

## Chapter 13: Marriage, Sex and Babies

In most past societies that we know of, most people got married, most marriages lasted until the death of one of the partners, and most babies were born, although not necessarily conceived, in wedlock. None of these statements is true of the United States at present, and they are becoming increasingly untrue.

This raises a set of interesting questions. One is whether there is a plausible economic explanation for these changes. Another is what part legal rules have played, either as cause or effect, in the process.

The first step to the answer is another question: Why, in most societies, are childbearing and household production undertaken primarily by couples who have committed themselves to the long term, often lifetime, partnership called marriage?

### Why people get married

Many years ago, I accepted a position in the UCLA economics department. Doing so required me to move across the country, find a place to live, develop relationships with a new set of friends and colleagues—costly activities which produced a return only if I remained at or near UCLA.

Suppose when I came, it was for a salary of \$40,000. A year or two later, the department chairman, who is of course an economist, makes the following calculation:

"If Friedman was willing to come for \$40,000, despite all of the transitional costs he had to pay, he would be willing to stay for \$30,000. After all, if he leaves he has no way of getting back his moving costs, or taking his new friends with him, or ... ."

The chairman calls me into his office to discuss the tight state of the department's budget.

I am happy to talk to the chairman. I too am an economist and have made my own analysis of sunk costs. I know, and the chairman presumably knew, that for my first year or two I would not be a very productive member of the faculty, since I would be distracted by the costs of learning a new environment, finding out what colleagues I could usefully interact with, and the like. Now that I have finished that process I am

more useful as teacher, researcher, and colleague. If he was willing to pay me \$40,000 to come he should be willing to pay me \$50,000 to stay. After all, there is no way he can get back the money he lost during my first year.

This stylized fiction demonstrates a real and important point: A fundamental reason for long term contracts, in marriage or business, is the existence of relation-specific sunk costs. Before I came to UCLA, both they and I were bargaining on a competitive market; there are other universities and other economists. Once I had been hired and both they and I had adapted to our relationship, we were stuck in a bilateral monopoly with potential bargaining costs. One way of reducing those costs is through long term contracts—explicit, as in the tenure system, or implicit, as in the general custom of not cutting an employee's salaries save under special circumstances.

Marriage is an extreme example. While many of us like to believe that our husbands or wives were uniquely suited to that role, it is not true; if it were, the chance of finding them would be remote. I at one time did some rough calculations on the subject and concluded that my present wife is about a one in two hundred thousand catch. That seems reasonably consistent with the fact that I found her, given the mechanisms our society provides for the early stages of the search process, such as sorting people socially by interests and educational status. I was lucky, but not unreasonably lucky. It is also consistent with the fact that in the years since finding her, I have met one or two other women who might have been as well suited to me.

They might have been as well suited to me, but it would have been foolish to investigate the matter. Once a couple has been married for a while, they have made a lot of relationship specific investments, born costs that will produce a return only if they remain together. Each has become, at considerable cost, an expert on how to get along with the other. Both have invested, materially and emotionally, in their joint children. Although they started out on a competitive market, they are now locked into a bilateral monopoly with associated bargaining costs.

One way of reducing those costs is a long-term contract, till death do us part. There remains room for bargaining within the marriage, but the threat of walking out is removed. And bargaining within the marriage can be reduced by well defined social roles, laws and customs prescribing each party's obligations, as well as by the knowledge that when the bargaining is over the two parties will still have to live with each other.

There are costs to that solution. The most obvious is that people who make the wrong

choice are stuck with it. That problem that can be reduced by more careful search, but not eliminated. Clearly defined sexual roles may result in an inefficient division of labor, a husband who is good with children working while a wife who is good at earning money stays home. And even within the prescribed pattern, each partner still has available the threat of adhering to the letter but not the spirit of the contract. So far as I know, nobody has ever been divorced for cooking, or making love, badly.

My favorite evidence of the limits to contract enforcement in a traditional system of marriage is provided by al-Tanukhi, a ninth century Arab judge who produced a volume of anecdotes for the entertainment of his contemporaries.

*A woman stood waiting on the road for the Vizier Hamid ibn 'Abbas and complained to him of poverty, asking alms. When he had taken his seat, he gave her an order for two hundred dinars. The paymaster, unwilling to pay such a sum to a woman of her class, consulted the vizier, who said that he had only meant to give her two hundred dirhems. But as God had caused him to write dinar for dirhem, gold for silver, so the sum should be paid out as it was written.*

*Some days later, a man put a petition into his hand, wherein he said that the vizier had given his wife two hundred dinars, in consequence whereof she was giving herself airs and trying to force him to divorce her. Would the vizier be so good as to give orders to someone to restrain her? Hamid laughed and ordered the man to be given two hundred dinars.*

[Hamid should be written with a long a and a long i]

In traditional Islamic society, men could divorce their wives but women could not divorce their husbands. Yet the Vizier, and presumably al-Tanukhi, took it for granted that as a practical matter the wife could force a divorce and not even the Vizier could prevent it.

If traditional marriage provides a solution to the problems of relationship-specific sunk costs, why have we abandoned it? One answer is that in traditional societies child rearing was something close to a full time job and child rearing plus household management at least a full time job. One profession, housewife, absorbed almost half the labor force. Most individual women were specialized to the job of being the wife of

a particular man.

Two things changed that. One was the enormous drop in infant mortality over the past two centuries. It used to be the case that in order to be reasonably sure of ending up with two or three children, a woman had to produce children practically nonstop during her fertile years. Today, a family that wants two children has two children.

The second change was the shift of production out of the home. Clothes are now made in factories by machines, bacon is cured by professionals. Clothes may be washed in the home, but most of the work is done by the washing machine. The job of housewife has, for most families, gone from a full time to a part time job. The result is that women are less specialized to a particular job and a particular man. There are still substantial costs to breaking up a marriage, but they are considerably lower than two hundred years ago and, as a result, more marriages break up. Our legal institutions have changed accordingly, shifting away from indissoluble marriage to something close to divorce on demand.

### **I Gave Him the Best Years of my Life: The Problem of Opportunistic Breach**

Two firms agree on a long-term joint project. One will research and design a new product; the other will produce and market it. The first, having done its part of the job, hands over the designs—and, in a world without enforceable contracts, the second firm dissolves the agreement, produces and markets the product, and keeps the money. This is the problem of opportunistic breach, discussed in the previous chapter in the context of building houses.

A couple marries. For the next twenty years, the wife is bearing and rearing children—a more than full-time job, as those who have tried it can attest. The husband supports the couple, but not very well, since he is still in the early stages of his career.

Finally the children are old enough to be only a part-time job and the wife can start living the life of leisure that she has earned. The husband gets promoted to vice-president. He divorces his wife and marries a younger woman.

It makes a better soap opera than my first story, but the economics are the same. In a traditional marriage, the wife performs her part of the joint project early, the husband late. That timing, combined with easy divorce, creates the potential for opportunistic

breach—encouraged by the fact that most men find women more attractive at twenty-five than at forty-five.

Once women recognize that problem, as by now they have, they adjust their behavior accordingly. One way is to become less specialized to the job of housewife, to have a career and hire someone else to clean the house and watch the kids. Another is to postpone or spread out childbearing, so as to make the pattern of performance by the two partners more nearly the same. Both adjustments fit, and may help explain, changes of recent decades, including the increase in both age at first marriage and age at first child.

Another solution is to make the contract more nearly enforceable by imposing substantial damage payments on the breaching spouse. While that happens to some extent, there are a number of practical problems. One is the difficulty of enforcing such rules. Human capital is mobile, and a man ordered to pay alimony or child support may move to another jurisdiction, making collection hard. A second is the problem of monitoring quality, discussed earlier. If a husband who asks for a divorce must pay large damages, he has the alternative of trying to make his wife's life so miserable that she is willing to give him a divorce without being asked. And if we try to prevent that with a legal rule that automatically gives the wife a large compensation whenever a marriage breaks up we create a risk of opportunistic breach in the opposite direction. The net result at present appears to be that, although husbands are sometimes required to pay money to their wives when there is a divorce, the ex-wife ends up, on average, worse off, and the ex-husband better off, after the divorce.

[book link: Ask June]

So far I have mostly been concerned with one oddity of modern society—the historically high ease and frequency of divorce. The same arguments help explain a less striking oddity—the substantial number of people who never get married. We are left with a third puzzle: the large and perhaps historically unprecedented number of people who don't get married but do have children.

### **Out of Wedlock Births**

One popular explanation for the sharp increase in the illegitimacy rate over the past

few decades is that it is a consequence of welfare laws. Poor women are, in effect, paid to have children—perhaps not enough to make having children profitable in an accounting sense, but enough to make it profitable for some in the more relevant economic sense, which includes non-pecuniary benefits as well as pecuniary ones. A woman who is not quite willing to have a child if she knows she must support it herself may be just barely willing if she knows that the state will pay part of the cost.

The problem with this explanation is that although the highest illegitimacy rates occur in low-income populations, illegitimacy rates in parts of the population to which welfare is almost irrelevant have also risen. So although welfare might be one cause of the changes, it cannot be the only cause. A second piece of evidence in the same direction is that, despite recent decreases in the real subsidy to childbirth, the illegitimacy rate continues to rise.

A second explanation, proposed by my friend James Woodhill, is that the illegitimacy rate, like the divorce rate, has increased as an indirect consequence of reduced mortality—this time not infant mortality but mortality in child birth. Until recent times, the single most dangerous thing that an ordinary person did was to have a baby. He argues that the result was a world where, in the age groups relevant to marriage, men outnumbered women. Women were thus in a sufficiently strong market position to be able to demand support for their offspring as a condition for sleeping with a man and bearing his children. As medicine improved and the numbers shifted, women's market position became weaker, with the result that some who wanted children were unable to find a man willing to support them.

To make the story more vivid, add in one more factor. Women typically marry men a few years older than they are. In the mid-sixties, as the children of the baby boom reached marriageable age, women born in 1946 were looking for men born in 1944—and there weren't very many of them. Some, unable to find a husband, accepted a lover instead. And so the sexual revolution was born.

A different and more elaborate explanation has been offered by two economists, George Akerlof and Janet Yellin, who argue that the increase in illegitimacy was an indirect consequence of the widespread availability of abortion and contraception. On the face of it, that seems backwards; abortion and contraception prevent unwanted children, and we would expect that, on average, people who are not married are less likely to want children than people who are. Their argument, in my words not theirs, goes as follows:

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In a world without contraception or abortion, sex and childbearing are linked; they are, in the jargon of economics, *joint products*. Each act of intercourse produces both sexual pleasure and, with some probability, a baby. Both women and men enjoy children, but not equally; women have a higher demand for children than men do.

Here as elsewhere in economics, "demand is higher" means that the quantity demanded is higher at any given price. In a world where men father children but women raise them at their own expense, men may well want more children than women since, in that world, having children is expensive for women and inexpensive for men. But in a world where the costs were evenly divided, women would choose more children. That, at least, is the underlying conjecture.

As long as sex and childbearing are linked, someone who wants sex can only get it combined with a possibility of children. That is a good reason for women to refuse to consent to sex unless the man guarantees support for any children that result, either by marrying her or by committing himself to do so if she gets pregnant. She can expect to get those terms because other women face the same risk and thus make the same demand.

We now add in legal abortion and widely available contraception, breaking the link between sex and childbearing. Women who don't want children are willing to provide sex on much less demanding terms, since they enjoy it too. Women who want both sex and children must compete for men with women who want only the former. They end up getting them, on average, on less favorable terms. Some women who want children must have them without husbands.

There is an empirical problem with this explanation. Both reliable contraception and safe illegal abortions were available to middle and upper class women before they were available to poorer women. If the Akerlof-Yellin explanation is correct, high illegitimacy rates should have appeared first near the top of the income scale and then worked their way down. What actually happened was the reverse. To explain that, one must combine their explanation with something else, perhaps the role of welfare payments in encouraging illegitimacy at the bottom of the ladder.

Before closing, I should add one more possible explanation: rising incomes. The richer people are, the easier it is for a woman to support children by herself. Some women may regard a husband as a net cost, and so prefer, if possible, to do without one.

## Explaining Sex Law

Many societies, including ours, forbid prostitution. Many societies, until recently including ours, forbid fornication and adultery. The arguments in favor of permitting people to engage in transactions in their mutual benefit seem to apply to sex as to anything else, so why do these laws exist?

The easiest to explain is the law against adultery—especially, although not exclusively, female adultery, which in most societies is more severely sanctioned than male adultery. The terms of a traditional marriage include sexual exclusivity. From the standpoint of the husband, one reason is that he wants to be sure the children he is supporting are his own. The wife does not have that problem, but she would like to be sure that her husband is not spending money that should go to her and her children on another woman and other children instead. For both, there is also a link between sexual fidelity and emotional commitment—and emotional commitment, or if you prefer mutual altruism, helps reduce the problems of a bilateral monopoly bargaining game, which is one of the things a marriage is.

The Akerlof-Yellin argument provides a possible explanation for laws against fornication and prostitution. Even in a world without reliable birth control, it was still sometimes possible to get sex without marriage, and that fact weakened the bargaining position of women who wanted sex, babies, and husbands. Laws making sex outside of marriage illegal improve the bargaining position of women who want to get married, or stay married, or to maintain a strong bargaining position within marriage. Hence it is rational for such women to support such laws.

It may also be rational for at least some men to support them. If the argument is right, a longer-term result of access to sex without marriage may be a partial breakdown of the institution of marriage. If, as seems to be the case, children brought up by two parents end up on average as better people, more valuable trading partners and fellow citizens, than children brought up by one, preserving the institution of marriage may be desirable for men as well as for women.

## Glittering Bonds



Premarital sex is not, popular opinion to the contrary, a new discovery. In most societies we know of, however, men prefer to marry women who have never slept with anyone else. This creates a problem. Unmarried women are reluctant to have sex for fear that it will lower their ability to find a suitable husband, and as a result unmarried men have difficulty finding women to sleep with.

One traditional solution to this problem is for unmarried couples to sleep together on the understanding that if the woman gets pregnant the man will marry her. This practice was sufficiently common in a number of societies for which we have data that between a quarter and half of all brides went to the altar pregnant.

[book link]

One problem with this practice is that it creates an opportunity for opportunistic breach by the man, the strategy of seduce and abandon familiar in folk songs, romantic literature, and real life. That problem can be reduced by converting the understanding into an enforceable contract. Under traditional common law, a jilted bride could sue for breach of promise to marry. The damages she could collect reflected the reduction in her future marital prospects. They were in fact, although not in form, damages for loss of virginity.

Starting in the 1930's, U.S. courts became increasingly reluctant to recognize the action for breach of promise to marry, with the result that between 1935 and 1945 it was abolished in states containing about half the population. This created a problem for women who wanted to engage in premarital sex but did not want to end up as single mothers in a society where that status was both economically difficult and heavily stigmatized.

The solution they found was described in "Rings and Promises," an ingenious article by Margaret Brinig. The practice of a man giving his intended a valuable diamond engagement ring is not, De Beers' ads to the contrary, an ancient custom. Data for diamond imports in the early part of the century are not very good, but Brinig's conclusion from such information as she was able to find was that the practice only became common in the 1930's, peaked in the 1950's and has since declined.

Her explanation was that the engagement ring served as a performance bond for the promise to marry. Instead of suing, the jilted bride could simply keep the ring, confiscating the posted bond. The practice eventually declined not because of further

legal changes—at present no states recognize the action for breach of promise to marry—but as a result of social changes. As pre-marital sex became more common and virginity of less importance on the marriage market, the risk of opportunistic breach, and thus the need for a bonding mechanism, declined.

### **Byways of Seduction Law**

A few years back, while investigating the history of punitive damages, I stumbled across an odd and interesting bit of nineteenth century law. In both England and America, when a man discovered that his daughter had been seduced he could sue the seducer—even if the daughter was an adult. The grounds on which he sued were that he, the father, had been deprived of the daughter's services. Suits for seduction were thus treated as a special case of the doctrine under which a master could sue for injuries to his servant.

In one case, a judge held that it was sufficient basis for the action if the daughter occasionally acted as hostess at her father's tea parties. Once the father had standing to sue as a master deprived of his servant's services, he could then base his claim, not on the actual value of the services, but on the reputational injuries suffered by the family as a result of the seduction.

The obvious question is why, given that seduction was considered a wrongful act, the law took such a roundabout approach to dealing with it. The explanation I found in the legal literature was that one party to an illegal act cannot sue another for damages associated with the act. If you and I rob a bank and you drop the loot on the way out, I am not entitled to collect damages for your negligence. Fornication was illegal, hence a seduced woman was party to an illegal act, hence she could not sue for damages. So the law substituted the legal fiction of the father suing as a master deprived of his daughter's services.

It occurred to me at the time that there was another, and perhaps more plausible, explanation of what was going on. In traditional societies, including 18th and 19th century England, fathers attempt to control who their daughters marry. One tactic available to a daughter who disagrees with her father's choice is to allow herself to be "seduced" by the man she wants to marry, in the expectation that her father, faced with a *fait accompli* and possibly a pregnancy, will give his consent. That tactic

appears explicitly in Casanova's *Memoires*, which provide a vivid and detailed first hand account of life in eighteenth century Europe.

A legal doctrine that gave the daughter the right to sue would lower the risk of the daughter's tactic for evading parental control by making it possible for her to punish a seducer who refused to marry her, and would thus weaken paternal authority. A legal doctrine that gave the father control over the action gave him a threat that could be used to discourage enterprising, and unacceptable, suitors.

Back in chapter 1, I described the economic analysis of law as involving three different projects: predicting the effect of legal rules, explaining legal rules, choosing legal rules. In discussing the second project, I offered as an example the Posner conjecture that common law rules tend to be economically efficient.

I have just provided a different example. My explanation for why common law treated seduction in the peculiar way it did depends on the assumption that the people shaping the law wanted fathers to be able to control who their daughters married. I do not assume that such control was efficient.

## **Buying Babies**

Some years ago, I came across an article in the *Wall Street Journal* that astonished me for the degree of economic ignorance displayed by a publication whose writers I expected better of. Its subject was the adoption market. The writers discussed how that market has swung between shortage and surplus, between periods when infants were unable to find adoptive parents and periods when potential parents were unable to find suitable infants to adopt. They concluded that it demonstrated a failure of the free market.

There was one small point that the article omitted. Under United States law, it is illegal for prospective adoptive parents to pay a mother for permission to adopt her infant. The adoption market is thus a "free market" on which the price is set, by law, at zero. The observation that price control leads to shortages when the controlled price is below the market price and surpluses when it is above is neither surprising nor a failure of the free market.

There are at least three ways in which shortages produced by price control can be

dealt with. The simplest is queuing. When the United States experimented with gasoline price control under Nixon, one result was long lines at gas stations. Waiting in lines is a cost, so when the lines get long enough the sum of the money cost of gasoline plus the time cost becomes large enough to drive quantity demanded down to quantity supplied. In the adoption market at present, prospective parents must often wait years to adopt an infant.

A second way of dealing with the problem is rationing; some authority decides which prospective buyers are given how much of the limited supply. In the case of the adoption market, the rationing is done by adoption agencies that are authorized to arrange legal adoptions. They impose their own criteria in order to eliminate enough prospective parents so that they can provide adoptions for the remainder. Some of the criteria they use may be defensible as attempts to select the applicants best suited to be parents. Others, such as the requirement that the adoptive parents be of the same religion as the infant's natural mother, seem to make sense mainly as a way of reducing the number of applicants.

The third possibility under price control is a black market. It is legal for adoptive parents to make payments to lawyers to arrange adoptions and to the infant's biological mother to cover her medical costs. Currently, the cost of arranging a private adoption of a healthy white infant is in the tens of thousands of dollars, which is quite a lot more than the pecuniary costs usually associated with childbirth. Presumably some of that ends up as an illegal payment to the mother for her consent, disguised as something else, and some goes to the lawyers who arrange the transaction.

On this market as on others, the problem could be eliminated by eliminating price control, permitting adoptive parents to negotiate mutually acceptable terms with the natural mother. That solution has been proposed by, among others, Judge Posner. It is widely believed among his fellow legal academics that that fact alone makes it almost certain he will never be on the Supreme Court, despite being one of the most distinguished jurists and legal scholars of his generation. What senator would vote for the confirmation of a candidate who had openly advocated selling babies?

Why does the proposal produce such a strong negative reaction? The obvious answer is that it involves selling human beings, and human beings should not be owned. But what an adoptive parent gets is not ownership of a baby but parental rights (and obligations) with regard to a baby. If "owning" a child in that sense is objectionable, why is it not equally objectionable when the owner is a natural or adoptive parent under current law?

A better argument against a free market in adoptions is that, while it will maximize the joint benefit to the parties to the transaction—adoptive parents and natural mother—it may ignore costs and benefits to the child. But it is hard to see why that should be more true than under current institutions; in neither case do the infants get a vote. People willing to pay money to adopt a child are typically people who very much want to be parents—which is, after all, one of the chief qualifications for the job. Why is the willingness to wait three years and fill out lots of forms, or the ability to find and willingness to pay a lawyer with the right connections, better evidence? Adoption agencies claim to impose their restrictions with the welfare of the child as their chief objective—but why should we expect them to be more concerned with the welfare of a particular infant than either its natural mother or the couple that wants to adopt it? Infants have considerable influence over their parents, natural or adoptive, and very little over the running of adoption agencies.

A more interesting argument, and one with a much broader range of applications, goes under the name of "commodification." The idea is that a transaction between two parties affects others, not in the direct ways economists normally include in their analysis of externalities but in a more subtle fashion—by changing how people think. If we permit payments of money in exchange for babies—even for parental rights with regard to babies—we will start thinking of babies as things like automobiles and jewelry, commodities not people. If we permit cash payments between a prostitute and her customer, we will start thinking of sex as a service that women sell rather than part of a loving relationship. Thus, argued Margaret Radin in a widely cited law review article, even if prohibiting prostitution makes both prostitutes and their customers worse off, it might still be proper to prohibit it on the grounds that permitting it commodifies sex and so makes men and women in general worse off. On similar grounds, it might be proper to prohibit a free market in adoptions.

[[article link](#)]

I find the argument ingenious but unconvincing. Even where prostitution is common, very few people—prostitutes, customers, or others—regard it as a model for what sex is supposed to be. Men sleep with prostitutes not because they would not prefer to sleep with women who love them but because there are no suitable women who love them and are willing to sleep with them.

Also implicit in the argument is the assumption that what matters is what the law says rather than what people do. Prostitution, as Radin recognizes, exists at present throughout the United States, even though it is legal only in two rural counties in

Nevada. Adoptive parents pay money at present to get an infant, probably more than they would pay if direct payments were legal, since the real cost of price controlled goods, including waiting time, covert payments, and the like, is usually higher than the cost of the same goods on legal markets without price control.

To argue that legalizing such transactions will also make people see them as legitimate requires two assumptions, both implausible. The first is that if anything is not illegal it must be good, which suggests a view of society along the general lines of T.H. White's ant nest, where everything was either forbidden or compulsory. In a nation where private gambling is illegal but many states conduct lotteries, it is hard to believe that many of us make a close identification between good/bad and legal/illegal.

The second necessary assumption is that people view government as a source of moral authority. Current polling results put government fairly far down on the scale of public approval. As William Godwin put it almost two hundred years ago, in his response to the argument that we need government run schooling in order to teach people morality, one should hope "that mankind will never have to learn so important a lesson through so corrupt a channel."

Commodification is an ingenious argument, but less novel than it appears. It is simply a new version of the traditional social conservative argument against both immoral behavior and free speech: that ideas matter, that preaching, or demonstrating, bad principles leads to bad behavior.

Seen from this standpoint, Radin's argument for why laws against prostitution might be justified fits oddly with the jurisprudence of the First Amendment. Courts routinely hold that acts which might properly be banned as acts, such as burning the American flag, are also speech, and because they are speech are legally protected. The commodification argument holds that some acts that ought not to be banned as acts, such as the transaction between a prostitute and her client, are also speech, and because they are bad speech ought to be banned. There is nothing logically indefensible in the claim, but once it has been accepted it becomes hard to see why one should not accept broader arguments in favor of government censorship of bad ideas.

I have devoted so much time to this set of arguments not only because they are interesting but also because they relate to an important set of legal issues raised by new reproductive technology. One such technology, in vitro fertilization, has now become both common and widely accepted. A second and technologically simpler, the

use of surrogate mothers, is still controversial, with courts generally reluctant to enforce a contract by which a woman agrees to be artificially inseminated with sperm from a man whose wife is infertile and to turn over the resulting infant to the couple for adoption. A third, producing an infant by cloning a cell from an adult human, has not, so far as we know, happened yet, but is almost certainly now possible. Coming up in the near future is the possibility of giving parents some control over which of the children they could produce they do produce, and perhaps, in the somewhat further future, giving their children characteristics that no child naturally produced by those parents would have. Other technologies, some of which have already been implemented in mice and could be in humans, could permit a lesbian couple to produce a child genetically related to both of them.

All of these practices have been or will be criticized in ways similar to current criticisms of legalizing the adoption market. Arguments will include claims that even though the transactions are voluntary, some participants are being taken advantage of. They will include arguments based on the presumed interest of children, with the implicit assumption that parents who employ new technologies will be less committed to their children than parents who produced them the old fashioned way. They will get much of their force from a deep-seated belief that these things are contrary to nature, that they treat human life in ways it ought not to be treated. New things are frightening.

*"What this new technique, and so many others like it, tell us is that there is nothing special about human reproduction, nor any other aspect of human biology, save one. The specialness of humanity is found only between our ears; if you go looking for it anywhere else, you'll be disappointed."*

Mouse geneticist Lee Silver, responding to a bioethicist concerned that a technique that might make it possible to produce human sperm by implanting human cells in the testes of an animal challenged "the specialness of humanity."

While arguments against the transactions associated with new reproductive technologies will probably prevail in many courts, that may have very little effect on how widely such technologies are used. Consider the case of host mother contracts. Such contracts are criminal in at least one state and to varying degrees unenforceable in most. But that has very little effect on what actually happens, because people who want to make such contracts can choose where to do so—and, of course, choose

states with favorable legal rules. Even where the contract is not entirely enforceable, that fact has become relatively unimportant as firms in the business of arranging host mother transactions have learned to identify and avoid potential host mothers who are likely to try to renege on their agreement after the fact.

### **Rationing Surplus Kittens: A Feline Digression**

Some time back, my children decided that they wanted kittens, so we took a trip to the local Humane Society. It was an interesting experience. We ended up spending several hours waiting in line to receive one of a small number of permissions to "adopt" a pet, filling out forms, and then being interviewed by a Humane Society employee to make sure we were suitable adopters.

What was puzzling about the experience is that kittens are a good in excess supply. The Humane Society has more of them (and of cats, puppies, and dogs) than it can find homes for and, although it does not like to say so, routinely kills surplus animals. Rationing goods in excess supply is not usually a problem. Yet the Humane Society was deliberately making it costly, in time and effort, to adopt a kitten, and trying to select which lucky people got to do so, despite their knowledge that the alternative to being adopted was not another adoption but death. Why?

Part of the answer was that they gave out only seven adoption permits at each two hour interval because that was as many as they could process, given a limited staff and the requirement that each adopter be suitably checked and instructed. But that raises a second question. Since they did not have enough staff to process everyone who came, why insist on extensive interviews? Better owners are no doubt superior, from the standpoint of a cat, to worse owners, but almost any owner is better than being killed, which was the alternative.

So far as I could tell, the only real function of the process was to make the employees feel important and powerful, handing out instructions and boons to humble petitioners. That suspicion was reinforced when the woman interviewing us insisted very strongly that cats should never be permitted outdoors, stopping just short of implying that if we would not promise to keep our new pets indoors she would not let us have them. On further questioning, it turned out that she did not apply that policy to her own cat.



We left the Center petless, obtained two kittens from a friend (and very fine cats they have become), and I wrote an unhappy letter to the local newspaper with a copy to the Humane Society. The result was a long phone conversation with one of the women running the shelter. She explained that there were two models for such shelters: one in which animals were given out on a more or less no questions asked basis and one involving the sort of "adoption procedures" I had observed. When pressed on the fact that the real effect of her shelter's policy was to discourage adoptions and thus kill animals that might otherwise have lived, she responded that if they followed the alternative policy nobody would be willing to work for the shelter, since employees would feel they were treating the animals irresponsibly. That struck me as a kinder version of the explanation I had already come up with.

When the decision of what baby goes to what parent is made by an adoption agency, there is no good reason to expect the people making it to prefer the baby's welfare to their own. When the equivalent decisions are made for pets, there is no good reason to expect the people making them to put the animal's welfare—or life—above their own feelings.

### **Are Babies A Good Thing?**

In recent decades, it has been widely argued that babies are a bad thing, that when I decide to have one more child the predictable result is that other people are worse off and the world a less pleasant place. This belief, which has led to a variety of proposals for laws and policies designed to reduce the birthrate, is based in part on bad economics and in part on possible, but contestable, empirical claims.

The argument starts with the idea that more people mean less resources for each—less land, water, minerals, petroleum, and the like. The statement may be true, but the conclusion that by having a child I make yours worse off does not follow. Children are not born clutching deeds to a per capita share of the world's land and oil. In order for my child to acquire land, he must buy it, which means that he must produce, or I must provide him, enough valuable resources to compensate the previous owner for giving up his land. The same is true for any other owned resource.

By buying land, my child may (very slightly) bid up its price. But while that is a bad thing for those who are buying, it is a good thing for those who are selling. The

externality, as I pointed out back in chapter 3, is only pecuniary.

A better argument looks to real externalities associated with childbearing. My child may use the public schools. He may pollute. He may become a criminal. He may go on welfare. In these and other ways, he may impose net costs on other people.

The list of externalities is too selective. My child may find the cure for cancer, and so save your child from an agonizing death. He will pay taxes, some of which will go to help pay fixed expenses such as the national debt or veterans' pensions which your child would otherwise have to pay. More people means a bigger market, more competition, more customers to share in the fixed costs of designing goods or writing books. An additional child generates positive as well as negative externalities. In order to argue for policies designed to reduce the birth rate, one must show not merely that there are some negative effects but that the net effect is negative.

As it happens, my first piece of economic research dealt with just this question. In it I attempted to estimate the size of the relevant externalities in order to calculate whether the net effect was positive or negative, whether someone having one more child makes the rest of us, on average, better or worse off. I concluded that the numbers were too uncertain to permit me to calculate with any confidence the sign of the result.

[article link]

The point is not limited to this particular issue. Any time you are involved in a political controversy and somebody argues for taxing or banning something because it produces negative externalities, or for subsidizing something because it produces positive externalities, it is worth trying to draw up your own list of externalities—of both signs. It is only too easy to generate an apparently objective argument for either conclusion by suitable selection.

## **Two Routes to Efficiency**

Perceptive readers may have noticed that in this chapter I have invoked two different sorts of arguments for the efficiency of law and custom. One derives efficiency from standard economic arguments, expansions of the simple case for Laissez-Faire presented in chapter 2. The use of engagement rings as bonds, for example, is a

rational response by individuals to the problem of making possible sex before marriage while controlling the risk of opportunistic breach by the male partner. The increased instability of marriage over the past century would have happened in a world where marriage contracts were explicitly negotiated as couples rationally adapted the terms of their agreement in response to a decrease in the sunk costs associated with it. The same individualistic approach can sometimes also be used to derive from rational behavior the existence of inefficient outcomes, such as opportunistic breach due to women performing early in marriage and men late.

The same cannot be said of arguments that interpret laws against adultery or prostitution, or legal rules designed to protect children, as efficient adjustments to the corresponding problems. It cannot even be said of changes in marriage law as they actually happened, since in our society terms of marriage are not individually negotiated; contractual agreements on terms such as easy divorce would almost certainly be held unenforceable as contrary to public policy. Such arguments require some more general mechanism to push legal rules toward efficiency. It is not obvious, *pace* Posner, that such a mechanism exists. It is particularly puzzling if we wish to explain legal rules designed to protect children. Children, after all, neither vote, lobby nor litigate, which ought to eliminate their welfare from influencing the mechanisms that most obviously determine law.

Altruistic parents care about the welfare of their own children—but not, or not very much, about the welfare of other people's children. If I care about the welfare of my children I have no need to lobby for laws against abuse, or to make divorce more difficult; I know I am not going to abuse my children and that I will take due account of their welfare when deciding whether to get a divorce.

The distinction between arguments for efficiency based directly on individual rationality and those that require some more elaborate mechanism runs through the analysis of the law. The efficiency of the terms of a negotiated contract follows directly from the rationality of the parties. The efficiency of the law of contracts—supposing that it is efficient—is harder to explain. We will return to that topic in chapter 19.

### Further Reading

The anecdote of the poor woman and the 200 dinar is slightly condensed from *The*

*Table-Talk of a Mesopotamian Judge*, by al-Muhassin ibn Ali al-Tanukhi, D. S. Margoliouth, tr.

Both the idea and the title of one section of this chapter are borrowed from Lloyd Cohen, "Marriage, Divorce, and Quasi Rents; or, 'I Gave Him The Best Years of My Life'", JLS XVI, 1987.

The classic presentation of the commodification argument is Radin, Margaret, "Market-Inalienability", 100 *Harv. L.Rev.* 1849 (1987); you may find it more convincing than I did.

Lee Silver, *Remaking Eden*, provides an entertaining and informative account of reproductive technology, current and forthcoming.

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