THE LAW & ECONOMICS OF MARRIAGE AND DIVORCE

Aspasia Tsaoussis
Assistant Professor
Athens Laboratory of Business Administration (Greece)

Università degli Studi di Siena
Doctoral School in Law & Economics
Siena Seminars on Law & Economics, April 8, 2005
PRESENTATION OVERVIEW

- Introduction
- The economic approach to the family
- Marriage and the formation of families
- Marriage market models: New empirical data
- Divorce: Negative consequences on women & children & how to address them
- A Law & Econ approach to non-traditional family arrangements
- Can legal reform reduce the divorce rate?
- New challenges for legislators & policy makers
FAMILY LAW THEN

- Traditionally, family law perceived of the family as a unit (for historical, cultural and economic reasons).
- For the purposes of the law, this unit was presumed to be both indissoluble and homogeneous.
- The legislator organized family life around a central ideal, which was procreation, and around a simple basic rule -- the predominance of the husband/father in the family unit.
- Family members were ranked according to an unchanging hierarchy, which dictated their respective rights and obligations.
- Women and children were at the bottom of the hierarchical ladder, with rigid roles that were socially constructed and reinforced by other social institutions like religion and education.
In recent decades family law around the world has been transformed. In a sweeping wave of reform, all Western nations and a great number of other countries have enacted new family laws that are predicated on the fundamental principle of gender equality and are informed by the provisions of the international conventions relating to family life.

These legislative changes have gone hand-in-hand with the growing complexity of family life. In all market-oriented societies, this unprecedented variety of family forms is closely interrelated with larger social trends:

- individualization
- secularization
- rapid urbanization
- the increasing participation of women in the labor force
THE ECONOMICS OF THE FAMILY: THE WORK OF GARY BECKER

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

“Gary Becker’s influence on the economics of the family has been pervasive. His ideas have dominated research in the economics of the family, shaping the tools we use, the questions we ask, and the answers we give”.

CERTAIN KEY ASSUMPTIONS

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

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

- Preferences are stable, interdependent and endogenous (subject to learning and habit formation/in part determined by social institutions)

- The household is like a small factory- it produces goods and services that are valuable to its members and to the economy.
Becker’s theory of the household

- An economic model of the household begins with the understanding that a household produces various goods (or commodities) which increase the utility of the household members who consume these commodities.

- The primary input into the production of household commodities is the time of household members.

- Not all of this time is traded for money, because not all household members perform work for pay.

- Homemakers use inputs (such as laundry detergent) and spend their time doing non-market work (e.g. time spent doing laundry, drying and ironing the clothes) to produce final products (e.g. clean clothes).

- Groceries (market commodities bought at the supermarket) are not consumed in their raw state, but are transformed into utility-giving final goods (home-cooked meals).
Becker’s economic approach to the household is predicated on two theories:

- His **theory of the allocation of time** (households produce commodities by combining inputs of goods and time) (1965)
- His **theory on human capital**, which he first presented in 1962 and then developed in subsequent work. This is the only general theory that provides a rigorous scientific basis for the recognition of the economic value of housework.
The concept of “full income”

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

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

- It has been estimated that, on average, the value of the wife's household production is equal to at least 70 percent of the household's money (or market) income after taxes, implying that even if she remains out of the paid labor force, she generates 40 percent of the household's full income (Gronau 1980).

- Families and other households are in effect small factories that even in the most advanced nations produce many valuable services and goods.

- Housework is “the missing piece of the economic pie” (Becker and Nashat Becker 1997).
Explaining the sexual division of labor

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

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

(Becker 1991: 39)
ANALYZING MARRIAGE MARKETS

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

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

- Hypothesis: Homogamy leads to marital stability.
- Lehrer and Chiswick (1993) studied religious homogamy as a determinant of marital stability and found that interfaith unions have higher rates of dissolution than intrafaith unions. They suggested that religious compatibility between spouses at the time of marriage has a major influence on marital stability, rivaling in magnitude that of age at marriage and dominating any adverse effects of differences in religious background.
- Weiss and Willis (1997) and Lehrer (1998) report that educational and religious homogamy are associated with lower divorce rates in the U.S.
The marriage squeeze in countries with excess female child mortality

- China, South Korea and Northern India have commonalities in their kinship systems which make for discrimination against female children. Discrimination was heightened by war, famine and fertility decline. From 1920-1990, India has had the quietest history, while China experienced the most war and famine, with sharp rises in discrimination. This generated a very different "marriage squeeze" in China and India during these decades, with a surplus of men in China and of women in India.

- Das Gupta and Shuzhuo (1997) argue that these demographic changes have had several social ramifications. In marriage payments, bride price remained the norm in China while there was a shift to dowry in India.

- The burden of "marriage squeeze" falls disproportionately on the poor. Women's social powerlessness exposes them to violence in both situations: dowry-related violence in India, and in China being kidnapped and sold to men desperate to find a wife.
The algorithm proceeds by rounds. Each round consists of two parts: Men make proposals of marriage, then women reject or (tentatively) accept. We will see that reversing these traditional roles can produce vastly different results.

In the first round each man proposes to the woman whom he most prefers, even if someone else has already proposed to her. Then, from the proposals that she receives, each woman tentatively accepts the proposal from (becomes engaged to) the proposer whom she prefers the most; she rejects all the other proposals. A woman who does not receive any proposals waits for the next round.

In each subsequent round men who are currently engaged do nothing. Each man who is not engaged makes a new proposal, to the woman highest in his preference ranking who has not already rejected him, whether or not she is already engaged. In the women's part of the round, a woman accepts the proposal from the man highest in her ranking, rejecting all others and (if necessary) breaking her current engagement to become engaged to a man higher in her ranking. A woman who does not receive any proposals in this round waits for the next round.

As long as there are unengaged men at the end of a round, another round is conducted.
Becker’s Marriage Model
(Theory of Marital Search, 1973, 1974)

- Optimal assortative mating forms the basis of this “specialization and trading” model of marriage.

- Single men and women are seen as trading partners who choose to marry only when both partners believe that they will be better off married than single.

- Thus, *ceteris paribus*, the gains to marriage are greatest when a man and a woman each specialize in different tasks (the man in the labor market and the woman in the home), and trade on their comparative advantages.

- This model, which emphasizes the economic specialization of spouses, has been supported by empirical evidence demonstrating that many couples actually practice assortative mating.
Oppenheimer’s Model (1988)

- As women’s labor force participation patterns increasingly resemble those of men, the traits that each prospective spouse considers important in the other spouse become more symmetrical for men and women.

- This “career-entry theory” suggests that potential wives are evaluated on the basis of their socio-economic status and future economic prospects, rather than on the basis of more traditional characteristics such as religion, educational background and physical attractiveness.
Grossbard-Shechtman’s Model (1995)

- This model focuses on a key determinant of marriage market conditions—the relative number of men and women in a given society.

- Using the traditional demographic definition of sex ratio as number of men divided by number of women, she finds that when the sex ratio is favorable to the wife (i.e. there is a surplus of men in the marriage market), then the distribution of gains from marriage will be shifted in her favor. When the ratio is favorable to husbands (i.e. there is a surplus of women), then men benefit from marriage.

- Therefore, when the sex ratio increases, so will women’s share of marital consumption and leisure.

- Grossbard-Shechtman and Neideffer (1997) found that an increase in the sex ratio reduces the labor force participation of married women and their hours worked.
Bergstrom and Bagnoli’s Model (1993)

- In most times and places, women on average marry men who are older than themselves. The model proposes a partial explanation for this difference and for why it is diminishing. In a society where the economic roles of males are more varied and specialized than the roles of females, it may be that the relative desirability of females as marriage partners becomes evident at an earlier age for females than it does for males.

- The males who regard their prospects as unusually good choose to wait until their economic success is revealed before selecting a bride. In equilibrium, the most desirable young females choose successful older males. Although they are aware that young males available for marriage are no bargain, the less desirable young females will be offered no better option than the lottery by marrying a young male.

**BUT**

- Homemaking in this model is equated with childbearing and childrearing.
- Women are by definition interested solely in homemaking. They are assumed to be marriageable as soon as they can have children.
Testing the model

- In countries that report low labor force participation rates of women (like Holland and Greece), more women may indeed consider a career of married homemaker.
- We can predict that more traditional division of labor between men and women is likely to be observed in these countries (Blau et al. 2002).
- Other marriage models view age difference between the spouses as an equilibrating mechanism in marriage markets: women tend to marry men who are older than they because when cohort sizes fluctuate, there are shifts in the relative supply and demand of marriage partners of the two sexes).
Women’s economic position and marriage formation

- Prominent theories in the literature converge in suggesting that:
  - a wife's resources are positively related to marital dissolution (i.e., the wife's independence hypothesis)
  - a husband's resources are inversely related to dissolution (i.e., the husband's income hypothesis).

- Previous studies of the economic context of marriage had focused primarily on the effects of good economic prospects on marriage among men.
- In recent years, there has been a shift of attention to the importance of women’s labor market position and economic prospects for marriage formation.
Spouses’ earning capacity & the divorce hazard

- Weiss and Willis (1997) investigated the role of surprises in marital dissolution. Surprises consist of changes in the predicted earning capacity of either spouse.
- They used data from the National Longitudinal Study of the High School Class of 1972.
- They found that an unexpected increase in the husband's earning capacity reduces the divorce hazard, while an unexpected increase in the wife's earning capacity raises the divorce hazard.
- Couples sort into marriage according to characteristics that are likely to enhance the stability of the marriage.
- The divorce hazard is initially increasing with the duration of marriage, and the presence of children and high levels of property stabilizes the marriage.
Bargaining models of marriage

- They provide a more natural approach to modelling household behavior because:
  - they incorporate the utility specifications of each individual in the household
  - they describe how differences between individuals are resolved

- They are substantially more complicated than the single-preference neoclassical model:
  (1) They specify bargaining power within marriage in terms of options outside of marriage;
  (2) A proper description of these options further requires a model marriage and/or household formation;
  (3) They also specify equilibrium conditions.
The typical model on Nash-bargained household decisions was proposed by McElroy and Horney (1981).

In the model refined by McElroy (1990), each household member has a utility function (the individuals have interdependent preferences, goods going to the other spouse enter their own utility).

Each household member also has a threat point (which is the person’s maximal level of utility outside the household) influenced by factors such as incomes and sex ratios. In these models, each person’s input depends upon his or her opportunities outside the family. These opportunities have an impact on resource distribution within the family.

Consistent with this hypothesis is evidence that marital-property laws have an impact on women’s labor force participation (Gray 1998).
Chiappori introduced a collective approach to household behavior (1988), claiming that McElroy & Horney’s Nash-bargaining model is of “weak empirical relevance” and “neither convenient nor really restrictive”.

Bourguignon, Browning, Chiappori and Lechene (1993), Browning and Chiappori (1998) and Chiappori and Ekeland (2001) further developed this “collective” framework for the intrahousehold allocation of consumption.

In its most general version, the collective approach relies on the sole assumption that household decisions are Pareto efficient. It thus nests all model based on cooperative bargaining, at least under symmetric information. It can be proved that this minimal setting is sufficient to generate strong testable restrictions on behavior.

Non-cooperative bargaining models

- The family can also be studied as a non-cooperative game (Lundberg and Pollak 1993 and 1994). Under this approach, the decision-making processes within a family may lead to inefficient allocations of resources.

- This is a “separate spheres” model (Lundberg and Pollak 1993) which assumes that the threat point is not divorce, but an uncooperative marriage.

- In this line of research: the work of Ted Bergstrom, who adopts an evolutionary view on family conflict and cooperation. The economics of the family can be much enriched by incorporating recent developments in evolutionary biology, animal behavior studies, cultural evolution, anthropology, and game theory.
Main difference between the cooperative and non-cooperative models

- Example: A child care allowance or a tax subsidy paid only to married mothers

- In the cooperative model, this change in the distribution of resources within marriage which does not change the total level of resources or the resources outside of marriage does **not** change the behavior of the spouses.

- A similar change in the non-cooperative model changes the partners’ relative bargaining positions and, therefore, affects their behavior
Finally, Gottman et al. (2003) have recently proposed a mathematical model for the study of marriage and divorce prediction.

The goal was to build a mathematical framework for the general system theory of families first suggested by Ludwig Von Bertalanffy in the 1960s.

It assumes that in marriages there is a “core triad of measures”: behavior, perception, physiology. The interplay between these three elements provides balance in a marriage.

Newlywed marriages in which negative behavior drives the couples toward both negative perceptions and greater physiological arousal (of husbands only) will end up either in divorce or as “stable but unhappy” (supra at 289).
The crucial role of information

- More recent, refined marriage models focus on the significance of information in marriage markets.

- The success of the matching process in the marriage market depends both:
  - on the number of potential partners
  - on the reliability of information about important characteristics of both the searcher and the potential partners
MAJOR STRANDS OF L&E RESEARCH: CRUCIAL AREAS OF PUBLIC POLICY

- Divorce and the labor force participation of married women (Mincer 1993; Gray 1998)
- part-time employment
- the household division of labor and its impact on the labor supply of married men and women (see e.g. Hersch and Stratton 1994)
- fertility and female labor supply
- fertility and female wage rates
- the economics of child care
PART-TIME EMPLOYMENT

- Recent OECD figures show that part-time employment as a proportion of total female employment is fast-rising, even in countries of the European South like Greece, Spain, and Portugal. The highest percentages are found in the Netherlands (55 percent) and the United Kingdom (40 percent).

- Yet a recent study on female part-time employment in the European Union (Tijdens 2002) found that quite different patterns of part-time work exist within Europe, and that these patterns do not follow geographical lines.

- The higher demand for part-time employment in EU countries during the 1980s and 1990s is no doubt a rational response on the part of working mothers –yet it poses a challenge for policymakers, since part-time employment raises the employment rate but does not reduce the wage gap.

  - family leave
  - publicly funded child care
  - guaranteed benefits of part-time work
Fertility and female wage rates

- Economists predicted that a rise in the mother’s wage rate is likely to be associated with lower fertility. According to one econometric estimate, a 10 percent rise in female wages would lower the birth rate by between 8 and 17 percent (while a similar rise in the male wage rate would raise the birth rate by between 10 and 13 percent). These predictions have been validated by empirical research.

- An illustrative example is the decline of fertility in the Mediterranean countries. The Member States that had the highest fertility rates in the early 1980s (the countries of southern Europe and Ireland) are those which have since recorded the biggest reductions (more than 30%). The figures have fallen to such an extent that the lowest fertility rates now occur in Spain (1.22), Italy (1.25) and Greece (1.30). The highest figure occurs in Ireland and France (1.89), followed by Luxembourg, Denmark, Finland and the Netherlands (between 1.72 and 1.78).

- Decreasing fertility not only creates imbalances in the current marriage market, but it also affects family formation and future fertility patterns.

- In Italy, where marriage still plays a central role in procreative behavior, deficits of marriageable males or females may contribute to the persistence of low numbers of births.
Fertility & Family Formation: An example from Italy & West Germany

- A comparative study between Italy and West Germany (Billari & Kohler 2000) describes the mutual relationships between union formation, first marriage, and first births – and then evaluate the impact of union formation behaviour on the transition to motherhood. The study concludes that household and partnership formation has structural effects on fertility.

- In Italy, where child-bearing occurs almost exclusively within marriage, the postponement of marriage and child-bearing may have a cumulative effect, reinforcing fertility reduction.

- In West Germany (and even more so in the Nordic countries) the delay of marriage is partly offset by an increase in non-marital births. The results of this study offer evidence that within Europe the patterns of transition to first marriage and first births are not converging across countries.
Why do people decide to divorce?

- Couples divorce when they no longer believe they will be better off by staying married (Becker 1991).
- Couples divorce when the wife has financial autonomy and can exit the marriage first. In most countries of the West, women have increasingly initiated divorce proceedings (Brinig and Allen 2000).
- Couples divorce when divorce law provides the breaching party an easy exit to marriage by lowering the transaction costs.
The distributional effects of divorce

- One point of consensus in the L&Econ literature is that the switch to no-fault divorce lowered the transaction costs of divorcing and thus reassigned the property rights within marriage.
- Under fault regimes, the spouse who most wanted to exit the marriage had to “purchase” the right to exit.
- Under the current no-fault laws, the spouse who least wants the divorce either must pay the other to stay, or, in most cases, is simply not able to prevent the divorce from occurring.
- Thus, no-fault divorce has had a negative impact on the economic well-being of the spouses who wish to stay married (predominantly wives in traditional, long-duration marriages).
- See generally Allen and Brinig (1998) who point to high transaction costs as a major reason behind the bargaining failures of wives upon divorce.
The Economic Consequences of Divorce: The Gender Divide

- Weitzman (1985) found that in the first year after divorce, the average standard of living of divorced men increased by 42 percent while that of divorced women decreased by 73 percent.

- Duncan and Burkhauser (1988) used data from the Panel Study of Income Dynamics and found that one-quarter of married women ages 26 to 35 who divorce or separate experience a decrease in their income-to-needs ratio of at least 50 percent. [See also Burkhauser et al. (1990) for a comparative analysis of the costs of marital disruption in the United States and Germany].

- Stirling (1989) demonstrated that in the initial years of divorce, the economic well-being of divorced women declines by more than 30 percent and remains at that same low level in subsequent years.

- Garrison (1991) found that the average postdivorce per capita income of wives and children approximates 68 percent of their before-divorce per capita income, whereas the per capita income of husbands increases by 182 percent after divorce.

- Finnie (1993) showed that, in the first year after divorce, Canadian women's household income falls by about 50 percent, while men's declines by 25 percent.
The harsh consequences of divorce on older women

- The soaring divorce rate in the United States brought about a significant increase in the number of displaced homemakers and incited a growing public and academic concern about the socio-economic status of divorced older women.

- The major reason why homemakers are particularly vulnerable upon and after divorce is because their contributions during marriage are asymmetric in relation to the contributions of their husbands (see esp. Cohen 1987).
Asymmetries in the accumulation of human capital during marriage

- The human capital accumulated by homemakers is marriage-specific (or home-specific) and thus not portable. By contrast, human capital accumulated by wage-earners (earning capacity) is entirely portable and not marriage-specific.

- Older women have exhausted their primary capital asset (that of “wife”) during their first marriage; their advanced homemaking skills have little or no market value.

- “Women in general are of relatively higher value as wives at younger ages and depreciate much more rapidly than do men.” (Cohen 1987, p. 278).

- This asymmetry allows the party who had specialized in market-related activities to make credible threats of divorce in order to enhance his bargaining position and strike a better deal for himself.

- According to Trebilcock and Keshvani (1991), the wife in a marriage characterized by a sharp division of labor risks a defection strategy by her husband in later stages of the relationship which will typically impose greater costs on her than him.
Homemakers: A Vulnerable Subpopulation

- Since full-time homemakers have specialized in domestic labor during marriage, the dissolution of marriage often means an end to their occupation.

- This occupation, though invaluable to the welfare of the national economy, accrues no health, retirement, or unemployment benefits.

- Displaced homemakers find it difficult to get employment after divorce, because they lack vocational skills and experience, and also because of their age. but “a marginal group” running a high risk of social exclusion.

- Divorced housewives seeking to enter or re-enter the labor market in a part-time job but facing demand side constraints for their employment constitute a large reserve labor force (Tsaoussis 2003; Addabbo 1997).
Marital Opportunism
(Brinig and Crafton 1994)

- The types of resulting opportunistic behaviour that could be predicted in a marriage involve situations where one spouse leaves shortly after the other has worked to allow his or her graduate education, where one spouse has swindled the other systematically of assets for a separately held business enterprise, where there is adultery, or where there is spousal or child abuse.

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

Marital opportunism (Dnes 1996)

- Dnes identifies the principal forms of likely opportunism as the greener-grass and black-widow effects. Both problems arise because a marriage partner can leave without meeting obligations incurred early on in the marriage, i.e. will not be forced to pay expectation damages as would be required for breach of a commercial contract.

- Under the **greener-grass adverse incentive**, a husband (usually) will leave the marriage if the gains in a new marriage or from single status exceed his gains in the first marriage, when he knows he will not have to compensate his first wife for the full loss of her married lifestyle. Women appear to make most of their domestic investments early in marriage, whereas male earnings grow later, so there is an incentive for greener-grass opportunism by males.

- The **black-widow effect** is similar but refers to cases where (typically) a female would find that a needs-based divorce award means she might be better off leaving a first husband (i.e. breaching) and moving to a new relationship, even when this would have lower net benefits for her in the absence of the award.
The implications of unilateral divorce on children (Gruber 2000)

- Gruber (2000) assesses the long run implications for children of growing up in a unilateral divorce environment, by measuring how such youth exposure affects adult outcomes.

- Using 40 years of census data to exploit the variation across states and over time in changes in divorce regulation, he confirms that unilateral divorce regulations do significantly increase the incidence of divorce.

- He also finds that adults who were exposed to unilateral divorce regulations as children are less well educated and have lower family incomes. They are also more likely themselves to be both married and separated, and both of these effects appear to reflect primarily a shift towards earlier marriage and separation.

- Women in these exposed cohorts are less attached to the labor force, while men are somewhat more attached; the timing of these effects appears consistent with a causal role for marriage.

- Thus, exposure to easier divorce regulation as a youth appears to worsen adult outcomes along a number of dimensions.
How can spouses and children be protected from the opportunistic spouse who seeks an easy divorce?

- Greater use of mediation in divorce proceedings
- Legislators should encourage private contracting between the spouses (the private ordering of the consequences of marriage and divorce.
  - Courts are generally hard-pressed to enforce any agreement that can be seen as threatening the mandatory and absolute nature of the right to divorce.
  - A way to sidestep this problem is to enact statutes that permit divorce but provide for liquidated damages in some circumstances. Buckley and Ribstein (2000: 28) argue that using a “statutory standard form contract” is more efficient: since its terms are mandatory, it provides a greater degree of certainty to the parties with regard to its enforcement. It also reduces the likelihood of potential re-negotiation.
- Covenant marriage legislation (Louisiana 1997; Arizona 1998; Arkansas 2001) and other initiatives to promote marital stability by restoring confidence in marriage as a serious commitment that cannot be unilaterally and opportunistically revoked.
- Joint custody as the default rule in custody proceedings
- Compensatory spousal support as a protective mechanism for wives in traditional marriages (see e.g. the American Law Institute’s Principles of the Law of Family Dissolution)
Compensatory Spousal Support: The ALI Principles

- Attempting to allocate the costs and benefits deriving from the dissolution of marriage, the ALI Principles recognize that a spouse’s alimony claim is an entitlement to compensation for financial losses suffered in the future (Chapter Five).

- The goal was to replace the need-based, discretionary standard of current law with a set of clearly articulated presumptive rules designed to allocate loss “according to equitable principles that are consistent and predictable in application” [ALI Principles (Pt. I), § 5.01, Comment b].

- Under the principles, compensation upon divorce is appropriate for three kinds of losses:
  1. a loss of marital living standard in a marriage of “sufficient duration” (id. at § 5.05)
  2. an earning capacity loss incurred by a primary caretaker of children (id. at § 5.06); and
  3. an earning capacity loss incurred by a spouse caring for a “sick, elderly, or disabled third party in fulfillment of a moral obligation” (id. at § 5.12).

- Loss is measured by calculating the spouses' income disparity and multiplying that figure by a “durational factor” (equal to the number of years of marriage or of the caretaking period multiplied by 0.1)
Some Criticism to the ALI Principles

- Starnes (2001, pp. 147-148) shows that the application of this durational factor would actually perpetuate the disparate impact of divorce on wives. As applied, this factor would produce a compensatory spousal payment of 5 percent of any disparity in earnings after 5 years of marriage, 10 percent after 10 years and 20 percent after 20 years, with a maximum payment of 40 percent of the disparity in earnings after 40 years of marriage.

- Parkman (2001, p. 161) notes that the ALI Principles lack consistency, addressing sacrifices during marriage only indirectly and ignoring an analysis of human capital. He suggests that the sacrifices spouses incur for the benefit of their family create debt obligations that would be better served upon divorce by a clearly defined property settlement based on human capital considerations.
A model of compensatory alimony for Civil-law jurisdictions (Tsaoussis 2004)

- We found that the current need-based standards for alimony are restrictively interpreted by the courts, seriously curtailing a homemaker’s opportunities for postdivorce rehabilitation.
- We argue that in traditional marriages, post-divorce obligations should be framed in terms of compensation and propose a reliance-based model that judges can utilize to compensate homemakers for their nonpecuniary contributions.
- A model based on reliance and human capital will assist the judiciary in making more realistic assessments of homemakers’ contributions during marriage and in securing their entitlements to marital property after divorce.
- We propose a reintroduction of compensatory spousal support, which is the nearest approximation to expectation damages under no-fault divorce regimes. This proposal offers a viable unifying model for civil-law countries that should be taken into consideration in the current efforts to harmonize European Family Law.
Dividing Marital Property

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

- According to Dnes (1998), the current amalgam of needs-based, expectations and restitution elements is problematic in that it can encourage opportunistic behaviour centred on marriage, as can any deviation from strictly enforcing promises (expectation damages).

Does divorce law affect the divorce rate?

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

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

- Ellman and Lohr (1998) find that in almost all states divorce rates began increasing before the change to no-fault. They conclude that this change in some cases yielded a short-term increase in the divorce rate, but find no evidence of any long-term effect.
No-fault divorce did not affect the divorce rate

- Recent evidence (Wolfers 2003) showed that the divide in the relevant literature reflects a failure to jointly consider both the political endogeneity of these divorce laws and the dynamic response of divorce rates to a shock to the political regime.

- Taking explicit account of the dynamic response of divorce rates to the policy shock, Wolfers finds that liberalized divorce laws caused a discernible rise in divorce rates for about a decade, but that this increase was substantially reversed over the next decade.

- This increase explains very little of the rise in the divorce rate over the past half century. Both administrative data on the flow of new divorces, and measures of the stock of divorcees from the census support this conclusion.

- These results are suggestive of spouses bargaining within marriage, with an eye to their partner's divorce threat.
No-fault divorce raised divorce rates

- Several cross-state studies that have isolated the effect of the legal variable from other demographic factors, find that no-fault divorce has raised divorce rates significantly:
  - Allen (1992)
  - Brinig and Buckley (1998)
  - Friedberg (1998)
  - Rodgers et al. (1999)

- The basic argument is that transaction costs involved in divorce are quite high and that the advent of no-fault laws lowered them considerably.
- For example, because marital property cannot be easily defined and valued, or because child support payments are difficult to enforce.
Recent evidence from Europe

- Binner and Dnes (2001) used times series data and found that the introduction of no-fault divorce law had a significant effect on the divorce rate in England and Wales.

- These findings are consistent with the view that “marriage is characterized by indivisibilities that inhibit Coasian bargaining” (supra)
No-fault divorce & the LFP of women

- Elizabeth Peters was the first economist to link no-fault divorce laws to the labor force participation rate of women. She found that married women living in no-fault states increased their labor force participation in order to insure themselves against the possibility of an unfavorable divorce property settlement.

- Several years later, Parkman (1992) also investigated the effect of no-fault divorce on the labor force participation of women, concluding that it was mostly young white women who increased their LFPR because they would experience larger reductions in their human capital if they reduced their participation in the labor force.
No-fault divorce, women’s labor supply & household bargaining

- Jeffrey Gray (1998) has studied the effects of divorce law reform on women’s labor force participation in the U.S. He showed that passage to no-fault divorce had opposite effects on married women’s labor supply in states with common law systems and community property systems.

- A change to unilateral divorce by itself was not associated with significant changes in married women’s employment or hours of work. In states with common law property rules, a change to unilateral divorce led to decreases in married women’s labor supply, whereas in states with community property rules a switch to unilateral divorce led to increases in married women’s labor force participation.

- Gray assumes that married women’s increased labor supply is indicative of a better bargaining position within marriage.
NEW CHALLENGES FOR MARRIAGE LAW

- non-traditional family forms
- the rights of same-sex partners
- medical advancements (esp. in reproductive technology)
  - in vitro fertilization
  - posthumous reproduction
  - the cryopreservation of embryos
  - sperm and egg donation
  - surrogate motherhood
  - the cloning of human cells
The main substitute for marriage

Cohabitation is related to issues that may be crucial for determining family policy, such as financial obligations to partners, inheritance rights, and health and social security benefits.

Over the last three decades, the dramatic rise in cohabitation has intrigued social scientists. In the U.S:

- **439,000 couples cohabiting out of wedlock (1960)**
- **4,900,000 couples cohabiting (2000)**

Empirical studies show that premarital cohabitation serves as “trial marriage” (“a period of learning” in the model proposed by Sahib and Gu 2002, who find that couples are more discriminating when forming marital unions than when forming cohabiting unions)
EXPLAINING INCREASED COHABITATION

- For L&E scholars, the significant growth of cohabitation is in large part a response to the lack of flexibility in traditional Western marriage laws.
- Cohabitation is perceived to have fewer costs than marriage. Interestingly, McGinnis (2003) found that cohabiters perceived fewer costs and fewer benefits to marrying than did non-cohabiting daters.
- A growing number of men and especially women may choose to cohabit because the current unilateral divorce regimes offer insufficient protection for marriage-specific investments and sacrifices (see e.g. Dnes 2002: 129)
- Increased cohabitation may be related to unfavorable economic circumstances (couples cohabit to reap the benefits from economies of scale)
Increased cohabitation is also the result of government policies: e.g. Sweden does not offer a “marriage allowance” for tax purposes and no tax deduction for raising children (an overwhelming number of Swedes engage in unmarried cohabitation).

Empirical studies have shown that divorce rates, as well as the labor force participation of women increase cohabitation:

- Ressler and Waters (1995)
- Ekert-Jaffé and Sofer (1996)
Persons involved in a homosexual living arrangement experience many of the costs and benefits of legal marriage, with the exception of the higher cost of dissolving the relationship.

Even if there is social disapproval that increases the costs of choosing to live in a same-sex relationship, the “alternative living arrangement” market will respond well to relative supply and demand.

Same-sex couples can create a more economically efficient partnership by using existing contract law to gain the legal benefits awarded to married couples. However:

- many benefits of marriage, such as employer medical benefits and tax deductions, simply cannot be gained by private contract
- without recognition of status, courts may not enforce contracts for short-term relationships because they may resemble contracts for sex
- any ambiguities in the contract do not have the benefit of developed case law

Such costs make private contract a poor substitute for state recognition of same-sex marriage. Same-sex couples also incur heavy transaction costs when adopting or seeking custody of children.
HOW DOES FAMILY LAW INTERNALIZE THESE NEW SOCIAL & BIOLOGICAL “TRUTHS”? 

- Through redefinition of terms used traditionally in family law
- Through new legal definitions (e.g. of terms relating to maternity and paternity) and the crafting of new model statutes
- Through the increasing contractualization of family law (a greater reliance on the principles of contract law)
  - Cigno (1991)
  - Grossbard-Shechtman and Lemennicier (1999)
- Through expansive interpretations of family law statutes that are ideally based on economic analysis or otherwise apply and/or make use of empirical data from the social sciences

HOWEVER

There is no consensus on the issues that raise questions about the ethics of creating, ending and defining human life.
The tension between rules and discretion in Family Law

- Family law is characterized by more discretion than any other field of private law (Glendon 1986). The standards in family law for allocating family assets, deciding child custody and visitation, child support and alimony have traditionally been characterized by broad discretion.

- Advocates of discretion:
  - Legislatures should leave the delicate and difficult process of fact-finding in family matters to flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines.
  - Several theorists (e.g. Ellman 1999) call attention to “the pressing need for individualized discretion in family law.

- Advocates of rules point out that uniformity of standards facilitates enforcement. [In the U.S., the two decades between 1978 and 1998, roughly coinciding with the initial period of support guidelines, witnessed a fourteen-fold increase in child support collections]

Has Family Law entered a “consolidation phase”? (in which scattershot judicial discretion is displaced by delimiting rules)

In an effort to ensure the success of this consolidation, the ALI has blueprinted an architectonic design in the construction of the rules of domestic dissolution. This new legal structure showcases three features. First, the generative entities of family law, parents and other domestic unions, are undergoing a utilitarian metamorphosis. Parenthood is proceeding to abandon its biological chrysalis and emerge in a more functional form. Second, the financial aftershocks of marital dissolution, traditionally termed alimony (or maintenance) and property division, have virtually melded into one integrated financial schema governing all domestic fractures. Third, despite the ongoing societal reconsideration of the ease of divorce, the ALI Principles exclude consideration of fault or any other dissolution-delaying mechanism. Considered together, these features fuse to form the backbone of a unified field theory of the family, one whose unspoken aim is finally to consolidate the no-fault divorce revolution.

“Customizing” the Marriage Contract

No-fault divorce might seem to foster individual choice, in keeping with the spirit of the age, but it does not really favor individual choice. Some people would like to be able to choose to bind themselves in a permanent marriage, yet the law makes it difficult to personalize the contract. One legal size is presumed to fit all. The chief problem comes in being unable to specify the grounds for divorce, either directly or through using the terms of divorce to penalize a spouse who is at fault. The long-established rule against judicial interference in ongoing marriages further hinders the establishment of individually tailored marriages. Moreover, social norms and families have become weaker. With non-legal constraints weakening, people need legal institutions to pick up the slack, allowing them to make credible commitments to each other. It is time for legislators and judges to clarify to what extent courts will enforce marital agreements.

(Rasmusen and Stake 1998)

FUTURE DIRECTIONS

- Judges should become consumers of Law and Economics literature
- Legislative initiatives should be scrutinized under the lens of economic theory - in terms of the incentives they generate and their long-term consequences.
- Law & Econ theorists and researchers should act as experts in the drafting process of laws that directly or indirectly deal with the family.

- The Unification and Harmonization of Family Law in Europe (“Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses”)
- The “Healthy Marriage Initiative”, a bill promoting marriage among low-income people that is currently making its way through Congress and has sparked an academic and political debate

Thank you for your attention!

atsaouss@alba.edu.gr
atsaoussi@vivodinet.gr
REFERENCES

REFERENCES


REFERENCES


REFERENCES