

COMMENTS ON THE JUSTICE MINISTER'S SAME-SEX DISCUSSION PAPER

I. Personal Background and Introduction

I have worked in the area of family economics since the mid 1980s when I wrote my Ph.d. thesis on the economics of marriage and divorce. For the most part I have stayed out of policy debates, and have focused on the effects of divorce laws, the incentives to cooperate and behave opportunistically in marriage, and the nature of regulation in marriage. In the course of my work I've reached two personal opinions. First, the economic approach to marriage is extremely useful. It is able to both explain why the changes in family law over the past 40 years had the effects they did, and is able to make "out of sample" predictions on marital behavior that continue to stand up to further testing.[1] Second, I have concluded the impacts of past family reforms were completely unanticipated by those who advocated the changes to begin with, and that these outcomes were negative. Past changes in divorce law were not zero sum games merely transferring wealth from one party to another. They were negative sum games that altered many aspects of our lives.

My comments will be organized as follows. I will first discuss the unanticipated and unintended consequences of changes to the institution of marriage and the consequences of implementing no-fault divorce in Canada and the U.S. I will make the argument we do not understand the institution of marriage well enough to anticipate what will happen if we make a fundamental change to the definition of marriage. Second, I will argue, based on what is known about the institutional value of marriage, that allowing same-sex couples to marry will have tremendous social costs and minimal benefits. Throughout my arguments will be brief. I leave the economic and methodological arguments on the economics of marriage to an appendix, and I leave the statistical and theoretical details to references.

My conclusions are these: (1) if proponents of divorce reform were unable to anticipate the negative consequences of changes to divorce law, it is unlikely proponents of same-sex marriages can anticipate changes in the fundamental definition of marriage; (2) the institution of marriage is fragile; (3) lowering the value of the institution of marriage has far reaching negative consequences for large segments of the population; (4) the benefits to changing the definition of marriage are insignificant due to small numbers of homosexuals, the availability of alternatives, and the likely inability of current marriage laws to meet same-sex needs. In light of these conclusions, same-sex couples should not be allowed to marry, but should be provided with a parallel, but different institution for regulating their relationships. Common-law couples should not be given access to the new legal status.

II. The Lesson of No-Fault Divorce

The Explicit Intentions of the Law

Jacob (1988) refers to no-fault divorce as the "silent revolution". Indeed, one is hard pressed to find another example of social legislation with as little debate before its enactment. And why should there have been any debate when no-fault divorce was based on principles that were both noble and well-intended — namely to minimize suffering, prevent perjury, to treat marriage partners as equals, to eliminate the adversarial nature of assigning blame, and maintain the notion of marriage as a social institution. Why should men and women, especially low income men and women, be forced to remain in a dead marriage? Why should couples be forced to humiliate and compromise themselves by fabricating faults to satisfy the legislated requirements for terminating a marriage? Why should women be treated as dependents in the awarding of alimony? Why not take blame, hostility, and animosity out of divorce proceedings? And why should the courts not represent the interests of society in deciding when to allow a marriage to cease based on the quality of the marriage and not on the existence of a few arbitrary faults? It was obvious at the time that no-fault divorce was the right thing to do.

As early as the 1930s North American reformers argued fault based law should change. Many felt that in centering on moral faults and guilt the process encouraged couples to become spiteful and more antagonistic towards one another.[2] Others, arguing law should reflect the world and not be opposed to it, argued the law should be changed to recognize the rising demand for divorce.[3] For example, an extremely influential book by a group appointed by the Archbishop of

Canterbury stated:

“When they call for reform of the law, they are not asking for ‘easy divorce’, but that the law should have regard to the empirical state of affairs, and that the court should be empowered to declare defunct de jure what in their view is already defunct de facto. [Canterbury, p. 38, 1966]

But the most common argument against fault divorce was the incentive created for couples to lie and perjure themselves. This is the position taken by Judge Posner, stating that “confining divorce to grounds ... [leads to investing] resources in manufacturing them.... At this point internal goals of the legal system — the goals of economizing on judicial resources and of reducing perjury — become decisive in favor of allowing either consensual divorce or divorce at will.” (p. 252, 1992).[4] Along the same lines Humphrey states:

“To require an adversary proceeding and fabrication of a statutory excuse to legally justify the marriage dissolution makes a mockery of matrimonial law.

[p. 111 1972-73]

All arguments for no-fault divorce were well meaning. Nowhere does one find any hint that no-fault divorce might actually lead to higher divorce rates, and certainly no one anticipated the more subtle impacts. The Canterbury report was an extremely well argued document on the problems with fault divorce and it made a strong case that no-fault divorce was not “easy” divorce. The report appears to have been instrumental in successfully bringing no-fault to the state of California (the first state to change its law), and played a role in the few discussions in Canada as well. Here was a major religious source of authority, acting independently of North American legislative bodies, drawing the same conclusions divorce reformers sought. The Canterbury report viewed marriage as a lifelong commitment that society has a stake in. In order to mitigate suffering, marriages no longer functional were to be recognized as such and allowed to dissolve. It is the opinion of the report that it is a serious job of the court to make this decision. Courts, it is argued, decide on a careful consideration of all evidence what the outcome of the marriage should be. It is for this reason the writers of the report ironically rejected the notion of mutual consent. They state:

The fatal defect of the consensual principle is ... that it subjects marriage absolutely to the joint will of the parties, so making it in essence a private contract. Since it gives the court, as representing the community, no effectual part in divorce, it virtually repudiates the community’s interest in the stability of marriage. ... Dissolution of marriage ought always to require a real exercise of judgment by the court, acting on the community’s behalf. [p. 34, 1966]

Given that the Anglican church was promoting divorce reform, that no major churches were actively against it, and that there was no intellectual opposition, it is not surprising that the laws passed quite uneventfully. The Canadian experience appears typical. From a reading of the Parliamentary debate on the 1968 Canadian law, there was little opposition. After the introduction of the bill, the leader of the opposition stated:

Mr. Chairman, in just a few words I should like to indicate that we on this side of the chamber approve of reforming the divorce law, and look forward to receiving the bill.... [Canada, p. 5017, 1968]

In the debate that follows, there is no opposition. Members from both sides simply repeat that adultery and separation are not the only factors that could terminate a marriage, and that the time has come for a new way. Jacob (1988), writing mostly on the California experience also argues no-fault divorce arrived with little resistance. And thus, beginning in Canada in 1968, most western countries quietly altered their divorce laws.[5]

In essence the arguments of the time were: a) the current law hurts a group of people (those in “dead” marriages); b) allowing this group freedom to divorce will benefit them and not harm anyone else. Such an argument, when couched in the language of “honesty”, “individual responsibility”, and “non-adversarial”, becomes almost seductive and certainly difficult to object with. It is interesting to note the similarity of these arguments with those advocating same-sex marriage today. Same-sex marriage would be “fair”, they would satisfy the “equality” conditions of the charter, and they would

have no impact on existing marriages.

The Actual Effects of No-Fault Divorce

The actual outcomes of no-fault divorce could hardly have been more different than what was expected and intended. The most obvious outcome was the immediate increase in the divorce rate. In Canada the divorce rate went from 50 per 100,000 people in 1968, to 150 per 100,000 in 1969, and then 300 per 100,000 in 1970. A six-fold increase in just two years after a century of rather stable divorce rates. In the U.S., where divorce laws are state jurisdictions, the transition to no-fault divorce was slower and less dramatic than in Canada, but the anecdotal evidence of increased divorce rates was also immediate.

However, the effects of no-fault divorce were much greater than just the direct impacts on the divorce rate. The law influenced the rate at which women entered the workforce, the amount of hours worked in a week, the incidence of spousal abuse, the feminization of poverty, the age at which people married, and the value of the marriage in the popular culture. In short, the actual outcomes of no-fault divorce were completely unanticipated and unintended. I will now briefly touch on the evidence on these various effects. I leave it to the attachments for the detailed analysis.

Divorce

The first question asked by lawyers and academics after the switch to no-fault divorce was: did the law change the number of divorces? The very early papers published on the subject are incredibly bad. Data in the early 1970s was rare, computers for analysis even rarer, and no theoretical framework existed to direct the method of testing. As I mention in Allen (1999) the first serious, but highly flawed study occurred in 1986.[6] If one was interested in a scorecard on divorce rate studies, the crude score would be 11 to 6 in favor of the divorce rate increasing as a result of no-fault divorce laws. If one were to eliminate studies that contained mistakes in legal classification, mis-coded data, biased visual techniques, or trivial sample sizes, the score is 9 to 0 — an absolute rout. All of the divorce studies done since 1986 have concluded that the divorce rate increased with the introduction of no-fault divorce. After almost thirty years of analysis, there is no question that divorce rates were affected by the law, and that they increased. There has only been one study on the effect of no-fault divorce in Canada (Allen 1998), and there I find the change in the law was quite strong. So strong one really doesn't require sophisticated econometrics to understand what the effect was.

Some have argued the rise in divorce was unimportant because it simply reflected the number of dead marriages. However, what makes the rise in divorce so troublesome is that often the divorces are “inefficient” or “opportunistic”; that is, the benefits of marriage exceed the joint benefits of living apart. These divorces occur because one party is able to unilaterally leave and perhaps take a disproportionate share of the marital assets with them. Brinig and Allen (2000) show that both men and women behave in this opportunistic fashion. Crudely speaking, custody of children is the driving factor behind who files for divorce, second is access to the financial assets of the marriage. The problem with opportunistic or inefficient divorces is that they leave behind partners who are more worse off than the benefits derived from those leaving. The most common outcome being a father separated from his children or a wife living in poverty.

Economists and lawyers have only recently shifted their attention away from the divorce rate to empirically estimating the effects of divorce on the various parties involved. The results to date suggest a rather complicated story. From Brinig and Allen (2000) it is clear both men and women behave opportunistically at the time of divorce. When these strategic divorces happen, the partner left behind is worse off, but the partner leaving is better off. On the other hand, there are divorces which do make both husband and wife better off because they result from dead marriages. This explains why we hear both men and women opposing and supporting the current divorce regime: although the nature of the gains and losses to divorce are different for men and women, there is no gender bias in favor of men or women in terms of divorce.

Most spouses who file for divorce are women. The best explanation for this is child custody. Of those women who file for divorce, most claim after the divorce that they do not regret it. On the other hand, women are made poorer by divorce. The actual amount of poverty caused by no-fault divorce is still disputed. In 1985 Lenore Weitzman made a splash in her book, *The Divorce Revolution*, with the claim that women were financially worse off by as much as 70% after divorce. No one since then has measured an effect nearly as large, although Brinig (1999) argues that seventy-five percent of low income female single parents were not poor when they were married.[7] The general consensus is divorce is a financial hardship for women, but this is most often offset by control over the children. For men there is little empirical data on the

costs of divorce. Some surveys show that fathers suffer a great deal of emotional stress caused by their separation from their children, with those fathers most attached to their children during marriage becoming the most distant after divorce. The recent increase in father's rights groups suggests that the numbers of disenfranchised fathers is not trivial.

If the effect of divorce on men and women is complicated, the effect on children is straight forward. There has been a tremendous amount of research conducted on the effect of divorce on children. Much of this is discussed in Moir (1999). None of this would appear good news. According to Moir's assessment of the literature, if we consider any social pathology (teen pregnancy, criminal activity, divorce, etc.) and control for the demographic characteristics of the child, then the probability that a child participates in one of these activities increases on average by a factor of 2 if they come from a divorced home. Of the approximately 50000 Canadian children each year that enter single families through divorce, 1/3 of them become disadvantaged in some way. Discussions of the effect of divorce on children during the no-fault debate suggested that at worst the results would be ambiguous if not positive on children. It was argued children would be better off in single parent homes rather than in homes with dead marriages.[8] Nothing could have been further from the truth. The real negative impact of the no-fault divorce regime was on children, and increasing the divorce rates meant increasing numbers of disadvantaged children.

Age At Marriage

The impacts of no-fault divorce law mentioned above are not too surprising with hindsight. However, there were subtle impacts just as significant in terms of altering the daily life of the average Canadian. One particular impact I have recently been examining is the effect no-fault divorce on the age at which an individual might marry. Again, I will only outline the argument here, for details and econometrics see Allen, Pendakur, and Suen (2003) in the refereces.

Everyone is different to some extent in terms of the value they place on marriage, and their aversion to a mismatch in their choice of spouse.[9] As a result, any movement towards easy divorce will have different individual effects. In my paper with Pendakur and Suen we assume there are two types of people: those who highly value marriage and those who place little value on a marriage. A low value type takes marriage lightly and is very concerned about a mismatch. For this type of person easy divorce makes marriage more attractive. On the other hand, a high value type is interested in a relationship lasting for the entire length of procreation or for life, and is less concerned about a mismatch. For this type an easy exit option makes marriage less attractive.[10]

These differences in marriage preferences manifest in the age at which individuals marry. Under a fault divorce regime a high value type will marry sooner than a low value type because he is less worried about mismatches and because the law makes divorce more difficult. The law reduces the demand for search for high value types and as a result he marries early. The opposite is the case for low value types. Under a fault law, low value types search longer because they are more concerned about mistakes and because they place a lower value on marriage. With a switch to no-fault divorce, low value types risk being less selective in the choice of spouse because a bad choice can be offset by an early divorce. The willingness to be less selective means low value types experience a reduction in their marriage age after the change in the law. On the other hand, high value types now search harder and longer to ensure a higher probability of a more compatible spouse — search substitutes for the prior legal restrictions on divorce. Since search takes time, high value types will experience an increase in their marriage age after the switch to no-fault. Since, under fault divorce, high value types married younger than low value types, with the introduction of no-fault there is a shrinkage in the variance in the distribution of marriage ages. Just looking at the average age at marriage prior and after the adoption of no-fault divorce might show relatively little effect since the different types of people will tend to offset each other. The minor average change, however, masks large offsetting changes at the individual level.

Professors Pendakur, Suen, and I have collected individual marriage records for all marriages for approximately 40 states between 1970 and 1996. Using this massive data set we are able to control for individual characteristics, estimate fixed state effects, and control for changes in marriage ages over time. What we find is a very robust effect: the variance in marriages does indeed collapse in no-fault states. This is a very strong and non-obvious result that is difficult to arrive at without the help of economic theory. What it shows though, is that the divorce law has the subtle, unintended consequence of altering the marriage ages of everyone, especially those extremes in terms of high or low values for marriage. The divorce law effected, on this one margin, everyone, not just those who divorced.

Secondly, we also find that no-fault divorce increased the average age at which people get married. This suggests that there are more “high value” types in the population than “low value” types. This is important for two reasons. First, for those that look to marriage as an institution to protect specific investments in procreation, they are now engaged in costly search and this results in postponed family life. Since there are more of these type of people in the population, it suggests that this is a significant social cost. Second, individuals who take marriage lightly are now more likely to marry and to marry sooner. Given the low values to marriage and concern over mismatches, these types are also more likely to divorce at a higher rate than the other types. The increase in the marriage rate of “low value” types lowers the total value of marriage in a society. This in itself feeds back into the divorce rate and influences the way we view marriage culturally.

Labor Force Participation of Women

Though there has been a relatively surprising amount of disagreement over the effect of no-fault divorce on the divorce rate, of the work done on the effect of divorce laws on the labor force participation of women (LFPR), there is remarkable agreement. Women have been increasingly joining the workforce for over a century, with the bulk of the increase coming after the second World War. Until 1970, the bulk of this increase in participation could be attributed to the growth in female real wages. However, a puzzle arose after 1970. Although female participation in the workforce continued to increase, real wage growth was flat.

Robert Michael (1985) was the first to suggest the rise in the participation rate was caused by increases in divorce. Because divorced women are more likely to work, and because the divorce rate was increasing after 1970, he suggested this could explain the anomaly. To test this he observed a lagged relationship between increases in the divorce rate and the increases in the female participation rate of married women with young children.

Peters' (1986) was the first person to link the no-fault divorce law to the LFPR of women. Peters argued married women make specific family investments when they stay home and look after the kids. If these marriage specific investments are not accounted for in the divorce property settlement, then the wife is made worse off at divorce, and as a result, she tries to protect herself by working during marriage. Using the same Current Population Survey (CPS) data that she used for the divorce rate, Peters ran regressions of the LFPR against a series of demographic variables and a dummy variable for whether or not the individual lived in a no-fault state. She found that labor force participation increased by 2% in no-fault states. Allen Parkman (1992a) also investigated the effect of no-fault divorce on the LFPR using the same CPS data as Peters. His main point was not that women would increase their LFPR as a result to a threat in divorce, but with how this mechanism worked. Parkman argued it was not the marriage specific investments married women worried about, but that by being married and staying home with the kids, married women decreased their human capital, and this would not be compensated for at the time of divorce. Parkman shows that the increase in LFPR was mostly among married women “who could experience larger reductions in their human capital if they reduced their participation in the labor force.” These were young white women. Although Parkman disagreed over the mechanism described by Peters, he found a similar effect for the law.

Parkman (1998) expands on his earlier work and looks at the total amount of time that women are working. He not only looks at the increased workforce participation of women, he also considers the increases in the household work over all. Parkman uses a times series data set that spans 1975-1981 and contains data on household work. He finds that women living in no-fault states work on average 4 hours more per week than their counterparts in fault based states. In contrast, the husbands in these states actually reduce the amount of hours per week by almost two hours. Parkman argues this refutes the notion that women work simply to increase the family budget, and argues the increased work load for women is a mechanism for women to use the labor force as a means of obtaining insurance against the threat of divorce.

One final important study is by Johnson and Skinner (1986). They use a panel study from Michigan to analyze the effect of divorce on the LFPR. They find that women increase their participation in the workforce before a divorce occurs, which begs the question: did the increase occur because the women were trying to insure against divorce, or was the labor force participation destabilizing to the marriage. They test these two hypotheses using a simultaneous model of future divorce probability and current labor supply on married women, and conclude that working has no real impact on divorce probabilities, but that an anticipated divorce has a relatively large impact on working. Their results account for 2.6% of the 15% of the growth in labor force participation that is not explained by real wages and other factors.

The results from changes in female LFPR are similar to that one ages at marriage: the change in the law influenced vast segments of the population that did not experience divorce. Women entering the workforce because they want to improve the quality of their life and the lives of their family members is a good thing. However, women virtually forced to work out of fear they may be abandoned lowers the welfare of the family. Had there been a law protecting these women, they would choose not to work. The phrase “super-mom burnout” has now entered our vocabulary and is just another one of the many significant costs that resulted from allowing easy divorce. A cost completely unanticipated by advocates of legal reform.

The Divorce Culture

Barbara Dafoe Whitehead, in her book states:

divorce is not simply a legal mechanism for dissolving marriages but a social and cultural force that opportunistically reproduces itself everywhere. A high divorce society is a society marked by growing division and separation in its social arrangements, a society of single mothers and vanished fathers, of divided households and split parenting, of fractured parent-child bonds and fragmented families, of broken links between marriage and parenthood. The shift from a family world governed by the institution of marriage to one ruled by divorce has brought a steady weakening of primary human relationships and bonds. Men’s and women’s relationships are becoming more fleeting and unreliable. Children are losing their ties to their fathers. Even a mother’s love is not forever, as the growing number of throwaway kids suggests. (p. 182)

Perhaps the most unexpected result of the no-fault divorce revolution was the creation of a divorce culture, and a lowering of the value of the institution of marriage in the popular culture. Advocates of same-sex marriages point to the increase in common law unions, single parenthood, and blended families as evidence of a “growing acceptance.” Rather, these are the sad consequences of, in part, legal changes that have contributed to the divorce culture. By inadvertently allowing for opportunistic divorce the law created a whole new class of inequality as many women and children entered poverty through divorce. The sheer size of this group over the span of 30 years has influenced everything from greeting cards and daycare centers, to kindergarten classes and TV shows. Whitehead argues that the divorce culture has led to a society with more coercion, individualism, and less commitment. Schools now teach “life skills”, “job counseling”, and “secular ethics”, rolls that at one time were universally done by families. We have “deadbeat dads” and “lock key” kids.

Parkman, in his 1992b book, makes the following conclusion regarding the effects of no-fault divorce:

It [no-fault divorce] contributed to the deterioration in the financial condition of many divorced women and the children of divorced parents. In response to the deteriorating conditions of divorced women, married women increased their labor market participation and education and unmarried women delayed marriage. It might appear that no-fault divorce only made women worse off, but no-fault also reduced the incentive for married women to specialize in domestic production and thus may have reduced the quality of life for their entire family. (p. 104, 1992).

Within the past two years a number of “real life marriage drama” TV shows have become popular. Those watching the pathetic tale of Rick Rockwell and Darva Conger on “Who Wants to Marry a Multi-Millionaire” might have thought western civilization had bottomed out. Unfortunately this show was followed by the “Bachelor” series, and “Married by America.” What all these shows have in common is a disrespect for the institution of marriage. Their popularity reflects a fall in the cultural value of marriage brought about in part by legal changes to the institution. These changes are not innocent, as the evidence just cited testifies. One must wonder: if these outcomes had been anticipated in 1968, would there have been the divorce revolution and would it have been so silent a debate?

II. Why Were The Effects of No-Fault Divorce Unexpected?

It is easy to understand why the effect of no-fault divorce was unintended: the results have been so bad that no one would have wished them on future generations. However, it is interesting to ask why the results were unexpected, why was there no anticipation of the problems that might arise from the no-fault law? A hint is found in the Canterbury report. That report failed to consider the incentives that would significantly change with a new divorce law — a failure which occurs over and over in the history of no-fault divorce debates, and now which appears in the debate over same sex unions. Reformers, both legal and sociological have tended towards an unrealistic view of marriage, the law, and human

motivation. Quite often the picture painted is that men and women are either compatible or not, and therefore, the marriage is either good or bad, and if bad then a divorce is inevitable. Individuals are characterized as dichotomous as well: mostly good and interested in the welfare of others, some bad and hopeless. Finally, the law is often viewed as completely binding; that is, whatever the law states in principle, will be the outcome, in fact. For example, when the law states there will be an equal split of the marital property — there will be.

This fails to account for the economic realities of marriage and the law. Economists view the world in terms of the rights people actually possess and their ability to make decisions based on this possession, not just under the law. Furthermore, economists view marriage as a long term exchange shaped in an effort to police the self-interested motives of the husband and wife. One implication of the economic approach is that individuals change their behavior when they face different sets of incentives.[11]

One of the key mistakes that no-fault divorce advocates made in arguing for the law, and which must have biased the interpretations of the early evaluations, was the assumption that there are either good marriages or bad marriages and their number is independent of the law. Whitehead (p. 19, 1997) quotes an early century advice writer as saying “no good purpose is achieved by keeping people together who have come to hate each other.” As if “hatred” were exogenously imposed on the couple by the gods. Sheppard, in defending the no-fault system states:

The idea, embraced by the no-fault separation ground, that unhappy marriages

are not worth retaining It seems to me self-evident that an unwanted marriage ... can be a source of enormous family harm.... Surely the state has no principled interest in refusing to recognize this...[pp. 148-149, 1990][12]

Or we have the following:

there are relationships which cannot easily be altered to make the marriage smoother. Divorce provides a quick and unequivocal termination of such marriages. [Zuckman and Fox . p. 536]

Sentiments like these are commonplace in the pro-no-fault literature.

It is more useful to think of a spectrum of marriages; some healthy, generating large positive amounts of surplus utility to each spouse, others unhealthy, generating large negative amounts of utility, and a continuum of marriages in between. Critical is the notion of a “marginal” marriage. This is a marriage where the couple is, jointly speaking, indifferent to staying together or apart. Marginal marriages, however, depend on the costs and benefits of staying together, and changes in these costs and benefits can lead good marriages into marginal ones and marginal ones into bad ones.[13] There is no exogenously given number of good marriages. Most divorce law reformers advocated a change in divorce law because they simply thought that they were freeing a fixed number of bad marriages that were bad independent of the law. They ignored the fact that for any given law many marriages are marginal, just barely in the parties’ interests in keeping together. For these marriages a relaxing of the law tips the scale in favor of divorce.[14]

What is less clear among the reformers was their implicit theory of marriage. To the economist, a man and woman enter into a marriage because there are gains from joint production.[15] Marital production, especially children, requires a long time and involves the investment of resources that are specific to the family. Often the wife is required to invest early in the marriage, and as a result puts herself at risk of breach of contract. To the economist, marital law is designed to prevent inefficient breaches, or to put another way, to prevent one spouse from taking advantage of the other’s weaker bargaining position due to the specific investments in the marriage. Too often, the reformer does not have a theory of what marriage is, but rather simply articulates what they think marriage ought to be. However, policy recommendations made before understanding simply gets the cart before the horse and is about as effective.

This same form of argument is found today in the debate over same-sex marriage. Arguments are based on normative models of the way families should be, not based on the way families actually are. Consider the “social responsibility model of the family” supported by Professor Eichler. In this model a family should, for example, “minimize stratification on the basis of sex.” One wonders what this would mean in practice? Differences in the sexes abound and couples exploit these differences to their joint advantage by specializing in those activities in which they have a comparative advantage. Furthermore, couples often find it in their joint interests to enhance their differences through human capital investments that increase their comparative advantages and increase the value of their marriage. To prevent this or to engage in public

policy that discourages it, only makes couples worse off. More surprising is Eichler's statement that "spousehood is not automatically identified with parenthood." One of the key ideas in economics, and one that is almost common sense, is that those who make decisions bear the costs of those decisions. Separating the role of spouse and parent creates all sorts of incentive problems.[16] As a normative tool to guide policy this, and the other characteristics, completely ignore the incentives that individuals within a family have.[17] As a result, policy based on a model like this will have bad outcomes.

III. Why Marriage?

Advocates of same-sex marriages often divert the debate way from the issue of marriage by discussing only changes in family structure.[18] Over the span of recorded history the role men and women in the household has changed with the ebb and flow of the various constraints faced by families. Changes in commerce and industry, life span, birth control, social customs, religious participation, the law, and a host of other innumerable factors effect such things as the age of marriage, common law unions, work force participation, living arrangements, the gains from household and market place specialization, and the divorce rate. However, "the family" in its many forms must not be mistaken with "marriage". It is remarkable, indeed, that despite the changes in family structure that have taken place, the central characteristic of the family — marriage between one man and one woman — has remained essentially unchanged. In the appendix I discuss a key idea in the economics of institutions, namely that only efficient institutions survive. If so, then marriage must have some strong efficiency characteristics to have lasted so long.

Marriage, as an institution, is not about love — many people love one another in both sacrificial and sexual ways, but are not married. Marriage is not about "familial interactions", which again are not unique to heterosexuals. Marriage is an institution society uses to regulate a specific type of union. Marriage is an institution that maximizes the gains from exchange between a man and a woman, net of the tremendous transaction costs that arise in such an exchange. (Again, I defer the detailed argument to the appendix). Failure to recognize this can only lead to faulty public policy decisions.

In Allen (1990) I made a case for why the state was involved in making marriage contracts "special"; that is, why has a third party over history always regulated marriage? I argued that given that the vast majority of people are heterosexual and are interested in a one man, one woman "contract", the benefits of allowing other types of relationships to be regulated under the same law would be small and that the potential costs enormous. Extending the definition of marriage to other groups (homosexuals, incestuous marriage, marriage to minors, "room-mate" marriage, marriage with no sexual content) cannot be done without incurring social costs.

In attempting to get a handle on these costs it is a useful first step to consider how many individuals we are worried about. Advocates for same-sex unions who suggest that 10%

of the population is homosexual based on the 1948 work of Kinsey are either being misleading or ignorant. As early as 1954, the American Statistical Association published a volume of over 300 pages dealing with faulty sampling and other methodological problems conducted by Kinsey.[19] Kinsey came up with several estimates of the number of homosexual males that ranged from 4 to 37 percent of the population depending on the definition used. Using the Kinsey numbers and factoring in that there are fewer lesbians than gay men, the best estimate is that 4% of the population is homosexual. However, most scientific studies have found much fewer homosexuals than did Kinsey. In my opinion, the best scientific study on this matter is Laumann et al. They estimate that the number of homosexuals is between 1-3 percent of the total population. To the extent that homosexuals would receive the benefits of marriage and heterosexuals would bear the costs, it would appear on the basis of the numbers that the cost/benefit ratio would be huge.[20]

It is difficult to anticipate all of the costs of homosexual marriage. However, I would speculate on some of the following impacts:

1. Same-sex marriages fundamentally are not based on procreation, and therefore they will naturally demand different forms of regulation than heterosexual marriages. Given that many aspects of marriage are based around the problems that arise when one party must make idiosyncratic investments in the marriage and the other has not, these demands for different regulations will only hurt heterosexual marriages, women in particular. To the extent these demands are not met, then married homosexual couples will exist in an regulatory environment not well suited to their needs.
2. Fidelity is of less concern in same-sex relationships given the risk of illegitimate children is eliminated. To the extent

homosexuals had the identical marriage contract as heterosexuals they would demand fewer regulations regarding adultery. There would be pressure to make adultery more acceptable.

3. Given same-sex relationships are often made up of two financially independent individuals, there will be pressure for even easier divorce since the problem of financial dependency will be reduced.

4. There will be constant pressure to allow other types of marriage and to have custom marriages. Why stop at same-sex marriages? If we are only interested in “familial interactions” then virtually any long time caring relationship would want the added “social acceptance of marriage”. All of which means enforcement costs by the courts will increase dramatically. Courts, who were in theory intended to “protect” the institution of marriage during the no-fault era, have proven quite unable to handle domestic disputes adequately. What will happen when the issues become much more complex in custom marriages where the very issues of dispute will be idiosyncratic.

5. To the extent that any “familial interaction” can become “married”, the meaning of marriage becomes diluted. This further perpetuates the divorce culture. As argued above, the culture of divorce has negative impacts on everyone’s daily lives.

6. In the same-sex marriage debate, little attention has been given to the differences between lesbian and gay couples. Research has shown these couples differ in terms of their expected lengths of survivorship, rates of sexual interaction, fidelity, and other couple characteristics. Allowing for same-sex unions to marry is not about adding one other type of relationship, but adding two. This would generally compound the arguments made.

7. In the same-sex debate, common-law couples are often lumped in with same-sex couples, and some policy recommendations suggest the two be given some type of civil recognition. This would be a mistake. Common law relationships are a second best institutional choice to marriage (for example, there has been found to be less relationship investment and commitment in these couples). Every effort should be made to encourage these couples to marry and act as married couples. To create a parallel heterosexual civil relationship would only further reduce the value of marriage and exacerbate current social problems.

The impact of all of these events will be a further destabilizing effect on marriage. All of the above will lead to further divorce. To the extent that divorce is damaging the law obviously should not change.

VI. Conclusion

The words “equality” and “fairness” are often used to simply get what we want. Laws, if they are to have value, must necessarily come down on one side or another. As Coase pointed out 40 years ago, the question is not how to eliminate harm, but rather whom should be allowed to hurt whom? If same-sex couples are allowed to marry they hurt heterosexuals. If they are denied this right, then they are hurt.[21] I have argued the potential anticipated costs of same sex marriage would be huge, and many other costs are simply too difficult to even anticipate. I’ve made this argument based on the small number of homosexuals in the population, the impact widening the definition would have on divorce, and on the impact divorce has on the rest of the population. I have used the example of the switch to no-fault divorce to make the case that marriage is efficient and that messing with it will result in unintended negative outcomes. The same arguments used to bring in no-fault divorce are, at a fundamental level, now being used to alter the definition of marriage. At both times the advocates are ignoring the fact that institutions are designed to police the private individual incentives that may be incompatible with the objectives of the institution. Lastly I would suggest that the court respect one of the oldest institutions known to man, since changing it could mean incredible suffering on a large scale.

References

- Alchian, Armen. "Uncertainty, Evolution, and Economic Theory." *Journal of Political Economy*, 1950.
- Allen, Douglas. "No-Fault Divorce in Canada: Its Cause and Effect" *Journal of Economic Behavior and Organization* October 1998.
- ____ "No-Fault Divorce and the Divorce Rate: Its History, Effect, and Implications. In *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- ____ "An Inquiry Into the State's Role in Marriage," *Journal of Economic Behavior and Organization* 13(2) 1990.
- ____ "Marriage and Divorce: Comment," *American Economic Review* June 1992a.
- ____ "What Does She See In Him: The Effect of Sharing on the Choice of Spouse." *Economic Inquiry*, 30 January 1992b.
- ____ "Transaction Costs" *Encyclopedia of Law and Economics (Volume One: The History and Methodology of Law and Economics)* Bouckaert, Boudewijn and De Geest, Gerrit (eds.) (Cheltenham: Edward Elgar Press, 2000).
- ____ and M. Brinig. "Sex, Property Rights and Divorce" *European Journal of Law and Economics* 5 June 1998.
- ____ K. Pendakur, and W. Suen. "No-Fault Divorce and the Contraction of Marriage Ages" (SFU mimeo, 2003).
- Archbishop of Canterbury's Group on the Divorce Law Putting Asunder: A Divorce Law for Contemporary Society. (London: society of the Promotion of Christian Knowledge, 1966).
- Brinig, M. "The Effect of Divorce on Wives" in *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- ____ and D. Allen. "These Boots Are Made For Walking: Why Most Divorce Filers Are Women" *American Law and Economics Review* Vol.2(1) Spring 2000.
- ____ and Frank Buckley. "No-Fault Laws and At-Fault People." *International Review of Law and Economics* 1998.
- ____ and Steve Crafton. "Marriage and Opportunism." *Journal of Legal Studies*, 23 1994.
- Becker, Gary, Elizabeth Landes, and Robert Michael. "An Economic Analysis of Marital Instability" *Journal of Political Economy* 85 1977.
- Canada. *Commons Debates* (Queen's Printer, Ottawa, 1967).
- Coase, Ronald. "The Problem of Social Cost" *Journal of Law and Economics* 1960.
- Humphrey, Stephen. "Kentucky Divorce Reform" *Journal of Family Law* 12 1972—73.
- Jacob, Herbert. *Silent Revolution: The Transformation of Divorce law In the United States* (University of Chicago Press, 1988).
- Johnson, William, and Jonathan Skinner. "Labor Supply and Marital Separation" *American Economic Review* 76(3) 1986.

- Michael, Robert. "Consequences of the Rise in Female Labor Force Participation Rates: Questions and Probes." *Journal of Labor Economics* 3 1985.
- Moir, Donald. "A New Class of Disadvantaged Children: Reflections on "Easy" Divorce. In *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- Parkman, Allen, M. *No-Fault Divorce: What Went Wrong?* (Westview Press, 1992a).
- _____. "Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited" *American Economic Review* 82(3) 1992b.
- _____. "Why Are Married Women Working So Hard?" *International Review of Law and Economics* 18 1998.
- Peters, H. Elizabeth. "Marriage and Divorce: Informational Constraints and Private Contracting," *American Economic Review* June 1986.
- Posner, Richard. *Sex and Reason*. (Cambridge: Harvard University Press, 1992).
- Sheppard, Annamay. "Women, Families and Equality: Was Divorce Reform A Mistake?" *Women's Rights Law Reporter* 12 Fall 1990.
- Weitzman, Lenore. *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. (New York: The Free Press, 1985).
- Whitehead, Barbara. *The Divorce Culture* (New York: Knopf, 1997).
- Zelder, Martin. "Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce" *Journal of Legal Studies* 22 June 1993.
- Zuckman H. and W. Fox. "The Ferment in Divorce Legislation" *Journal of Family Law* 12 1972—73.

Appendix

Much of my argument above is based on the "economics of marriage" and other basic economic principles. In this appendix I provide a brief methodological review of what it means to have unintended and unanticipated consequences, along with a summary of the economics of marriage and divorce. The arguments here back up my statements made in my brief.

A.I. Unintended and Unanticipated Consequences

It is clear from the above discussion that the move to no-fault divorce caused outcomes that were unanticipated and unintended. That is, many of the outcomes were surprises in that no one expected them to happen, and these surprise outcomes were often negative. The question is: why was this so? What is the fundamental reason for why such a policy could have outcomes so different from what was intended. The answer is that unintended/unanticipated outcomes are the result of false theories of human behavior. When legal or public policy decisions are made on the basis of false theories of human behavior the results will be unanticipated. To the extent the status quo was efficient, and to the extent that the public policy was based on intentions to improve welfare, the results will be unintended. It is important to understand this point because the same arguments made during the no-fault revolution are now being made in the context of expanding the definition of marriage.

All human actions are based on theory. When an individual drives down the road he has a number of theories in mind. The driver believes that other drivers will obey the rules of the road, the driver believes he knows the rules of the road, that the car will obey the laws of physics, etceteras. An unobservant Canadian driver in New Zealand, quickly discovers that his standard theories of driving are wrong through a series of unintended consequences. For example, driving on the right-hand side of the road in Auckland leads to a head on collision. The driver did not intend to have an accident, but his theory of driving was incorrect. When a driver decides to take a sharp corner at 100 km/h and flies off the road, again, his theories of the motion of the car are proven false.

An unanticipated consequence is simply another way of saying that one's theory of the world has been refuted. The agents making the decision, simply have the wrong theory. This holds for physical predictions like the driver and the car, and it holds for models of social science as well. In the 15th century, most of the sailor's on Columbus' ship believed that the world was flat. Although Columbus believed that the world was round, he did think that the world was much smaller than its actual size. It was a surprise to the sailors that they did not sail off the face of the earth, and it was an incorrect understanding of the local geography that lead Columbus to believe he had reached India. False theories, if they are testable, eventually lead to unanticipated consequences.

An unintended consequence is slightly different than an unanticipated one. Unintended consequences may be good or bad. Some one who drills for oil, but discovers gold receives an unintended good outcome. A policy that intends to reduce illegal drug use, but ends up increasing it results in an unintended bad outcome. One might think that most laws and public policy are driven by good intentions. We have laws that attempt to reduce crime, encourage competition, prevent poverty, and the like. To the extent negative outcomes happen from policies that had positive intentions, we can say the results were unintended. I will argue below that negative unintended outcomes result from altering efficient institutions.[22]

In the social sciences, where the quantity of theory often exceeds the quantity of testing, there are many examples of policies based on false theories that have often led to tragic outcomes. In economics failed policies litter the historic record like dead sea birds after an oil spill. Keynesian economic policies that encouraged government spending under the assumption that there was a trade-off between unemployment and inflation, led to the stagflation of the 1970s where both unemployment and inflation were high. More recently, economists have flooded Eastern Europe after the fall of communism, preaching the merits of a capitalist market system. More than ten years after the reforms, many of these countries remain in poverty and economists are generally unable to explain the different patterns of growth rates. Anyone who has ever heard a Keynesian preach while Keynesianism was in fashion, or heard the private property gurus during the early 90s, knows that there was no humility in their policies, no acknowledgment that these models of the world might be false, and no anticipation of the failures to come.

A.II. The New Institutional Economics (NIE).

In the context of marriage I believe there are two reasons why the outcomes of past reforms have been so poorly anticipated. First, many reforms are based on models that ignore basic economic principles. Second most of these models are inconsistent with institutional economics — the field of economics that has had considerable success in explaining the evolution and structure of various institutions.

Basic Economic Principles

As an economist I am convinced that theories of human behavior that ignore basic economic principles are bound to fail. Economic principles are a core set of principles in economics that have stood the test of time, and which have been robust in explaining human behavior. Later, when I discuss possible outcomes to changes in the definition of marriage, I will refer to these basic principles which are:

1. Every person desires many goods and goals, and acts in a self-interested manner to achieve those desires.
2. Every person is willing to forsake one good they value for some amount of another good they value.

3. The more one has of anything, the larger is their total value of the good, but the lower is their marginal value of that good.
4. Not all people have the same preferences.
5. Information is not free and knowledge is not perfect.

As stated these five principles hardly seem worth writing down they are so innocuous. However, I will argue that most common views of marriage ignore most of them or their implications, and as a result, are doomed to experience unintended and unanticipated consequences.

New Institutional Economics

“Marriage is an economic institution”. Many people are often surprised to hear that economists have anything to say about institutions, let alone marriage. The everyday perception of economics is biased by the business section of the newspaper, not, unfortunately, by the Journal of Law and Economics. If we consider the basic economic principles above, we see that there is no reason why marriage should be beyond the scope of economic inquiry. Marriage is something that people value and is often a goal for most individuals. Marriage is an example of a set of rules or “property rights” (to be defined later) that encourage various types of household production. In this respect marriage is like other institutions (firms, non-profit groups, the law, clubs, markets, etc.) that encourage productive activity in other endeavors.

Slightly over 40 years ago a group of economists at the law school of the University of Chicago began to study the law through economic lenses. This group established the field of law and economics. As the number and types of institutions under examination grew an offshoot of this field was created in the mid 1990s which examines all types of organizations, not just the law. This sub discipline is called the New Institutional Economics.[23]

The NIE is best viewed as a modification of neoclassical economics and fully accepts the principles above.[24] For the purposes here, NIE has two relevant characteristics. First, it views long lived institutions as efficient and therefore proper subjects of economic inquiry. Second, it adds to the neoclassical analysis the assumption that “transaction costs” are positive. The understanding of transaction costs is critical to the study of institutions because economists believe that institutions are chosen (either explicitly through a conscious act or implicitly through trial and error) to maximize the gains from trade net of transaction costs. As I will briefly argue below, and have argued in detail elsewhere, when transaction costs are zero, then the institutional rules do not matter. When transaction costs are positive (which they always are), then institutions have significant consequences for the allocation of resources. [25]

Efficient Institutions Survive

In a famous paper Alchian (1950) argued that the process of natural selection works on firms over time. In a competitive environment firms that survive are those that can offer the best deal to their customers while still maintaining revenues above cost. Firms that do not meet these requirements simply go out of business. Alchian pointed out that since firms were adopted by an environment that selected profit maximizing strategies, the actual or perceived motivation of the owners of the firm were irrelevant. One might accomplish the profit maximizing strategy while being completely unaware of the reasons for success. Likewise, one might ponder a strategy for a long time and conduct the most sophisticated survey’s of consumer preferences, but if in the end prices and quantities are set incorrectly, then the environment rejects the firm with no consideration for the research effort. Motivation may help for the survivability of firms, but it is not necessary. The market for firms is one of self-selection, and only those firms that are efficient and maximize profits survive.

The argument runs for all types of behavior and institutions beyond firms. Any institution that exists in a competitive environment must satisfy the condition of maximizing wealth if it is to survive. Consider the case of the family. The basic family structure centered around one man and one woman acting as the residual claimants to their union has existed as long as written records have existed. Families have proven to be a very efficient method of raising children and passing human capital from one generation to another. There have been attempts to raise children outside of families since the time of the ancient Greeks, yet each case has not survived. At the same time, if we look closely we see that in minor ways family structures change over time and across locations. In some cultures entire extended families live under one roof, in others not. Some cultures have bride prices, dowries, and polygamy. At one time a marriage required the blessing of a church and then a state. Despite the relatively minor variations, several features of marriage have always been common, and the most common of all is that marriage is a union between one man and one woman. The NIE approach to a long lasting institution such as marriage is one of respect. One is hard pressed to find any institution that is as long lasting as the covenant relationship between one man and one woman that we call marriage. From the economic point of view, this form of organization must have some powerful characteristics that allow it to be so robust across time, location, and cultures.

Institutions Are Functions of Transaction Costs

In discussing institutions as if they matter, we are implicitly assuming that transaction costs are positive. The statement that institutions are irrelevant when transaction costs are zero is called the Coase Theorem, after the economist Ronald Coase who won the Nobel prize for articulating the main idea.[26] Transaction costs are critical for understanding the NIE, the Coase Theorem, and marriage.

The Coase Theorem and No-Fault Divorce

The Coase Theorem states that “the allocation of resources is independent of the distribution of property rights when transaction costs are zero.” That is a compact statement if ever there was one, and it requires significant elaboration. For the moment we will simply interpret the Coase Theorem to mean that “rules do not matter when individuals can bargain costlessly.” In the context of changing divorce laws, the Coase Theorem says that the divorce law changes should have had no impact on the divorce rate. I will now go through a detailed example to help establish the main ideas.

Our personal experience tells us that the Coase Theorem is wrong. When I was in primary school, divorce was relatively unheard of. There may have been the odd child that came from a divorced family, but it was rare. Now divorce is common place, and for certain cohorts of marriages, the probability that a divorce will occur over the life of the marriage approaches 0.5. There are many factors that influence the rate of divorce, and one of them is the actual divorce law. In Canada, prior to 1968, the divorce law in most provinces was a “fault” based law. This meant that in order for a divorce to take place an actual fault (like adultery, desertion, or cruelty) had to be committed and proved in a court. In 1968 the federal government passed the Canada Divorce Act, which introduced a type of “no-fault” divorce by allowing unilateral separation as a ground for divorce. As the name suggests, with this type of law, no actual fault has to be committed. It was enough for one of the parties to the marriage to be dissatisfied with the marriage and initiate divorce proceedings.[27]

In practice, fault divorce often amounted to a mutual divorce, which meant that both parties had to agree to the divorce before it could occur. This was because it was generally too costly to prove that a fault had taken place. Those committing adultery are usually secret about it, and evidence for cruelty may be only circumstantial. As a result, couples would often work out a property settlement on their own and then go to court and possibly perjure themselves by admitting to a fault that may or may not have occurred. In Canada, the fault of choice was “mental cruelty”. Under such circumstances the property right over who gets to decide on whether or not there is a divorce is the spouse that least wants the marriage to end, because it was critical that both spouses agreed to the divorce.

With no-fault divorce we have the exact opposite situation. Since either spouse can leave the marriage and start divorce proceedings, in effect the law becomes unilateral. With no-fault divorce, agreement to the divorce is not necessary. This means the property right to divorce is now in the hands of the spouse that most wants the divorce.

The switch from fault (mutual) to no-fault (unilateral) divorce provides an interesting test of the Coase Theorem. Those

marriages that should end in divorce because they are inefficient should still end in divorce, while those that are efficient should stay married, regardless of the law. Let us consider a simple numerical example. Table 1 shows the values of being married and divorced for a particular couple.[28]

TABLE 1

	Husband	Wife	Total
Married	\$50 000	\$50 000	\$100 000
Divorced	\$60 000	\$30 000	\$90 000

In this example, the total value of being married is \$100 000, while the total value of being divorced is only \$90 000. This is what economists would call an “efficient” marriage.[29] Of course, if the numbers that represent total value were reversed, this would be an inefficient marriage. However, it is also the case that the husband prefers being divorced to being married, while the wife prefers being married to being divorced. What will happen under the two different legal regimes?

If the couple is married in a fault jurisdiction, then the husband must get his wife’s consent to divorce. In effect he will have to pay her for the divorce. The husband, though, is only willing to pay \$10 000 to his wife, while the wife will not accept anything below \$20 000. Since the husband is unwilling to compensate his wife for the damage divorce will cause her, she does not consent to the divorce and the divorce does not happen, which is the efficient outcome.

If the couple is married in a no-fault jurisdiction, then the husband can just leave the marriage. In this case the wife must pay him to stay. Since she is willing to pay him up to \$20 000 in this example, and since he is willing to accept any payment greater than \$10 000, a deal is reached, and again there is no divorce. The actual legal rules do not matter for the allocation of resources (in this case whether or not a divorce happens) when the couples can freely and completely bargain.

Since the divorce rate in Canada tripled after the introduction of no-fault divorce legislation, it is obvious that the Coase theorem did not apply. I now turn to a brief discussion of property rights and transaction costs in order to understand the Coase Theorem and its role in explaining institutions.

Property Rights and Transaction Costs

When Coase first articulated the idea that became known as the Coase Theorem, he claimed that his result held when “transaction costs were zero.”[30] To begin understanding transaction costs we must be explicit about the meaning of “economic” property rights.

Economic property rights are one’s ability to freely exercise a choice.

Choices over goods can be boiled down to excluding others, deriving income, and transferring goods. The extent of an individual’s property rights depends on the extent to which he or she is able to make these choices. As a result, we should seldom think of economic property rights as all-or-nothing rights, since our ability to make choices is often circumscribed. For example, we often say things like “My home is my castle, I’m free to do what I want.” But at closer inspection this is not true. You cannot mine for gold in your back yard, you may not be allowed to build a ten foot fence, or park six cars on your front lawn. You do not own the air space above your house, nor can you stop the neighbor’s music or BBQ smells from coming into your yard. Just as importantly, you seldom can prevent with certainty a burglar invading your home and making off with “your” property. When you think about it, most of the things you “own”, are owned incompletely; that is, your economic property rights are incomplete.

Property rights are often limited because someone else holds the rights. All laws and regulations are assignments of legal property rights to different people. Hence, I may not own the mineral rights to a parcel of land, but someone else might. At other times, property rights are incomplete simply because it is too costly to enforce them. To “trespass” is to use someone else’s legal property without their permission. If children take a short cut across my lawn on their way to school, my property rights over the lawn are limited by my reluctance to enforce them. This points to an important distinction. To

the lawyer, property rights are always “legal” rights; that is, one’s rights to use property under the law. Hence a trespasser has no legal right to the property. But if the trespasser is unhindered, the economist would say he has an “economic” property right. Most of the time the two definitions overlap, but there are many instances when they do not. The distinction is important because behavior depends on economic rights, not legal rights.

The distinction between legal and economic property rights raises an important point. When economic property rights are reduced, then wealth is lower, and when economic property rights are eliminated or absent, then wealth is zero. This is true at an individual level and a social one. Consider a slave. A slave, by definition has no legal rights, and in practice very few economic ones as well. A slave has no wealth, has no incentive to increase his human capital, and no ability to trade with others. The absence of property rights makes the slave the poorest of all people.

Most often legal property rights are tied closely to economic property rights. If I am the legal owner of my computer, then I am usually the one that knows the password, has access to the room where it is stored, and gets to play the games. However, if my computer gets stolen, I am still the legal owner, but my economic property rights are eliminated. The value of the computer to the thief, however, is lower than for me because the ability to use the computer may be restricted (he may not know the password), and the ability to sell the computer is also reduced. For these reasons, stolen property sells for vastly reduced prices on the black market. Once again we see that a reduction in property rights reduces wealth.

A second point, already mentioned indirectly, is that when property rights are perfect, wealth is maximized — this is the Coase Theorem. Hence we can conceive of a spectrum of property rights varying from completely absent to perfect, with the level of wealth ranging from zero to some maximum level along this spectrum. Of course, we live in neither extreme. Our property rights are never perfect, but neither are they completely missing. Even in times of slavery, as in the American South, slaves had some economic rights, including (sometimes) the right to purchase their freedom (manumission). Other things equal, maximizing individuals will always prefer better defined property rights because in this case wealth is higher. These better defined rights, however, are costly to achieve, and in equilibrium we would expect the optimal level of rights would equate the marginal value of rights with their marginal costs. The costs of establishing and maintaining property rights are what we call transaction costs.

Transaction costs are the costs of establishing and maintaining property rights.

Hence we see that property rights are fundamentally linked to transaction costs. If transaction costs are zero, then economic property rights are complete, wealth is maximized and the Coase Theorem holds. If transaction costs are positive in a nontrivial way, then property rights will be incomplete, and the Coase Theorem will not hold. If transaction costs are so large that property rights are absent, then we have a world of anarchy.

Now we come to the most important point. Since institutions (distributions of property rights) are irrelevant when transaction costs are zero, and since institutions clearly matter, in order to understand them we must understand transaction costs. The grand hypothesis of NIE is that institutions are chosen to maximize the gains from trade net of transaction costs.[31] To understand marriage requires an understanding of the transaction costs involved. As I will show later, the divorce rate did increase with the introduction of no-fault divorce. This happened because the spouses were prevented, by transaction costs, from bargaining around their difficulties. I now turn to a brief discussion of some of the day-to-day problems that arise in a marriage that might prevent such bargaining from taking place. I do not intend to be exhaustive here, I only wish to point out how transaction costs violate the Coase Theorem.

Transaction Costs in Marriage

Marriage is one exchange where the transaction costs are quite high. As a result it is often possible that divorces happen in no-fault situations that are inefficient. The number and types of transaction costs that may result in inefficient divorces under no-fault divorce laws would seem to be quite large.

First, quirks in property laws at the time of divorce can easily create situations

whereby efficient marriages dissolve. In the past, for example, if a wife contributed to the education of her husband, but the courts did not consider a degree as property, then that contribution was not considered in the marital property settlement. Likewise pension funds, insurance policies, and lost workforce opportunities may or may not be considered property in a given jurisdiction. In some U.S. states there is an automatic split of marital property 50—50 — despite

contribution. In other states the courts make an effort to establish each spouse's contribution to the marriage. In every case imperfect rules are made that allow one spouse to take advantage of the other. The history of divorce legislation since the enactment of no-fault divorce has been the adoption of one band-aid remedy after another. No sooner is one type of asset ruled on as marital property than another example emerges. As long as it is costly to write laws, no law will ever define

property accurately enough, and the possibility of inefficient divorces arises. This was not a problem under fault based laws where the mutual nature of the law forced individuals to negotiate over all the economic assets of the marriage, whether they were legally recognized as marital property or not.

Second, government failures to enforce support payments for children and spouse allow the instigating party to avoid some of the costs of their actions. Hence the private values of the party leaving the marriage can be out of line with the joint value of the marriage.

This phenomenon of the "deadbeat dad" imposes costs not only on the mother and children, but also on the state which is often required to assist the family through welfare.[32] To the extent welfare creates its own set of disincentives the wife and children are further made worse off.

Third, many family assets may be indivisible or may be public goods, making them difficult and costly to bargain over at the time of divorce. Zelder (1993) makes the case that children are always quasi-public goods, and as a result their presence almost always makes the divorce inefficient. "Public good" is an economic term that essentially means one's consumption of a good does not hinder the consumption by another. With children, the fact that a father gets utility from a child does not mean the mother cannot also gain utility from a child. This affects divorce because a father can leave a marriage and still get utility from being a father. The mother in using the child as an enticement to stay is limited by the fact that the child is partly a public good. To the extent that utility from children is tied to access, this reduces the public good nature of children. Unfortunately, for many fathers this does not appear to be the case.

Fourth, violent reactions by a spouse may make renegotiating the terms of the marriage too costly, and an inefficient divorce or marriage may occur. Inefficient bargains are always the result of a failure to respect the property rights of others. Given the physical difference between husbands and wives, and given the privacy in which they interact, violence is often a possibility. Either party is capable of threats of violence in order to forcibly dissolve a marriage and enforce a property settlement that does not reflect the true contributions of the parties. Likewise, both parties can force a divorce by destroying the marital capital if they stay together by being abusive, irresponsible, and dissipating financial assets. Similarly, one party may be able to maintain a marriage through threats of force. When violence or threats of violence are involved, inefficient divorces and marriages are likely.

Finally, contracts based on a promise not to leave are essentially unenforceable in court, so this restricts the ability to bargain for the person least wanting to leave and can result in an inefficient divorce.[33] Marriage is such a complicated contract that the list of transaction costs that could lead to breach is probably very long. This is particularly a problem for women. Though wives make many contributions to a marriage, a major one is pregnancy and the rearing of children. Though a mother may also work, the presence of more than one child causes major disruptions in workforce participation, and hence a reduction in her financial contribution to the household. Because this contribution takes

place early in a marriage, the wife makes a sunk investment in the marriage and places herself in considerable jeopardy. The husband, on the other hand, makes no such investment. In fact, typical male incomes increase throughout his working life. Middle-aged husbands, then, can realistically expect a new spouse after divorce, while the same is not true for middle-aged wives.[34] Under these conditions it is easy to see why the inability to enter a binding contract with the husband is detrimental to wives. Thus the question, 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. If transaction costs are high, for example because marital property is difficult to define or child payments are hard to enforce, then the divorce rate should increase with the introduction of no-fault.

[1] By out of sample predictions I mean that economists are able to develop models that predict certain behavior before they actually look at the data. Two examples that are dealt with later are the effects of no-fault divorce on the age of

marriage and on female labor force participation. Economics is not simply about rationalizing past events.

[2] For example, according to Weitzman one of the goals of the no-fault laws was to “recognize the inevitability of divorce for some couples and to try to make the legal process less destructive for them and their children.” (p. 17, 1985). In fact, in the early years of no-fault divorce, advocates and researchers often called it “non-adversary divorce”. The California Family Law Act of 1969 went so far as to alter the entire divorce lexicon to reflect the anticipated non-adversarial nature. “Divorce” was replaced by “dissolution”, “plaintiff” with “petitioner”, to name two examples. In practice the law simply transfers the hostility from proving fault to establishing claims over property and children. It is no longer considered non-adversarial.

[3] “The entire fault divorce system creates strains on our legal system. But perhaps more important, fault divorce fails to reflect sociological and psychological realities.” (Zuckman and Fox p. 528).

[4] Allen (1998), provides an alternative hypothesis. He argues that the change in law was the result of changes in female workforce participation rates. As more women entered the workforce, it became more difficult to estimate the marital contributions of women and this increased the number of inefficient marriages. These marriages created a demand for divorce reform.

[5] The list of no-fault countries include: Australia, Bermuda, Canada, China, Denmark, England, Finland, France, West Germany, Greece, Hungary, Israel, Netherlands, New Zealand, Northern Ireland, Scotland, South Africa, Sweden, Switzerland, and the United States.

[6] This was Peters (1986). See Allen (1992a) for a critique.

[7] One final effect on wives was found by Brinig and Crafton (1994) who found that wives in no-fault states experienced more spouse abuse. They argued that since fault was not considered for grounds or property settlement in these states, that it lowered the cost of abuse and encouraged its use at the margin.

[8] Research on this particular point, in my opinion, is still incomplete. However, every indication is that both fathers and mothers are critical in child rearing. If true, the implications for same-sex families is clear: we can expect a larger fraction of them to be disadvantaged.

[9] By “value” I do not mean “dollar value” but rather how much of other things one is willing to sacrifice for the marriage.

[10] In Allen, Pendakur, and Suen (2003) we assume there is an entire spectrum of types, here I use only two types to keep the argument simple.

[11] See the Appendix for a more complete discussion of the economic approach to marriage.

[12] Compare this to statements made in support of same-sex couples: “most Canadians continue to live in families, and all Canadians deserve the benefits of legal recognition and protection, social acceptance, and support. This includes the freedom to choose marriage.” (Arnup, p. 11). Disagreeing with statements like these is like disagreeing with motherhood. However, note that there is no mention of the costs of extending the benefits of marriage.

[13] Or the costs and benefits could change such that the number of good marriages increases.

[14] One might think that if the marriages are marginal, then there is no social loss when they end. However, there are also intra-marginal marriages, and the losses here may

be considerable.

[15] The economist does not deny any role of love. Love, however, plays a role in the choice of the partner, not in the design of the contract.

[16] As a soccer coach of a 15 year old girls team, I recently witnessed a fight between a step-father and an ex-husband/

biological father over the logistics of who would pick the girl up after practice. The scene was extremely hurtful to the young girl, but demonstrates the naiveté of thinking these roles can be separated easily or without cost.

[17] For example, a father/husband has an incentive and the opportunity to teach his daughters the difference between male affection and sex. When a teenage girl seeks affection from other males, the probability of receiving sex instead of affection increases.

[18] For example, in her affidavit Professor Eichler states: “It is widely recognized among researchers and policy makers that a monolithic definition of the family is no longer adequate to reflect the complex realities of today’s families.” This ignores the fact that families are still organized around marriage, and that marriage is monolithic.

[19] See Cochran et al. (1954).

[20] Some argue that even though there are very few homosexuals they suffer tremendous utility losses, and that these losses are greater than the costs to heterosexuals. As I state below, the costs to heterosexuals are likely to be large, but this argument fails for two other reasons. First, homosexuals can enter private contracts that mimic marriage and so the losses must be small. Second, at the other end of the spectrum, there are fundamental Christians (perhaps 10% of the population?) who consider marriage a God sanctioned union and who would claim to suffer considerable utility loss if non-heterosexuals were allowed to marry. The problem with making arguments based on unobservable utility costs is that other groups can just as easily claim large utility losses as well.

[21] This is what Coase called “the reciprocal nature of the problem” and it always amazes me that such a simple idea is so often ignored in policy debates over marriage. For example, consider the following statement which considers it harmful to pressure “for policies that will privilege this one family type over other types of families to the detriment of families not thereby privileged.” (Eichler, p. 5). This is the cost. The reciprocal nature of the problem states that we must also look at the benefits!

[22] This term is defined later.

[23] There is virtually no theoretical distinction between law and economics and the NIE. The difference is in terms of the subject matter.

[24] See Eggerston for an introduction to NIE.

[25] For a detailed account of transaction costs, including the history and abuse of the term, see Allen (2000) attached.

[26] See Coase (1960).

[27] In the United States, where divorce is a state jurisdiction, California was the first state to introduce a no-fault law in 1969, and South Dakota was the last in 1985. Although I will use the term “no-fault” to essentially mean “easy” divorce, I fully recognize that the various no-fault laws are seldom identical. This is mostly an empirical issue. See Allen and Pendakur (2001) for an example of how to empirically deal with the different definitions of no-fault law.

[28] The use of dollars to measure the value of a marriage is only done for convenience.

[29] Some object to the use of the words “inefficient” and “efficient” in the context of marriage, probably because the layman’s use of the words usually revolves an engineering notion of efficiency. For example, we speak of “a gas powered motor as more efficient than a steam engine”. The economist uses these terms in the context of values and costs. To say a marriage is efficient only means that the value married (however measured) is greater than the joint value of being apart.

[30] Coase first discussed this point in the context of legal liability in tort law. Cheung (1968) was the first to apply it to the context of contracts. Becker et. al. (1977) were the first to apply it to marriage.

[31] See Allen(2000) for a detailed discussion and list of empirical literature on this point.

[32] Moir (1999), makes the case that failure to make payments may reflect more the fact that one man cannot support two

households, than a lack of responsibility on the part of the husband. Hence the problem is not one of enforcement, but rather one of a lack of resources.

[33] This last point is made by Brinig and Buckley (1998). Allen and Brinig (1997) provide another reason for bargaining failures based on biological difference between the life-cycle demands for sex for men and women.

[34] After 40 the male/female sex ratio also begins to turn against women, and the increased competition hurts the bargaining position of wives.