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Comment on Ribstein's
Incorporating the Hendricksons

Robert C. Ellickson *

I am saddled with the handicap of knowing little about “Big Love,” the HBO television series that inspired Larry Ribstein’s title. Because Ribstein’s subject is the legal organization of domestic associations, particularly untraditional ones such as the polygamous marriage depicted in “Big Love,” I am nonetheless confident that his playful allusion is apt.

American states, in the aggregate, offer several standard forms for marital relations: conventional marriage, covenant marriage, and civil union. The states similarly provide individuals setting up a business association with a short menu of default organizational forms, including the general partnership, the limited partnership, the corporation, and the limited liability company. Legal scholars who are dissatisfied with the conventional marriage form have understandably considered the desirability of entitling marriage partners to structure their relationships partly, or entirely, according to one of these business templates. In his insightful essay, Ribstein evaluates the merits of these thought experiments. His central conclusion is that the relations among domestic partners are sufficiently different from relations among business partners that a direct transplant of forms from one of these domains to the other would be unwise.¹ I agree. Should the grip of currently conventional conceptions of marriage loosen, however, Ribstein also predicts that

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1. Larry E. Ribstein, *Incorporating the Hendricksons*, 35 WASH. U. J.L. & POL’Y 273 (2011); see also MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000) (an extended inquiry into differences between families and firms).

the two types of forms ultimately might converge.² This I deem improbable.

Two landmark articles, both cited by Ribstein, help clarify the analysis of standard legal forms. The first is Thomas Merrill and Henry Smith's classic exploration of the *Numerus Clausus* principle.³ Merrill and Smith assert that parties contemplating entry into an oft-encountered social or business arrangement commonly prefer to make use of a standard legal form to reduce the transaction costs that they will bear at the outset and also during the course of their relationship. Merrill and Smith's central new insight was that it may be unwise for a legal system to approve an additional standard form because a proliferation of forms may increase outsiders' information costs.⁴ For example, when law places too few constraints on the forms of ownership of land, an entrepreneur may be deterred from attempting an otherwise worthwhile land assemblage. Merrill and Smith contend that lawmakers therefore should strive to provide an *optimal* number of standard forms—enough to give transactors an ample range of starting templates, but not so many as to create inordinate informational burdens.⁵ Ribstein shares these sentiments. He concludes that the law should provide multiple standard forms in both the business and marital contexts, but only so long as both menus remain short and (implicitly) that no particular form appear on both menus.⁶

In addition, Ribstein succinctly and insightfully canvases the basic problems a standard form on either of these two menus must address. These include formalities of creation, procedures for termination, participants' duties one another, and so on. An analyst, when considering the merits of a form's specific rules on one of these matters, can benefit from keeping in mind Ian Ayres and Robert Gertner's fundamental distinction between a default rule and an immutable rule.⁷ Lawmakers in a society generally devoted to

2. Ribstein, *supra* note 1, at 297–300.

3. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

4. *Id.* at 24–35.

5. *Id.* at 38–41.

6. Ribstein, *supra* note 1, at 298–99.

7. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic*

freedom of contract commonly are willing to entitle parties to treat a particular rule in a given legal template as a mere default that they are free to customize. Prospective marriage partners, for example, may be able to modify some of the default rules of marriage by means of a prenuptial agreement. Lawmakers, however, also sometimes forbid the alteration of certain rules incorporated in a standard form. They may make these rules immutable because either they are paternalistic or they want to protect outsiders who have stakes in the relationship that the parties are creating. For instance, the law may constrain the terms of a prenuptial agreement to protect the welfare of minor children.

It is useful to consider the sorts of assets that marriage partners might transfer to a marital corporation, a topic that Ribstein does not broach. Here, a useful conceptual starting point is Hansmann and Kraakman's thesis that the main purpose of current business law is to allow an individual to partition assets used in the domestic sphere from assets used in a particular business sphere.⁸ By incorporating their marriage, the Hendricksons would cloud the distinction between these two domains. In the purest of thought experiments, they would transfer all of their major domestic assets, whether previously owned separately or concurrently, to their newly created business entity. These assets would include their separate and joint financial accounts, entitlements to future wage and pension income, and capital goods such as their houses,⁹ furniture, and vehicles. In the purest scenario, they would also obtain judicial approval to transfer to the new corporation their rights and duties with regard to minor children. (This is not possible under current statutes, which entitle only a natural person to adopt, or have custody of, a child.)¹⁰ The Hendricksons would also probably want the documents governing

Theory of Default Rules, 99 YALE L.J. 87, 87–88 (1989).

8. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393–94 (2000).

9. No law prohibits marital partners from establishing a corporation or other closely-held business entity to own their primary residence. Land records reveal, however, that married couples almost never do this. In addition to the other shortcomings of incorporation that I soon canvass, federal, state, and local tax laws all typically disfavor transferring a marital home to a business association.

10. See, e.g., ARIZ. REV. STAT. ANN. § 8-103 (2000) (addressing adoption); *id.* § 25-401 (addressing custody).

their corporate entity to alter some of the default rules of corporate law. For example, if the documents did not limit the free transfer of shares, a disgruntled marital partner could unilaterally bring in a stranger as a substitute.

An experienced attorney, if asked by the Hendricksons to set up a corporation along these lines, certainly would advise against it. A first reason for wariness, which does not go to the heart of the idea, is the high costs of pioneering a new legal form in a context where other forms are well-entrenched. With little guidance from others' experiences, the Hendrickson spouses would have to decide who should serve as the corporation's board members and officers, how decision-making authority should be divided among them, and how formal their internal procedures should be. More importantly, outsiders who first encountered the Hendrickson Marital Corporation would likely be flummoxed. For example, suppose the Corporation were to apply for a mortgage loan to help finance the purchase of a new residence to be occupied by some or all of the marriage partners. Most mortgage lenders, bewildered by the unconventional form of the applicant, would be chary of getting involved in such a deal.¹¹ Many government officials would also likely be baffled. The Internal Revenue Service, for example, might have to decide which taxpayer, if any, would be entitled to claim one of the children transferred to the corporation as a dependent for income tax purposes.

These sorts of problems are merely transitional and their severity might abate with the passage of time. Ribstein rightly concentrates his discussion on the more fundamental question of whether an organizational form devised for the relatively impersonal and untrusting world of business is inherently unsuited for transplantation to the more intimate domestic sphere. Ribstein detects a number of fundamental differences between a conventional marital relationship and a conventional business relationship.¹² Three of these differences warrant emphasis.

11. The condominium form of ownership, for example, was not well accepted in the United States until a decade after state legislatures had first authorized its use. Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 28–30, 62–63 (1991).

12. Ribstein understandably makes no mention of marital partners' expectations about engagement in sexual relations. Now that premarital sex has become so common, sexual

First, as Margaret Brinig has stressed, individuals who enter into a marriage typically contemplate that theirs will be an unconditional relationship, one potentially encompassing every aspect of their lives.¹³ In a successful marriage, spouses benefit from mutual interactions across a wide spectrum of activities. In practice, of course, few marriages are all-encompassing. A spouse, for example, may maintain separate friendships and hobbies and own some assets as an individual. But, even with that qualification, participants typically expect a conventional marital relationship to be far different from a business relationship, which conventionally calls for only a partial commitment in a limited sphere. In particular, marriage vows conventionally include unqualified promises of mutual aid—in the form of care and emotional and financial support—should unemployment, bad health, old age, or other misfortune strike one of the partners.¹⁴ When Ribstein states that marriage involves a “personal support structure,”¹⁵ he is alluding to the unconditional nature of the marriage relationship.

Second, a significant fraction of those who marry anticipate using their new relationship as a foundation for the titanic task of raising young children. An unconditional and all-encompassing relationship such as marriage is a particularly propitious base for undertaking a challenge so long-lasting and complex. Lawmakers' concerns about the forms of marital institutions largely stem from the potentially strong interconnection between marriage and child-rearing. Extant marital forms therefore reflect not only spouses' preferences but also legislators' solicitude for the welfare of children. A standard business form, unlike a marital form, of course provides no guidance on participants' relations with children.

Third, knowing that marriage is an unconditional relationship, a person is unlikely to enter wedlock without already having what Ribstein calls “strong-form trust” in their future partner.¹⁶ Many of

relations are not as closely bound up with the marital relationship as they were a century ago.

13. BRINIG, *supra* note 1, at 79.

14. In many contexts, the family is another important vehicle for the provision of mutual aid. Although a single person may be able to call on relatives for support in a pinch, marriage commonly provides an additional, and more efficacious, form of informal insurance.

15. Ribstein, *supra* note 1, at 287.

16. *See id.* at 283. When a marriage is arranged by parents, as is still common in less

the default rules in a standard business form, by contrast, presume that the co-venturers are wary of one another. These rules are ill-suited for transplantation to the domestic sphere. A robust right of exit, as Ribstein explains, makes more sense when trust is weak than when it is strong. The standard default rules governing corporations also typically impose formalities, such as scheduled meetings of the board of directors, to reassure the untrusting. Those who share a deep trust would regard compliance with these formalities to be not only a waste of time but also potentially corrosive. A business form signals social distance and coldness. A marital form signals intimacy and warmth.¹⁷ Imagine the emotions of a child who had to turn over a report card from primary school to a corporate officer for a signature.

I thus agree with Ribstein that a conventional business relationship inherently differs from a conventional marital relationship. The menus of legal forms that apply to these relationships do not, and should not, overlap. The immutable rules appropriate in the two contexts are different. It is true, of course, that many of the rules that attach to both domestic and business forms are defaults that a drafter could alter. Even so, it invariably is cheaper for a drafter to start drafting from a template that most closely fits the relationship at hand. For the Hendricksons, that template would be a marriage form, not a business form.

Dramatic changes in social norms conceivably might, as Ribstein speculates, make this analysis obsolete. The institution of marriage currently has great appeal to adults who value the prospect of entering into an unconditional and trusting relationship that may provide, among other advantages, a robust form of social insurance and a promising platform for raising children. I myself cannot imagine a world where people, and their lawmakers, would not highly value an institution that offered so much. Convergence, to my mind, is unlikely. Instead, to borrow from William Faulkner, I predict

developed nations, it may be that the trusting parties are the parents, not the newlyweds.

17. Margaret Brinig prefers to call the mutual disposition of marital partners *love*, not trust. See BRINIG, *supra* note 1, at 79.

that the warm institution of marriage will not only endure, but also prevail over the forces that push to make it cold.¹⁸

18. Cf. William Faulkner, Nobel Prize Acceptance Speech (Dec. 10, 1950), in NOBEL LECTURES: LITERATURE 1901–1967, at 445 (Horst Frenz ed., 1969), available at http://nobelprize.org/nobel_prizes/literature/laureates/1949/faulkner-speech.html (“I believe that man will not merely endure: he will prevail.”).