

# The Economics of Family Law

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## 1. Introduction

The family, perhaps the most enduring institution in the history of civilization, performs many essential functions for individuals and societies: reproduction, physical and economic sustenance, socialization of children into the norms, values, and language of their culture, protection, care and emotional support for children and the elderly, regulation of sexual behavior, affection and companionship, and in many societies, education. Families rear children, prepare meals, and provide shelter. At the same time, they instill in younger family members values like love, patience, and compassion and virtues like tolerance, discipline and forgiveness. In short, families allow societies to reproduce themselves physically, socially and culturally.

Traditionally, family law had set down the rules that regulated the relationships of individuals within families. For historical, cultural and economic reasons the family was perceived as a unit. 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, however, 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, which in turn is closely interrelated with larger social trends, such as individualization, secularization, rapid urbanization and the increasing participation of women in the labor force.

Today most contemporary societies, especially those which are market-oriented, are characterized by an unprecedented variety of family forms. The fast-rising divorce rates have created a large number of single-parent families and stepfamilies. There is also an observed increase of adoptive families, owing to the significant rise in the number of married couples who are involuntarily childless, combined with the soaring rates of out-of-wedlock births in most Western nations. Also, the high percentage of women who enter paid employment has overturned the traditional male breadwinner/female homemaker model of marriage, leading to a substantial increase in the number of dual-income (or two-paycheck) families.

The diversity of family forms and the increasing plasticity of the terms that are used to define contemporary families are directly linked to the heterogeneity characterizing family ties. According to the letter of the law, family members are no longer entangled in oppressive relations of dependence, but share family responsibilities on equal terms. Egalitarianism is the ideal that permeates both spousal and parent-child relations. Deference has given way to affection and modern-day parents have ceded a lot of authority to their children.

Therefore, although social scientists still adopt a view of the family as a unit in forming their research hypotheses, they know that this unit is actually more heterogeneous than previously assumed. Moreover, interdisciplinary approaches to the family, like economics or sociology of family law, have both expanded current views of how families function and sharpened the focus on specific social problems related to the family.

## 2. The economics of the family

It was in the early 1960s that Gary Becker began to publish his pioneering work which applied the tools of economics to the study of the family. Becker, who was awarded a Nobel Prize in 1992, was a pioneer in drawing parallels between the economics of the household and the economics of firms, marking the birth of a new area of study which became known as the *New Home Economics* and inciting strong scholarly interest across disciplines. For the past four decades, the burgeoning economic literature on the family has linked the public and the private spheres,<sup>1</sup> by illuminating the relations between the household division of labor and its impact on the labor supply of married men and women,<sup>2</sup> or between fertility and female wage rates.

Today it has become quite clear that the economic approach to the family can help legal practitioners, legal theorists and judges develop a better understanding of how family law functions. On a normative level, economic analysis provides solid methodology in the form of viable models that allow theorists to identify the incentives created by a particular legal framework and thus predict the behavior of affected parties. On a praxeological level, the tools of the “hard” science of economics trace the practical consequences of the implementation of legal rules, revealing their degree of effectiveness. Overall, lawmakers and lawgivers alike are enabled to foresee the consequences of their actions (by *a priori* adopting the most suitable rules with which to regulate family life) and also to “correct” these consequences (by *ex post* improving on existing family law statutes and making the necessary adjustments).

Economic analysis generates its predictions on the basis of certain key assumptions. The most basic among them is the premise that family members are rational utility-maximizers. It is assumed that people, on average, will do their best to make themselves happy with whatever means are available to them. Another central assumption is that resources are limited and thus individuals are required to make choices under constraint. Individuals try to achieve their objectives given their limitations (limited time, money, energy, or information) – i.e. they optimize.

The assumption of optimizing behavior is a useful hypothesis for the area of the family, because it provides a sound explanatory basis for many unsatisfactory outcomes. To use the example of a failed marriage, we may assume that marital conflict is attributable to the spouses’ poor judgment about each other’s characteristics prior to marriage. But why do men and women make seemingly wrong choices upon marriage? A facile answer would be that human beings are just crazy or stupid or that they have decisions totally determined by their environment. An economic-minded person would instead hypothesize that men and women simply make the best choices they can subject to limitations on their resources, e.g. shortages of information as to the quality of a prospective partner, high transaction costs which make

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<sup>1</sup> See especially the collective volume edited by Shoshana Grossbard-Schechtman with Jacob Mincer (2003), which is the latest sampling of research conducted by the second and third generation of New Household Economics analysts.

<sup>2</sup> See e.g. Hersch and Stratton (1994).

the search for the best possible marriage partner costly,<sup>3</sup> etc. Of course, some poor decisions are made simply because people can never know the future. When the future differs from their expectations (rational or not), then they may become more willing to put an end to their marriage.<sup>4</sup> Research suggests that couples entering marriage are overly optimistic and generally underestimate the possibility that their own marriage will fail.

The concept of rationality implies that individuals reveal their preferences for various goods based on the *utility* they derive from each good. Utility is a term synonymous to welfare, satisfaction, and occasionally, happiness. To say that an individual derives more utility from good *X* than good *Y* is simply to say that *X* is preferred to *Y*. To use an example, a man choosing to marry is revealing his preference for marriage as a living arrangement from which he derives greater utility than if he had remained single. In another example, in societies favoring sons, the availability of prenatal sex determination leads to the abortion of female fetuses. This in turn creates an imbalance of sex ratio (a shortage of women) and perpetuates both social segregation by sex and intrafamily discrimination against daughters.

Perfectly rational people tend to respond to the incentives confronting them. For example, a government policy such as the income tax system can create incentives that will encourage women to increase their at-home labor --and discourage their labor force participation. In Sweden, where husbands and wives are taxed separately and child benefits for working mothers are generous, both fertility and female labour-market participation are considerably higher than in Germany (where couples are jointly taxed and benefits are not as generous).<sup>5</sup> On another level, families or households as units respond to state-imposed public policies such as taxes. Households pay taxes, an important source of public revenue, and consume goods and services, which constitute a large part of public expenditure. Hence, analyzing the response of households is clearly necessary for designing optimal tax, budgetary or welfare policies.

Economics can tell legislators what to expect in terms of the incentives created by specific policies. Many of the harsh “unintended consequences” of legal reform that had proclaimed ambitious goals but actually did more harm than good could have been predicted and prevented if economists had been consulted. Yet some legal scholars and other non-economists remain skeptical about the application of economics to the family, questioning whether relationships characterized by strong emotions, such as the love between parent and child or the affection and companionship between a man and a woman prior to marriage, can be analyzed and understood in terms of “rational self-interest” that have been equated in the minds of most with activities of the public sphere like commercial transactions.

However, a rudimentary knowledge of the economics of the family will dispel any misunderstandings and reservations. Some parents are selfish beneficiaries, but others are altruistic; women will seek to combine motherhood with labor force participation by reducing their desired number of children, etc. In short, the behavior of individuals in families can be explained without being “commodified” or “commercialized”. The voluminous literature has clearly demonstrated the predictive power of economics regarding the behavior of family members. Even a hasty glance at the relevant work, both theoretical and empirical, leads to

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<sup>3</sup> For example, let us assume that the perfect (*optimal*) marital partner for Sabrina, who is searching for a mate in New York City, is John, who lives in Tokyo. The transaction costs that Sabrina would incur to search for and locate John (airplane tickets, hotel accommodation, the potential opportunity cost of giving up her promising career for an uncertain professional future in Japan, etc.) are so prohibitively high that Sabrina would in all likelihood remain in New York City and “settle” for second best (Paul), or even third best (George) as far as marital partners are concerned.

<sup>4</sup> Scott (1990) argues that the period before marriage is not optimal for making decisions about divorce because of predictable cognitive error. She further suggests that such cognitive biases make decision-making concerning marital commitment difficult to predict.

<sup>5</sup> See the comparative study conducted by Gustafsson (1985) as cited in Cigno (1991: 113).

the safe conclusion that the marriage between family law and economics has proven a happy and fertile one.

### 3. A theory of household production

An economic model of the family and 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. More particularly, homemakers use inputs (such as laundry detergent) and spend their time doing nonmarket work (e.g. time spent doing laundry, drying and ironing the clothes) to produce final products (e.g. clean clothes). Similarly, 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) produced by household members who use as inputs not only the market commodities, but their own time as well.

The assumption that households produce commodities by combining inputs of goods and time was at the heart of Becker's path-breaking "theory of the allocation of time", which he presented in 1965. Since then, Becker has written extensively on *human capital*, formulating a general theory that offers a rigorous scientific basis for the recognition of the economic value of housework. Human capital theory forms the theoretical base upon which almost all modern labor economics is built and has been successfully applied in other fields such as education.

Human capital is the economic value of a person's ability to produce goods and services in the future. The fundamental idea is that people can invest in *themselves*, purchasing education and training in order to acquire skillful jobs and earn more money later in life.<sup>6</sup> The spouse who invests in children may forego valuable opportunities to develop skills she could sell in employment markets. The spouse who is freed from childcare responsibilities can work outside the home and contribute financial assets to the marriage. The asymmetric quality of the spouses' investments creates a risk of opportunism. The "working" spouse can withdraw from the marriage after reaping much of the advantage of specific investment in the children, but before making his or her own financial contribution.

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.

To use an example, let us suppose that a married couple is deciding how to maximize their joint utility. Even if both spouses were employed prior to marriage, if there are gains to specialization -if one spouse spending all his/her time in the labor market and the other spending all his/her time at home yields a greater return than each spending some time in both sectors- then one spouse may work in the household full time and the other in the market full time. Similarly, if the returns to market labor are high for both, they may both work for wages

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<sup>6</sup> As casual observation confirms, most high-wage jobs require a long period of education and/or training. If a worker forgoes years of wages in order to fulfill the requirements for this type of job, it must be because earnings are high enough later to compensate for the "difficult" years. The term "human capital" is used since the skills (the means of obtaining the return on the investment) are embodied in the worker.

and purchase household goods (eating out instead of cooking, hiring a domestic for chores like cleaning, and so on).

This theory incited strong interest in the study of the family under the lens of economics, producing what is now a rich body of literature that connects the monetized economy of the public sphere and the non-monetized economy of the household. Becker himself refined the theory in subsequent publications, illuminating many aspects of the division of labor within households. 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)

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 (Gronau 1980), implying that even if she remains out of the paid labor force, she generates 40 percent of the household's full income.<sup>7</sup> Therefore, families in all societies are responsible for a sizeable part of economic activity, since they have produced much of the consumption, education, health and other human capital of their members.

#### **4. Marriage and the formation of families**

In traditional societies, one of the most significant functions performed by the family is the regulation of sexual behavior. The sexual norms which prevail in a given society exert considerable influence on the sexual behavior of men and women. Moreover, such norms may play a decisive role in an individual's decision to marry.

Marriage is a defining event for the overwhelming majority of adult men and women in virtually all countries. Despite the many changes it has undergone over time, marriage has proven to be a resilient institution, if only because such an overwhelming number of men and women continue to reveal a preference for marriage as a necessary precondition for creating a family. Indeed, although children in developed countries are quite costly and couples could easily use contraception to avoid having them, they still choose to bring children into the world and remain genuinely concerned about the quality of life they will offer their children.

As the divorce rates in virtually all Western nations are skyrocketing (and given that remarriage rates are not declining), social scientists have become increasingly drawn to research concerning people's decision to marry. Much of this empirical work is conducted by economists, who have proposed various models for analyzing and understanding the marriage market.

##### **4.1. Choosing a mate**

Over the last few decades, sociologists, psychologists and anthropologists have developed interesting mating theories, aiming to explore and understand the fascinating area of mate

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<sup>7</sup> Becker has described housework as "the missing piece of the economic pie", explaining that families and households are in effect small factories that even in the most advanced nations produce many valuable services and goods (Becker and Nashat Becker 1997: 127).

choice between men and women. In recent years, economists have taken up the relevant research, looking at the mating process from the perspective of incentives and cost-benefit analysis. Their findings have provided new insights and have enriched our understanding of this shady area of human behavior.

Let us briefly examine some of the main points in the relevant literature. A factor of decisive influence in people's mating decisions is *homogamy*, the tendency of like to marry like (in terms of age, race, religion, nationality, education, intelligence, health, etc.). There is ample empirical evidence that homogamous marriages are more common and more successful.<sup>8</sup> Physical attractiveness also plays a part in mate selection. It appears that people habitually prefer the companionship of attractive people to that of unattractive people. However, since the supply of unusually beautiful or handsome partners is limited, in real life individuals tend to select partners who have a degree of physical attractiveness similar to their own. According to the *matching hypothesis*, people typically experience the greatest payoff and the least cost when following this course. A third important factor in choosing a mate is that individuals mate by identifying different personality traits that are complementary to each other.<sup>9</sup> For instance, dominant people find a complementary relationship with passive people, and talkative people find themselves attracted to good listeners. Similarly, men who earn higher wages may find that they are better off marrying women who are homemakers with a low opportunity cost for providing homemaking services, i.e. women who would not receive a high wage doing market work. In such cases, more household product will be produced by mating with someone with complementary traits.

Combining the aforementioned three factors, *exchange theory* is based on the notion that individuals tend to like those who reward them and dislike those who punish them. Individuals with similar social traits, attitudes, and values are mutually rewarded by validating one another's lifestyle and supporting it at very low cost. For example, in selecting partners of comparable physical attractiveness, one minimizes the risk of rejection while maximizing the profit from such a conquest. In other words, people involved in a mutually satisfying relationship will exchange behaviors that carry a low cost and a high reward.

#### **4.2. The marriage market**

The neoclassical economic theory of marriage is based on two assumptions: The first is that 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. The second is that 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.

Optimal assortative mating forms the basis for the theory of marital search, which was first expounded by Becker (1973, 1974). Becker developed a “specialization and trading” model of marriage, in which 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.<sup>10</sup>

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<sup>8</sup> In a recent behavioral study on the cognitive processes underlying human mate choice in Western societies, Buston and Emlen (2003: 8809) conclude that humans use a “likes-attract” decision rule when forming their preferences for long-term partners.

<sup>9</sup> This is the *theory of complementary needs*, formulated by sociologist Robert F. Winch (1958).

<sup>10</sup> Similarly, Becker argues that couples divorce when they no longer believe they will be better off by staying married. Also, the number of children a couple has depends on the costs and benefits of child rearing. Therefore, couples tend to have fewer children when the wife works and has a better-paying job, or when the cost of educating children rises, etc.

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.

Based on Becker's theory of marriage, Grossbard-Shechtman (1995) develops a model that focuses on a key determinant of marriage market conditions –the relative number of men and women in a given society.<sup>11</sup> 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 high (i.e. there is a surplus of men in the marriage market), women benefit from marriage, and when it is low (i.e. there is a surplus of women), men benefit from marriage. Therefore, when the sex ratio increases, so will women's share of marital consumption and leisure.

According to another model of marriage proposed by Oppenheimer (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. Although previous studies of the economic context of marriage had focused most on the effects of good economic prospects on marriage among men, there is now a shift of attention to the importance of women's labor market position and economic prospects for marriage formation.

Pooled household models have also been used to study marriage markets. These models assume either collective decision making within the household or a principal decision maker, who is altruistic. Their weakness lies in their basic hypothesis that family demand is independent of which family member's income rises. Lastly, our current understanding of marriage markets has been enriched with models of quality signaling, which refine existing theories regarding optimal marital search and help explain the repercussions of misperceived quality on marital relationships.

Game theorists have proposed their own theories of marriage as alternatives to the neo-classical models mentioned above. According to game-theoretic (or cooperative bargaining) models,<sup>12</sup> each household member has a utility function and 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. Consistent with this hypothesis is evidence that marital-property laws have an impact on women's labor force participation (Gray 1998). Finally, Gottman et al. (2003) have recently proposed a mathematical model for the study of marriage, aiming to build a mathematical framework for the general system theory of families first suggested by Ludwig Von Bertalanffy in the 1960s.

The value of men and women in the marriage market has also been explored. It has been found to vary with education, family income, ethnic origin, number of previous marriages and age. The human capital assets of husbands and wives do not have the same time profile of growth and depreciation. Therefore, if a wife's human capital consists only in her reproductive capacity, then a woman's value in the marriage market typically decreases with age faster than a man's. Hence, women incur a higher cost for exiting marriage.

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<sup>11</sup> It has been found that the success of the matching process in the marriage market depends both on the number of potential partners and on the reliability of information about important characteristics of both the searcher and the potential partners.

<sup>12</sup> See mainly McElroy (1990).

Another strand of research has branched off in the direction of the remarriage market. It has been shown that conditions in the remarriage market affect bargaining power over the allocation of resources within existing marriages (Lundberg and Pollak 1996), as well as the risk of marital dissolution. To use an example, if the sex ratio of unmarried men to unmarried women in certain age groups is high, then remarriage opportunities of wives could be favorable. In these cases, women will be in a strong bargaining position with respect to the distribution of marital assets and will be more likely to initiate divorce proceedings.

As the term itself suggests, the marriage market bears many similarities to the labor market. In recent years, these two markets have been investigated in parallel, yielding interesting findings. Researchers have used Census data to investigate the impact of labor and marriage market conditions on the incidence of marriage of specific demographic groups (for example, on the decision to marry of young women aged 16-24). According to a recent study, the factors which were found to play a strong role in lowering marriage rates were better female labor markets, worse female marriage markets and worse male labor markets.

Social scientists have given particular attention to women's decision to marry and its correlation with women's labor force participation. Today women marry at a later age and have both greater labor force participation and higher earnings.<sup>13</sup> Many studies have attributed declines in the marriage rate to increases in women's economic independence resulting from these trends. This view, which assumes that women with good prospects in the labor market will be less likely to marry than will women with relatively poorer prospects, is commonly labeled the "economic independence hypothesis".

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. 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. A comparative study between Italy and West Germany focusing on the changing impact of union formation on the transition to motherhood, suggests that household and partnership formation has structural effects on fertility (Billari & Kohler 2000). 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.

Another factor that has a determining impact on the mating game is the unemployment or insecure professional status of either searching partner, which has been shown to delay couple formation and to worsen the quality of the potential match.<sup>14</sup> Similarly, individuals have been shown to take the risk of separation into account when deciding on their labor force participation. More particularly, both divorced persons and cohabiting individuals tend to have higher than average labor market participation because they know that they run higher

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<sup>13</sup> Women's economic prospects are measured in terms of their earnings, educational attainment, and employment status.

<sup>14</sup> This is particularly true for the members of social minorities, for example African-Americans, since higher adult male unemployment rates and lower adult male average wage rates were found to reduce marriage rates.

risks of experiencing a separation in the future, which will make them the sole income provider of their household.

### ***4.3. The market for alternative living arrangements***

Another strand of research has focused on individuals' decision *not* to marry. Men and women who choose not to marry either live in alternative living arrangements (primarily heterosexual and secondarily same-sex cohabitation), or remain single throughout their life course. Marriage and divorce are institutions which are publicly observable; thus they create costs for exiting a match --but informal relationships do not.<sup>15</sup> This is why alternative living arrangements (or alternative family forms) have become increasingly common, attracting more scholarly attention in recent years. 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.

Cohabitation was still an infrequent living arrangement in the early 1970s and was considered a deviant behavior. Today it has become a generally common life-course experience, particularly among young people.<sup>16</sup> In European countries such as France, unwed cohabitation has over the last decade become the major alternative to traditional legal marriage. Legal reforms across Europe seem to be moving in the direction of "equalizing" both heterosexual and same-sex cohabitation with marriage.

For law and economics scholars, the significant growth of cohabitation is in large part a response to the lack of flexibility in the traditional Western marriage laws. Moreover, 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 is also the result of government policies: for example, Sweden does not offer a "marriage allowance" for tax purposes and no tax deduction for raising children. In response to these incentives, an overwhelming number of Swedes engage in unmarried cohabitation. Finally, increased cohabitation may be related to unfavorable economic circumstances, since many couples choose to cohabit in order to share the rising expenses of urban living.<sup>17</sup> A strong indication is the demographic evidence of higher non-marital childbearing in the lower social strata.

Lastly, 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. For example, if men were relatively scarce, we might see more women choosing same-sex partners or choosing to remain single. Similarly, if social disapproval decreases, we may see a greater number of homosexual relationships.

The decision of men not to marry is also correlated with the rapid increase in the illegitimacy ratio, which is the proportion of all births by unmarried women. In the United States, theorists have attributed this increase to the decrease in "shotgun marriages" (marriages celebrated at gunpoint, usually under duress or coercion due to an accidental pregnancy). Two major factors that account for the decline of shotgun marriages are the wider availability of abortion after the landmark U.S. Supreme Court decision of *Roe v. Wade*, and the increase of

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<sup>15</sup> Perhaps Dnes (2002: 129) puts it best: "[C]ohabitation is potentially a highly rational state chosen deliberately by people who wish to limit the commitments they assume towards each other, possibly as part of a pattern of careful search for a marriage partner".

<sup>16</sup> However, recent Census data indicate significant increases in cohabitation among older people. Cohabitation still remains a relatively short-lived family form, since many cohabiting couples either marry or separate within two years.

<sup>17</sup> There are economies of scale in cohabitation.

financial aid provided to never-married mothers. Once again, this constitutes a very good example of how a change in the law (either by statute or by interpretation) brings about changes in society, by altering the incentives of social actors and thus the decisions they make regarding important life-shaping events like marriage and parenthood.

Legal economists explain the increased prevalence of abortion in terms of the expected costs and benefits to women. Put simply, prior to making their decision, women weigh the costs of single motherhood against the costs of an abortion. When abortion is available (meaning sanctioned or allowed, both legally and socially), a large number of women will choose to have an abortion, since abortion will carry a lower cost than the costs of single motherhood. Under such a regime, women will not need to seek a promise of marriage on the part of men before agreeing to be sexually intimate. The inverse is true when abortion is unavailable: women have the incentive of soliciting promises of marriage before agreeing to be sexually intimate with men, precisely because the costs of abortion are too high and clearly outweigh the costs of single motherhood (Akerloff et al. 1996).

There is sufficient statistical evidence corroborating these assumptions. To use only one example, abortion rates are substantially higher in the United States than in the United Kingdom (and other European countries) because abortions are generally easier to obtain in the United States. Moreover, the U.S. abortion rate is affected by the existence of a public policy subsidizing abortion for poor women. By contrast, women in the U.K. have greater access to contraception than U.S. women. Thus, the availability of birth control puts a check on the abortion rate.

## 5. Divorce and its consequences

Perhaps no other area within the economics of family law has been as well-explored as the area of divorce. The dissolution of marriage is an event that is rich with implications on many different levels. It is thus understandable that social scientists (particularly sociologists and economists) would approach divorce as a phenomenon with broader socio-economic consequences and with spill-over effects on many other social institutions.

It was in 1969 that Ronald Reagan, then Governor of California, signed the first no-fault divorce law. During the 1970s, one state after another adopted no-fault divorce statutes, in a sweeping "silent revolution". By 1985, all states had allowed couples to divorce without proving fault, although the laws governing distribution of assets vary from state to state. A similar revolution has taken place on the European continent, when even countries with strong religious resistances (like Italy, Greece and fairly recently Ireland) liberalized their divorce laws.<sup>18</sup> Ever since this strong pro-nofault wave swept across Western nations from the late sixties and the mid-eighties, the purposes and premises of no-fault divorce have been strongly debated, by social scientists and legal theorists alike.

The major economic consequence of no-fault divorce is that it allows either spouse to terminate the marriage *unilaterally*, i.e. without the other spouse's consent. Today there is a rich body of research demonstrating that no-fault divorce has imposed unexpected costs on third parties (women and children) that were greater than any benefits it might have had (Parkman 2000).

Divorce has become easier, on a legal, social and economic level. From a legal-technical point of view, divorce in many cases can be likened to an administrative procedure. This is especially the case with divorce by mutual consent (or consensual divorce) which rep-

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<sup>18</sup> Most European countries had reformed their divorce legislation during the 1970s: England (1969), followed by the Netherlands (1971), Sweden (1973), France (1975) and later by Austria, Italy, Portugal, Spain and Greece. However, only Sweden had instituted a total no-fault system of divorce.

resents the most popular type of divorce in Europe today. Socially, divorce is better tolerated than in the past, especially in urban areas. This is a reason that applies particularly to women, who are no longer socially stigmatized by divorce.<sup>19</sup> Overall, divorce has become less costly to women, from a psychological, sentimental and cultural point of view.

Finally, divorce carries a lower cost for the spouses from an economic point of view. This is also a reason that finds special application in women, because more women are working in paid employment today than ever before. The sense of security provided by a well-paying job leads women to believe that their economic independence is a sufficient guarantee for ensuring a financially stable life for themselves and their children. This perception leads a growing number of women to invest more in market-oriented human capital and to have greater expectations from this investment (in terms of future earning power, etc.) than from investment in marriage. Therefore, divorce has become literally less costly to women working in paid employment.

We should note that although the facilitation of divorce influences both men and women, it is women's decision to divorce that is increasingly having a considerable impact on the divorce rate. Statistics indicate that in most countries of the West, women have increasingly instigated divorce proceedings (Brinig and Allen 2000). There is a growing body of research aimed at investigating why this is so. The findings of a recent study (Johnson 1999) are characteristic: the longer work hours of women (ten hours added to the average wife's work-week) raise the probability of divorce substantially more than the longer work hours of men do. Along a similar vein, although higher income for men reduces the probability of divorce, higher income for women increases such probability.

### ***5.1. The consequences of divorce on 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). More importantly, the primary child-rearing obligations assumed by wives most often occur before the peak earnings period of the husbands.

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.

Furthermore, women take the biggest risks in the development of human capital within marriage, since 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. 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.

Another reason why predominantly houseworking wives are particularly vulnerable under the current no-fault regimes is that the advent of no-fault divorce has pressed all marriages toward a particular mold: one in which both parties are independent, self-supporting, and free to exit their marriage without a finding of culpable action. The corollary of this model of mar-

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<sup>19</sup> Becker (1991: 356) notes that as divorced persons become less stigmatized, they can more readily find other divorcees to marry. Thus, a growth in the divorce rate itself eventually encourages additional divorces. See also G. Becker et al. (1977).

riage is the "clean break" philosophy of divorce, based on the clear legislative preference for use of property division rather than spousal support to address need. However, under the separation of assets theory of property, there is no legal recognition of the economic worth of the homemaker's services.

Today it is widely recognized that the no-fault grounds for divorce have reduced the bargaining power of those spouses who do not want to divorce (Mnookin and Kornhauser 1979). Most often these are women who have specialized in domestic work during marriage. By eliminating the need for their consent, no-fault divorce has deprived wives of considerable bargaining power relative to their husbands over issues like alimony and child support, as the need for concessions from a divorcing spouse was reduced. Wives can no longer ensure satisfactory property settlements for themselves and their children, because husbands no longer need to give an exchange for their wives' consent to divorce. Indeed, it has been found that reduced bargaining power at divorce leads to lower alimony and child-support payments,<sup>20</sup> as well as to unsatisfactory and unfair financial settlements for women.<sup>21</sup>

Finally, the marked shift from permanent alimony to short-term, rehabilitative alimony over the last three decades has further disadvantaged women in long-duration marriages. In recent years, empirical evidence from different countries demonstrates that permanent alimony is rarely awarded. However, a positive change is that economics has broadened the legal perspective on views on alimony, as shown by a long line of appellate decisions reversing short-term alimony awards to longtime homemakers (Carbone 2000: 285).

Empirical evidence shows that there are marked gender differences in the way individuals experience the changes entailed by divorce. Men's greatest problems after divorce seem to be psychological, resulting mostly from the lack of contact with their children and the duty to pay child support, while women's greatest post-divorce problems relative to men's are financial. These problems were first documented in the 1970s, when they had been identified as the *feminization of poverty*. Today, three-fourths of all poor families in the United States are headed by women and more than half of single-mother families are living below the poverty line.

Most wives become poorer after divorce, while most husbands experience an increase in their standard of living. The economic problems of divorced women are exacerbated by the fact that they retain physical custody of children following ninety percent of divorces. Recent studies of both old and new data have shown that women on average suffer about a 30 percent decline in their standard of living following divorce, largely because they must still care for children, and also because few men assume traditional financial responsibilities for their children after divorce. Thus, awarding custody of children to their mothers reinforces and perpetuates traditional gender roles after divorce.

Divorced mothers as a group earn significantly less than divorced fathers. In 1991, 39 percent of all divorced women with children and 55 percent of those with children under the age of six were living below the poverty level (Wallerstein 1998: 76). Moreover, studies show

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<sup>20</sup> See Weitzman (1981 and 1985), who found that 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. However, Peterson (1996) re-evaluated Weitzman's data, concluding that the effects of divorce were actually a 27 percent decline for women and a 10 percent increase for men. Duncan and Burkhauser (1988) used data from the Panel Study of Income Dynamics and found that one-quarter of married women aged 26 to 35 who divorce or separate experience a decrease in their income-to-needs ratio of at least 50 percent. Finally, Garrison (1991, p. 720) 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.

<sup>21</sup> These settlements usually consist of a return of any separate property and an equal division of the marital property –and generally ignore the largest source of the couple's wealth, which is human capital. The bridging concept between alimony and marital property is human capital (Parkman 1987).

that women and children who were in the upper economic group prior to divorce suffer the most precipitous decline in income. Since the postdivorce economic problems of American women are so closely interconnected with the economic problems of children, the feminization and the "infantilization" of poverty are often treated as a single social problem.<sup>22</sup>

Women and children in Europe fare a lot better after divorce thanks to more effective welfare programs. Countries like Sweden have been particularly effective in reducing women's poverty through sizeable state subsidies to working parents, universal access to child care, and so on. However, the deregulation of the labor market in the last two decades has led to changes in the private and public sectors which have weakened welfare regimes in several countries (see esp. Rubery et al. 1999). Thus, future policies should more effectively match individual household patterns with employment practices and enable men and women to combine employment with a fulfilling family life.

### **5.2. The effects of divorce on children**

In most cases, marriage "evolves" into something more than a "two-party" deal. Children enter the contract as third parties, who do not have a say over how the contract is realized, or over how and when it will end, but have a definite "vested" moral and material interest in the preservation of the marriage. Thus, divorce creates *negative externalities* for children. An externality is a term widely used in economics to describe the impact of one person's actions on the well-being of a third party.

Children are the most significant measurable example of *a public good within marriage* (Weiss and Willis 1985: 268), a "family" commodity that is "enjoyed" jointly by the two spouses, or a domestically produced asset. In economic terminology, a public good possesses two basic characteristics: it is neither excludable (that is, people cannot be prevented from using it) nor rival (that is, one person's enjoyment of a public good does not diminish another person's enjoyment of it). Therefore, if husband A and wife B have two children, the number of children enjoyed by A is the same as the number of children enjoyed by B --two. Within marriage, A cannot choose to have fewer children so that B can have more.

By contrast, private goods within marriage are both excludable and rival. Consider the different kinds of marital assets. For example, the marital home (a durable commodity to which the couple attaches sentimental value) is excludable, because it is possible for one spouse to prevent the other from using it --by just not giving it to him/her. Consider also the money spent by parents on their children. As noted by Weiss and Willis (1985), after divorce, the custodial parent will spend less on the child than he/she would in the marriage, because expenditures by one spouse on the child confer a benefit on the other. Expenditures on the child become a rival good after parents divorce, as children lose some of their public-good characteristics, becoming more costly to maintain. In fact, it has been suggested that the larger the fraction of its income a couple spends on children (relative to other transferable goods), the more likely that couple is to encounter non-transferability problems and to get divorced under a no-fault divorce regime (Zelder 1993: 254).

Some theorists view marriage as an observable institution that improves men's incentives to make costly unobservable investments in their children (see e.g. Murphy 2002). Under the perspective of such theories, some marriages end in divorce precisely because some fathers do not invest in their children. To use the correct terminology, these fathers are *opportunistic* (investing in their children is costly for them).

The advent of no-fault divorce has hurt children economically, by leaving their mothers with inadequate financial resources. But a substantial body of literature demonstrates that the

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<sup>22</sup> See e.g. Everett (1994). In the United States, one out of five children, and one out of two single mothers, live in destitution.

no-fault regime has also caused palpable psychological damage to children (see indicatively Amato and Keith 1991). Longitudinal studies have revealed that young women from divorced families face several psychological difficulties in late adolescence and young adulthood. It has also been shown that children whose parents have divorced exhibit more health, behavioral, and emotional problems, are involved more frequently in crime and drug abuse, and have higher rates of suicide.

Lastly, more is known today about the long-term effects of parental divorce on adult children, as a growing number of studies examine the continuing effects of a parental divorce on individuals over their adult life course. The findings of such studies seem to suggest that the life courses of individuals whose parents divorce continue to diverge in adulthood from the life courses of those whose parents do not divorce. Indeed, parental divorce has been associated with diverse problems in young adults, such as low educational attainment and early childbearing (McLanahan and Sandefur 1994), more premarital cohabitation, early marriage and divorce, even a shorter life span.

### ***5.3. Reversing the no-fault current: can we reduce the divorce rate?***

In the United States, there is an ongoing scholarly debate over the effect of no-fault divorce on the divorce rate. According to some economists (Peters 1986; Ellman and Lohr 1998; Gray 1998), the switch to no-fault divorce, which lowered the transaction costs of divorcing one's spouse, has two empirically observable effects:

- (a) It 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),<sup>23</sup> and
- (b) It has reassigned the property rights within marriage. Under fault regimes, the spouse who most wants to exit the marriage must "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, will not be 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.

Although most economists agree on point (b), there is general disagreement concerning point (a), that is, concerning the impact of no-fault divorce legislation on the divorce rate.<sup>24</sup> In a seminal study, Peters (1986) had used a large data set to conclude that no-fault laws had no impact on divorce rates.<sup>25</sup> 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

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<sup>23</sup> 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 of a year or two, but they find no evidence of any long-term effect.

<sup>24</sup> For an illuminating overview of the particular debate, see Allen (2002: 197-208).

<sup>25</sup> As noted by Allen (2002: 204), Peters was the first economist to link no-fault divorce laws to the labor force participation rate of women. Peters 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.

next decade. These results are suggestive of spouses bargaining within marriage, with an eye to their partner's divorce threat.

However, 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 (see esp. 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<sup>26</sup> and that the advent of no-fault laws lowered them considerably. Thus, "the question of what happens to the divorce rate when the law changes from fault to no-fault is ultimately an empirical one that hinges on the level of transaction costs" (Allen 2002: 126).

Since two of the most dramatic demographic trends in post-industrial societies today are the decline in the marriage rates and the rise in divorce rates, the basic question that has been addressed by economic analysis is whether the enactment of stricter divorce laws would curb the divorce rate and thus promote the stability of family life, perhaps ultimately encouraging the marriage rate.

Some theorists posit that high divorce costs may discourage single individuals from marrying. In earlier work, Becker had argued that when divorce becomes easier, the number of people who are legally married may actually increase, as illustrated by the example of Latin American countries, where divorce is virtually impossible and yet only a small fraction of the adult population is legally married. A number of empirical studies lend support to this argument by pointing to the example of Catholics who tend to postpone marriage till a later age (or not marry at all) because of high divorce costs, a result of the Catholic Church's opposition to divorce. However, other economists maintain that changes in divorce costs have a negligible effect on single individuals' decision to marry. More particularly, there is research showing that changing divorce costs (through new divorce legislation) had an effect mostly on the incidence of divorce rather than on the incidence of marriage.<sup>27</sup>

Within the same area of discourse we find another suggestion which has received much attention: the proposed switch from the current no-fault laws to divorce laws requiring either mutual consent or proof of fault. Since 1996, at least eight states have begun considering to tighten their divorce regimes in this direction.

Yet another proposal for reversing the damage wrought by no-fault is to effect legal changes which will help protect the parties that run the highest risk of being the most disadvantaged after divorce. In this direction, a view which is fast gaining momentum is the call for a privatization of marriage law. Becker and Nashat Becker (1997) have proposed that divorce laws be replaced by private marriage contracts, which will be compulsory. Advocates of private ordering during marriage propose using the principle of freedom of contract to enhance security of contract in the context of marriage.<sup>28</sup> A shared belief that they hold is that traditional marriage had provided a framework which safeguarded the stability of marriages and also protected the more dependent spouse better than the current legal regime does.

The no-fault system signals to homemakers that investing strongly in the family makes them vulnerable to spousal departure. Under an alternative legal regime that would facilitate the traditional family structure, these women would be encouraged to invest in the welfare of their families. Thus, marriage contracts could in the long run reduce the number of divorces in more ways than one, for example by encouraging women who are not interested in pursuing a

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<sup>26</sup> For example, because marital property cannot be easily defined and valued, or because child support payments are difficult to enforce. See generally Allen and Brinig (1998) who point to high transaction costs as a major reason behind the bargaining failures of wives upon divorce.

<sup>27</sup> But see Bougheas and Georgellis (1999).

<sup>28</sup> See Estin (1995), and more recently Cohen (2002).

career to have children earlier and withdraw from the labor force longer while caring for their young children.

At the same time, marriage contracts can effectively protect women's property rights upon the dissolution of marriage. They should specify how the marital assets (or joint human capital) will be shared during marriage, as well as how assets will be distributed in the event of divorce—especially what compensatory payments will be made thereafter in the form of alimony. By clearly defining each spouse's property rights, marriage contracts can safeguard wives from the eventuality of involuntary transfers of wealth during marriage (especially in anticipation of divorce).

Lastly, it should be stressed that the contractualization of divorce has already yielded positive results. As the rich literature on mediation and pretrial settlement suggests, divorcing spouses have increasingly relied on contracts to divide their marital property, to determine custody and visitation rights, and to specify child and spousal support payments. Economic analysis has demonstrated that low conflict dispute resolution in divorce cases is desirable because it minimizes the costs to the family and the state, and also because agreements reached outside of court are more likely to be honored by both parties. The two dominant models used by legal economists to study failure to reach an out-of-court settlement are the asymmetric information and the optimism models. Farmer and Tiefenthaler (2001) test the theoretical predictions of these models and find that attorney representation and the husband's income increase the likelihood of going to court, while the wife's education, the time lag between separation and divorce, and home ownership all decrease the likelihood of using the courts.

## 6. The protection of children

A basic assumption in the literature on the economics of the family is that parents are altruistic (Becker 1991: 277). This means that parents' utility is raised when their children are better off. An altruist is made better off by actions that raise his family income and worse off by actions that lower it. Parents jointly maximize family utility and then carry out planned actions as time unfolds. Hence, although having a child entails a cost that is a lot higher than the minimum dictated by mere survival, men and women choose to have one or more children because they obviously derive utility from the number and the quality of their children. Furthermore, many, if not most parents in developed nations, choose to spend on each of their children more than is strictly required for food, clothing and shelter. This lends validity to the assumption that parents, compelled by a sense of moral obligation, derive utility from ensuring the quality of life of their children. It also helps explain why children from altruistic families tend to be more successful than children from selfish families.

The altruism assumption is backed up by empirical grounding (see esp. Berhman et al. 1995), although recently the relevant literature includes research which considers the possibility of conflicting interests within a household, for example between parents and children. Many empirical studies focus on the divergence that usually exists between the private goals of the spouses and the best interests of the household. The term *opportunistic* is widely used to describe behavior that promotes a spouse's self-interest, but not necessarily the interest of the other spouse. Spousal abuse and the post-divorce "theft" of professional degrees earned during marriage are illustrative examples of marital opportunism (Brinig and Crafton 1994: 892).

Given the high divorce rate, the question of how the law should improve the average welfare of children has become pressing for legislators and policymakers. An obvious way for a society to improve the lot of its children is to strengthen the institution of marriage. A strong trend in the relevant literature suggests that penalizing divorce is a good way of reducing the

number of “broken” homes. Many child-oriented critics of no-fault divorce advocate restrictions on adult autonomy and freedom to divorce to protect children.

If divorce is unavoidable, it is of paramount importance to shield children from the harshness of the divorce proceedings and especially from the bitter custody wars between adults that have been found to compromise children’s interests (Mason 1999). Furthermore, since the divorcing spouses can no longer provide their children with the benefits of an intact marriage and family life, they should take extra care in drafting agreements that guarantee their children’s best interests. However, the courts should be particularly attentive to nullifying or substantially amending the agreements that do not protect children’s interests in the best possible way.

Given the empirical evidence suggesting that children thrive when living in serene and stable surroundings, expanding our current understanding of what constitutes a fitting home is increasingly necessary. Several theorists and organizations have argued that a child can find comfort, safety and love only under the hearth of a traditional, two-parent (heterosexual) nuclear family. Yet statistics show that there is a fast-rising number of unmarried women, unmarried men, and homosexual partners who choose to raise children. Legislatures across Europe have begun to recognize this reality, enacting laws that redefine the family. For example, the German government had in 1998 defined the family as “any relationship involving children”. Danish “registered partnership” legislation for same-sex couples provides another example of this trend to afford legal recognition to *de facto* relationships.<sup>29</sup> Finally, the *Pacte Civil de Solidarité (PACS)*, introduced in France in 1999, permits both heterosexual and same-sex partners to regulate by private contract their reciprocal obligations of support and assistance, both personal and financial. By expanding the boundaries of persons who can be legally recognized as parents, the law may be able to help more children in securing the best possible home.

Other proposed policies for enhancing the social status of children include establishing paternity rights for unmarried men, income tax deductions for parents with children, and more effective mechanisms for the enforcement of child support awards. Furthermore, it is important to increase family allowances for single-parent households,<sup>30</sup> learning from countries with a tradition in pro-family policies, such as France and Sweden. The primary goal of the welfare reform enacted in the United States in 1996 was to discourage single parenthood and to promote marital stability. Yet the experiences of European nations show that the most effective remedy may well be to increase the economic resources available to low-income families – by enhancing public benefits for families with children and setting a social agenda that reconciles paid employment with reliable parenting. Feminist economists (see e.g. Folbre 2001) have offered viable recommendations for connecting markets and caregiving, calling for a more equal distribution of caring obligations within the family.

One after the other, European nations are adopting measures that accommodate the changing composition of a labor market increasingly populated by working mothers. The employment of mothers with small children has virtually exploded over the past three decades, bringing this demographic group in the spotlight for economic research and placing child care high on the policy agenda.

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<sup>29</sup> In 1989, Denmark became the first country in the world to introduce a law on registered partnership for two persons of the same sex. The law enables same-sex couples to register their partnership and gives them roughly the same rights and responsibilities of a heterosexual married couple. Amendments effected in July of 1999 have further expanded the rights and freedoms of same-sex partners. For example, a partner can adopt the children of his/her partner.

<sup>30</sup> The number of single-parent households across Europe is steadily rising. Recent data provided by Eurostat indicate that in the year 2000, 9.7 percent of all children under fourteen in the European Union lived in single-parent households, compared with 3.7 percent in 1983. Some countries report a more impressive increase (e.g. in the United Kingdom, the relevant figure is 19.8 percent).

The literature on the market for child care is significant. Many policy papers have successfully explored issues such as how differences in the quality of child care services affect the demand for such services and the role of the state in providing child care services given the imperfections in the private child care market. Yet the overriding theme in the bibliography concerns the role played by child care costs in the labor supply decision of women. Economists have investigated the relationship between child care costs and female labor supply by using econometric techniques, as well as data sets and structural models based on utility-maximizing behavior. Regardless of the methodological approach, most studies have found a negative relationship between child care costs and maternal employment. Put differently, high day care costs tend to reduce a woman's propensity to participate in the labor market.

The heightened importance of economic analysis in this crucial area of public policy is obvious, especially at a time when many European countries are planning to reform their childcare policies, under the larger social-welfare umbrella of European Union legislation. The goals of reformers should move in the direction of providing high-quality day care that will be more flexible and more extensive in order to meet the increased demands of working mothers. Emphasis is given to this demographic group, because as shown by virtually all empirical studies in the area, married women continue to do the lion's share of housework compared to men.

The unequal division of household labor is much the same around the world, although the size of the gap varies. This phenomenon might be attributable both to choices on the part of individuals and to social forces such as gender role socialization and discrimination. In light of this research, it is clear that any government policies to provide family leave, publicly funded childcare and guaranteed benefits for part-time work<sup>31</sup> should aim at helping working mothers manage their work and family responsibilities.<sup>32</sup> 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.

Economists have more generally investigated the relation between parenthood and the wages and hours worked by married men and women. Recent evidence indicates that both marital status and parenthood (household roles) seem to play a decisive role for the productivity and labor supply decisions of both men and women. It has been found that the average market hours and wages of women with young children remain substantially lower than those of men and of childless women. A rich literature has explored the gap in wages between women with and women without children, aiming to determine whether the relationship between motherhood and earnings is causal.

According to the findings of a recent study (Lundberg and Rose 2000), the relationship between household and labor market activity is sharply different for families in which the mother interrupts her career for child rearing and those in which she does not. More particularly, households in which the wife is not a continuous participant in the labor force, declines in wages appear to be associated with increased specialization in the household. For households in which the wife is a continuous participant in the labor force, the estimated effect of motherhood on wages is zero.

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<sup>31</sup> 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.

<sup>32</sup> But if these policies are gendered, they can potentially hurt women by reinforcing women's subordinate position in the labor market and in the home.

## 7. New areas of interest

The ethical dilemmas posed by the recent advances in the field of reproductive technology (e.g. surrogate motherhood) find both social scientists and legal scholars ambivalent in their responses. These dilemmas can be illuminated if viewed under the lens of economics. To use an example, we will turn to the economic analysis of adoption.

Despite great advances in the treatment of infertility, the demand for babies available for adoption remains considerably greater than the supply. Legal obstacles and slow-moving administrative procedures commonly prolong the waiting period for parents who are seeking to adopt a baby from an adoption agency. In some cases, agencies have only a few babies available for adoption. This situation would be described by economists as a baby shortage. Two important reasons for the shortage are the increase of births to unmarried women and the greater availability of abortion. Some legal economists add a third reason: the fact that the law prohibits the sale of parental rights.

Posner (1998: 167) explains that a market in babies for adoption would be feasible, since many people who are capable of bearing children do not want to raise them, many other people who cannot produce their own children want to raise children, and the costs of production to natural parents are much lower than the value that many childless people attach to children.

Today, black markets in babies are operating across the European continent, attracting the attention of the press in recent years.<sup>33</sup> Because these markets are illegal, they necessarily operate secretly and rely heavily on the services of middlemen, usually lawyers and gynecologists. The result is that the prices of the babies are higher and the quantity of babies supplied is smaller than it would be in a legal market. As for the quality of babies, it has also declined significantly. There are fewer healthy babies available for adoption than in the past, primarily due to the financial support for never married mothers.

An economist's solution to this problem would be to allow pregnant women to make binding contracts when giving up their child for adoption and to have no limitation on the price specified in the contract. This would match each child with parents who are willing to pay the most money to obtain him or her. In fact, legalizing the market for babies would allow the most efficient methods of matching up buyers (adoptive parents) and sellers (biological parents).

Adoption is only one area within the larger boundaries of the discourse on the economics of reproductive services –these boundaries are being sketched as technological breakthroughs give rise to new debates. Due to advances in the reproductive procedure known as in vitro fertilization, scientists and policy makers are confronted with a reality that seemed like a science fiction scenario just two generations ago: multiple births, posthumous reproduction, the cryopreservation of embryos, sperm and egg donation, surrogate motherhood, and the cloning of human cells, are raising questions about the ethics of creating and defining human life. At the same time, the legal system is called upon to assimilate these new biological truths

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<sup>33</sup> According to information that has become available through the International Social Services located in Geneva, Switzerland, sending countries without strong child protection laws and welfare policies are among the most vulnerable to the black market sales and trafficking of children. There is a widespread view in Latin America, for example, that international adoption takes the most desirable adoptees in terms of age, health and racial heritage, and leaves hard to place children in their countries of origin.

and to incorporate them through new definitions of maternity and paternity --and through a greater reliance on the principles of contract law to interpret agreements about parentage.<sup>34</sup>

As medical and technological advances will continue to expand the reproductive freedom of men and women, family law will need to maintain its versatility, recognizing broader definitions of what constitutes a family and laying down more explicit rules governing the behavior of family members. This is a difficult challenge to meet: in real life, the variety of family forms may be infinite -- in the law, it cannot be. Legislators are required to set limits that assign duties and define rights. Economic analysis can assist lawmakers to draw these limits and judges to interpret them. As societies and families are becoming more complex, predicting individuals' behavior will increasingly become more important than *ex post* intervention.

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<sup>34</sup> Contract doctrine can help resolve disputes arising when women change their minds during surrogate pregnancy and thus are in breach of their reproductive agreements. Contract principles can guide the courts in determining whether in each particular case these "changed circumstances" can excuse nonperformance.

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