

WITH OR WITHOUT YOU: REGULATION OF DIVORCE AND INCENTIVES ECONOMIC ANALYSIS OF NO-CAUSE DIVORCE+

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During the 70s, a tendency to remove fault divorce systems and replace them with no-fault systems started in the United States. Much more recently, in 2005, the Spanish Parliament passed a divorce reform act that basically had the same aim: to introduce a “free” divorce system that disregards the spouses’ behaviors to grant it.

Using economic analysis of law, this paper evaluates the impact of the abolishment of cause in divorce proceedings and the simplification of the procedure to obtain a divorce. In other words, how does the loosening of requirements to divorce, and thus the easier exit of the marriage contract, influence individual incentives with respect to marriage? We argue that the free exit from marriage lowers transaction costs, favors efficient breach of the marriage contract and discourages opportunistic behaviors from the spouses. However, the willingness to marry loses its signaling function.

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I. INTRODUCTION

A. Methodology and Scope

This article analyzes the non-fault divorce system using the rational choice theory to examine how rules and institutions affect human behavior. This Law & Economics approach has traditionally been used in other fields of the law, namely, antitrust or tort law. The fundamentals are, however, the same in all cases: individuals act (or, more accurately, react) to rules and regulations and try to maximize their utility given a certain constraint (a budget constraint or a legal one). Therefore, changes in the law will make individuals adapt their behavior to new constraints.

To accomplish this lawyer economists use the tools provided by microeconomics and try to explain behavior by treating individuals as profit-maximizer agents. Using this approach to explain behaviors where feeling and emotions are also present, such as in the case of marriage, might seem like an impossible task. However, a “profit-maximizer individual” is not to be understood as a person with no scruples that only cares about money. Profit is not limited to a monetary benefit, but to all aspects from which an individual can obtain “happiness”. This would include, for instance, the well-being of one’s offspring so that the better that the child is, the greater the “profit” of the parent is. Also, this approach takes into account that decisions are also driven by emotional reasons (later on, we talk about the partner searching process, in which is, more that obviously, emotional).

This paper will use this approach to examine how divorce laws affect this behavior: how a “free” divorce system affects the decision to marry or not, or to

undertake specific investments for the family. Our analysis will be partial: there are many factors that affect those decisions, one of them being the financial consequences of divorce. The division of assets following divorce, alimony provisions, or how parental responsibilities are defined will also influence the *ex ante* decision of marriage and the organization of the family. We leave those out and focus on the changes in the divorce system that has been substantial enough to study it on its own.

B. Background

Spain has witnessed major changes in its family and social structure in the past decades. It has evolved from a religious society that viewed marriage as the only legitimate way of structuring a family to a much more diverse environment that embraces many types of family structures.

As a consequence, the laws governing marriage and divorce have also evolved in order to reflect the new social preferences regarding families, as we will see later on. However, we must bear in mind that not only laws change as a consequence of a social transformation, but individual choices are also affected by new laws

The radical changes in Spain, both regarding social structure and legal ground make it a case especially suitable for study. The scope of our conclusions, however, is not limited to the Spanish case. We use a general model to predict the change in behavior and then use Spanish data to see whether the model actually works.

Divorce was introduced in Spain in 1981 by Act 30/1981 of July 7 (B.O.E. 1981, 172).¹ Until then, the only way to terminate the marriage was through its annulment (whether in a civil or religious form).

From 1981 to 2005, the divorce laws included a double procedure in which, first, it was necessary to file for separation and only when judicial separation had been granted, the spouse could then file for divorce. The established periods were lengthy, too: spouses had to wait a year since they married to begin the separation procedure, and another year, once they got the separation, to begin the divorce procedure (with some exceptions, of course).

1 With the only exception of the republican Divorce Act of March 2, 1932, repealed after the Spanish civil war (1936-1939), which did allow for divorce.

C. Marriage and Divorce: the Spanish Revolutionary Legal Reform

Many major changes in Western societies occurred throughout the end of the past century and all these changes demanded substantial reforms in family law. In Spain, the legislative, both at national and regional levels, gave responses to the spread of a new conception of the family regulating cohabitation and reforming marriage contract.

In 2005, regarding the marriage contract, two acts were passed by the Spanish Parliament: Act 13/2005 of July 1 (B.O.E. 2005, 157), which allowed for same-sex marriage with full legal effects; and Act 15/2005 of July 8 (B.O.E. 2005, 163), which eliminated the requirement to adduce legal grounds for separating or divorce and allowed either spouse to file for divorce without previous judicial separation. Act 15/2005 facilitates divorce, even when it is unilaterally requested, and shortens from one year to three months the minimum marriage duration in order to file for divorce. Spanish marriage law has become the most liberal divorce system in Europe.²

D. Act 15/2005: the Clear-Cut of Spanish Marriage Regime

Changes have developed so abruptly in Spain that two separate periods can be distinguished with Act 15/2005 acting as the turning point: first, the period of traditional marriage with a causal divorce and a lengthy and complicated divorce procedure—direct heir of the Catholic tradition—, and second, the period after Act 15/2005, of no-cause divorce, and a short divorce procedure.

We identify the first period with the classical analysis that Gary Becker carried out, in which there is a division of labor between husband and wife: the husband working in a paid job, and the woman being the home maker. In this setting, divorce laws must ensure that the wife who has cared for the family is not left unattended after the marriage is broken.

In the second period, however, it is acknowledged that the State should not tend to promote a specific model of family but allow for diversity and individual choice. The new legislation reflects this neutrality.

2 Josep Ferrer Riba, *Same-sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law*, INT'L FAM.L. J. 139, 142 (2006).

II. CLASSICAL ANALYSIS OF TRADITIONAL MARRIAGE WITH CAUSE DIVORCE: BECKER'S MODEL

A. *Basic Assumptions*

This work starts with Gary Becker's model, a pioneer in applying law and economics to family law, in which he studies the family as a production unit formed after a search process in the marriage market.³ applying applies the classical economic model of utility maximization to explain the behavior of husband and wife while the marriage lasts.⁴

The model relies on three basic assumptions:

1. According to the search theory, the marriage market is in equilibrium: a person will invest in the search for a partner until the costs of further search exceed those of remaining single or with the current partner. In other words, one will stop searching when the marginal cost of search equals the marginal revenue of remaining with the current partner.⁵

Nevertheless, we believe that this does not imply that the marriage market is perfectly competitive. There is not just one market for wives and husbands and the price is unclear at the moment of contracting. On the one hand, all potential husbands and all potential wives cannot be aggregated to form a demand curve and a supply curve respectively, or vice versa. On the other hand, the price, as an economic value of the decision to marry someone, is mostly determined by the duration of the marriage, increasing with respect to time.

2. In most cases, the decision to marry is voluntary, which means the utility of spouses will be higher if they marry rather than if they remain single,

3 GARY S. BECKER, *A TREATISE ON THE FAMILY* (enlarged ed. 1993). Despite that the first edition of the book dates from 1981, his earlier work goes back to his article *A Theory of Marriage: Part I*, 81 JPE 813 (1973), followed by *A Theory of Marriage. Part II*, 82 JPE 811 (1974).

4 As acknowledged by Gary Becker, "economic theory had tried to explain almost all behaviors involving scarce resources but one: marriage; and yet 'marital patterns' have major implications for, among other things, the number of births and population growth, labor-force participation of women, inequality of income, ..., allocation of time on leisure", Becker (1973), *supra* note 3, at 813. He also explains that this line of work was either ignored or disliked by his fellow economists. However, his 'thinking out of the box' yielded him the Nobel Prize in economics in 1992 "for having extended the domain of microeconomic analysis to a wide range of human behaviour and interaction, including non-market behaviour", www.nobelprize.org/nobel_prizes/economics/laureates/1992.

5 This assumption may seem unromantic, but one can interpret the "marginal revenue" simply as the love for the current partner.

otherwise they would not marry.

Becker defines marriage as a couple sharing the same household, regardless of legal status, whether they are married or cohabitating.⁶ However, we will distinguish between married and cohabitating couples, since their legal status determines substantial different consequences from break-up.

3. Spouses maximize “household commodities”, *Z*, which includes children, but also company, love, prestige, health, leisure... Apart from family life, spouses also enjoy economies of scale derived simply from sharing a household and its expenses.

B. Becker's Model

To maximize *Z*, spouses must allocate their time between the market sector (a paid job) and the non-market (the so-called household commodities: child rearing and house keeping). Each spouse will specialize in each sector so as to maximize their comparative advantage, which, in turn, depends on their relative wage. Once spouses have placed in one sector or the other, they will proceed to carry out their “specific investment”.⁷

Typically, says Becker the woman's wage will be lower than the man's –and in many countries this is still the case- so she will specialize in household work. Richard Posner explains that the reason for the difference in relative wages is sexual discrimination,⁸ but even if this was not the case, there are still biological reasons for which the cost of the woman staying at home is relatively lower than the cost of the man. Many activities related to offspring can only be carried out by the mother like pregnancy, delivery and breastfeeding.

Furthermore, as Lloyd R. Cohen points out, the wife's specific investment is higher at the beginning of the marriage when the decision of having children and leaving the market sector is made.⁹ On the other hand, the returns on the husband's investment are realized at later time as his professional career develops. Marriage, then, is an asymmetric contract: the wife must invest much more at the beginning of the marriage, when the decision of having children and not pursuing a career is made. She will benefit later from her husband's investment. In turn, the husband will benefit from the wife's investment from the beginning of the marriage and will profit later in time from his own investment in his career as well. In addition, the

6 Becker (1973), *supra* note 3, at 820.

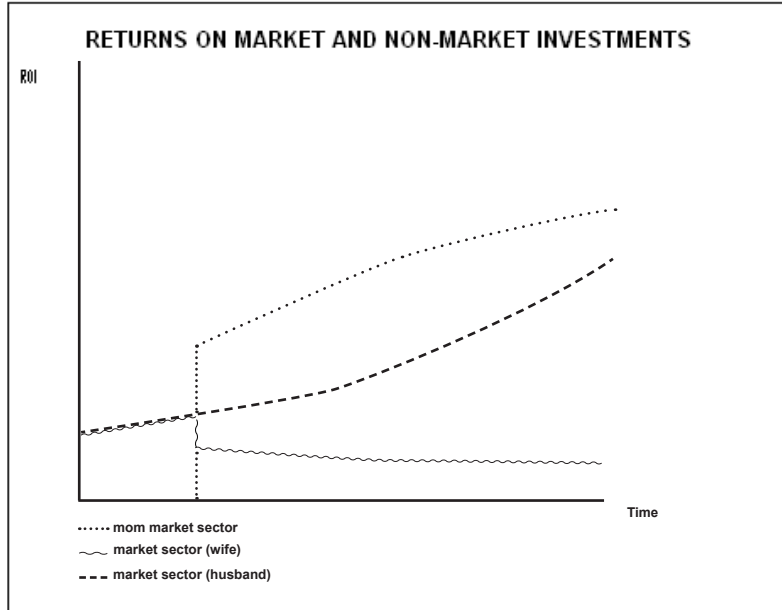
7 A "specific investment" is the one that loses value outside the context it was made.

8 RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 146 (6th ed. 2003).

9 Lloyd R. Cohen, *Marriage: the long-term contract*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 10, 17 (Antony W. Dnes & Robert Rowthorn eds., 2002).

man's investment is much less specific than the woman's, since as it is a market investment it does not lose value outside of marriage.

This unbalanced return on investment in time can be depicted as follows:



Graph 1: Returns on market and non-market investments

Source: made by the authors

The blue line represents the husband's return on the market sector. We have assumed that it is increasing and convex because as the husband progresses in his career his earnings will increase proportionally (the convexity of the function is not necessary, but only shows that the husband's investment yields increasing returns over time).

On the contrary, the stay at home wife will experience decreasing returns on her market sector investment (green line). Not only because she does not develop market skills over time –unlike her husband- but also because it is increasingly difficult for her to return to the market sector as she grows older.

We assume that the returns on the non-market sector are positive (pink line) because the children eventually grow, and the wife's housekeeping skills do increase over time.

The graph shows that, if spouses divorce, the overall return on investment for the housewife is negative, due to the increasing loss in her own market investment value over time. If the average marriage duration is 15–20 years, it begs questions: what is the “resale value”¹⁰ of a housekeeper in her forties with two kids? On the contrary, what is the “resale value” of a career man, not yet in his fifties, with kids but no custody?

This negative ROI¹¹ suffered by the housewife necessarily gives rise to compensation if marriage fails, a wealth transfer in her favor under one form or another: either by marriage economic regime liquidation rules or, by an entitlement to alimony.

C. Implications and Criticism

According to this Beckerian approach, marriage is a contract of indefinite duration, and its policing must take into account the advisability of protecting the woman’s initial specific investment and discouraging opportunistic behavior by the husband.

Before going further with the analysis, in a system with causal divorce we distinguish between:

1. Duties of spouses, as set in the marriage contract before the reform, were fidelity, mutual care and life together.¹²
2. Grounds for divorce, that is, what the parties can invoke to ask for a divorce, which can include a breach of duties of the spouses, but also the breach of parental responsibilities, drug and alcohol abuse or imprisonment.

The grounds for divorce include but are not restricted to a breach of duties of spouses. That is because some behaviors might not be specifically linked to the marriage contract but seriously affect family life (i.e. drug abuse, alcohol abuse or imprisonment), thus damaging prior specific investments. This means that grounds for divorce are not directly linked to specific investments, they act as a barrier to

10 "Resale value" refers to specific investments. The higher the specificity, the lower the price one can get from reselling the asset in the market. *See* HANS-BERND SCHÄFER & CLAUD OTT, *THE ECONOMIC ANALYSIS OF CIVIL LAW* 381 (2004).

11 The return on investment (ROI) is the ratio of utility gained or lost on an investment relative to the amount invested.

12 Act 15/2005 reformed article 68 of the Spanish Civil Code by introducing a new duty of spouses: sharing both housework and child rearing.

exit, designed to protect the wife and children against the husband's opportunistic behavior once the wife has made the specific investment.

Since the marriage contract can only be voluntarily complied with, specific performance in case of breach is impossible, since spouses' duties are not legally enforceable. Therefore, parties can either ask for the termination of the contract (through divorce) or suspend its performance through separation. This implies that the wife can only obtain the returns on the specific investment of her husband in monetary equivalent in the proportion determined by the mandatory rules and economic regime of the marriage.

The aforementioned implies that the duties of the spouses are not concretely enforceable, but merely behavioral expectations. Therefore, a decrease in specific investment in household commodities as well as a decrease in sector specialization can be expected.

Strict application of the productivist view, with causal divorce, upholds the creation of "traditional" families. Nonetheless, it is not for the State to do so, but to guarantee individual freedom and promote the free development of the personality.

We also argue that Becker's approach, and the traditional division of labor between wife and husband is not necessarily Pareto efficient. Even if a comparative advantage exists (albeit only because of biological reasons) and conventional economic theory advises specialization in order to benefit from the advantage, the fact that the marriage can come to an end suggests that it would be more efficient that the wife also invest in a market career. A woman in the workforce will need less alimony¹³ from her former husband and will be able to support herself after divorce.¹⁴

13 Amounts paid by one spouse to another in discharge of the paying spouse obligation to support the other spouse. Alimony is different from "child support", a distinct obligation consisting in the payment of an amount of money by one spouse to the other whom has custody of the spouse born of marriage.

14 Statistics also support this suggestion, since in Spain the mode of age of wife when marries is 25-29 and the mode of marriage length is 20 or more years, one can expect that housekeepers ex wives will have a difficult time finding a paid job, because of education but also because of age,
www.inmujer.migualdad.es/MUJER/mujeres/cifras/familia/matrimonios_divorcios.htm
 (follow "Matrimonios heterosexuales, según edad y estado civil anterior del cónyuge" hyperlink and "Rupturas matrimoniales, por duración del matrimonio y sexo de los contrayentes" hyperlink).

Almost two decades ago, June Carbone and Margaret F. Brinig concluded that the empirical assumptions on which Becker's model was based have been broadly overcome by the massive participation of women in the labor market and the weakening of gender roles.¹⁵ Although these phenomena began in Western societies during the second half of the 20th century, both are still in development because they do not equally affect all generations.

III. POLICING THE NEW MARRIAGE CONTRACT

Before undertaking the analysis, we must define divorce as dissolution of the marriage bond and the subsequent possibility of remarriage, considering that economic consequences always follow, especially if the couple has had children.

We must also distinguish between:

- (a) "Cause" invoked in the claim for divorce, which will be the breach of some marriage duty.
- (b) "Effects" of separation and divorce: use of family dwelling, alimony, custody and child support.

"Cause" and "effects" will affect the spouses' behavior, so the modification of either "cause" or "effects" will have an effect on it. This paper is mainly focused on the outcome of the casual-divorce suppression.

A. *To Marry or Not to Marry: Asymmetric Information and Opportunistic Behavior*

First, we consider the effects that the marriage laws have on the partners *before* and *after* they decide to marry. For simplification purposes, as economists always do, we will only consider two types of individuals, the ones with high commitment level, who are more willing to go through the marriage, making the probability of divorce lower, and the ones who want a low commitment level, with a higher probability of divorce.

1. Marriage as a Signal: Pooling and Separating Equilibria

Signaling takes places in a setting of asymmetric information: parties do not have complete information about the other, so some behaviors are taken as an indication of their purposes. In other words, agents indirectly convey information

15 June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991).

about themselves through their actions, the so-called “signal”. The effectiveness of such a signal depends on the cost born to send it. The higher the cost, the more valuable it will be.¹⁶

As said before, in our model we have two types of agents: **(i)** those who want to acquire a high level of commitment with their partner and are willing to undertake a high investment to obtain household commodities. We will call them C_H . And **(ii)** those who want a low level of commitment and will be prone to opportunistic behavior. We will call this type C_L .

We assume that both types of agents will want to marry a C_H . C_H types do so to match their level of commitment and C_L types to profit from C_H .

We will call our couple H and W. W knows her type but she does not know H’s type. We define p as the probability that H is C_H , and $q = (1-p)$, the probability that he is C_L . The signals sent by H are the willingness to marry or the willingness not to marry. Once the signal is sent (marriage proposal or lack thereof) W will decide to accept or not.

Actually, there are two simultaneous signaling games since H does not know W’s type either. Otherwise the game would not exist, since H would not want to marry W unless she was C_H .

If H does not propose to marry, different outcomes may take place depending on W’s type: if W is C_H he will either propose or eventually break down the relationship if he takes H’s actions as indicative of low commitment willingness. If W is C_L , they may just decide to cohabit.

Depending on the cost of the signal, we can achieve two types of equilibria:

- a) There will be a **separating equilibrium** when each type signals his true intentions. In this way, if the cost of marrying is very high only C_H will choose to marry. Under this equilibrium only same-type agents will marry.

For example, if divorce is not allowed, only people interested in a high level of commitment will choose to marry. The cost of marrying for a C_L is so high that he will never propose it nor accept it. In this scenario, C_H will

16 See INÉS MACHO STADLER & DAVID PÉREZ CASTRILLO, AN INTRODUCTION TO THE ECONOMICS OF INFORMATION: INCENTIVES AND CONTRACTS 185-210 (2d ed. 2001). The classic example is the worker who signals his abilities in the job market by higher education.

marry and C_L will cohabit.

- b) However, there will be a **pooling equilibrium** when the signal is not revealing of the type (it is ‘cheap talk’) because cost of marrying is low and both types send the same signal (that is, willingness to marry). H will not distinguish W’s type (and vice versa) and both will be unhappy with a probability q . If agents cannot distinguish among themselves, the couple’s expectations may be frustrated if they belong to different types, C_H married with C_L .

The decrease of barriers to divorce affects the quality of the signals that future spouses send each other, thus increasing uncertainty with respect to the level of commitment that each spouse wants to acquire.¹⁷ In other words, the possibility of unilateral divorce with no cause dilutes the signaling function of the willingness to marry.¹⁸ The uncertainty is much greater if we take into account that the couple can organize their life together without resorting to marriage.

This loss of meaning could result in an increase of prenuptial agreements, because it would help to reduce uncertainty of marriage exit. Additionally, the spouses would be forced to agree on the consequences of future behaviour.¹⁹

However, to evaluate the effectiveness of the signal we must look at, not only the free exit from marriage, but also the economic effects of divorce, because one may counteract the other, as it would happen if an exorbitant compensation would be granted to the spouse that opposes to divorce. In this case, the barrier would be placed in the effects of divorce, and not its causes.

17 See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 205 (1990). Brinig explains that, during the first half of the XXth century, the engagement ring served as an insurance to the bride in case the marriage never came about, as a woman was morally obliged to get married. But all her marriage value was lost if she had had sex with her former fiancée. The ring then was not only an insurance but a signal that the husband to be had a serious intention of marrying.

18 Robert Rowthorn, *Marriage as a signal*, in THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 132 (Antony W. Dnes & Robert Rowthorn eds., 2002).

19 Ian Smith, *The Law and Economics of Marriage Contracts*, 17(2) J. ECON. SURVEYS 201 (2003); See also Albert Lamarca i Marquès, Esther Farnós Amorós, Albert Azagra Malo & Mireia Artigot i Golobardes, *Separación de bienes y autonomía privada familiar en Cataluña: ¿Un modelo pacífico sujeto a cambio?*, 3 INDRET (2003) (Sp.), www.indret.com/pdf/dc07_es.pdf. available in english version at www.indret.com/pdf/dc07_en.pdf.

In this sense, Act 15/2005 is consistent with the removal of barriers to divorce. The elimination of causes goes hand in hand with the smoothening of the effects of divorce. Act 15/2005 also reforms section 97 Spanish Civil Code, allowing alimony to be limited in time and to be paid as a lump sum.²⁰ Also, the progressive regulation of cohabiting couples and the approximation of both regimes, marriage and cohabitation, in terms of alimony, survivor's social security benefits and, in some regions like Catalonia, inheritance rights too.

In sum, both the abolition of the need to invoke a cause for divorce and the progressive acknowledgment of cohabiting couples as a relationship analogous to marriage decrease the value of the signal, loss that the Spanish law does not amend because it weakens the effects of divorce by means of temporary alimony, even with the possibility of a single payment, and joint custody.

As it is shown in graph 3 (*see infra* section 4.1), regardless that the impact of the reform in the short run is an increase of the number of divorces, the main effect in the long run is a radical change of the institution of marriage and, in turn, a change of what potential spouses would expect from a marital relationship. Hence, this could be regarded as an example of the expressive function of family law: how legal rules convey the prevailing morality and practice, and how individuals behave consequently.

2. Opportunistic Behavior

“[Opportunistic behavior] occurs when a performing party behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the explicit terms of the agreement, leading to a transfer of wealth from the other party to the performer”.²¹ This is the case when the contract performance is not verifiable,

20 Divorce gives rise to compensation when one of the parties suffers an imbalance with respect to the other one's position during the marriage. To determine the amount of the compensation it must be taken into account the following circumstances of the aggrieved party: (1) Age and state of health; (2) Professional qualifications and likelihood of getting a job; (3) Past and future dedication to the family; (4) Collaboration by working in the other spouse's commercial, industrial or professional activities; (5) The duration of the marriage and of their marital cohabitation; (6) The possible loss of pension rights; (7) Economic wealth and resources and the needs of each spouse.

21 Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 521 (1991); *See* Margaret F. Brinig, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994). "Opportunistic behaviour" is also referred to as "moral hazard", especially in the market for insurance: insured party decreases his level of precaution because he does

i.e. performance is not observable to outsiders.

Let us go back to our couple: H and W have decided to marry; each one expects a certain behavior from the other one during their married years. In our model this expectation corresponds to the specific investment of the other spouse in order to produce household goods. These goods are non-excludable, that is, both spouses can enjoy them regardless of who produces them. Opportunistic behavior can take two directions, depending on when the returns on investment are obtained.

Class 1 Opportunistic Behavior:

Class 1 opportunistic behavior occurs when a contracting party takes advantage of the other's specific investment. This kind of behavior is found in asymmetric marriage contracts, those in which each spouse invests in different specific goods: one spouse specializes in the market sector, which yields their return at a later time in life –let us assume H- and the other in non-market goods – let us assume W-. In a scenario in which W has already invested (and have had children) and H has not yet received his returns on investment (has not achieved full promotion yet), opportunistic behavior occurs when H files for divorce. This behavior implies that H has enjoyed W's investment but not the other way around. Lloyd R. Cohen qualifies this wealth transfer as a quasi-rent, defined as the difference between the specific goods' value inside and outside the marriage.²² The value of the specific goods outside the marriage is zero, so W incurs in a sunk cost, since she gave up investing in market goods, and will never be in a position to invest in such sector with the same intensity as that before marriage.

Class 2 Opportunistic Behavior:

Class 2 opportunistic behavior occurs when the level of effort of one party is less than the other one expected. Here opportunism is seen from the perspective of effort undertaken, regardless of the contract being asymmetric or not.

In the production of household goods one can undertake high effort (e_H) or low effort (e_L). Each spouse wishes for the other to exert a high level of effort, but it is not possible to contract over the level of effort nor is it possible to verify it by a third party after the marriage contract has been executed.²³ This means that ex ante, the only thing that spouses can hold on to is their expectation that the other party is e_H ;

not bear the total cost of suffering an accident. At the same time, the insurance company cannot verify insured parties' level of precaution. See STADLER & CASTRILLO, *supra* note 16, at 185-210.

22 Cohen, *supra* note 9, at 25.

23 Smith, *supra* note 19.

and ex post, their effort will only be known to the other spouse. If the effort effectively undertaken does not correspond to the expected effort, the spouse that has seen his or her expectation frustrated will file for divorce.

Suppression of causal divorce decreases class 2 opportunistic behaviors, since, once the lack of effort has been detected, the unsatisfied spouse can obtain a divorce right away. However, it increases class 1 opportunistic behavior as the removal of exit barriers eases the marriage departure to the opportunistic spouse.

B. *Filing for Divorce*

In 3.1 we have examined the impact of marriage laws when deciding whether to actually get married or not. We now consider the situation of being already married and wanting to file for divorce because one of the spouses turned out to be a low commitment type.

1. Efficient Breach

There is an efficient breach of the marriage contract if the “marital surplus”²⁴ vanishes or one of the spouses does not receive any share of this surplus.²⁵ There are negative externalities on children arising from divorce that are not considered in our analysis of efficient breach, since marriage is one path to procreation, but it has substitutes.²⁶

For our purposes, we consider only unilateral divorce, only one party wants to break off the relationship because were both parties be willing to separate, the breach will always be efficient. In this context, it is sufficient that the breach is efficient for one of the parties as long as he has the possibility to compensate adequately the other party. The spouse that wants to divorce must be able to cover

24 "Marital surplus" is defined as "all utility-enhancing effects that would not exist in the absence of the relationship", Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 529 n.40 (1998). This authoress defends that women accept a smaller share of marital surplus, because their value in the remarriage market declines relative to that of their husbands and therefore their bargaining power is lower, *id.* at 591-593.

25 In general, efficient breach of contract occurs when the cost of performance exceeds the benefits of performance. See THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 128 (2004).

26 Cohen, *supra* note 9, at 12.

the utility loss born by the other party.²⁷ Efficiency of the result will be measured according to a Kaldor-Hicks criterion rather than a Pareto one since unilateral divorce always makes one party worse off, i.e. the party that did not want to divorce. The efficiency of this result is measured according to Kaldor-Hicks, which only requires the mere possibility of compensation but not an effective one.

$$|U_H(D)| \geq |-U_L(M)| \text{ or } |-U_H(D)| \leq |U_L(M)|$$

Compensation must cover economic consequences of divorce *as well as* the personal costs derived from breaking the relationship and therefore should place the spouse in such a position that he or she would be indifferent between divorcing or remaining in the marriage.

Kaldor-Hicks efficiency differs from Pareto efficiency in that the latter requires effective compensation, or as the classic definition states: “there will not be a Pareto improvement unless some party is better off and no party is left worse off”.²⁸ A Kaldor-Hicks improvement may imply an effective welfare loss to some parties, but as long as the global gain exceeds the loss it will be efficient. For instance, the change in an allocation from (100, 50) to (130, 25) will never be a Pareto improvement, but certainly is a Kaldor-Hicks improvement.

Both economic and personal costs of divorce are higher with a causal divorce system (Act 30/1981), since it requires fault or a minimum period of separation (old article 86 of the Spanish Civil Code) as well as a double procedure (first, a separation procedure and, after at least a year, the final divorce procedure), which means double legal costs and need of invoking a cause, i.e. blaming the other spouse in order to get the divorce. The new no-cause divorce act (Act 15/2005) promotes efficient breach in the following cases, distinguishing between bilateral divorce and unilateral divorce:

- When divorce is bilateral, that is, wanted by both parties, Act 15/2005 anticipates the result because of the elimination of double procedure.
- However, as stated before, unilateral divorce may not always be efficient, only the ones that fulfill the Kaldor-Hicks requirement, that is, when the increase in utility obtained from divorce by one party is higher than the utility loss born by the other party (in an ideal setting of perfect

27 Antony W. Dnes, *The Division of Marital Assets Following Divorce*, 25(3) J.L. SOC'Y 336, 341 (1998); See FRANCISCO CABRILLO, *THE ECONOMICS OF THE FAMILY AND FAMILY POLICY* 70 (1999).

28 SHÄFER & OTT, *supra* note 10, at 23.

information). Of course, it is not possible to distinguish efficient from inefficient breach, that is to say, it is impossible to measure global utility gains from efficient breaches against global utility losses from inefficient breaches and formulate a certain assessment of the reform.

Nevertheless, the overall evaluation of the reform must be positive, because most divorces are bilateral, mutually consented and hence mutually advantageous, and a certain number of unilateral divorces will be efficient too. Therefore, the final outcome of the new legislation is an increase of efficiency.

| <i>Year</i> | <i>Mutual consent separations</i> | <i>Mutual consent divorces</i> |
|-------------|-----------------------------------|--------------------------------|
| 2007 | 57.29% | 63.59% |
| 2006 | 51.96% | 65.27% |
| 2005 | 62.16% | 66.7% |
| 2004 | 80.11% | 71% |
| 2003 | 81.5% | 70.87% |
| 2002 | 79.7% | 69% |

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

2. Transaction Costs

Beyond economic consequences and emotional costs derived from the breaking, spouses have to bear transaction costs, those necessary to obtain the divorce, which include both monetary –attorneys, negotiation time, time at courts- and non-monetary –to prove the cause which is the basis to divorce or to complete the required period of separation-. Undoubtedly, Act 15/2005 diminishes transaction costs. The Coase theorem predicts that, without transaction costs or with low transaction costs, the bargaining of the parties will lead to an efficient outcome.

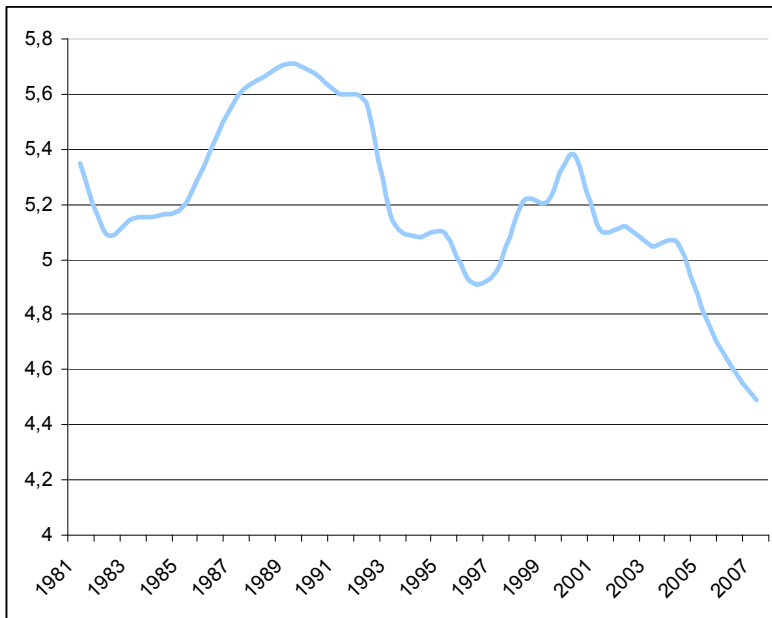
IV. EMPIRICAL EVIDENCE

A. Impact of Act 15/2005 on Marriage Creation and Destruction

Act 15/2005 came into force on July 2005 and we now have some data that can show how the divorce legislation has affected the celebration of marriages as well as their dissolution. Contrary to what has been held, a much lower nuptiality rate and a much higher divorce rate are not the result of Act 15/2005.

Firstly, since 2005 there has been a sharper and longer drop of the nuptiality

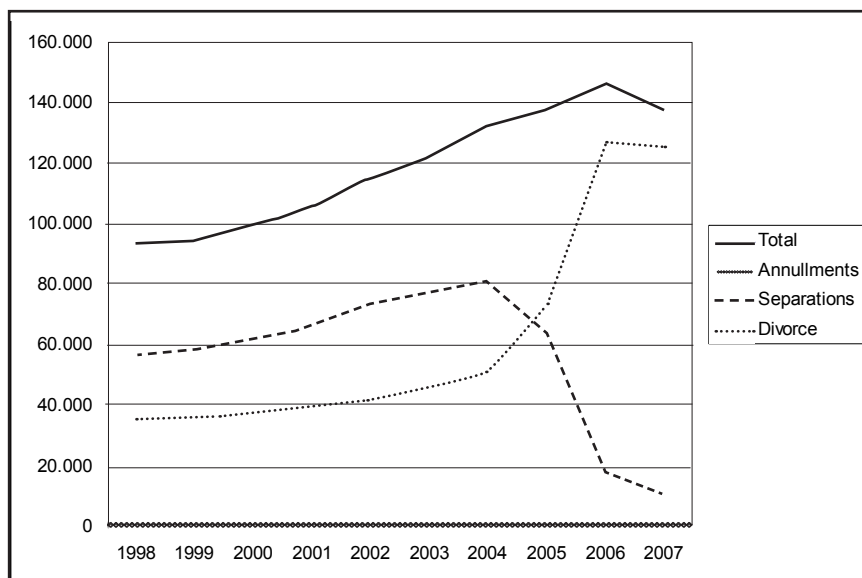
rate²⁹ than in any other period, but we cannot conclude that the decrease has been due solely to Act 15/2005. In fact, this trend started much before due to the popularization of cohabitation, a non-marital relationship statutorily regulated by regional legislations –starting the Catalan Parliament with Act 10/1998 of July 15 (B.O.E. 1998, 198)-, regarding cohabitants’ rights and duties. However, as a direct effect of Act 15/2005, the number of separations has dropped dramatically whereas the number of divorces has increased, because of the removal of the double procedure in which a couple had to first separate and could only divorce a year after the separation. The fact that most couples choose to directly divorce, and very few opt for the separation, is a clear indication that transaction costs are lower.



Graph 2: Nuptiality rate in Spain (1991-2007)

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

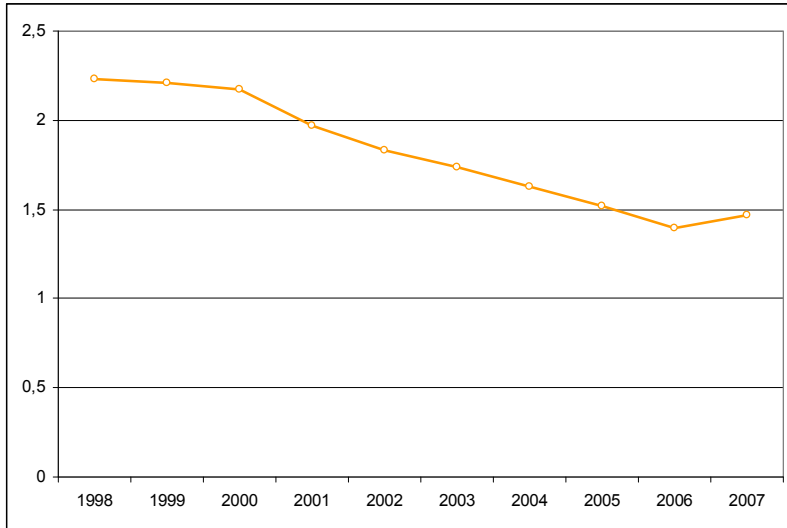
29 Measured as number of marriages out of 1000 people.



Graph 3: Separations, divorces and annulments in Spain (1998-2007)

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

Secondly, the ratio of marriage destruction from 1998 to 2007 informs us about how many couples marry in relation to how many get a divorce each year, but it does not inform us about the number of marriages that end up divorcing. This ratio has substantially decreased from 2.3 marriages for each divorce in 1998 to 1.4 marriages in 2007, which means that the divorce rate has increased. Again, Act 15/2005 cannot be blamed for this situation because many other factors interfere. Moreover, this trend began in the early 2000s and it slightly withdrew in 2006, after Act 15/2005.



Graph 4: Marriage destruction rate in Spain (1998-2007)

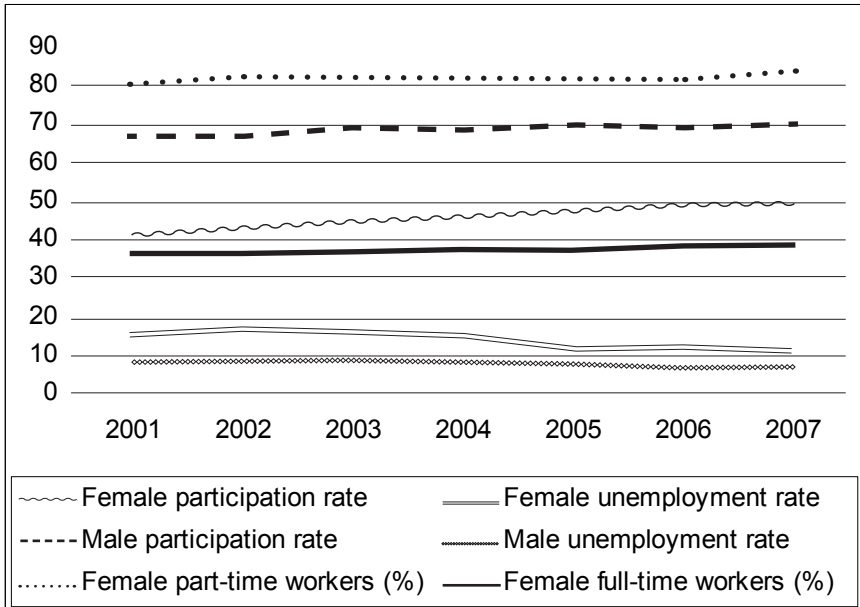
Source: Based on data from INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

B. *Labor Division in Spanish Married Couples*

Another question to answer is whether married couples are homogeneous or not, i.e. whether they respond to a model as Becker envisioned, in which husbands are ‘bread-winners’, whereas wives are homemakers. One can wonder whether there is still a different role of spouses based on their gender.

In Spain, this weakening of gender roles started relatively later, in the 80s. However, it is not only constrained by the generational change, but also by the fact that the wife is still mainly responsible for child rearing and housekeeping, even if she may have a paid job. The average Spanish wife works outside home and bears the responsibility of housework (house and children care). Using Beckerian terms, she is no longer specialized in the non-market sector; she produces household goods in both sectors. Unlike her husband, who is strongly specialized in the market sector and contributes to housework in a much lesser portion than her.

On the one hand, taking labor market in 2007 from a gender perspective, the female unemployment rate doubles the one of male employees and women concentrate part-time jobs, being the minority in full-time employments, despite the fact that during the last decade the participation of women has experienced a significant rise (from 40.96% in 2001 to 49.37% in 2007).



Graph 5: Spanish labor market figures (2001-2007)

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

On the other hand, the *Instituto de la Mujer* (Spanish Institute for Women, belonging to the Ministry of Equality) has statistics that reflect how men and women use their hours of the day, unfortunately these statistics do not separate for married couples. These data provide the average hours a day a man and a woman in Spain respectively spend in market sector (a paid job) and non-market sector work (housework and family care).

| Sector | Men | Women | Men | Women |
|-------------------|--------|-------|--------|--------|
| | 1993 | 1993 | 2006 | 2006 |
| Market sector | 3h 20' | 1h | 4h 30' | 2h 30' |
| Non-market sector | 2h 30' | 8h | 2h 20' | 6h |

Source: Spanish Institute for Women (*Instituto de la Mujer*)

Therefore on average, men *still* do about a third of the housework that women do; and yet they only work twice as much in the market sector as women. Of course, we cannot directly extrapolate these results to married couples, but it does give an indication that men and women are not homogeneous in their daily tasks: nowadays people do less housework and work more, but there is a huge difference in the non-market sector between men and women remains, despite having women doubled their time spent in the market sector.

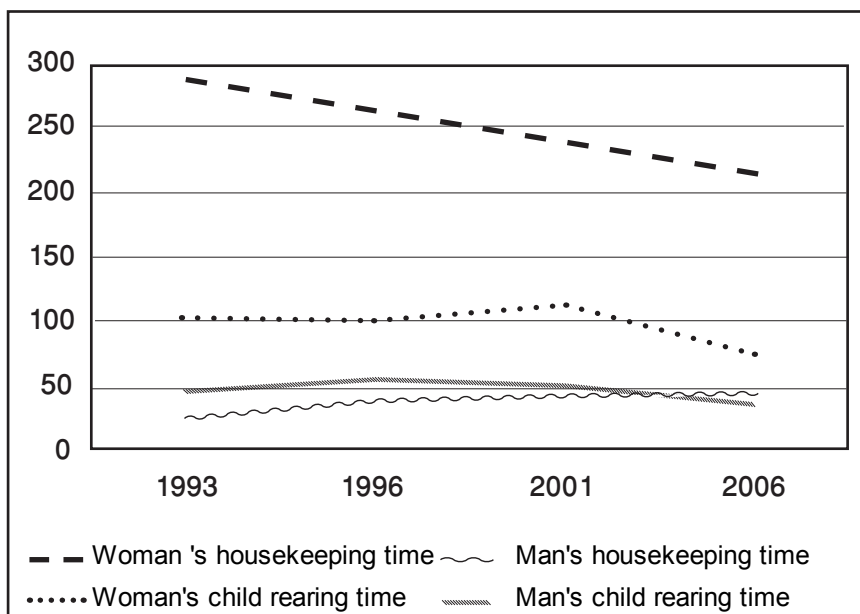
Moreover, other figures describe the unequal situation of spouses in Spain: in 2007, men were less than 2% of workers that ask for a parental leave after child's birth and less than 6% of workers with an extended leave of absence for child care. Also, over 95% of people that leave their job in order to take care of family members (children or elder) are women. Furthermore, the participation rate of men in relation to the number of children remains the same (around 90%) whereas the participation rate for women goes from a little over 70% if a woman is childless to less than 50%, if a woman has 3 or more children.³⁰

However, statistics show the trend to externalize tasks related to housework. For instance, the increasing percentage of pupils (0–5 years) having lunch at school or staying there before its opening: from 25.18% in the school year 2000-2001 to 35.30% in 2006-2007 and from 1.93% to 6.12%, respectively.³¹

All in all, in Spain, women dedicate more time than men to children care and even more so to housekeeping, where there is a long way to run.

30 Data from the Spanish Institute for Women (*Instituto de la Mujer*) and INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute). See also INSTITUTO DE LA MUJER, *LAS MUJERES EN CIFRAS 1983-2008*, (2008) (Sp.), available at www.inmujer.migualdad.es/mujer/publicaciones/docs/Mujeres%20en%20cifras%201983_2008.pdf.

31 Data from the Spanish Institute for Women (*Instituto de la Mujer*).



Graph 6: Distribution of the housework (1993-2006)
 Source: Spanish Institute for Women (*Instituto de la Mujer*)

Hence, there is an empirical basis to protect women through alimony and there always will be for biological reasons: the specific investment of motherhood cannot be undertaken by man. Legislation, except for motherhood, should, regardless of gender, provide a fair compensation for that spouse in a married couple who takes family and domestic responsibilities. In fact, this is the current regime in Spanish family law system, which now compensates women through alimony for the aforementioned reasons. Nonetheless, in Spanish society wives as a whole are not only mothers, but also the primary caretakers of their home, children, and the elderly.

V. CONCLUSIONS

The relatively recent diversification of family models has entailed a reduction of legal intervention in the personal sphere, which in marriage law has translated into the elimination of the requirement to adduce legal grounds for separating or divorce.

Classic contract theory understands divorce as a consequence of breaching the marriage contract, so the removal of grounds for divorce cheapens the costs of breach. Thus, duties of spouses lose their content causing an uncertainty that may lead to a decrease of specific investment in the non-market sector. However, family

law should not be aimed at promoting the preservation of traditional families, but to encourage cooperation among family members, regardless of its structure. Family law should provide only a suitable benchmark for spouses to freely organize their married life.

Act 15/2005 slightly affects the effects of divorce, as it only modifies the potential duration of alimony and regulates joint custody, safeguarding then the protection of the spouse devoted to family and home without gender distinction. The “caretaker” can now easily exit marriage and receive certain compensation for his or her specific investment. Notwithstanding, the reform has the following implications:

1. Reduction of transaction costs through the elimination of mandatory previous judicial separation and the shortening of the minimum marriage duration in order to file for divorce.
2. Increase of efficient breaches if divorce is mutually consented, in spite of concurrently increasing inefficient unilateral breaches. The global result is uncertain, since it is not possible to aggregate gains and losses of efficiency.
3. Blurring the information value of the signal, whose quality was already questioned by the legal protection awarded to cohabitation.
4. Restraining opportunistic behaviors arising from the performance of different effort levels during marriage, although the risk of opportunistic behavior rises in asymmetric contracts. Nonetheless, the progressive homogeneity within the couple plays down the importance of this kind of moral hazard.