion of American Marriages That End in Divorce," *Methods and Research* (1975), 435, 457.

[2]C*alifornia Civil Code 4000–5174* (West 1970 & Supp. 1981).

[3]Lenore J. Weitzman,"The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," *UCLA Law Review* 28 (1981): 1181–268.

[4]James McLindon, "Separate but Unequal: The Economic Disaster of Divorce for Women," *Family Law Quarterly* 21 (fall 1987): 351–405.

[5]Nan Hunter, "Child Support Law and Policy: The Systematic Imposition of Cost on Women," *Harvard Women's Law Journal* 6 (March 1983): 1–27.

[6]McLindon, "Separate but Unequal, 351–405.

[7]Hunter, "Child Support," 21.

[8]Hunter, "Child Support," 3.

[9]Weitzman, "The Economics of Divorce," 1251.

[10]U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Marital Status and Living Arrangements* Series P-20:372 (March 1981–82), 1, 5 (Table D).

[11]Kathleen Kiernan, "Lone Motherhood, Employment and Outcomes for Children," *International Journal of Law, Policy and the Family* 10 (1996): 233–49.

[12]Weitzman, "The Economics of Divorce," 1181–268.

[13]Weitzman, "The Economics of Divorce," supra note 276, at 1262.

[14]Weitzman, "The Economics of Divorce," supra note 278, at 1262.

[15]Weitzman, "The Economics of Divorce," supra note 278, at 1262.

[16]Weitzman, "The Economics of Divorce," 1262.

[17]Weitzman, "The Economics of Divorce," 1263.

[18]K. E. Kiernan, "The Impact of Family Disruption in Childhood on Transitions Made in Young Life," *Population Studies* 46 (1992): 213–34.

Alimony Reform

H.L. Rogers

While Singer trenchantly attacks the faults in no-fault divorce, the alimony system she proposes falls short. Alimony is indeed necessary but must be based on something other than the traditional economic rationale, which disenfranchises women and children.

In the article "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," Jana Singer discusses the problems in the evolving no-fault divorce laws and argues the need for alimony. However, both no-fault divorce and the alimony system she proposes (based on an economic rationale) are inadequate. First, I intend to show the problems with no-fault divorce as chronicled by Singer and others. Second, I will discuss how Margaret Brinig and other feminist scholars have found that the economic justification Singer proposes for alimony, partly in this article and more extensively in the article "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony," is not capable of equitably awarding alimony to the noneducated or nonprofessional spouse.

Economic justification is not capable of equity in all cases because it falsely assumes that family specialization is always desirable. Because economic rationale often disenfranchises women and children, many of those adversely affected do not have marketable commodities. As a result, they often receive less through alimony than they should. Not only does this demonstrate why the notion of a clean financial break is impossible, but it also provides evidence to show that alimony should

not be seen as a hurdle to overcome in divorce, but as an equitable means of compensating for capital lost through divorce.

No-Fault Divorce

No-fault divorce has two main purposes. The first is to exclude fault from divorce proceedings, while the second is to enable a financial and emotional clean break between the couple. Although the first purpose has made divorce proceedings simpler and cleaner, the second has been shown to be nearly or completely impossible.

When no-fault divorce took effect in California in 1970, it implied the dissolution of alimony payments. However, as both Singer and Herma Hill Kay have discussed, the primary reason for moving to no-fault divorce was to dissolve the prerequisite of fault in a divorce and to enable a clean break in the marriage.[1] Finding fault in a marriage could be used for two purposes only: to show a no-fault basis for divorce by establishing "irreconcilable differences" or to determine the custody of a child produced from the marriage.[2] The impact of no-fault divorce on alimony came from its second purpose—to enable a clean break financially and emotionally. Because of the idea of "the clean financial break," "divorce proceedings were to sever not only the couple's legal union, but their economic relationship as well."[3]

Eliminating fault from divorce has helped create divorce procedures that limit adversarial procedure, thus diminishing the emotional damages that stem from sometimes lengthy and harsh litigation. The clean break theory, however, has proved impractical in marriages that include children.

Clean Break

Margaret Brinig has shown that the goal of achieving a clean break through divorce in a marriage with children is impossible:

> Most of the time divorce involves minor children. Whether or not we characterize them as unwilling victims of their parents' decision to separate, they are affected. These effects may be temporary, as with the emotional or relocation costs of divorce, the probable lowered standard of living, or the immediate loss of a continued parental contact. Children also lose over the very long-term according to a

> number of studies. Thus arguably there can be no clean break when children are involved.[4]

Children need a relationship of some type even after the marriage is over. One spouse cannot simply disappear without adverse effects. And usually neither spouse wants to disappear.

Because a clean break is not possible in all circumstances, the dissolution of alimony is also not possible in all circumstances. In cases where there are children, contact between ex-spouses must continue, and alimony is no longer a hurdle. Since the idea of a clean financial break, alimony was seen as a hurdle to overcome. If a spouse had to continue to pay alimony, the break could not be achieved. Thus, "alimony, if awarded at all, was to be awarded sparingly, and only for the short-term."[5]

Alimony

In an earlier article, Singer expands on the rationale that dissolved alimony:

> The advent of no-fault divorce and the demise of the state-imposed marriage contract significantly undermined these traditional rationales for alimony. Because divorce no longer required a showing of fault or breach, a damage remedy seemed inappropriate. Similarly, because marital obligations were no longer officially gender-based, an alimony remedy premised on the husband's support obligation and available only to the wife seemed both anachronistic and discriminatory.[6]

The reasoning behind no-fault divorce led to the dissolution of alimony. As shown above, however, such reasoning was faulty in marriages with children. But alimony also has other intrinsic problems that Singer discusses. For instance, traditional husband-to-wife alimony seems discriminatory in an era when both male and female are shown to be equally capable in the work force. Therefore, alimony is necessary in certain divorces, but any alimony stipulated must be reformed.

Under current theory, and according to Singer's argument, the alimony that would be enforced now is based on an economic rationale. In her view, economic rationale for alimony assumes that couples will attempt to maximize their commodities in their marriage relationship.

These commodities include not only traditional aspects such as income and material wealth, but also things such as home-cooked meals, children, and family time. Economic rationale also theorizes that couples will specialize in order to gain more commodities more efficiently. Marital specialization theory holds that the spouse that is more productive in a certain sector will specialize in that sector. For example, if the female spouse is better suited to raise and care for children, she will stay home and care for them while the male spouse enters the work force.[7] Thus, following economic rationale, alimony would be based on the commodities lost by the dissolution of the marriage and its specialization.

Economic Rationale

Two main problems exist with approaching divorce using an economic rationale. First, this approach incorrectly assumes that marital specialization is the most efficient means of a couple increasing their "commodities," meaning the overall well-being of the couple. Second, the rationale often disenfranchises women and children because it is difficult to gauge a commodity that has no value in an economic market such as material compensation for time spent raising children instead of earning a degree and entering the work force.

Specialization is not always the most efficient way to sustain the well-being of the marriage and family. As Brinig points out, specialization is only most efficient in a marriage "that ends in due course."[8] If the marriage ends prematurely in divorce or death, the specialized spouse that remains with the children must learn to fill roles that he or she knows little or nothing about. For example, if the male was the sole economic provider and he is left to care for the children, he will have to learn quickly about household production and child-rearing.

Conversely, if the female that raised the children and carried out the household production is left without the sole economic provider, she will have to quickly enter a work force for which she is not prepared. In these circumstances, it would be far more efficient for the male to participate in some of the child-rearing and household production and for the female to participate moderately in the work force. Thus, economic rationale is not the best model for alimony decisions, because if the roles are shared, this model is not suited to discern where commodities were earned in the more complex setup. Also, economic

rationale theory fails to consider the psychological effects of a divorce on a spouse in a relationship where the roles are completely specialized.

Another problem with economic rationale is that it often disenfranchises women and children. Joan C. Williams notes that this rationale "not only impoverishes women, but also results in systematic disinvestment in children."[9] Although many would like to think differently, gender roles still influence economy. As Singer states, "despite recent attempts by some economic theorists to delink marital specialization from gender roles, the two remain closely, perhaps inextricably, connected."[10] When specialization occurs in a marriage, the male almost always goes into the work force while the female stays at home to raise the children and maintain the household. Because of the dominance of these gender roles, women and children almost never have marketable commodities. Thus, alimony is still almost always paid from male to female. And while it is arguably easier to calculate how much a male in the work force is worth and will be worth, it is difficult to calculate how much the female has earned and will earn in the household. This makes it difficult to determine how much the male owes the female.

Because of these two problems, the economic rationale that Singer proposes for deciding alimony needs reform. Alimony is necessary, especially because gender roles often leave the female spouse with few or no marketable skills. As Joan Krauskopf shows,

> Every court reacted sympathetically to the inequity of one spouse receiving no compensation for sacrifice of standard of living and personal funds in order to enable the other spouse to obtain the personal benefit of advanced education, which significantly increased earning capacity. A fundamental sense of fairness was repelled by the enrichment of one at the expense of the other ex-spouse when, contrary to expectations, divorce precluded sharing the personal benefit reaped by the educated spouse.[11]

Currently, courts want to award spouses that have supported the other spouse through school and into the work place, especially if the divorce takes place before the noneducated spouse can enjoy the higher income that comes from additional education. Alimony is necessary to ensure the well-being of the noneducated spouse and the

children after the divorce. As the current attitude of the courts demonstrate, it is unfair that one spouse sacrifice his or her market value to send the other spouse through school without receiving some type of compensation should divorce occur.

Conclusion

Thus, alimony is necessary but difficult to award. The easiest way to award alimony is by using the economic justification. However, this method has been shown to be unfair. Often the most prized commodity in the marriage is not the money earned by the working spouse. And often it is not even the care of the household by the other spouse. As Singer states, "The most important career asset associated with marriage is not the career enhancement itself; it is instead, the ability to advance a career while at the same time experiencing the benefits of parenthood."[12] Singer concludes, "This analysis implies that, for purposes of apportioning career assets, it may be appropriate to distinguish between marriages that have and have not produced children."[13] It is important to determine the type of marriage relationship in order to adequately award the alimony. Differences in the law should be maintained for specialized marriages, marriages where specialization is not total, and marriages with and without children, among others. Alimony based on laws that differentiate between families would be more equitable. However, although alimony remains a necessity, the law will have to find and implement better ways of awarding it.

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Notes

[1]Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 31 (spring 1997): 120.

[2]Herma Hill Kay, "An Appraisal of California's No-fault Divorce Law," *California Law Review* 75 (1987): 293.

[3]Singer, "Husbands, Wives, and Human Capital," 120.

[4]Margaret F. Brinig, "Property Distribution Physics: The Talisman of Time and Middle Class Law," *Family Law Quarterly* 31 (spring 1997): 108.

[5]Singer, "Husbands, Wives, and Human Capital," 120.

[6]Jana B. Singer, "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony," *Georgetown Law Journal* 82 (1994): 2424.

[7]Singer, "Alimony and Efficiency," 2429–30.

[8]Margaret F. Brinig, "Comment on Jana Singer's 'Alimony and Efficiency,'" *Georgetown Law Journal* 82 (1994): 2472–73.

[9]Singer, "Alimony and Efficiency," 2442.

[10]Singer, "Alimony and Efficiency," 2437.

[11]Joan M. Krauskopf, "Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery," *Family Law Quarterly* 23 (summer 1989): 260.

[12]Singer, "Husbands, Wives, and Human Capital," 126.

[13]Singer, "Husbands, Wives, and Human Capital," 127.

Standard Role Specifications and Default-based Premarital Agreements

Xiaoyu Lin

Premarital Agreements based on three standardized, or default, role specifications will help solve post-divorce financial inequalities created by current interpretations of no-fault divorce laws.

Marriage is a contract in terms of the agreed upon long-term mutual commitment and the expected joint benefits from the relationship. Not only do spouses anticipate that marriage will provide companionship and the joys and fulfillment of child rearing, but they also expect it to secure their respective emotional and economic investments.[1] Traditional fault divorce law chose to protect these investments through prescriptions on proper marital behaviors of each party, an approach that often led to hostility and unpredictable results. Seeking to avoid these problems, laws since 1969 have generally utilized no-fault considerations to regulate economic decisions in divorce.

Despite this proper focus, however, laws based on no-fault principles have repeatedly failed to properly interpret key elements in a couple's economic partnership. Most notably, these laws have partially or completely neglected to take into account a domestic spouse's many investments in the well-being of his or her children and in the career-enhancement of the other spouse. Investments into these areas, called human capital by economists, have significant economic value and deserve more careful consideration. Unless this occurs, current no-fault

interpretations and nonsystematic premarital agreement practices will continue to facilitate opportunistic marital defections and disproportional burdens on homemakers.

One way to ensure economically equitable divorce decisions is to implement a system of standard role specifications. Based on an analysis of the partnership aspects of marriage contract, it seems that using three general standards, or default modes, of role specifications to guide court and other decisions would minimize current problems. Not only would these three default modes serve as guideposts for the courts, but they would make it easier for potential spouses to customize premarital agreements in areas such as property division, alimony, and child custody arrangements and support. This approach should better protect the economic investments of the domestic spouse should divorce occur.

Partership and Human Capital

The contractual nature of marriage contract signals a dual partnership for the parties in cases where there are children. In the production of human capital (the bearing and rearing of children), the parties are *equal* partners and marriage between them is a joint agreement.[2] Each spouse is equally responsible for feeding, nurturing, and educating their children; and both expect to enjoy the benefits of parenting. In terms of the human capital of each party, however, marriage can be an *unequal* partnership, especially where one spouse serves a primarily domestic role. Role specification within marriage usually means that one spouse must sacrifice his or her own career opportunities to enhance the human capital of the other spouse.

Although the career-enhancement of the nondomestic spouse is mostly due to "educational institutions and on-the-job training,"[3] the domestic spouse invests considerable time and effort to facilitate this option. As a result, the helping spouse has valid claims on compensation for his or her diminished or lost career opportunities. In this sense, post divorce spousal support might be understood as "legal enforcement of insurance payments" in return for the "substantial marriage-specific investment" undertaken by the domestic spouse.[4]

Similar instances of reduced human capital appear in situations where both spouses work but one chooses to work less in order to fulfill domestic or other responsibilities or interests. Even where both spouses

work full-time, research has shown that one spouse (usually the woman) will earn substantially less, again primarily because of domestic responsibilities. All of this points to the need for legal safeguards against post-divorce financial inequalities. One such safeguard is the premarital agreement.

Premarital Agreement

Properly constructed premarital agreements can offer an effective avenue of security for couples seeking to protect themselves from potential post-divorce economic problems. Premarital agreement (often called prenuptial contract) is a way to reinstate legally the seriousness and commitment that a marriage relationship signals. Prospective couples that decide their own terms of marital contract regarding shared goals, labor division, and financial arrangements enjoy two main benefits. First, they are more motivated to invest emotionally in the relationship. Second, they have a more effective means of settling financial arrangements and/or disputes in case of divorce. The fact that premarital agreements are legally binding and enforceable decreases the likelihood of opportunistic behavior on the part of either spouse.[5]

The concept of premarital agreement is not new. Couples for centuries, especially celebrities, have chosen to form agreements with one another before marriage. However, in terms of whether premarital agreements are an effective way to solve current problems, contemporary theorists have differed in their views. Lloyd Cohen, for example, argues that current forms of premarital agreements do not adequately address the needs of those most needing them. Because these forms deal mostly with nontraditional instances of divorce (such as protection of several valuable assets), spouses in traditional marriages where divorce costs are most difficult to estimate are left without effective recourse. Based on these difficulties, Cohen believes that premarital agreements are ineffective in traditional marriages.[6]

Because of the above problems, theorists Elizabeth and Robert Scott assert that traditional marriages would be better served by replacing premarital contract with a device they call a "relational contract."[7] This contract, they believe, would legally reinforce marriage vows by including considerations of several important aspects of the relationship. Although Scott and Scott correctly refute Cohen by showing how

at least the concept of premarital agreement can still function, they fail to create any concrete role specifications that would serve as defaults, or models, in constructing the type of contracts they propose.

The primary advantage to creating default modes is that they provide traditional couples with an efficient way to customize premarital contracts. A second advantage is that traditional spouses can rely on more effective premarital contracts to better protect their economic investments in the relationship.

Default Modes and Applications

Role specification is likely the most important factor in the development of default modes. Based on the most common types of role specifications, three default modes emerge as those best suited for standardized application. The first mode is that of the traditional marriage, in which one spouse serves as the sole breadwinner and the other assumes a solely domestic role. In the second mode, both spouses bring income to the family but one of them exerts more effort in domestic responsibilities, resulting in unequal financial contributions to the family. The third mode consists of two spouses with a combined income high enough for them to continue working while they rely on a third party to perform domestic duties.

To illustrate how these default modes might practically function, it may be useful to provide a few limited examples of divorce proceedings arising under each mode. In the third mode, current no-fault considerations may be safely utilized because these decisions are, as a rule, based on property division. If both spouses own similarly valued assets, equitable economic distribution is likely. When children are involved the law should mandate a minimum economic obligation of each parent. The main goal should be to ensure that the child's (or children's) standard of living will remain reasonably similar to what it was before the divorce.

For divorce cases arising under the first and second modes, and where children are not involved, modern no-fault considerations generally do not require alimony payments to the economically weaker spouse. The reason for this, correct or not, is due to the expectation that the spouse has the ability and the opportunity to secure gainful employment. However, if a spouse has forgone education or job training opportunities to support the career-enhancement of the other

spouse, he or she should be able to claim compensation for lost human capital. One way to address this need is through repayment of the domestic spouse's contribution. Such a contribution could best be determined by a legal analysis of the premarital agreement. Of course, authorities would need to take into account the length of the marriage.

If divorce occurs under the first and second modes, and the couple has children, the best way to determine custody rights is to analyze the level of each spouse's involvement with each child. According to Scott and Scott, custody rights should be "proportional to each party's investment in the relationship with the children prior to divorce, and each party [should] continue to invest at that [same] level afterward."[8]

Because marriage usually diminishes human capital for domestic spouses in the first and second modes, if there are children involved the nondomestic spouse should be responsible for the majority of each child's living and educational expenses. Moreover, the domestic spouse should receive monetary support if he or she stayed at home full-time or received minimal remuneration due to domestic obligations. In either case, barring remarriage, the domestic spouse should receive spousal support that includes assistance with living and job training expenses for a set period of time, based on the length of the marriage. For instance, ten years of marriage justifies ten years of financial support. If the duration of the marriage spans a period long enough that the domestic spouse has permanently lost a career opportunity, the law should consider the possibility of awarding alimony for the remainder of the domestic spouse's life.[9]

Conclusion

To help remedy the ills of some current no-fault divorce practices, future laws would do well to more carefully consider the economic factors in divorce proceedings. This is especially true in cases where one spouse sacrifices career opportunities to take care of children or enhance the career of the other spouse. One effective way to address the situation is through the use of premarital contracts based on three standardized role specifications, or default modes. Customizing premarital contracts based on these default modes will not only serve to guide court decisions, but will protect rather than punish those couples who choose to form families.

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Notes

[1]Elizabeth S. Scott and Robert E. Scott, "Marriage as Relational Contract," *Virginia Law Review* 84 (October 1998): 1229.

[2]Shirley P. Burggraf, *The Feminine Economy and Economic Man: Reviving the Role of Family in the Post-Industrial Age* (Reading, Mass.: Addison-Wesley, 1997), 51.

[3]Allen M. Parkman, "Human Capital as Property in Celebrity Divorces," *Family Law Quarterly* 29 (spring 1995): 148.

[4]Scott and Scott, "Marriage as Relational Contract," 1313.

[5]Scott and Scott, "Marriage as Relational Contract," 1298–99.

[6]Lloyd Cohen, "Marriage, Divorce, and Quasi Rents; Or 'I Gave Him the Best Years of My Life,'" *Journal of Legal Studies* 16 (June 1987): 197–98.

[7]Scott and Scott, "Marriage as Relational Contract," 1267.

[8]Scott and Scott, "Marriage as Relational Contract," 1278.

[9]Scott and Scott, "Marriage as Relational Contract," 1311.

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. Kozminiski,* 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

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

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

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

[4]Estin, "Economics," 521, note 12.

[5]Estin, "Economics," 554.

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

[7]Singer, "Alimony and Efficiency," 2439.

[8]Singer, "Alimony and Efficiency," 2439.

[9]Singer, "Alimony and Efficiency," 2439.

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

[11]Biondi, "Who Pays for Guilt," 621.

[12]Biondi, "Who Pays for Guilt," 621.

[13]Biondi, "Who Pays for Guilt," 621.

[14]Biondi, "Who Pays for Guilt," 621.

[15]Baker, "Contracting for Security," 1193.

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

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

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

[19]Estin, "Economics," 554.

[20]Davis, "Enhanced Earning Capacity," 125.

[21]Davis, "Enhanced Earning Capacity," 125.

[22]Davis, "Enhanced Earning Capacity," 128.

[23]Davis, "Enhanced Earning Capacity," 125.

[24]Estin, "Economics," 519.

[25]Estin, "Economics," 519.

[26]Estin, "Economics." 519.

[27]Estin, "Economics," 565.

[28]Jana 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."

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

Shifting Sexual Divisions of Labor

Chelsea L. Grimmius

The primary step toward creating a more equitable divorce environment for men and women does not lie in changing the divorce laws themselves, but rather in adjusting the existing divisions of labor between the sexes in individual marriages.

The division of labor within marriage is often divided starkly between men and women, with the husband as the primary worker and the wife as the primary caretaker. When a couple chooses to divorce, the sexual division of labor usually leaves the primary caretaker at a great economic disadvantage. Jana Singer, in her article "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," discusses how divorce laws have evolved in recent years to compensate for this but have yet to produce an equitable way to divide financial assets after divorce.[1] Singer offers suggestions for offsetting this discrepancy, such as income pooling and limited no-fault divorce laws, but neglects to address how a rearrangement of the domestic and professional roles of parents could play a key part in making current divorce laws work. If the primary objective of lawmakers is to make divorce laws more equitable and reduce the negative financial impact of divorce on women, then their focus should be making individual marriages more equitable before the issue of divorce ever arises.

The most common form of the sexual division of labor begins when one spouse, usually the wife, chooses to forego a career or an education to take on the role of a primary caretaker. Most often she continues this role after the marriage dissolves, but without the financial benefits from the primary worker. In contrast, the primary worker

maintains many of the benefits of parenthood but remains relatively unaffected financially. In her article "Is Coverture Dead? Beyond a New Theory of Alimony," Joan Williams illustrates why this is so: "The ideal worker is typically away from home nine to twelve hours a day. Consequently, an ideal worker-parent will see his young children for only a few hours each day."[2] After a divorce, men who share custodial rights with their ex-wives spend about the same amount of time with their children as they had before. In this way, "The resulting post-divorce custody arrangements reproduce precisely the dominant pattern during marriage, but without the corresponding financial sharing that such an allocation of parental rights and responsibilities assumes."[3]

Singer notes that "the structure and pressures of market work generally preclude a primary breadwinner from assuming equal caretaking responsibilities, either before or after divorce."[4] She uses this structure to illustrate why divorce laws should financially compensate primary caretakers after divorce. According to Singer, "advocates of more equitable divorce outcomes for supporting spouses might insist on income sharing rules that would require divorcing parents to continue to pool their joint incomes for a significant time period after divorce."[5] Singer's suggestions are feasible, but the very need for them is a short-sighted resignation to the inequality that exists; her suggestions preserve the very relationships they are seeking to compensate for. The question of why the structure of market work precludes a primary breadwinner from assuming equal caretaking responsibilities deserves principal consideration.

The nature of a capitalist market encourages and requires competition to achieve success. If an enterprise seeks to be profitable, it must employ people who are willing to sacrifice and work hard for the company. For employees seeking to meet the demands of their employers, this can often mean long hours and extra work outside the office. For a married man with children, the need for a primary caretaker is essential if he is to be successful. The primary worker's salary therefore "reflects the work of two adults: the ideal-worker's market labor and the marginalized-caregiver's unpaid labor."[6] If more effort was focused on finding ways for families to thrive economically without requiring such a distinct sexual division of labor, the need for continually updated divorce laws would decrease. If men and women were equally economically

independent and equally capable of rearing children, there would not be a need for such programs as income pooling after divorce.[7] In order to foster economic equality as a preventative measure, there are several changes that could be made to allow a husband and wife to both work outside the home *and* be active contributors to domestic responsibilities.

Current examples of how businesses have changed their policies to accommodate for the shifting division of labor within marriages include job-sharing programs and paternity leave. A law firm in New Jersey has started a job-sharing program that allows workers the benefits of a full-time job, while only working part-time.[8] Two of the women currently participating in this program are able to each work two and a half days a week, crossing over on Wednesdays to go over their joint caseloads. They share an office, a secretary, and phone mail so that they function, in essence, as one employee. The firm benefits by retaining experienced employees and the women benefit by having the opportunity to have a family life and a fulfilling career.

Paternity leave is another program designed to allow employees the benefits of a career and a family life. *The National Law Journal* conducted a survey recently to find out some of the latest job perks at law firms around the country. They discovered that over half of the firms surveyed offer paternity leave for their attorneys. At a Washington D.C. firm this includes six weeks of full pay.[9] Other firms around the nation are offering up to six months of leave time with partial pay.[10]

If the majority of corporations were to offer similar programs to both men and women, husbands and wives could choose to share domestic responsibilities and pursue career goals at the same time. There are obvious drawbacks to offering and participating in these programs. Most businesses, for example, depend on the commitment of their employees to ensure the success of their companies, and promotions to high positions of responsibility are unlikely if the employee only works part time. However, the sacrifices that couples may make in choosing to have both a fulfilling career and a successful family life will be balanced by the benefits. In addition, as more couples begin to choose these options, more businesses will find it in their best interest to provide them as incentives to their employees. Highly qualified professionals will accept positions with companies that can offer them the benefits they seek, and if a company intends to retain valuable employees, it is in

their best interest to offer incentives that accommodate for different lifestyles. Roger Frankel is a managing partner at the law firm of Swidler & Berlin Chartered, where they offer six months maternity and paternity leave, as well as flextime partnership tracks. In Frankel's view, the cost of the employment perks are worth it: "If you lose just one associate that you didn't want to lose, that's too many."[11]

In addition to the administrative programs that could be introduced to promote a more equal distribution of labor within marriages, there are needed social changes. As mentioned before, the primary problem with division of financial assets after divorce stems from the huge economic discrepancy between the role of a mother and the role of a father. In order to decrease the negative financial impact of divorce on women, (and by extension, to prevent some of the reasons for divorce), we must start within individual marriages. In her book, *Kidding Ourselves: Breadwinning, Babies, and Bargaining Power*, Rhona Mahoney gives suggestions on how women can work within their own marriages to achieve economic equality.

Mahoney's main argument rests on the idea that all women should prepare themselves in some way for work outside the home. They should acquire skills and education that will allow them to support themselves. At the same time, men should also prepare themselves to be able to be caregivers. Such couples, as they choose to "[give] up these deeply held convictions that women should be primary caregivers to their children and that men should not or cannot, will bring an end to the sexual division of labor in the home. Ending the sexual division of labor in the home will end the link between one's sex and his or her work in the marketplace."[12] As this is accomplished, husbands and wives may choose to share home and market responsibilities, taking into account their own strengths, weaknesses, and capabilities. Once there are two marketable members of the relationship, economic equality becomes more attainable.

Today, many married women work outside the home and are often marketable. However, the higher participation of women in the work force has not diminished or eliminated their domestic responsibilities. By contrast, it has increased their workload and forced them into the problem of the "second shift." Mahoney defines the "second shift" as doing all or most of the housework and childcare in the home, in

addition to working jobs outside the home.[13] In order for working mothers to achieve economic success, they must have partners who are capable of compensating for their part-time absence in the home by sharing in domestic responsibilities.

The primary steps toward this sharing of domestic and professional responsibilities must be taken as much by men as by women. Historically, resistance to the idea of sharing childcare responsibilities has been strong from both sexes. Mahoney explains why this phenomenon occurs even in the most egalitarian of marriages. Because a woman carries the child in her womb, she is conscious of its needs for many months before the man is capable of assuming the same level of consciousness. After the child is born, especially if the mother chooses to breast-feed, she develops further interest in the child's needs. If the father neglects to participate in this process, or is not encouraged to participate, he never spends time alone with the infant and does not develop as intimate a connection. When problems arise, the mother is more likely to intervene because of her vested interest and personal connections with the child. This cycle continues as the child develops, creating an increasingly deeper separation of parental roles.[14] This separation of parental roles can only be prevented by individuals within a marriage. If we intend to create economic equality between men and women, we must begin on the level of individual couples, educating both as to how this can be achieved.

There are currently many different groups of professionals working on the issue of divorce. The law is only one of many avenues for change. In a sense, Singer's article is progressive; she asserts her own ideas for better divorce laws and acknowledges the positive results of recent changes in the system. But these changes cannot be truly effective without the help of a shift in the sexual division of labor within marriages. By encouraging men and women to share the professional and domestic duties more equally during marriage, the burden of trying to create an equal distribution of financial assets after divorce would be greatly minimized. Our primary goal as both lawmakers and citizens, who are concerned with the state of the family, should be to promote healthy and equal relationships between the sexes. If we neglect to do this, every other revision we make with respect to divorce law will, in the long term, be ineffective.

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Notes

[1] Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 31 (spring 1997): 119–31.

[2] Joan Williams, "Is Coverture Dead? Beyond a New Theory of Alimony," *Georgetown Law Journal* 82 (1994): 2236.

[3] Singer, "Husbands, Wives, and Human Capital," 127.

[4] Singer, "Husbands, Wives, and Human Capital," 127.

[5] Singer, "Husbands, Wives, and Human Capital," 130.

[6] Williams, "Is Coverture Dead?" 2229.

[7] Singer, "Husbands, Wives, and Human Capital," 130.

[8] Shephard, "Job Share Lets Moms Litigate," *National Law Journal* 21:7 (1998): A16, col. 1.

[9] Margaret Cronin Fisk, "Newest Perks Include Flextime, Paternity Leave," *National Law Journal,* 12 August 1991, S19, col.1.

[10] Cynthia Cotts, "How Firms Keep Their Associates on the Job," *National Law Journal,* 8 June 1998, A01, col.1.

[11] Cotts, "How Firms Keep Their Associates," A01.

[12] Rhona Mahoney, "Kidding Ourselves: Breadwinning, Babies, and Bargaining Power," *Basic Books* (1996): 4.

[13] Mahoney, "Kidding Ourselves," 106.

[14] Mahoney, "Kidding Ourselves," supra note 1, 112–14.