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Toward Contractual Choice in Marriage

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I. THE LOGIC:

A. Introduction

A fine, eminently sensible idea, this Rasmusen-Stake proposal: at the time of marriage, let couples choose from among an array of contracts that offer different grounds for divorce.¹ To see why it makes such good sense, posit two firms, an automobile assembler and a headlight maker. So long as the assembler buys 1960s-vintage, round, standard-issue headlights from the headlight maker, neither firm will care much about the duration of their contract. If the assembler decides to buy its headlights elsewhere, the headlight maker can find other outlets. If the headlight maker decides to sell to a rival assembler, the assembler can find other suppliers.

Now suppose that the assembler wants a 1990s-vintage, distinctively shaped, sealed-beam headlight. In order for the headlight maker to produce this peculiar headlight, suppose further that someone will need to invest heavily in headlight-making equipment that can be used only for making this distinctive headlight. To those involved, the duration of their contract will now matter dramatically. Absent some assurance that it will receive compensation if the other side defaults, neither will invest in the equipment.

Rewritten for marriages, this is Rasmusen-Stake's point. Some couples will not want to invest heavily in their marriage. Two lawyers may marry, but want to continue billing their 2500 hours each at Skadden, Arps. Quintessential yuppies, they will eat out routinely and hire others to clean the house, water the plants, and walk the parakeet. Although current law allows only at-will, penalty-clauseless marriages, for them such a regime works fine. Either of them can leave the other at the drop of a hat, granted. But because both are protecting their market wage and neither is investing heavily in the marriage, in the grand scheme of things neither will suffer much from divorce.

Other couples will want very different arrangements. Just as there are gains to specialization in most economic activities, some couples will want to specialize in complementary activities within the marriage.² Suppose one of them (usually, it seems to be the wife) wants to leave the market and focus on household production. She will quit Skadden and—if they have children—fire their nanny and raise them herself.

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1. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *IND. L.J.* 453 (1998).

2. On the gains to specialization within marriage, see GARY S. BECKER, *A TREATISE ON THE FAMILY* 30-53 (rev. & enlarged ed. 1991).

For couples who want such specialized arrangements, modern at-will marriage law is a disaster. She is dropping out of the labor market (a move that will dramatically lower her market value should she later choose to return). She is investing in skills specific to the relationship (skills that will be worthless should they divorce). Yet for taking these risks, modern at-will marriage law offers her nothing.

Before placing themselves in such a precarious position, many wives understandably want some protection. For the sake of her household, she may want to take (and her husband may want her to take) these risks. Before she does so, though, she will justifiably want to have (and to induce her to take these risks, he may reasonably want to give her) some recourse against him should he divorce her unilaterally. Under the old American divorce law, she had considerable protection—since if he left her for another woman (or on other grounds constituting fault) he had to pay alimony. Under Islamic law, according to Elisabeth M. Landes, she likewise might have had considerable protection—since if he unilaterally divorced her he sometimes had to pay a large penalty.³ Under modern American law, even if both spouses want her to have the protection and even if both spouses explicitly agree to protective clauses, many courts will refuse to enforce their arrangement.

B. Consequences

The consequences of this modern legal regime are straightforward. If people can make only at-will marriage contracts, then they will invest less in assets specific to the marriage, and fewer people will specialize within marriage in household activities. Couples will have fewer children, in other words, and fewer parents (usually mothers) will stay home to care for those they have. On the margin, children will be less attractive investments to the husband—because with his marriage fragile he has lower odds of being there to enjoy them. On the margin, they will also be less attractive investments to the wife—because with her marriage uncertain she runs a large risk of raising them alone, with all the economic, social, and psychological costs that entails.

These incentives have direct, real world effects. All else held constant, one would expect modern liberalized divorce rules both to increase the number of women who stay in the labor market during marriage,⁴ and to decrease the number of children they have. Consistent with that prediction, Margaret Brinig and Steven Crafton find that because of the law, couples are not having the children they would otherwise prefer to have.⁵ As the law imposes no penalty on at-fault spouses at divorce, they also find that they suffer increased spousal

3. See Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35, 38-39 (1978); see also BECKER, *supra* note 2, at 14.

4. On the effect of no-fault divorce on the labor-force participation of women, compare Allen M. Parkman, *Unilateral Divorce and the Labor-Force Participation Rates of Married Women, Revisited*, 82 AM. ECON. REV. 671 (1992), with H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986).

5. See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994).

abuse. All this is not abstract theory. It directly affects the way real people live their very real lives.

The Rasmusen-Stake proposal would substantially mitigate these problems. Instead of a single marriage contract mandatory for all, it would introduce choice. Under the proposal, those couples who wanted an at-will marriage could choose the current regime. Those who wanted to specialize in complementary skills could choose one that made divorce harder. To its credit, the proposal does this without significantly raising the administrative costs of either marriage or divorce.

II. DIVORCE LAW AND DIVORCE RATES

A. No Direct Effect

The effect that the Rasmusen-Stake proposal would have on divorce rates bears directly on its social benefits. Although it would indeed lower the divorce rate, it would not primarily do so directly. It would not, in other words, primarily do so by locking couples into undesirable marriages. People who think they would be better off divorced than married will divorce, whether under at-will marriage or under the Rasmusen-Stake durable-marriage option. Instead, the Rasmusen-Stake proposal lowers the divorce rate by raising the relative *quality* of marriage—by increasing the returns that people earn from marriage relative to divorce.

To explore these issues, in this, as in much of the law, one can do no better than to start with Gary Becker.⁶ As Becker pointed out years ago, making divorce harder does not directly reduce its incidence. Provided transaction costs are sufficiently low, whether divorce is easy or hard a couple will divorce if but only if their combined welfare is higher under divorce than under marriage.⁷ Whether divorce is easy or hard, as Elizabeth Peters puts it, “divorce will occur only when the joint value of marriage is less than the *sum* of each spouse’s value from getting divorced.”⁸

To see this, take two polar legal regimes: one where either spouse can unilaterally leave on a whim (call it At-Will Marriage), and one where the couple

6. See generally BECKER, *supra* note 2; Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977).

7. The theoretical point here is not disputed, at least within the law-and-economics community. There has been empirical debate, however, over how large the transaction costs (and any other potential impediments to negotiation) are, and whether they are large enough to have a noticeable effect on divorce rates. See generally BECKER, *supra* note 2, at 333-35 (arguing that no-fault divorce has only temporary effect on divorce rate); Peters, *supra* note 4 (stating that no-fault does not affect divorce rates); H. Elizabeth Peters, *Marriage and Divorce: Reply*, 82 AM. ECON. REV. 686 (1992) (same). But see Douglas W. Allen, *Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679 (1992) (arguing that no-fault does increase divorce rates); Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503 (1993) (same).

8. Peters, *supra* note 7, at 690 (emphasis in original).

can divorce only if one of the spouses has committed specified acts of fault (call it Hard Divorce). Now consider several cases. First, suppose that both spouses individually decide they would rather be divorced than married. Under At-Will Marriage, they will obviously divorce. However, under Hard Divorce they will too. A little perjury goes a long way, and they will simply fake fault.

Second, suppose that both spouses individually decide that they would rather stay married than divorce. Obviously again, whether under At-Will Marriage or Hard Divorce, they will stay married.

Third, suppose that a husband decides he would rather divorce, his wife decides she would rather stay married, and the amount by which he improves his welfare through divorce *exceeds* the amount by which her welfare falls through divorce. Under At-Will Marriage, he will petition for divorce, and nothing she can do will convince him otherwise. Under Hard Divorce they will likewise divorce, again by faking fault.

Although whether the couple divorces here does not depend on the legal regime, the property each spouse keeps does. “[D]ivorce occurs when it is efficient,” explains Elizabeth Peters, “but the compensation scheme depends on the divorce law.”⁹ Under Hard Divorce, the husband cannot leave his wife unilaterally. Instead, because he needs her complicity in filing a fault-based divorce petition, he must first make divorce worth her while. He can advantageously do this, because (by hypothesis) divorce improves his welfare more than it hurts hers. He will pay, she will agree, and the two will divorce.

Because a divorcing husband must make this side payment, however, under Hard Divorce a wife dramatically reduces the risk of specializing in household activity. Under At-Will Marriage, if her husband wants to divorce, he simply leaves. She may have left the labor market and invested heavily in marriage-specific skills, but no matter. She receives nothing. Under Hard Divorce, he will leave her only if he first pays her enough to make it worth her while.¹⁰

Fourth, suppose that a husband decides he wants to divorce, his wife decides she would rather stay married, but the amount by which he improves his welfare through divorce *is less than* the amount by which her welfare falls. Under Hard Divorce, they will stay married. Although he would like to divorce, he cannot obtain a divorce unless she agrees. Given the relative effects of divorce on the two, he cannot advantageously pay her enough to buy her consent.

Under At-Will Marriage, they will likewise stay married. Crucially, however, because he can divorce unilaterally she will now have to bribe him (whether financially or otherwise) not to leave. Because divorce hurts her more than it helps him, she will find that it pays to induce him not to divorce. Whether under At-Will Marriage or Hard Divorce, if the combined welfare of the two is higher under marriage than under divorce they will remain married—but under At-Will Marriage she will have to pay him to stay.

9. Peters, *supra* note 4, at 452-53.

10. Critics object that he can also leave by abusing her so badly that she finds marriage intolerable—indeed, this is a point Becker himself made. See Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 14 (1988). While the danger of abuse is a problem to be sure, it is one the law can substantially mitigate by making abuse itself grounds for which she can demand high levels of alimony.

B. Changes to Investments

Notwithstanding this logic, divorce law does change the divorce rate, but it changes it by altering the investments people make in their marriages. As just explained, although the law does not directly and substantially affect whether people divorce, it does affect whether and how money changes hands upon divorce. If divorce is hard, a spouse wanting a divorce must bribe the spouse who wants to stay married; if it is easy, a spouse wanting to keep a marriage must bribe the spouse who wants to divorce.

Given these financial ramifications, Hard Divorce directly facilitates specialization within marriage. Suppose a spouse (usually the wife) wants to specialize in nonmarket activities or invest in marriage-specific skills. Under a Hard Divorce regime, she can do so with the knowledge that her husband cannot unilaterally divorce her. Because specialization is safer under Hard Divorce than under At-Will Marriage, on the margin more couples will find it advantageous. Again, on the margin, if he cannot leave her without buying her acquiescence, she will be more likely to quit her outside job and invest in activities that have their highest value within the marriage.

C. The Consequences for Divorce Rates

These different investment patterns will in turn affect the relative benefits from marriage and divorce. Suppose a wife invests heavily in marriage-specific skills. She and her husband will now earn returns from those investments, and (importantly) those returns are ones they will earn only if they stay married. Had she stayed in the labor market, they would earn returns there too, of course. But those returns are ones she earns whether or not they stay married. That she chose to specialize in household activities, moreover, necessarily also implies that she and her husband valued those activities above her market wage.

These returns to specialization lower the divorce rate. Recall that whether a couple divorces depends on whether they earn higher combined returns in or out of marriage. Yet, the more heavily they invest in household production, the more likely they will find themselves better off married than divorced. After all, the longer she stays out of the labor market, the lower her wages when she returns upon divorce; the more she invests in marriage-specific assets, the higher the returns they earn from marriage. Specialization makes marriages more durable, in short, by raising the returns to marriage relative to divorce.¹¹

11. See Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581, 601 (1985). Compare Parkman, *supra* note 4 (recognizing that no-fault divorce has increased the number of married women in the workforce, but arguing that the increase is due to a lack of compensation at divorce for a married woman's reduced earning capacity), with Peters, *supra* note 4 (arguing that no-fault divorce causes an increase in the number of married women in the workforce because married women are not compensated at divorce for marriage-specific investments).

III. THE BENEFITS

Given all this, the social benefits to the Rasmusen-Stake proposal are straightforward. Not all couples would benefit from Hard Divorce. After all, some couples will both prefer to invest heavily in market skills. Under the Rasmusen-Stake proposal, they are free to choose At-Will Marriage.

Other couples would prefer to specialize within marriage. Under the present divorce regime, they cannot safely do so. Under the Rasmusen-Stake proposal, they could. Having chosen it, they would then build marriages that are, all else equal, more durable than the marriages of those who invest instead in labor-market skills.

Ultimately, the Rasmusen-Stake proposal simply expands contractual choice in marriage. It mandates nothing. Yet, by expanding the choice couples face, it directly facilitates more enduring marriages among people (and only those people) who self-consciously want to make more enduring commitments, and more stay-at-home parents among those (and only those) who self-consciously want to stay at home.

Children are the obvious winners. To be sure, we can all think of marriages that are better off dead than alive, and of nannies who provide better care than some mothers and fathers. Exceptions notwithstanding, however, children usually *benefit* both from more durable marriages, and from greater parental attention. Children born to parents who choose the Rasmusen-Stake Hard Divorce option will—on average, and all else equal—have both.