BALANCING ESCAPE AND COMMITMENT IN MARRIAGE

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Most people place a priority on having a happy, rewarding and fulfilling life and a successful marriage has a central role in their attempt to accomplish that goal. To assist people in obtaining that marriage, the marital laws have to balance two interests: a desire to escape from bad marriages and the benefits that follow from a commitment to good ones. Essentially all people approach their marriage optimistically with the expectation that it is going to be a success. Still, it is common knowledge that many marriages will end in divorce. Knowing that marriages can be fragile, some people may want for it to be easy to dissolve a marriage if they consider it unsuccessful. Others being more optimistic may want to make a strong commitment to their marriage and for those people an easy dissolution of their marriage is unattractive.

Regrettably, these two interests can be in conflict. The easier it is to dissolve a marriage the more limited are the incentives to commit to it. Therefore, a desirable goal is to find a proper balance between escape and commitment.

This paper is divided into four parts. In the first, a pragmatic perspective on marriage using an economic framework is introduced to illustrate the fundamental changes that are occurring in marriage. In the second, the reason why an easy exit from marriage can be desirable is developed. In the third, the reason why commitment is important for a successful marriage is discussed. In the last section, the conflict between these two goals and a program for balancing these interests is presented.

A Pragmatic Perspective on Marriage

The convergence in the opportunities available to men and women starting in the 20th century has dramatically changed the fundamental nature of marriage. While it is appealing to view marriage from a romantic perspective based on the love between two

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1 A sample of high school seniors have been asked a series of questions in the Monitoring the Future Survey conducted annually by the Institute for Social Research at the University of Michigan. The percentage of respondents who said that having a good marriage and family life was “extremely important” has increased over the 25 years of the survey. For girls, it increased from 80.2 percent in the period 1976-80 to 82.6 percent in 2001-2. For boys, it increased from 69.4 percent to 71.8 percent over the same period. See DAVID POPENOE & BARBARA DAFOE WHITEHEAD, THE STATE OF OUR UNIONS 2004: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 26 (2004).
2 For a more detailed discussion of this conflict, see ALLEN M. PARKMAN, GOOD INTENTIONS GONE AWRY (2000).
4 Demographers have concluded that approximately half of marriages will end up in divorce. See Martin T. Castro & Larry L. Bumpass, Recent Trends in Marital Disruption, 26 DEMOGRAPHY 37 (1989).
5 While proponents of no-fault divorce often wanted to ignore that it permitted unilateral divorce, it dramatically reduced the cost of a divorce to a spouse who wanted a divorce in the face of an spouse who did not agree. For a summary of the justification for the passage of no-fault divorce, see Herma Hill Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CAL. L. REV. 291 (1987).
6 While there is often strong religious support for a commitment to marriage, much of the academic support comes from economists who recognize that most successful marriage consist of the participant investing in it. Like any investment, it is based on the expected return. Traditionally, women’s investment in domestic activities has been protected from abandonment by their husbands by a “long term contract” called marriage. See GARY S. BECKER, A TREATISE ON THE FAMILY, ENL ED. 30 (1991)
people, Nobel laureate Gary Becker summarizes the economic perspective on marriage by suggesting that people marry when they expect to better off married and they divorce when they conclude that they were wrong. The keys to a successful marriage are for people to search diligently for a preferred spouse and then--when they marry--to make the choices that increase the likelihood that the marriage is going to be a success. Certainly, love and physical attraction between two people is fundamental to their feeling better off when they marry. However, continuing to feel that way has to go beyond just their attraction.

Historically, adults had limited control over the person that they married and the roles that they assumed when they married. Married adults were usually better off than single people in very visible and tangible ways. They had access to more goods and services. At the most basic level, they ate better and lived in more comfortable homes. Economists describe goods and services as commodities that are produced using the income and time available to individuals. The requirements for an enjoyable meal consist of more than just the money necessary to buy the ingredients. It also requires the time and skill necessary for its preparation. In the process of attempting to increase their welfare, people have to combine their income and time so as to produce the preferred bundle of commodities.

Married couples often were capable of producing more commodities than single people because they assumed more specialized roles. Most men were incapable of working in the fields or at a job and also providing desired domestic services for themselves. Meanwhile, women had few attractive employment opportunities, so they could increase their welfare by marrying and providing domestic services to a husband and their family.

Because of the tangible gains from marriage, most adults married as soon as they were able to support a family. They often chose—or were essentially forced to choose--a spouse from within a limited geographic, social and economic pool. Having married, the spouses assumed specialized roles often in line with those of their parents or other couples. Because of their being better off, seldom did couples consider alternative living arrangements. Divorce was unusual for practical as well as legal

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7 Id. at 331.
9 Economists view families as producing units with the participants making decisions about what is produced within the family. See Becker, supra note 6 at 30.
10 For a history of marriage, see STEPHANIE COONTZ, MARRIAGE, A HISTORY (2005).
11 BECKER, supra note 6 at 30.
12 For the seminal work on commodities, see Gary S. Becker, A Theory of the Allocation of Time, 75 ECONOMIC J. 493 (1965) and KELVIN LANCASTER, CONSUMER DEMAND (1971).
13 BECKER, supra note 6 at 30.
14 COONTZ, supra note 10.
16 Becker argues that women tend to specialize more in domestic activities because of their stronger commitment to the care of their children. See BECKER, supra note 6 at 37.
reasons. From a practical perspective, few men were in a position to support two families. The legal reason was more obvious as divorce was only permitted based on specific grounds usually based on the fault of one spouse.

Today, adults have more choices about whom to marry and what to do during marriage so making the decisions that will lead to a successful marriage has become more difficult. Central to the change has been a reduction in the tangible gains from marriage. To be blunt, men and women are less dependent on each other to increase their standard of living. This shift is primarily due to the convergence in the opportunities available to men and women. Most important has been the growth in the employment opportunities for women, who in most cases no longer need a husband for financial support. Meanwhile, men have benefited from the increase in labor saving devices in the home.

Love and compatibility between spouses has become more important for marital success. There continues to be important—but less tangible--gains from marriage for most adults with specialization of labor continuing to have a central role. This was especially true for couples who become parents. While it might be appealing to share parental responsibilities equally continuing existing careers, most couples eventually realize that their family is better off with one parent assuming the primary responsibility for parenting at least initially while the other emphasizes income earning. This is due to the fact that many higher paying positions can require long hours, travel or unanticipated overtime that would conflict with equal parental responsibilities. The couple may conclude that their family will be better off if only one parent rejects those positions.

Even without children, some couples may have access to more commodities if they assume more specialized roles. While an increase in a spouse’s emphasis on domestic work probably reduces the couple’s income, the time available may permit the production of important commodities such as high quality meals or just peace of mind because the pace of life has been reduced. It is important to recognize that the production of commodities requires time as well as income, so an emphasis on just income earning may actually reduce a family’s welfare.

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17 Following the tradition of 18th Century England, divorces were very uncommon in a majority of American states. For a history of divorce in the United States, see GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION (1991).
18 For example, the gross domestic product per capita in 1900 dollars the United States rose from $4,091 in 1900 to $27,948 in 2001. See ANGUS MADDISON, MONITORING THE WORLD ECONOMY 1820–1992 (1995) and the 2003 update.
19 PARKMAN, supra note 2 at 22.
20 Id. at 77.
21 An increase in the employment of women reduces the gains for the sexual division of labor and, therefore, the gains from marriage. See BECKER, supra note 6 at 55.
22 The labor force participation rate of married women increased from 23.8% in 1950 to 61.6% in 1997. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, various years.
23 The compatibility of the spouses has become much more important for marital success. See Allen M. Parkman, The Importance of Gifts in Marriage, 42 ECON. INQ. 483 (2004).
24 Traditionally, this has been very important as practically all women spent most of their prime adult years bearing and raising children. See BECKER, supra note 6 at 38.
25 The idea that earnings increase for less attractive and demanding jobs goes back to Adam Smith. See ADAM SMITH, WEALTH OF NATIONS 100 (1937).
While couples can benefit from this specialization during the marriage, it can reduce their income earning capacity later. Workers are often rewarded for a long term commitment to a career as those who are perceived as committed to a career are often rewarded with important promotions and on the job training. Alternatively, workers’ whose actions indicate a weaker commitment to their career--by being willing to relocate with a spouse or placing an emphasis on domestic responsibilities--will often will be confronted with fewer opportunities as reflected in the notorious “mommy track.” Those who de-emphasize their career will frequently find that they are no longer able to earn the income that could be earning if they had not made that adjustment. Still, their “sacrifice” could have increased their welfare and that of their family.

In summary, marriage has been attractive throughout history because married people were better off that single people. An important reason for these gains was the spouses assuming more specialized roles. A convergence in the opportunity available to men and women has reduced the material gains from marriage.

The Case for Escape

The shift from tangible to intangible gains from marriage has increased the importance of the person chosen as a spouse. People expect marriage to increase their welfare, but they can make a mistake in choosing a spouse. Because of the decline in the material gains from marriage, it has become more important that married couples are compatible. If they have made a mistake, often permitting them to dissolve their marriage easily increases social welfare. People can make a mistake about this person by discovering later characteristics of their spouse that were present prior to marriage, but had not been identified at that time. Tendencies toward abusive behavior or alcoholism are examples. Alternatively, things can occur after marriage, such as infidelity or poor health, which can reduce the attraction to that person. With this new information, some spouses might conclude that they would be better off dissolving their marriage. If the benefits to that person from dissolving the marriage exceed the costs to the other family members from the dissolution a divorce increases social welfare.

With the reduction in the material gains from specialization, the likelihood increased that at least one spouse would conclude that they would be better off dissolving their marriage. For most of the history of the United States, obtaining a divorce was difficult as it was based on the fault grounds of adultery, desertion and cruelty in most

26 The protection of investments in a person’s family is reason to an economist for why divorce historically has been difficult. See BECKER, supra note 6 at 30.
27 On the job training has been shown to be an important source of increases in individuals’ income earning capacities. See GARY S. BECKER, HUMAN CAPITAL 30 (1993).
28 Felice Schwartz is credited with coining the phrase, “the mommy track,” which describes the effect on the careers of women when their emphasis on domestic labor is recognized. Felice Schwartz, Women as a Business Imperative, 70 HARVARD BUS. REV. 105 (1992).
30 Becker, et al. have noted that the probability of divorce is a result of two factors: the expected gain from marriage and the variability of those expected gains. The higher the expected gain and the lower the anticipated variability the lower will be the probability of divorce. See Becker, et al., supra note 8 at 1143.
31 Id.
32 Id.
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states. 33 From a practical perspective, most divorces were based on the mutual agreement of the spouses using fabricated testimony to establish the fault grounds. 34 Still, the difficulty associated with obtaining a divorce conflicted with the preferences of those people—and they were probably increasing—who wanted a divorce. 35 The result was no-fault divorce—which quickly became in effect unilateral divorce 36—that provided an opportunity for one spouse to escape from a marriage that was perceived as unsuccessful. Marriage shifted from being an institution that was difficult to dissolve to one that can be terminated easily in most states based on the preferences of just one spouse. 37

For many people, this shift to unilateral divorce had substantial benefits and few costs. 38 The benefits were associated with the establishing of equality between men and women and the reduction in the adversarial process that had been necessary for a divorce. 39 Initially, there was little concern about the costs associated with no-fault divorce. Eventually, it was noted that it reduced the negotiating power of women who preferred to continue their marriage resulting in deterioration in the financial condition of women and their children after a divorce. 40 A reduction in the incentives for spouses to make a credible commitment to their marriage was not recognized as a cost of the legislation. 41

The Case for Encouraging Commitment

A credible commitment to marriage by both spouses is often important in encouraging the sacrifices that are central to a successful marriage. When people marry they usually pursue activities and assume roles different from those that they would have done or assumed if they had not married. 42 Overall, these choices leave them—and other family members—better off. Historically, the specialized roles of men and women in marriage were fairly pronounced. 43 In an agricultural society, men worked primarily in the fields and women in the home. In industrial societies, men worked in income earning positions, while women continued to work primarily in the home.

The recent convergence in the opportunities available to men and women has reduced the material gains from adults assuming specialized roles. 44 Marriage continues

33 For a discussion of the grounds for divorce, see HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 496 (1988).
34 Two factors caused Herma Hill Kay to conclude that most divorces in California under the fault divorce grounds were actually based on the agreement of the spouses. They were uncontested and they were granted on token testimony as to fault. See Kay, supra note 5 at 298.
35 PARKMAN, supra note 2 at 77.
37 All states by 1985 provided for no-fault divorces and in all but four states a divorce was available based on the preference of just one spouse. See Ira Mark Ellman & Stephen D. Sugarman, Spousal Emotional Abuse as a Tort?, 55 MD. L. R. 1268, 1276 n. 24 (1996).
38 The perceived benefits in terms of equality between the sexes and reducing the importance of the adversarial process in divorce resulted in only a limited opposition to the legislation in California. See Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath, 56 CINN. L. REV. 1, 55 (1987).
39 Id.
40 WEITZMAN, supra note 36.
42 BECKER, supra note 6.
43 Id.
44 Id.
to provide substantial benefits to those who are successful in establishing and maintaining it.\textsuperscript{45} People still tend to alter their behavior when they marry. This can be due to their increasing their specialization, especially when they become parents. Another alteration can be due to the conflict in the careers of the spouse causing one spouse to relocate for the benefit of the other spouse’s career. Increasing an emphasis on domestic work or relocating can reduce a person’s income earning capacity later. This cost is usually balanced for that individual by the income and love of their spouse and the affection of the other family members—so long as the marriage lasts.

Making sacrifices for the benefit of a marriage can be costly if the marriage is dissolved because the financial arrangements at divorce do not adequately compensate people for these sacrifices.\textsuperscript{46} It is common for property settlements to allocate a limited range of property equally without considering personal sacrifices during marriage. These sacrifices can be considered in a spousal support award but it is often limited and short term.\textsuperscript{47} Moreover, periodic payments may be difficult to collect.\textsuperscript{48} That leaves people whose sacrifices would benefit their family with a dilemma—should they make the sacrifice or not. It is important for the decision to make these sacrifices is the durability of their marriage.\textsuperscript{49}

To encourage the personal sacrifices that often are essential for a successful marriage, there needs to be the reasonable expectation that these sacrifices will be rewarded. Fundamental to these rewards is a sense that both spouses are making a credible long term commitment to their marriage. The grounds for divorce have an important role in establishing the credibility of a commitment. So long as a marriage can be dissolved unilaterally, it is difficult for spouses to make credible commitments to each other. Alternatively, if both spouses have to agree to a divorce, then a spouse can feel more comfortable that they will be rewarded for sacrifices made during marriage. These rewards will either occur because the marriage lasts or due to compensation that they will require to agree to a divorce. A credible commitment requires that it is difficult for just one spouse to dissolve a marriage. Commitment is encouraged by requiring mutual consent for a divorce.

**Balancing Escape and Commitment in Marriage**

The dilemma is how to make it easy for people to dissolve bad marriages, while encouraging people to make a commitment to good ones. The first thing to recognize is that people have the ability to accumulate information about their spouse over an

\textsuperscript{45} LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE (2000).

\textsuperscript{46} The most obvious omission is the lack of a systematic consideration of the effect of the marriage on the spouses’ income earning capacities. But there are also psychological costs of divorce, especially on a spouse who does not want the divorce and on the children. See Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KENT. L. REV. 51 (1998-9).

\textsuperscript{47} It has become more common for an award, if there is one at all, to be in the form or rehabilitative alimony for a specific period. See JOHN DEWITT GREGORY, PETER N. SWISHER, AND SHERYL L. SCHEIBLE-WOLF, UNDERSTANDING FAMILY LAW 252 (1993).

\textsuperscript{48} For example, only 74 percent of people with child support awards received any funds in 2001 and in many cases they did not receive the full amount that they had been awarded. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 2004-5, Table 548 (2004).

\textsuperscript{49} In effect, those people making a sacrifice are investing in their marriage. Economists have noted that the primary incentive for individuals to invest in a project is the return that they expect to receive from that project. See ROBERT S. PINDYCK AND DANIEL L. RUBINFELD, MICROECONOMICS, 6TH ED 554 (2005).
extended period as a relationship grows from courtship into a marriage.\textsuperscript{50} Most dating relationships do not result in a marriage as at least one person concludes the relationship does not have the characteristics that would warrant continuing it. Even after marriage, people continue to accumulate additional information some of which might suggest that earlier conclusions may have been erroneous. Gradually, there is less new information, thereby, reducing the gains from continuing to permit unilateral divorce. Meanwhile, the marriage would probably benefit from the spouses making sacrifices, so the importance of commitment increases suggesting that divorce should become more difficult.

Current divorce laws in most states do not attempt to balance the interests of escape and commitment. Most states have no-fault grounds for divorce that permit a divorce throughout the marriage based on “irretrievable breakdown” or “incompatibility.”\textsuperscript{51} In other words, the importance of being able to escape from a less than satisfactory marriage has been given more emphasis than the important of encouraging a commitment to successful marriages. This view is a reflection of the triumph of the obvious over the subtle. The problems in abusive and unsatisfactory marriages are obvious to at least one of the spouses and often to others. The cost of unilateral divorce due to it discouraging the commitment by the spouses that is more likely to lead increase the likelihood that their marriage will be a success are subtle and, therefore, often ignored.

There is a need to create a better balance between the interests of these two groups. A combination of unilateral divorce early in marriage followed by mutual consent for more established marriage is the best choice for balancing these two interests.\textsuperscript{52} Making it easy to obtain a divorce is attractive early in a marriage when people are accumulating new information about their relationship. The cost of dissolution is relatively low at that time because few changes have occurred and children are less likely.

It is potentially costly to continue unilateral divorce throughout a marriage. Eventually, most marriages benefit from the spouses making personal sacrifices for the benefit of their marriage.\textsuperscript{53} These sacrifices occur under numerous circumstances such as when parental responsibilities or one spouse’s career relocation opportunities disrupt at least one spouse’s career. These sacrifices are encouraged by a credible long term commitment to the relationship by both spouses. Regrettably, unilateral divorce limits the credibility of their long term commitment discouraging important sacrifices. Alternatively, the requirement of mutual consent for established marriages provides more credible assurances that the marriage is a long term commitment by the spouses.

The next issue then becomes when to shift from unilateral grounds for divorce to the requirement that the spouses mutually agree to a divorce? It should occur when the costs of divorce to some of the family members increase. The most obvious example is when the couple becomes parents. Then a divorce becomes costly to the child as well as potentially to the parent who assumes primary custodial responsibility. Another situation

\begin{footnotes}
\item[50] Becker, et al., supra note 8.
\item[51] Most states grant a no-fault divorce based on the request of only one spouse. See Ellman & Sugarman, supra note 37 at 1276 n. 24. In only four states (Mississippi, New York, Ohio, and Tennessee) is mutual consent required for a no-fault divorce. Id.
\item[52] See Allen M. Parkman, Reforming Divorce Reform, 41 SANTA CLARA L. REV. 379 (2001).
\item[53] BECKER, supra note 6.
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that potentially can be costly is when a couple relocates. Often this is due to one spouse responding to a career opportunity that requires the other spouse to adjust their career. Because the adjustments due to marriage can be subtle, the shift could be triggers by the marriage lasting a specific duration such as five or ten years.

The requirement of mutual agreement for a divorce seems very harsh to many people.\textsuperscript{54} This is due to a misunderstanding of the restrictions that mutual consent places on people. While married, people cannot marry anyone else and they have a financial obligation of support for their spouse.\textsuperscript{55} Otherwise, they certainly do not have to live together. Moreover, the larger number of divorces that occurred under the fault divorce grounds illustrate that people—when they are confronted with a failed marriage—are able to agree to divorce.\textsuperscript{56}

Escape may also be necessary if a spouse in a mature marriage, for which mutual consent would be appropriate, finds themselves in an abusive relationship. Under those circumstances, one spouse should be permitted to dissolve the marriage without the agreement of their spouse.

**Conclusion**

Marital laws need to balance the desire by some spouses for the ability to escape from an unsuccessful marriage with the desire by others to feel comfortable that both spouses are making a credible commitment to a good marriage. The desire for escape would support unilateral divorce, while encouraging commitment would suggest mutual consent as the basis for divorce. Unilateral divorce early in marriages followed by mutual consent divorce later does a better job of balancing these interests than the unilateral divorce that is common in most states for all marriages.

\textsuperscript{54} This is in line with the criticism of fault divorce that resulted in the introduction of no-fault grounds for divorce. WEITZMAN, supra note 36 at 15.

\textsuperscript{55} See HARRY D. KRAUSE, FAMILY LAW 3\textsuperscript{RD} ED. 109 (1995).

\textsuperscript{56} The divorce rate was already increasing before the introduction of no-fault divorce laws. It increased from 9.3 divorced per 1,000 married women in 1955 to 14.9 in 1970 the year in which California initiated the first “pure” no-fault divorce laws. See the U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, various years.