1 Introduction

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This book is a response to growing public concern about family breakdown, which is associated in the academic world with a burgeoning interest in marriage and divorce. Academic interest has spread beyond the conventional boundaries of socio-legal studies, and a new literature has emerged that draws on economic analysis to illuminate the dynamics of family formation and dissolution. This new approach is distinguished by the importance it assigns to incentives. Whereas other approaches mostly belittle the role of incentives, the economic approach gives them a central place in the analysis of marriage and divorce. Legal and other policy innovations that substantially alter the structure of incentives are presumed to have a significant impact on individual behavior and hence on the formation, operation, and dissolution of families.

Some followers of the economic approach are professional economists, some are specialists in the economic analysis of law, and still others are academic lawyers. They are all represented in this book. The subject matter of the book may be loosely described as "the economic analysis of family law" in so far as it concerns marriage, divorce, and related issues. The literature on this topic tends to be largely American in origin and is scattered around a wide diversity of academic journals. In this book we bring together some of the major authors in the field, who survey and synthesize existing literature and in some cases provide new analyses of their own. The American approach is beginning to catch on in Britain, and the British authors in this book bring a fresh perspective that may be of interest to Americans.

A major impetus behind the growing academic interest in the economics of family law has been the spate of initiatives to reform family law in North America and elsewhere. In the USA, the American Law Institute (ALI) has recently published new guidelines on the law of marital dissolution, which are likely to be highly influential in the design of state-based family law codes. Although the ALI guidelines may seem to fly in the face of economic logic in some areas, such as the arbitrary nature of the rules governing spousal maintenance payments, there is no doubt that debate has been stimulated among observers with economics training. Similarly, in England, the Lord Chancellor's Department has displayed increased interest in exploring the economic basis of

the division of marital assets, following its commissioning of a series of reports in the late 1990s.

The growth in marital dissolution witnessed in recent decades has imposed increasing costs on the taxpayer. Some of these costs are associated with the administration of justice. Others arise from the fact that marital breakdown imposes a range of extra demands on the welfare state. These include welfare services for damaged children and depressed adults, financial aid to meet the expense of running an additional household following separation, and the cost of supporting lone parents and their children when the former spouse cannot or will not contribute adequately to their upkeep. The post-war growth in divorce, and the associated fall in marriage rates, also raises wider, non-pecuniary questions about human welfare.

This book draws together recent advances in specialist work on marriage, cohabitation, and divorce. The common thread running through almost all of the contributions is the importance of family law as an influence on the structure of incentives facing individuals. These incentives revolve around the issue of consistent and honest behavior in human relationships. Specialists who apply economics to family law frequently observe that modern family law creates an incentive structure that encourages opportunism and facilitates systematic cheating on interpersonal obligations. Thus, apart from the financial impact of growing divorce rates, there is concern that a badly designed divorce law may undermine the fabric of trust upon which stable marriages depend. If it is badly designed, the law itself may stimulate divorce and contribute to a great deal of human misery. The economic approach takes this kind of issue seriously. It focuses on the incentives associated with alternative legal regimes and on the unintended adverse consequences emanating from faulty legal design.

Interest in the application of economic analysis to family life is not particularly new and dates back at least to the work of Becker and others in the 1960s and 1970s. This earlier work was not primarily concerned with the role of law, but was an application of conventional production and consumption theory to family decision-making in such areas as employment and the domestic division of labor. More recent developments stress the influence of law on family life, and there is now considerable interest in this topic among writers having some background in the economic analysis of law. Family law has become another legal area, along with contract, tort, and property, in which economic analysis has provided new insights. Family law is now set to become a "harder" area of law, akin to contract or tort, as a result of the new approach.

The economic analysis of family law is conducted on two levels. First, the law of marriage and divorce is theoretically analyzed in terms of its incentive structure. For example, following the lead of Lloyd Cohen, a contributor to this book, it is frequently argued that a failure to enforce quasi-contractual obligations between marriage partners encourages opportunistic behavior. Older women, in

particular, may be vulnerable to opportunistic abandonment by men, if the legal system renders divorce relatively cheap compared with promised levels of lifetime support. Faced with such a risk, individuals may respond defensively by investing less in their marriage and in their children, thereby damaging the children and destabilizing their marriage. It is easy to see that economics is useful in analyzing such linkages.

In addition to the insights derived from theoretical analysis, it is important to quantify the impact of law on behavior. This requires the application of statistical (econometric) methods to the growing volume of data that is now available. The major application of statistical analysis to family law concerns the impact of divorce law reform during the 1970s. During this period divorce law was liberalized throughout North America and much of Western Europe, and in all cases this change was accompanied by increased divorce rates. The aim of statistical analysis has been to quantify how far legal reform was a causal factor in the growth of divorce. The statistical results provide compelling evidence that in the case of North America the liberalization of divorce law had a permanent impact on divorce rates. In the case of Europe, there is less evidence to go on and the statistical results are less clear-cut. Quantitative analysis is also important for policy formulation. If the statistical evidence consistently rejected the hypothesis that the law had a significant impact, then the design of the law would matter much less. As far as one can tell from the econometric evidence, it matters quite a lot. We therefore offer this book to the reader as a contribution to the debates surrounding the major social changes associated with marriage and divorce in the twenty-first century.

Turning now to the content of this book, we have grouped the papers around four principal themes. The first group covers contractual perspectives on marital commitment (chapters 2 and 3). The next group of papers examines the regulatory framework surrounding divorce (chapters 4, 5, and 6). The third group (chapters 7, 8, and 9) focuses on several bargaining and commitment issues relating to marriage and near-marriage arrangements. The last group (chapters 10, 11, and 12) brings in empirical work, largely on the impact of more liberal divorce laws.

Lloyd Cohen examines the long-term incentive structure in marriage in chapter 2, "Marriage: The Long-Term Contract." His analysis begins from the observation that, although the true nature of marriage is not expressed in the wedding vows, there is a nearly universal expectation that the relationship should endure for the joint lives of the partners. In reality, separation and divorce often invalidate this expectation. He notes that many of the problems inherent in fashioning an efficient and equitable law of divorce, alimony, and property division are similar to the difficulties that surface in the enforcement of commercial contracts. It should be observed that long-term commercial contracts are also replete

with complex problems of incentive alignment and broken-down personal relations.

Cohen's contractual analysis of marriage does not yield strong conclusions about the "proper marriage." The nature of the underlying duties assumed by the marriage partners is highly idiosyncratic and not susceptible to bright-line definitions. However, success of the marriage requires the partners to invest heavily in the relationship, asymmetrically over time. They may be able to salvage little of their original investment should the marriage fail, and it is often the wife who has more to lose by divorce. "Insuring" the investments is in the interests of both marriage partners. Cohen finds that neither prenuptial contracts nor the various contemporary legal regimes of divorce and property settlement offer much hope. He argues that much can be claimed for the older reliance on informal social sanctions and the good moral sense of the parties. Our modern need to wrestle with settlement issues may stem from losing this traditional set of checks and loosening the moral value of promise.

In chapter 3, "Marital Commitment and the Legal Regulation of Divorce," Elizabeth Scott criticizes both conservative and liberal views on the legal regulation of marriage and divorce. Conservatives have welcomed the introduction of covenant marriage statutes in a few American states. In these states couples can now choose a more binding marriage option than is allowed under conventional divorce law. Some conservatives are hopeful that this is part of a trend towards a more restrictive divorce regime in which divorce is conditioned on fault. Many liberals see covenant marriage statutes as a threat to personal freedom, because they prevent the easy termination of marriage. Scott argues that one does not have to be a conservative to support legal restrictions on divorce. The legal enforcement of marital commitments is consistent with liberal principles and may enhance the freedom of individuals to pursue their life goals. In marriage, as in commercial contracts, legal commitment can promote cooperation and protect investment in the relationship, to the mutual benefit of the parties concerned. Scott argues that family law reforms since the 1960s increased the freedom of individuals to leave a marriage, but in doing so they have restricted the freedom of individuals to bind themselves so as to achieve the long-term goals they desire.

Scott goes on to consider alternative legal regimes that would facilitate personal commitment in a fashion broadly consistent with liberal principles. Amongst the possibilities that she considers are mandatory premarital and pre-divorce counseling, a mandatory waiting period of two to three years before divorce, and family property trusts to ensure that marital property is used to provide financial security for minor children following divorce. She welcomes covenant marriage because it embodies some of these provisions and because the introduction of this type of marriage offers couples an extra level of precommitment to choose from. However, she rejects fault-based divorce, which is the centerpiece of covenant marriage, on the grounds that judicial determination of

fault is both acrimonious and inaccurate. Thus, her initial sympathy for covenant marriage is heavily qualified.

In chapter 4, "Mutual Consent Divorce," Allen Parkman argues that the primary ground for divorce should be mutual consent. A marriage should be dissolved only if both spouses agree it is a failure, which means that two spouses who genuinely wish their marriage to end can dissolve it without difficulty. It also means that a spouse who wishes to terminate a marriage against the initial desire of the other spouse will have to win the consent of the latter. This suggestion mirrors the standard specific-performance remedy for breach of contract, which obliges a party wishing to be released from a contract to pay full compensation. Bargaining over the terms of dissolution might require concessions on such issues as child custody, alimony, or division of the family assets. Such a provision protects spouses against expropriation of their investments in the marriage, since it deters opportunistic desertion and forces a departing spouse to pay full compensation. Like the old fault-based system, mutual consent divorce encourages marital investment and facilitates arrangements that would otherwise be too risky.

Parkman does not consider that mutual consent should be the only route to divorce. The mutual consent provision gives substantial power to spouses who do not want a divorce. To limit abuse of this power, he proposes that unilateral, penalty-free divorce should be available early in the marriage when there are no children. He also believes that fault may have a role to play in exceptional cases. For example, a spouse may be driven out of a marriage by adulterous or cruel behavior, but the guilty spouse may be unwilling to consent to a divorce. Under these conditions, a fault divorce would provide a remedy for the injured spouse. In Parkman's view, such cases are rare and divorce in the case of established marriages would normally be by mutual consent.

In "An Economic Approach to Adultery Law" (chapter 5) Eric Rasmusen provides an economic analysis of sanctions for marital misconduct, of which adultery is one example. He rigorously examines three sanctions: criminal penalties for adultery, a tort action for "alienation of affections," and the self-help remedy of "justification." The penalties are then discussed in a variety of specific applications to past and present law. In modern law, the formal remedy is that the wronged party can file for divorce and force a division of the assets. This really is not a remedy, since under no-fault laws anyone can file for divorce. Other remedies existed in the recent past, of which vestiges continue today. These included criminal penalties, tort actions, and self-help. In general, efficiency requires adultery law that replicates the marriage terms that husband and wife would freely choose at the beginning of a marriage. In the absence of legal penalties, partners may avoid investing in the marriage or may heavily invest in monitoring the other partner. Adultery may be deterred either by the monitoring or by the credible threat of divorce when a partner has not invested

in the marriage. There is a very large welfare loss, created by the burden of monitoring and the loss to husband and wife if investments are avoided. There may also be costs attached to concealing adultery in circumstances where it can occur. To deter adultery efficiently, the introduction of a legal penalty must ensure a sufficiently large penalty that, even if the partners spend nothing on monitoring, the expected payoff from adultery will be too low to justify the risks involved. In that case, the partners will be deterred, and they will feel secure in using time investing in the marriage and not in monitoring. Both parties would be happy to accept the possibility of extraordinary penalties for adultery, *ex ante*, knowing that if the penalties are in place deterrence will be complete and no one will have to suffer them.

Katherine Spaht defends the role of fault in chapter 6, "Louisiana's Covenant Marriage Law: Recapturing the Meaning of Marriage for the Sake of the Children." As the person who drafted the covenant marriage law, she is in an ideal position to describe the thinking of those responsible for this reform. In Louisiana couples can now choose between two types of marriage: the conventional type, which permits easy divorce with few penalties; and the new covenant marriage, in which divorce is obtainable only after a substantial delay or on proof of fault. Before entering a covenant marriage couples must undergo counseling, and they must agree to mandatory counseling in the event of difficulties that threaten the marriage. Moreover, a spouse who is guilty of serious misconduct, such as adultery or physical abuse, may be compelled to pay damages in the event of divorce. There may also be damages if a divorce follows a refusal to take "reasonable steps to preserve the marriage, including marriage counseling."

The covenant marriage law unites two distinct strands of thought. It is consistent with the liberal notion that individuals should have the right to make binding commitments if they so choose. This choice is denied to them in states that offer only liberal, no-fault divorce. At the same time, it embodies the communitarian notion that marriage serves important social functions and that marriage law should embody moral principles consistent with these functions. The communitarian influence is especially clear in Spaht's treatment of marital counseling and fault. Under the covenant law, the primary purpose of counseling is to save marriages, and counselors are not expected to be neutral with regard to divorce. Although divorce is legally permissible, it is normally seen as a last option to be chosen only when other avenues have been fully explored. An exception occurs when some behavior by a spouse towards the other is so reprehensible that, despite society's interest in maintaining the marriage, the offended spouse may terminate it without prior counseling. A notable feature of this chapter is Spaht's robust defense of fault. Her grounds are both moral and practical. Marriage law, like ordinary contract law, should embody the moral notion of personal responsibility. She also considers that fault is no more difficult to establish in the case of divorce than in many other legal contexts.

In chapter 7, "Cohabitation and Marriage," Antony Dnes considers why people choose to cohabit rather than marry and the extent to which the law should seek to regulate cohabitation. He argues that many couples deliberately choose to cohabit because they do not want the legal commitments traditionally associated with marriage. The modern legal trend is to impose rights and responsibilities upon such couples irrespective of their wishes. Dnes considers this trend to be largely misguided, since it amounts to compulsory marriage for people who would prefer not to be married. The one exception concerns child support obligations following the dissolution of a cohabiting union. Legal regulation is justified in this case because children are third parties whose interests must be protected. Dnes also points out that people may choose to cohabit because marital law is dysfunctional and offers inadequate protection for spouses who invest in their marriage. He considers various ways in which this might be remedied. One option might be to make divorce contingent on the consent of both spouses (a specific-performance remedy likely to lead to bargaining). Another might be to apply normal contractual principles to marriage, so that damages would be payable for a unilateral breach of the marital contract. Dnes discusses the three standard principles for calculating damages: restitution, reliance, and expectation. He argues that expectation damages are the most efficient in the context of divorce.

In "Marriage as a Signal" (chapter 8) Robert Rowthorn applies the economic theory of signaling to marriage. Apart from a few seminal articles by authors such as William Bishop and Michael Trebilcock, this is a topic that has been largely ignored in the law and economics literature. Following the lead of these authors, Rowthorn argues that in Western culture marriage helps individuals to signal to each other and to the outside world their desire for a sexually exclusive, permanent union. However, modern legal and social trends have greatly reduced the credibility of this signal. It is now much easier to terminate a marriage and the penalties for serious misconduct have been eliminated or greatly reduced. As a result, marriage is no longer such an effective signal of commitment as it once was. This change represents a major loss of information that makes it more difficult to sort out the committed from the uncommitted. Even so, the degree of commitment is still higher, on average, amongst married couples than amongst cohabiting couples, and marriage is still the best predictor of the durability of a relationship. The chapter concludes with an extension of this application of signaling theory to cohabitation and same-sex marriage.

In chapter 9, "For Better or for Worse," Martin Zelder explores the subject of bargaining in marriage and divorce. He is concerned with two issues: the process of bargaining between potential or actual spouses, and the efficiency of the outcome. His chapter covers bargaining before marriage, during marriage, and at the time of divorce. He points out that theoretical analysis in this important area is in its infancy and systematic econometric work is even more

limited. The theoretical analysis of bargaining within marriage has developed in opposition to the early assumption that spouses have common preferences. If their preferences differ, then bargaining is likely to play an important role in household decision-making with regard to such items as expenditure, external employment, and the domestic division of labor. Such bargaining may be analyzed as a cooperative game in which the outcome is efficient, in the sense that one spouse could not be made better off without making the other worse off. Alternatively, it may be analyzed as a non-cooperative game in which the outcome may be inefficient, in which case the situation of both spouses could be simultaneously improved under alternative arrangements. Zelder also surveys the literature on bargaining over divorce. Following the lead of Becker, early work on this topic assumed that the legal framework has a negligible influence on the propensity to divorce. A number of authors, including Zelder himself, have recently questioned this assumption and have developed models in which the law has a significant effect on divorce rates.

In "Weak Men and Disorderly Women: Divorce and the Division of Labor" (chapter 10), Steven Nock and Margaret Brinig consider whether the divorce rate has increased because the modern marriage deal is unfair to women. It is a common complaint from women that they must do a double shift. The first comprises their hours of paid work outside the home and their second the long hours of housework when they get home. In considering the role of household labor, Nock and Brinig control for other determinants of dissolution such as age, presence of minor children, education levels, and other socio-economic variables. The effect of the household division of labor turns out to be of great significance. Marriages are strained when either partner does the majority of traditionally female work in the home, and are strengthened by time spent in traditionally male tasks.

In chapter 11, "The Impact of Legal Reforms on Marriage and Divorce," Douglas Allen examines the effects of no-fault divorce laws on three economic decisions: the divorce rate, labor force participation, and the age at which individuals marry. He provides new statistical evidence about age at marriage. A survey of the relevant work shows the effect of divorce laws to be clear but not large in absolute size. Introducing no-fault divorce raises the divorce rate by about 17 percent of the *increased* stock of divorces over the past thirty years. It also increases the age of first time marriage by up to nine months. Finally, it raises married women's labor force participation by around 2 percent. Allen's chapter gives a good illustration of the usefulness of applied (economics) work on family law.

Ian Smith examines the liberalization of divorce laws across Europe in chapter 12, "European Divorce Laws, Divorce Rates, and Their Consequences." Most investigations of the rise in divorce rates have focused on North America. The chapter re-evaluates the association between divorce statutes and divorce

rates in the European context. Since many jurisdictions are currently also evaluating rules regarding the division of marital property and child support payments, the chapter also comments on cross-country differences in the financial consequences of divorce. There is significant variation in the evolution of divorce rates and laws across European countries. Although legal innovations reflect and regulate changing behavioral patterns, Smith argues that it is currently difficult to establish a clear causal link between the liberalization of divorce law and rising divorce rates since the late 1960s. He notes that correlation does not automatically imply causation. Both the pattern of divorce rates and the strictness of legislation might be jointly explained by a third factor, for example religion or the economic costs of divorce for women and their children. A rigorous empirical study using a panel of data from European countries is required to permit discrimination between these hypotheses. This is not yet available. The historical trend in legislation is towards facilitating no-fault, separation-based marital dissolution. The trend, he argues, is unlikely to be reversed. There are currently no European initiatives comparable to the introduction of covenant marriage in some American states. Rather than using the law to discourage divorce, European countries (along with most US states) focus on measures that minimize its social and economic costs. Many European countries follow American trends in enforcing child support transfers, settling up after divorce, and the provision of child-care subsidies. Smith notes that insulating women and children from the adverse consequences of divorce may reinforce incentives for marital dissolution.

In commissioning the papers for this collection, we have tried to exhibit something of the range of modern work dealing with the economics of family law. We are confident that the reader will gain valuable insights into the issues surrounding marriage and divorce in the twenty-first century. We hope that this book will stimulate further research in the area.

2 Marriage: the long-term contract

Lloyd R. Cohen

Although far more than a contract from religious, cultural, biological, psychological, and philosophical perspectives, marriage is also a contract, the essence of which is transparent in the marriage vows.[1] The man promises that he will be a husband, the woman that she will be a wife. Each promises that whatever changes are wrought by the winds of time they will continue to perform their respective duties in a spirit of "loving," "honoring," and "cherishing" for the remainder of their lives. In reliance on these assurances, each spouse invests in this marriage, thereby sacrificing current and future love interests and other life choices.

The promise to perform duties in a particular spirit is not merely hortatory; it is a material requirement of the contract. In marriage, more than in any other contract, the spirit counts, and counts a lot. Both the value to the recipient of spousal services and their cost, or value, to the provider are crucially dependent on the attitude with which they are delivered and received.

Some might object to the characterization of marriage as a contract. They observe that marriage seems more like status than contract. That is, it is the state that defines and specifies most of the explicit rights, duties, and privileges of marriage, rather than the parties.[2] They also note the absence of substantial specific obligations voiced at the time of formation. How could this be a contract if there are virtually no specific, explicit duties?

These objections are not fatal to the concept of marriage as contract. They do no more than highlight the peculiarities of this contract. The contractual essence of this institution is that it is a voluntary agreement between two consenting adults, albeit an agreement in which the obligations, rights, and privileges are left largely implicit and defined, if at all, principally by the state rather than

[1] This chapter reflects the most current statement of my thought on the subject of marriage and divorce. My earliest and somewhat more complete statement on the subject appears in Cohen (1987). See also Cohen (1998, p. 618) and Cohen (1995).

[2] There has been much discussion in the legal literature of whether marriage is best understood as a contract relation or, alternatively, as a status relation. Some commentators have argued that, "because the law, not the parties, defines the obligations of each spouse," the relationship is truly one of status rather than contract (Babcock, 1978, p. 564). See generally, Clark (1968), esp. section 6.1 at pp. 181–2.