Repack the Household: A Response to Robert Ellickson's Unpacking the Household

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Abstract

I challenge the notion that households can be reduced to housing units. Ellickson, a law professor, overemphasized the desirability of ownership from the perspective of capital accumulation. Ownership is also important to the household members who do the work that maintains the household, including production of meals, homemaking, childcare, eldercare, and other essential functions of households. Discouraging home ownership by those who manage the details of such essential activities, and who need more rather than fewer incentives to engage in household production, is placing more nails in the coffin of advanced industrialized societies.

In the United States and many other industrialized countries, there is much concern that younger generations fail to invest the amount of household production time that is needed for society to reproduce itself and for children to receive the education that will make them into productive citizens.[1] In either instance, levels of household production of socially desirable goods and services may be suboptimal.[2] Robert Ellickson's

1. According to the CIA, it was estimated in 2006 that 93 countries out of 222 had total fertility rates below the rate of 2.1 necessary for society to reproduce itself. The United States had a total fertility rate of 2.09. *See* CIA, The World Factbook, Rank Order: Total Fertility Rate, https://www.cia.gov/cia/publications/factbook/rankorder/2127rank.html (last visited April 13, 2007).
2. For instance, from the perspective of younger workers contributing to social security systems, see Shirley Burggraf, *Marriage, Parental Investment, and the Macroeconomy*, *in* MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIALIZED SOCIETIES 318, 319 (Shoshana A. Grossbard-Shechtman ed., 2003).

emphasis on conditions optimal for capital supply,[3] but not for the supply of household labor, could reinforce these trends and further discourage some socially desirable household production.

Ellickson's theme is that households can be "unpacked" in the sense that they can be restricted to a real estate dimension: he defines the household as a dwelling space where occupants usually sleep and share meals.[4] Accordingly, much of his article is devoted to real estate issues, such as the distinction between occupant and owner, and the determinants of home ownership. I focus this Response on one of the article's major implications: the desirability of ownership by suppliers of capital.

One of Ellickson's goals is to facilitate the selection of a preferred governance system for the household, including a system that optimally allocates ownership (that is, rights to make residual control decisions and receive residual financial flows). According to him, the following groups of people hold a stake in the household's economy and could potentially be granted ownership[5]: household members who supply household labor; household members who contribute equity (in cash or in kind); and contributors of capital and labor from outside the household. Together, these four groups produce the shelter and meals that are mostly consumed by the household's occupants. Minimization of transaction costs leads Ellickson to eliminate outsiders as optimal owners. That leaves two groups of potential owners: household members who supply capital, and those who supply labor.

In arguing the advantages of conferring household ownership on the suppliers of at-risk capital, Ellickson uses the example of a "sitcom household" composed of five occupants: Dad, a widower; Granny, Dad's widowed mother; Maureen, Dad's divorced daughter; Chip, Maureen's young son; and Nadia, whom Maureen has hired to serve as a live-in nanny for Chip.

Ellickson offers four reasons why household members who contribute at-risk capital are more optimally suited for household ownership than

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3. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

4. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 230 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

5. According to Ellickson, the term "stakeholder" was recommended by Robert Pollak; Ellickson uses the term "patron" to describe any party who transacts with a business firm. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 230, 280 n.203 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

suppliers of labor[6]: they tend to (1) be few in number and stable in identity; (2) bear risks better; (3) be more homogeneous in their interests; and (4) place high value on rights of control (because they are highly vulnerable to opportunism). Each reason, discussed in turn, is problematic.

The first reason why capital suppliers are a preferred type of owner is that a household's equity investors tend to be fewer than its occupants. The fewer the agents, the lower the coordination costs in decision-making. As a result, the two suppliers of equity in the sitcom household can make decisions more easily than its four adult occupants. Ellickson does not pursue this argument to smaller numbers of occupants. If two is better than four, is not one better than two? However, as recognized elsewhere in the article,[7] it is possible that twosomes coordinate at low costs. Most households in the United States are owned by couples, and most homebuyers are couples.[8]

The second justification that Ellickson offers for ownership by capital suppliers is more problematic:

> A risk-averse person is helped by the diversification of her combined holdings of human capital and financial capital. An occupant who has specialized and nontransferable skills in housework already is somewhat invested in the dwelling she occupies. Particularly if she has little financial capital, for reasons of diversification she may prefer not to have a share of the ownership of the residual financial claim in the same dwelling. Other less risk-averse patrons of the same household also likely would not want her to serve as an owner. For example, if Granny and Nadia were co-owners of the Sitcom House and neither had much in the way of savings, they might be

6. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 283-87 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

7. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 254-56 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

8. For instance, according to Ellickson, in 1980, almost 70% of Bucks County, Pennsylvania, deeds named a husband and wife as co-grantees. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 261 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html. According to a 2005 survey by the National Association of Realtors (NAR), 68% of all homebuyers were couples. *See id.* at 261 n.125.

> overly cautious about taking on more household debt to finance the replacement of a leaking roof.[9]

This argument implies that if "Ozzie and Harriet" are married and occupy the same home, and they agree on a traditional gender-based division of labor, the leaking roof is more likely to be repaired if Ozzie owns the home by himself than if he and Harriet share ownership. She is likely to own less non-human capital than Ozzie, and more of her capital—possibly all of it—is likely to take the form of home-specific human capital. Were Dad and Nadia, the live-in nanny, to fall in love and marry, the argument implies that it is preferable for Dad to remain sole owner of the house. By contrast, consider "Bill and Hill," a hypothetical egalitarian couple who have invested little in home production skills, have equal earning power, and whose combined income and assets (besides the home) are comparable to those of Ozzie. They may be willing to take as much risk as Ozzie, assuming they have no costs of coordination. As I discuss further below, this explanation of home ownership is problematic because it fails to consider the incentives that motivate the supply of labor in the home.

Homogeneity of interests, Ellickson's third justification for ownership by suppliers of capital, also implies that Bill and Hill couples are more suitable for joint home ownership than Ozzie and Harriet couples. Homogeneity of ownership interests facilitates the calculation of shares of ownership. "Capital contributions are especially easy to value," Ellickson writes. "This is not the case for labor inputs. . . . If labor were the residual claimant in the Sitcom household, for example, the occupants might wrangle over the fractional interests that, say, Maureen and Granny should be accorded."[10]

Similar considerations follow from Ellickson's fourth justification for ownership by suppliers of capital: vulnerability of suppliers of at-risk capital to opportunism by household workers and managers. Suppliers of capital are at-risk since "a household worker who feels exploited can exit immediately with most of her human capital in tow" and could subject an asset to "unduly high risks, say, by skimping on maintenance."[11] Ellickson

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9. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth* 116 YALE L.J. 226, 284 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

10. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 285 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

11. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 285-86 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

states that occupants "are likely to recognize that [they can] best minimize their overall costs [by] bestowing ownership on those among them who are equity investors." Thus, he seems to estimate that suppliers of capital have more to lose from workers' opportunism and malfeasance than workers have to lose from the opportunism and malfeasance of capital suppliers.

Thus, the four reasons summarized above explain why, "[l]ike participants in a business firm, members of a household typically confer ownership on providers of at-risk capital, not on occupants who labor within the home."[12] The evidence provided in the article consists of (1) intentional communities' implicit recognition of the advantages of conferring ownership on providers of capital[13] and (2) the predominant ownership patterns of conventional households that were originally introduced in ancient Mesopotamia, Egypt, and Israel.[14] I am concerned about the parallels between such ancient households and the Anglo-American coverture system,[15] and don't see how such evidence can provide much guidance for modern households.

Rather than following Ellickson in viewing married suppliers of household labor with no access to capital as willingly bestowing ownership on spouses who supply capital, I prefer to see household occupants who actually or potentially supply labor in married household economies as participants in market and "collective bargaining" processes with household occupants who actually or potentially supply capital in these economies.[16] As is the case in monetary economies, suppliers of labor and capital in married household economies have different interests to the extent that

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12. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 233 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

13. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 286 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

14. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 286-87 (2006) (citing Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 354-57 (1995)), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

15. The breakdown of the coverture system is discussed in Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 239-40 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

16. *See* SHOSHANA GROSSBARD-SHECHTMAN, ON THE ECONOMICS OF MARRIAGE: A THEORY OF MARRIAGE, LABOR, AND DIVORCE (1993), *available at* http://www-rohan.sdsu.edu/faculty/sgs/documents/on_the_economics_of_marriage/table_of_contents.htm.

they each want a larger share of the household surplus.[17] Such diverging interests—exacerbated the more joint household occupancy is expected to be of limited duration—help explain why in the United States community property states were significantly less likely to enact legislation to overturn coverture than states following the common law.[18] Under coverture, capital-owning husbands did not have to worry about losing control over capital in case of divorce. The abolition of coverture involved a redistribution of surplus from capital-owning men to homemaking women everywhere. However, in a community property state it implied more losses to an Ozzie—compelled to attribute half of the marital assets to a Harriet—than in a common law state, where judges tended to attribute to a divorced Harriet less than half the marital assets. Therefore, relative to men in common law states, men in community property states were more likely to vote against the abolition of coverture.

Furthermore, Ellickson's focus on incentives for capital suppliers leads him to overlook the role of incentives for suppliers of household labor. Ellickson's second and fourth reasons—(2) capital suppliers will provide better maintenance,[19] and (4) capital suppliers have incentives to exercise control responsibly[20]—imply that economically rational young men or women with capital and stay-at-home spouses will buy homes in their own names, and that only employed spouses like Bill and Hill will jointly own their homes. Most couple relationships in contemporary liberal societies are not of the Bill-and-Hill type: they involve specialization between a principal breadwinner/supplier of capital and a principal household manager who supplies more labor.[21]

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17. In the monetary economy this mostly takes the form of a competitive market process based on the price mechanism. For a comparison of household economies with monetary economies, see Shoshana Grossbard-Shechtman, *Marriage and the Economy*, *in* MARRIAGE AND THE ECONOMY 1, 1-3 (Shoshana A. Grossbard-Shechtman ed., 2003).

18. This finding is reported in Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV .1079, 1088 (2002).

19. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 284 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

20. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 286 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

21. Relative to men, women are more likely to work part-time or not at all. For example, Current Population Survey data for 2000 indicate that 42.8% of all married U.S. women ages thirty to thirty-four were working full-time year-round, whereas this was the case of 85.9% of married men ages thirty-two to thirty-six. *See* Shoshana Grossbard-Shechtman & Shoshana Neuman, *Marriage and Work for Pay*, *in* MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIALIZED SOCIETIES 222, 224 (Shoshana A. Grossbard-Shechtman ed., 2003). Using data from the Current

Whether in the context of firms or households, an optimal governance structure needs to protect and motivate workers as well as capital suppliers. Workers in household production incur opportunity costs that increase with their earning power.[22] One expects that the more hours a worker engages in household production, and the more she invests in human capital that enhances productivity in such production, the higher the compensation she requires. I call this compensation the "quasi-wage" for household labor.[23] In the United States the legal system discourages the supply of household work by making it difficult to combine the processes of specialization and exchange so prevalent in the monetary economy. The law often dismisses implicit household contracts involving the exchange of one spouse's household work for access to the other spouse's income.[24] Ellickson reinforces underproduction in household economies and underinvestment in the human capital that enhances productivity in marital household production by failing to recognize the counterpart to breadwinners' concerns about opportunistic workers: opportunistic breadwinners may discontinue implicit household employment contracts.[25] One sound economic argument for offering home ownership to household workers and managers is that being offered access to housing by the breadwinning

Population Surveys of 1972-1973, Philip Cohen found that the percentage of prime-age women who classified themselves as "keeping house" stood at 52.8%. *See* Philip N. Cohen, *The Gender Division of Labor: "Keeping House" and Occupational Segregation in the United States*, 18 GENDER & SOC'Y 239, 245-47 (2004). During those years the percentage of women ages 16 and older not in the labor force stood at 55.7%, based on the average labor force participation rate for women 16 years and over for 1972 and 1973. *See* UNITED STATES DEP'T OF LABOR, BUREAU OF LABOR STAT., TABLE 2: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER BY SEX, 1970-2002 ANNUAL AVERAGES (2005), *available at* http://www.bls.gov/cps/wlf-table2-2005.pdf. This suggests a high correlation between "women keeping house" and "women out of the labor force." The last year that the CPS asked whether people were keeping house was 1993. *See* Cohen, *supra*, at 245-47.

22. *See* Amyra Grossbard-Shechtman, *A Theory of Allocation of Time in Markets for Labour and Marriage*, 94 ECON. J. 863 (1984); SHOSHANA GROSSBARD-SHECHTMAN, ON THE ECONOMICS OF MARRIAGE: A THEORY OF MARRIAGE, LABOR, AND DIVORCE (1993), *available at* http://www-rohan.sdsu.edu/faculty/sgs/documents/on_the_economics_of_marriage/table_of_contents.htm.

23. *See* SHOSHANA GROSSBARD-SHECHTMAN, ON THE ECONOMICS OF MARRIAGE: A THEORY OF MARRIAGE, LABOR, AND DIVORCE (1993), *available at* http://www-rohan.sdsu.edu/faculty/sgs/documents/on_the_economics_of_marriage/table_of_contents.htm.

24. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY (2005).

25. Ellickson recommends unilateral gift exchanges of household service rather than such contracts. *See, e.g.*, Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 248-49 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html.

spouse is a form of quasi-wage for work in marital household production such as meal preparation, lawn care, child care, elder care, and care for lovers.[26] High levels of joint homeownership by married couples indicate that many spouses who principally supply labor—not capital—to the household co-own their homes.[27] Capital suppliers may thus agree to co-own with the people who work for them in their homes as a way to obtain higher satisfaction from the home-produced goods they consume.

Ellickson's imbalanced emphasis on the rights of capital suppliers at the expense of those of household workers could further undermine not only the production of meals and homemaking in the unpacked household, but also the supply of home-produced childcare, eldercare, and other essential functions of households that respond to the proper incentives. Discouraging home ownership by those who manage the details of such essential activities, and who need more rather than fewer incentives to engage in household production, is placing more nails in the coffin of advanced industrialized societies.

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26. I am interpreting as compensation for work in household production the value of home equity that household working spouses obtain via marriage beyond what they personally contribute to that equity. Another commonly observed de facto compensation for work in marital household production is that breadwinning spouses share their income with spouses who manage the home, implying compensation at half of the employed spouse's hourly wage. Not inconsistent with this interpretation, Susan Moller Okin advocates that each spouse receive half of any paycheck earned for work performed outside the household. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 180-81 (1989).

27. For instance, according to Ellickson, in 1980, almost 70% of Bucks County, Pennsylvania, deeds named a husband and wife as co-grantees. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 261 (2006), *available at* http://yalelawjournal.org/116/2/226_robert_c_ellickson.html. According to a 2005 survey by the National Association of Realtors (NAR), 68% of all homebuyers were couples. *See id.* at 261 n.125.

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