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Marriage as Relational Contract

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MARRIAGE AS RELATIONAL CONTRACT

Elizabeth S. Scott and Robert E. Scott***

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INTRODUCTION

The evolution of marriage from a relationship based on status to one that is regulated by contractual norms achieved a milestone of sorts recently with the enactment of the Louisiana Covenant Marriage Act.¹ Under this statute, couples entering marriage can choose to have the termination of their relationship regulated under conventional no-fault divorce rules, or they can voluntarily undertake

¹ 1997 La. Acts 1380 (amending La. Civ. Code Ann. arts. 102-103 (West Supp. 1998) and La. Rev. Stat. Ann. §§ 9:234, 9:245(A)(1), 9:224(C), 9:225(A)(3), 9:272-275, 9:307-309 (West Supp. 1998)) (providing that divorce, in the case of a covenant marriage, is available only on fault grounds, after a two-year separation, or if the non-divorcing spouse has abandoned the domicile for one year and refuses to return). In 1998, Arizona enacted a covenant marriage law. See S. 1133, 43d Leg., 2d Reg. Sess. (Ariz. 1998) (to be codified at Ariz. Rev. Stat. Ann. § 25-901 to § 25-906 (West 1998)).

a greater commitment to their marriage. For couples who select covenant marriage, either party can terminate the relationship on fault grounds, but unilateral termination of the marriage is available only after a substantial waiting period. The principal impact of the statute is to give couples more options than were previously available to structure their marital relationship according to their mutual values and goals.²

The Louisiana statute grows out of a widespread dissatisfaction with the current social and legal landscape of marriage and divorce, and a sense that marriage itself is threatened under no-fault divorce law. Although Louisiana lawmakers have embraced a contractual solution to the problem of marital instability, many critics have identified the move from status to contract as the underlying source of the problems with modern divorce law. Among academics, the strongest objection comes from communitarians, who see abolition of fault and the use of "market discourse" in conceptualizing marriage as destructive of the values of caring and commitment that contributed to the stability of traditional marriage.³ Emblematic of

² Contrast this private ordering approach with that of the various efforts to reintroduce fault grounds in other states without providing a menu of contractual choices to the marrying couples. For example, a Michigan bill required proof of fault for parents of minor children to divorce. See H.R. 4432, 88th Leg., Reg. Sess. (Mich. 1995) (reintroduced in 1996 session). Under this bill, parents could divorce only upon proof of adultery, physical incompetence at the time of marriage, imprisonment for three or more years, desertion for two or more years, habitual substance abuse, or extreme cruelty. Spouses without dependent children could divorce only by mutual consent. A similar bill was introduced in Virginia. See H.D. 1188 (Va. 1996). This bill would have prohibited no-fault divorce if the parties had minor children, and would have required mutual consent and a one-year waiting period for no-fault divorce in other cases.

³ Milton Regan has observed that "market discourse seeks to drain one of the most highly charged areas of life and law [family law] of moral valence," and "conflates conduct based on self-interest and conduct based on moral norms." Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 Utah L. Rev. 605, 620, 627; see also Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* 3-4 (1993) (attributing the decline in Americans' notions of responsibility to the public welfare, and a corresponding increase in narrow notions of individual entitlement, partly to the Reagan-Bush philosophy that economic growth would cure social problems while at the same time requiring less individual sacrifice); Mary Ann Glendon, *Abortion and Divorce in Western Law* 112-19 (1987); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 12-15 (1991) (arguing that because popular discourse is dominated by the language of absolute, individual rights, the conditions necessary for cooperative behavior among groups and individuals are becoming increasingly rare); William A. Galston, *Divorce American Style*, Pub. Interest, Summer 1996, at 12, 13 (suggesting that the rise of no-fault

the communitarian concerns is the model of marriage as contract, under which the state is the neutral enforcer of the bargains of autonomous self-interested parties.⁴ These critics contend that such a "limited" conception of marriage leaves women vulnerable, harms the interests of children, and undermines social welfare. Their prescription is to resurrect notions of fault, create rules for marital termination that protect the interests of wives and children, and recover (insofar as possible) a world in which marriage is a privileged status, albeit without the patriarchal trappings.⁵

Other critics, using a law and economics methodology, are comfortable with the model of marriage as contract, but argue that no-fault divorce has transformed marriage into an "illusory contract," which provides no remedy for breach of the marriage vows.⁶

divorce has destroyed the notion of marriage as a presumptively permanent relationship); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 *BYU L. Rev.* 1, 2 (arguing that the rise of individualism in the general culture has eroded traditional notions of commitment and responsibility to the family).

⁴ As Bruce Hafen ruefully observed, "[i]n family law, as in family life, the individualistic cultural currents of the past quarter century have eroded the mortar of personal commitment that traditionally held the building blocks of family life." Hafen, *supra* note 3, at 2. Similarly, Martha Minow objected to the fact that family law increasingly "protects only the autonomous self," at the expense of "the relationships between individuals that constitute families." Martha Minow, "Forming Underneath Everything that Grows:" *Toward a History of Family Law*, 1985 *Wis. L. Rev.* 819, 894; see also Regan, *supra* note 3, at 605, 620, 627 (arguing that even a complex version of marriage as private ordering is undesirable because it conflates self-interested norms with moral ones).

⁵ Some communitarians, such as Martha Minow, do not argue for resurrecting fault. See Minow, *supra* note 4, at 831, 893-94.

⁶ Margaret Brinig and Steven Crafton posit that the changes in the institutional structure of marriage brought about by the no-fault divorce regime and the removal of fault as a consideration in grants of spousal support and property division, "make marital promises unenforceable and allow opportunistic behavior" by spouses. Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 *J. Legal Stud.* 869, 871 (1994); see Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 *J. Legal Stud.* 267, 275, 289, 303 (1987). Cohen finds a causal connection between the skyrocketing divorce rate and the no-fault regime, with a caveat that in his view the earlier system derived its strength not so much from the legal enforcement of the fault grounds of divorce, but from the "informal and social sanctions and the good moral sense of the parties" generated and reinforced by the legal availability of fault divorce. *Id.* at 303. Cohen argues that, as the influence of other societal institutions on marital relations wanes, no alternative safeguards against spousal breach remain in place. See *id.* at 290, 302. The incentives to behave opportunistically increase with the concomitant reduction in the level of marital investments. See *id.* at 295, 299; see also Elisabeth M. Landes, *Economics of Alimony*, 7

From this perspective, the availability of unilateral no-fault divorce encourages opportunistic behavior by the husband that destabilizes the relationship and threatens the marital investment of traditional wives. The predictable result is a reduced investment in the risky venture of marriage.⁷ Thus, both communitarian and law and economics critics argue that the no-fault regime has caused a decline in the importance of marriage and a loss of its valuable social functions.

In our view both of these critiques miss the mark. As Louisiana has recognized, the claim that a contract-based conception of marriage lacks norms of commitment misperceives the nature of contractual relationships. The claim that, without fault, a marital contract is illusory underestimates the multifaceted dynamics of relational contracting. Both of these concerns evaporate if contemporary marriage is analyzed as a long-term relational contract.⁸ Like relational contracts in commercial contexts, a marital contract contemplates a long-term commitment to pursue shared goals, the fulfillment of which will enhance the joint welfare of the parties. There are various mechanisms for enforcing this commitment. Thus, state enforcement of intramarital promises is not an essential element of a regime that can effectively support marital relationships. As in other contexts, a complex network of social and relational norms can reinforce the parties' efforts to achieve their mutual goals during the relationship. If the relationship fails, the parties' investment can be protected by legal enforcement without reintroducing notions of fault.

J. Legal Stud. 35, 44 (1978) (arguing that "the optimal degree of specialization [in the family] will be inversely related to [the] probability [of divorce]").

⁷ Brinig and Crafton call this the "'lite' version of marriage." Brinig & Crafton, *supra* note 6, at 872; see Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. Legal Stud. 503 (1993). Zelder concludes that no-fault divorce decreases the scope of exchange between the spouses, negatively affecting the level of their marital investment. See *id.* at 503-06, 516 (arguing that more divorces occur under a no-fault regime because the children of a marriage are like public goods, with the result that a large fraction of each spouse's investment in the relationship is nontransferable).

⁸ See generally Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981) (proposing a basic theory of relational contracts). A relational theory of marriage is consistent in broad terms with the transaction costs approach suggested by several commentators. See, e.g., Arthur B. Cornell, Jr., *When Two Become One and then Come Undone: An Organizational Approach to Marriage and Its Implications for Divorce Law*, 26 Fam. L.Q. 103 (1992); Robert A. Pollack, *A Transaction Cost Approach to Families and Households*, 23 J. Econ. Lit. 581 (1985).

An obvious puzzle, if marriage is to be understood as a relational contract, is to explain the peculiar pattern of legal enforcement and nonenforcement. Under the no-fault regime, the law does not enforce the explicit promises of the marriage partners (the wedding vows); nor does it enforce promises about conduct during the marriage.⁹ On the other hand, when the relationship terminates, the law purports to enforce the implicit understandings of the couple regarding investment in the joint venture, understandings that often have never been expressly articulated.

Relational contract theory largely resolves this puzzle. The marriage vows express the couple's emotional commitment and use hortatory language to emphasize the seriousness of the undertaking. They describe a standard of performance in idealized and general terms, and remind the parties of their goal of maintaining a caring, cooperative relationship.¹⁰ But emotional commitments are difficult to translate into quantifiable standards of performance, and assessing responsibility for breach proves to be vexingly difficult. Thus, the law relies on social and relational norms to promote cooperation and to enforce intramarital promises. Indeed, relational theory suggests that formal legal enforcement of all the terms of a "marital bargain" is inadvisable, because legal intervention risks undermining the parties' cooperative equilibrium, and ultimately subverts their efforts to sustain a lasting relationship. Thus, legal enforcement is limited to policing massive defections from the cooperative norm and to resolving economic and parental claims upon termination of the marriage (when the extralegal incentives to cooperate are greatly diminished). Law's domain is the area beyond the boundaries of social and relational norms.¹¹

⁹ Such as, "I promise to take vacations with my family." See *infra* text accompanying notes 160-162.

¹⁰ See Goetz & Scott, *supra* note 8, at 1126-30 (discussing the purpose and functions of hortatory rhetoric in enforcing the standards of loyalty and fidelity of fiduciaries); Cohen, *supra* note 6, at 272. Lloyd Cohen writes:

Each promises that he or she will carry out his or her duties in a spirit of "loving," "honoring," and "cherishing" his or her spouse. . . . [E]ach spouse promises that whatever changes are wrought by the winds of time . . . the parties will continue to perform their duties in the proper spirit for the remainder of their joint lives.

Id.

¹¹ See *infra* text accompanying notes 67-71.

Conceiving of marriage as a relational contract does not undermine the normative goals of mutual commitment and relational stability.¹² Given some modest assumptions about the objectives of the parties, a contractual paradigm strongly supports marital stability and encourages mutual investment in the relationship. Moreover, contract offers an attractive autonomy-based alternative to reform proposals that advocate a return to a status-based regulatory scheme that would impose coercive constraints on divorce.

Our evaluation of the current legal regime suggests that in many respects it conforms to the patterns of legal and extralegal enforcement that regulate relational contracts in other settings. Given the high rate of marital breakdowns, however, and the evidence that the interests of women and children are systematically discounted at divorce,¹³ the contemporary legal regime seems not yet to have generated the optimal set of legal rules necessary to sustain a cooperative equilibrium. We do not believe, however, that the abolition of fault per se is a significant cause of these instabilities or that the reintroduction of notions of fault will produce the results critics expect. Rather, the problem stems from two distinct sources that together reflect the incomplete evolution from status to contract. The first is the failure of contemporary legal rules governing divorce to protect marital investment adequately and to discourage

¹² Russell Hardin has commented that "if contracts become as shaky as marriage, then our society will be in danger of collapse." Russell Hardin, *Trustworthiness*, 107 *Ethics* 26, 35 (1996). The implication, which seems quite correct, is that the more marriage is like contract, the more solid and enduring the marital relationship. See *id.*

¹³ A 1988 survey of divorced women found that only 16.8% were entitled to alimony under the terms of their divorce decrees. See Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Series P-23, No. 167, Child Support and Alimony: 1987*, at 8, 11 tbl.J (1990). The survey evidence showed that the median income for families below the poverty line in 1987 with female householders and no husband present was only \$5,093, compared to the \$6,464 median family income of all other families below the poverty level. See Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Series P-60, No. 163, Poverty in the United States: 1987*, at 113 tbl.26 (1989). In the same year, 21% of divorced women between the ages of 55 and 65 lived below the poverty level. See *id.* at 35 tbl.8. While estimates vary, commentators seem to agree that living standards for custodial mothers and children decline after divorce by at least 30%. See Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 *Demography* 485 (1985); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 *Demography* 641 (1988); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *Divorce Reform at the Crossroads* 130, 149 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

opportunistic defection. The second is contemporary law's failure to afford couples the opportunity to undertake a legally binding commitment to marriage.

A key source of the instability of modern marriages is the assumption embedded in the reforms that produced no-fault divorce law: that individual freedom is antithetical to commitment.¹⁴ A contractual framework, to the contrary, assumes explicitly that autonomous individuals frequently will pursue their own ends by voluntarily restricting their future freedom through enforceable legal commitments to others; indeed, often it will not be possible to pursue individual ends in any other way. A legal regime that constrains the freedom to commit actually limits individual freedom. Thus, a contractual lens challenges not only the excessive constraints on marital contracting found in traditional law, but also modern legal reforms that discourage precommitments to marital cooperation.

The Article proceeds as follows. In Part I, we describe briefly the legal movement toward private ordering and the debate about the application of a contractual paradigm to marriage. We challenge the conventional wisdom about the meaning of this trend and its implication for legal policymakers. In Part II, we develop an informal model of the marital contract. The model shows that, under idealized conditions, many parties seeking to marry would agree to undertake a long-term relationship of indefinite duration to pool efforts and share burdens so as to maximize the joint benefits of their relationship. The model clarifies the interaction of legal and nonlegal factors in enforcing the "terms" of this agreement, isolating the complex function of contract-based legal rules as a complement to the influence of social and relational norms. In Part III, we apply the relational contract model to the current legal regime. We conclude that the model has considerable explanatory power and clarifies the structure and much of the substance of the contemporary

¹⁴ Much of the criticism of the Louisiana statute reflects this assumption. See, e.g., Katha Pollitt, *Why "Covenant Marriages" Could Be Harmful to Kids*, *Sacramento Bee*, July 12, 1997, at B7 ("[A]dvances in women's legal and social equality, not to mention their self-esteem and longevity, go hand in hand with easier and more equal access to divorce. . . . Both sexes should have the right to decide how to conduct such a personal part of their lives."). For a related criticism, see Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 *Stan. L. Rev.* 607, 622-23, 626 (1997) (criticizing, on constitutional grounds, recent proposals to change no-fault divorce laws).

legal regulation of marriage. We argue that the stability of marriage is undermined by default rules that are inadequate to protect asymmetric and specialized investment in the relationship, and by the absence of legal options by which parties can make binding temporal commitments to the relationship. Although our analysis is essentially positive, there are clear normative implications in the failure of legal policymakers to match the rhetoric exalting the social value of marriage with a regulatory scheme that assists couples who seek to pursue the goal of lasting marriage.

I. RETHINKING THE PROGRESSION FROM STATUS TO CONTRACT

Under the trend that has been called the privatization of family law,¹⁵ marriage is a relationship the terms of which are determined largely by the parties themselves rather than by the state. Carl Schneider sees the law's recent disinclination to dictate the terms of marriage and its termination as evidence of moral neutrality in family law.¹⁶ Others emphasize the social trend toward gender equality as central to the legal developments.¹⁷ In any event, the legal reforms are part of a broader trend in family law under which the family as an organic unit is less privileged than was once true and its members are increasingly treated as autonomous individuals. This progression is greeted by some observers with equanimity¹⁸

¹⁵ See Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443, 1444-45. Singer's analysis of this trend is insightful and comprehensive.

¹⁶ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1807-08 (1985) (distinguishing two primary themes in the post-fault evolution of the American law: "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated"). The trend toward moral neutrality is buttressed by the increasing heterogeneity of the American population, which makes it difficult for legislatures and courts to justify "impos[ing] values other than tolerance, equality, and individual liberty" on the diverse segments of the population. Hafen, *supra* note 3, at 5.

¹⁷ Singer emphasizes that in response to the modern trend in favor of gender equality, the demise of the state-imposed marriage contract has led to "eliminat[ion] . . . of the explicitly gender-based terms of the traditional marriage contract." Singer, *supra* note 15, at 1458. She further asserts that "[s]ubstituting private for public control over the formation and structure of family relationships seems to offer a . . . double benefit: it expands the opportunities for the exercise of personal choice while affirming the inherent equality of the sexes." *Id.* at 1518.

and by others with distress.¹⁹ While its extent may be debated, there is little controversy about the general direction of movement. In this Part, we examine the changes that reflect the trend toward private ordering and then critically evaluate what we call the conventional wisdom about its meaning and legal implications.

A. Private Ordering and the Legal Regulation of Modern Marriage

No exhaustive survey of legal developments is required to demonstrate the pervasiveness of the trend from state control to private ordering within marriage. Currently, there are few state-prescribed obligations associated with marriage, and fewer still that cannot be altered by the parties. The contractual paradigm is most evident in marital dissolution proceedings, specifically in the judicial response to the enforcement of separation and premarital agreements. Historically, divorce courts exercised far-reaching, paternalistic control over the termination of marriage. Couples generally were not free to agree to divorce and their agreements about the terms of the dissolution were subject to judicial oversight. Today, the choice to end the marriage is a private one. Moreover, while courts retain the authority in some states to reject the divorcing couple's agreement about property, spousal support, and (particularly) custody, judicial review is typically perfunctory and its scope has narrowed.²⁰ For example, under the Uniform Marriage and Divorce Act,²¹ the

¹⁸ See Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, in *The Resolution of Family Conflict: Comparative Legal Perspectives* 364 (John M. Eekelaar & Sanford N. Katz eds., 1984); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 950 (1979) (seeing "the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities"); Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 *U. Toronto L.J.* 533, 535 (1991) (arguing that the law's "predilection" for private ordering is justified by our "increasingly secular and pluralistic age, where monolithic norms, social and legal, as to ideal family and interpersonal structures and arrangements are likely to attract a sharply diminishing collective consensus").

¹⁹ See Hafen, *supra* note 3, at 25-30; Regan, *supra* note 3, at 609, 620.

²⁰ See Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina*, 69 *N.C. L. Rev.* 319, 326-27 (1991) (arguing for greater judicial oversight of separation agreements); see also Regan, *supra* note 3, at 641-49 (discussing the dangers of unqualified judicial acceptance of premarital and separation agreements).

²¹ *Unif. Marriage and Divorce Act*, 9A U.L.A. 147 (1973).

model for many state statutes, the parties' agreement is binding on the court, except for those provisions dealing with custody and child support.²² Even as to custody arrangements, observers have argued, and most courts generally seem to agree, that parents are better able than courts to make these decisions.²³ Indeed, the enthusiasm for mandatory custody mediation reflects a view that parents should be encouraged to make collective decisions about their child's future.²⁴

The hallmark of the law's retreat from regulating marriage is the abandonment of fault as a mandatory requirement for release from marital obligations. All states today allow spouses to divorce without proving fault and most allow either party unilaterally to terminate the relationship.²⁵ In many states, fault is also excluded from consideration in the determination of alimony and property division, a position that was recently endorsed by the American Law Institute in its proposed Principles of the Law of Family Dissolution.²⁶ Some states retain fault grounds as an alternative basis for divorce, but having fault as an option available to the disgruntled spouse in a no-fault regime is very different from the state conditioning divorce on fault. The most salient role of fault today is in jurisdictions in which it may be considered in decisions to award support and alimony. This limited role is viewed by some as a vestige of the *ancien regime*, while for others it constitutes a vital means of enforcing marital obligations.²⁷

²² See id. § 306(b), 9A U.L.A. 216.

²³ See Mnookin, *supra* note 18, at 378-79; Mnookin & Kornhauser, *supra* note 18, at 957-58.

²⁴ Advocates for custody mediation argue that this form of private dispute resolution reduces conflict between parents, and thus promotes the child's welfare. See Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 184-93 (1994); Robert Emery & Melissa M. Wyer, *Divorce Mediation*, 42 *Am. Psychologist* 472, 474, 477 (1987). Some states require that parents who file a petition for a judicial resolution of a custody dispute generally must first try a course of mediation. See Cal. Fam. Code § 3170 (West 1994); N.C. Gen. Stat. § 50-13.1 (1995); Or. Rev. Stat. Ann. §§ 107.755-107.795 (Butterworth 1990); Del. R. Fam. Ct. Civ. P. 16(a)(1).

²⁵ See Ira Mark Ellman et al., *Family Law: Cases, Text, Problems* 187 (3d ed. 1998).

²⁶ American Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 5.02 (Proposed Final Draft 1997).

²⁷ Ira Ellman represents the first position. See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 *Ariz. St. L.J.* 773, 786-91, 807-09 (1996) (rejecting fault in divorce law as a vehicle of compensation for harms during marriage, on the view that

The increasingly routine enforcement of premarital agreements is another clear representation of a changed attitude toward private ordering of the terms of marriage and divorce. At one time, courts declined to enforce premarital agreements on the grounds that such arrangements encouraged parties to divorce. Even today, many courts intervene when premarital contracts that are fairly executed *ex ante* lead to what seems to be inequitable results *ex post*.²⁸ In general, however, the formerly hostile judicial response has been replaced by a presumption of enforceability. Twenty states have adopted a version of the Uniform Premarital Agreement Act,²⁹ which directs the enforcement of premarital agreements according to general contract principles, except for provisions affecting children.³⁰ The law regulating premarital contracting increasingly reflects a straightforward contractual perspective, one in which couples are encouraged to reach an *ex ante* agreement about the terms of their relationship and its dissolution.³¹

punitive damages should be and are disfavored in family law, and that recovery should be based on financial, not emotional, losses; concluding that the no-fault regime, buttressed by tort law, is an adequate framework for addressing spousal claims).

Brinig and Crafton have argued for the continued viability of fault, because the threat of an action for damages will encourage marriage-specific investment by wives, and performance by husbands. See Brinig & Crafton, *supra* note 6, at 874 (noting that in states that continue to maintain fault grounds for divorce, breach of the marriage contract by one spouse allows the other, in addition to the right to sue for divorce, civil and criminal remedies); see also Landes, *supra* note 6, at 49 (arguing that "penalizing the party more at fault in contributing to a divorce economizes on the costs of enforcing the terms of the marriage contract within the marriage and increases the expected gain from investment in the marriage").

²⁸ See, e.g., *Button v. Button*, 388 N.W.2d 546, 552 (Wis. 1986) (holding that a premarital agreement, although fair at the time of contracting, can nonetheless be set aside for unfairness at the time of enforcement).

²⁹ Unif. Premarital Agreement Act, 9B U.L.A. 369 (1973).

³⁰ Under the Uniform Act, the only basis for setting aside a fairly executed contract which greatly disadvantages one party is if support terms result in one party's eligibility for public assistance. See *id.* § 6(b), 9B U.L.A. 376. Comment to § 6, on enforcement of premarital agreements, expressly refers to the "standard of unconscionability . . . used in commercial law, [and adopted by Unif. Marriage and Divorce Act § 306(b), 9A U.L.A. 216 (1973),] where its meaning includes protection against one-sidedness, oppression, or unfair surprise." Unif. Premarital Agreement Act § 6(b) cmt., 9B U.L.A. 376 (1983) (quoting Unif. Marriage and Divorce Act § 306 cmt., 9A U.L.A. 216 (1973)). The Uniform Act provides in § 3(b) that "[t]he right of a child to support may not be adversely affected by a premarital agreement." *Id.* § 3(b), 9B U.L.A. 373 (1983).

³¹ See Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 Vand. L. Rev. 397 (1992) (advocating mandatory execution of premarital agreements).

The development of a contractual paradigm for marriage is reinforced by its extension to long-term nonmarital intimate relationships. Since *Marvin v. Marvin*,³² courts have increasingly been receptive to enforcing the agreements of cohabiting parties regarding division of assets and support upon termination of the relationship.³³ This development signals an acceptance of the primacy of private choice in an area of social life once subject to strict regulation, and is a broad endorsement of the contractual ordering of intimate relationships. An unmarried couple is now free to develop a long-term, intimate relationship within a legal environment that will enforce key terms of its agreements. Judicial willingness to enforce cohabitation agreements signifies as well the law's neutrality towards the choice between marriage and nonmarital options.

B. The Critique of the Regulation of Modern Marriage

The move toward private ordering of marital relationships represents a major shift in the law's stance toward intimate relations, a shift that has been correlated empirically with an increased incidence of divorce.³⁴ The response of critics of the reform rests on several key assumptions about the impact of this trend on the marriage

³² 557 P.2d 106 (Cal. 1976).

³³ See *id.* at 110 (holding that in a suit for "palimony," which followed the dissolution of the parties' long-term unmarried cohabitation, cohabiting couple's agreement regarding its property and support rights is enforceable under express and implied contract theories). For a description of developments since *Marvin*, see Carol S. Bruch, *Cohabitation in the Common Law Countries a Decade After Marvin: Settled In or Moving Ahead?*, 22 U.C. Davis L. Rev. 717, 722 & n.19 (1989). Some courts have been willing to extend the *Marvin* rationale, making recovery in cohabitation cases available on the basis of partnership principles or through analogy with the statutes applicable to married couples. See, e.g., *Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986) (finding implied partnership agreement); *Artiss v. Artiss*, 8 Fam. L. Rep. (BNA) 2313 (Haw. Cir. Ct. 1982) (holding that "ostensible family relationship" warranted analogy to the divorce equitable distribution statute upon an implied-in-fact agreement); *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984) (employing analogy to the statutory disposition of community property upon divorce).

³⁴ See Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 L. & Soc'y Rev. 543 (1989) (showing the increase in divorce rates after the introduction of the no-fault divorce regime). Divorce rates, however, have leveled off in the 1990s. See Carlee R. Scott, *As Baby Boomers Age, Fewer Couples Untie the Knot*, Wall St. J., Nov. 7, 1990, at B1 (suggesting this may be only a temporary reversal of the trend, as some studies continue to suggest that as many as 60% of all first-time marriages will end in divorce).

relationship, and on the future of divorce law. The critique tends to conflate two related but separate dimensions of the private ordering trend. The first is the movement toward a contractual model of marriage. The second is increased emphasis on maximizing individual freedom in marriage, an emphasis which may actually undermine fundamental contract principles. An uncontested assumption shaping both the law and the debate is that autonomy and obligation are at war, and that the legal regime can promote one but not both. This assumption has confused analysis of the implications of a contractual model of marriage.

1. Marriage as Contract and the Character of Marriage

Communitarian scholars, and others who believe that the conception of marriage as contract distorts and undermines the meaning of this unique relationship, regret family law's trend toward private ordering.³⁵ If the contractual theory of marriage prevails, these scholars warn, marriage will no longer be understood as a cooperative, altruistic relationship characterized by long-term commitment; instead, it will be transformed into a relationship of two self-interested persons (usually described as atomistic) who enter into a limited agreement in which each seeks to advance selfish goals and under which both are likely to behave opportunistically.³⁶ When

³⁵ See *supra* notes 3-4.

³⁶ Bruce Hafen expresses this view in a discussion of the move from "familistic" to contractual relationships in marriage and other family relationships. See Hafen, *supra* note 3, at 23. Citing sociologist Pitirim Sorokin, Hafen laments:

[C]ontractual [relationships] . . . are always limited in both scope and intensity. Parties enter a contractual relationship primarily because of self-interest; therefore, their commitment is measured by the extent to which the relationship assures them of profit, pleasure, or service. Thus, the defined sphere of contractual solidarity is "coldly legalistic" to the point of being a "lawyer's paradise," and the parties may "feel quite virtuous . . . if they conform to the legal rule" even if their conduct is otherwise unethical or unfair. Neither party to a contract may assume that the other acts in constant good faith, because, reflecting free market assumptions, both parties are expected to interpret the limits of their commitment according to self interest.

Hafen, *supra* note 3, at 23-24 (citations omitted) (quoting Pitirim A. Sorokin, *Society, Culture and Personality: Their Structure and Dynamics* 104-05 (2d ed. 1962)).

Milton Regan criticizes the "economic" analysis of family for its almost exclusive focus on "the discrete individual with a relatively stable set of preferences who seeks to maximize personal satisfaction [through bargaining with others] within some set of

such a marriage no longer serves the individual self-interest of either party, the relationship is discarded in favor of a more desirable alternative, at great cost to the discarded spouse and children. According to communitarian critics, a contractual model of marriage contrasts starkly with one in which marriage was a permanent and stable commitment, inviting the couple instead to "unite[] temporarily for their mutual convenience."³⁷

The law's embrace of private ordering in marriage is part of a broader policy of maximizing the freedom of individuals to pursue personal ends in intimate relationships.³⁸ Those who dislike the individualistic norm tend to view its various expressions in divorce law as all of a piece. Thus, on the view of many communitarian critics, an understanding of the marriage relationship in contractual terms is inevitably linked to limited commitment motivated by selfish interest, to a unilateral right of termination, and to policies promoting a clean break without regret when marriage ends. As we will argue, however, these separate strands are conceptually linked only in the unlikely event that the clean break policies express (either implicitly or explicitly) the parties' *ex ante* understandings regarding the terms for dissolving the relationship.

2. *Marriage as Contract and the Role of Law (and Fault)*

The law's ability to regulate the marriage relationship is more limited under a contractual regime than under traditional law. From the perspective both of those who regret the modern stance of moral neutrality toward marriage and those who endorse it as a core value in liberal society, the limited function of law is seen as

constraints," while it fails to provide any basis for evaluating the "worthiness" of individual preferences. Regan, *supra* note 3, at 610.

³⁷ Schneider, *supra* note 16, at 1859.

³⁸ For example, reproductive privacy cases recognized the right of individuals to make important independent decisions regarding contraception and abortion. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Some commentators also argue that the law should supplement this negative procreational liberty with the affirmative liberty to procreate, by means of assisted conception if necessary. See, e.g., John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1994). Another significant aspect of the increased scope of private ordering is the judicial recognition of cohabitation agreements. In the two decades since *Marvin*, courts have generally become hospitable to claims arising out of cohabitation relationships, employing both express and implied contract remedies to resolve the parties' property and support disputes. See *supra* note 33.

an integral component of a contractual regime. The law's principal role in such a regime is to provide the background rules for enforcing marital contracts, a function that, it is often assumed, requires formal passivity about the substance of the agreements that couples make. A further implication of taking private ordering seriously, on this view, is that the law becomes indifferent to choices about intimate arrangements and neutral as between cohabitation and marriage. The upshot is that a contractual model of marriage negates the ability of the state to promote marital stability, a key focus of traditional law.

Many critics of modern divorce law target the abolition of fault grounds for divorce as exemplifying the deficiencies of the new legal regime. This criticism, however, takes very different forms.

Communitarian scholars view fault grounds for divorce as expressing a societal consensus about the moral obligations spouses owe to one another. A breach that constitutes a fault ground is a serious moral violation, one that causes an injury to the innocent spouse and society, and should be punished.³⁹ It follows that the abolition of fault is emblematic of an amoral stance toward marital obligation and an endorsement of the parties' authority over the terms of the relationship. The no-fault "reform" is thus seen as inextricably linked to the modern conception of marriage as contract. With the removal of fault, marriage is more like a commercial venture. The couple is free to set the terms that serve their interests and to terminate the relationship when it is no longer useful to

³⁹ Milton Regan develops this argument fully. "The implicit conceptual rationale for alimony was based on a moral judgment that marriage was a lifetime commitment, and that a man who violated this commitment was obligated to provide expectation damages for this breach. While alimony was never widely provided, its availability arguably expressed a distinct moral vision of marriage." Regan, *supra* note 3, at 650 (citation omitted). Regan argues that the law and economics interpretation of fault as existing to "encourage efficient division of labor and cooperative behavior during marriage in order to maximize the production of households assets," is one-sided, because "[e]vidence suggests . . . that marriage is highly charged with moral significance for most people," and this facet of marriage is usually not reflected in the economic theory. *Id.* at 635. Thus, the market-based approach "eschews any conception of marriage as a broader moral undertaking whose ends are not easily reducible to discrete identification and measurement." *Id.* at 637; see Galston, *supra* note 3, at 18 (maintaining that "no-fault divorce laws symbolize[] the spreading belief that divorce present[s] no particular moral problem, that there was, in the moral as well as legal sense, no fault").

them. Under the no-fault regime, the notion of condemning a moral wrong is as out of place as it would be in a commercial contract.

Law and economics critics also regret the removal of fault, but on contractual rather than moral grounds.⁴⁰ They treat the marriage vows as essential terms of the marital contract. A spouse who is guilty of a fault ground commits a breach of the marriage contract and should be liable for damages.⁴¹ The removal of fault grounds and the ability of spouses unilaterally to abandon the marriage under modern divorce law eliminates any remedy for breach and makes the contract illusory and unenforceable. This, in turn, encourages opportunistic behavior because no effective sanction deters defection from a norm of mutual cooperation.⁴² In such a regime, traditional wives, whose most valuable performance occurs in the early years of the marriage (childbearing and rearing years) are vulnerable to strategic behavior by their husbands, whose performance increases in value over the years of the marriage as their earning power increases. Husbands are motivated to appropriate the benefits of their wives' performance and thereafter either leave the marriage or defect from the relationship.⁴³ For this reason, wives are deterred from undertaking optimal marriage-specific investments. These critics argue that by resurrecting fault as a criterion for property settlement and support determinations, breach of performance of the marriage vows could (and would) be recognized as the basis for a remedy upon divorce. With the abolition of fault, the current scheme of legal regulation has contributed to the instability of marriage and undermined the welfare of wives and children.

⁴⁰ See Brinig & Crafton, *supra* note 6, at 892-93 (arguing that even if resurrection of fault as grounds for divorce is not feasible, fault is necessary in alimony awards, thus recharacterizing alimony as a damage remedy for breach); see also Cohen, *supra* note 6, at 273 ("Each party contracts for [the] future stream of services. The provision of these services is the standard by which substantial performance is judged, and the value of the withdrawn services is a first approximation of damages in the event of breach."). Stake, in contrast, views alimony as a contingent payout under the contract. See Stake, *supra* note 31, at 419.

⁴¹ See Cohen, *supra* note 6, at 287.

⁴² See Brinig & Crafton, *supra* note 6, at 871.

⁴³ Brinig and Crafton assert an empirical correlation between abuse rates and the availability of fault remedies. See *id.* at 889, 892 tbl.5. They argue that "spouse abuse occurred with greater frequency in states that had abolished consideration of fault in divorce and its incidents." *Id.*

3. *Private Ordering in Marriage and the Welfare of Women and Children*

The view that women fare poorly under the modern regime extends beyond a critique of the abolition of fault grounds for divorce. Divorce has a destructive impact for women who undertake the traditional homemaker's role, regardless of whether the husband's behavior was responsible for ending the marriage. The wife's homemaking and child-rearing roles represent an investment in the relationship that is marriage-specific and is not readily transferred to the employment market if the marriage ends. The breadwinner husband, in contrast, develops his human capital in the workplace throughout the marriage; thus, divorce has little or no impact on his ability to earn income. Many critics have argued that the no-fault regime contributes to an expectation that marriage is a short-term commitment that can be set aside unilaterally. This outcome systematically leaves women vulnerable to financial hardship when the relationship ends, a burden that is even greater if the wife has custody of the children of the marriage.⁴⁴ The costly impact of divorce on women and children is assumed to be inherent in the specialization of marital roles in a world in which marriage is unstable and exit is easy. This criticism is supported by empirical research which demonstrates that custodial mothers and children bear a disproportionate share of the financial burden of divorce.⁴⁵

The emphasis on values of individual freedom and the conception of marriage as a means of self-realization under the no-fault regime also contribute to the problem for women. These values support the inclination of spouses, especially husbands, to make a clean break and deemphasize ongoing responsibility. For example,

⁴⁴ See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 Wis. L. Rev. 107, 147-48; Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 Cal. L. Rev. 291, 318 (1987); Singer, *supra* note 15, at 1549 (warning against "grant[ing] unfettered discretion to private individuals to structure the process of marital dissolution" because it "may end up empowering economically stronger family members at the cost of economically weaker ones"); *id.* at 1565-66 ("[T]he shift from public to private ordering of divorce may well have contributed to the economic impoverishment of women and the children they continue to care for after divorce.").

⁴⁵ See, e.g., Hoffman & Duncan, *supra* note 13, at 641 (reporting that the living standard of women and the children who live with them declines by at least 30% in the first year after divorce); Sugarman, *supra* note 13, at 149 (same).

long-term alimony, grounded in a conception of marriage as a life-long obligation, is very much out of fashion.⁴⁶ Moreover, until recently, enforcement of the child support obligation was sporadic, a reaction that has been linked to the emphasis on personal freedom.⁴⁷ Relational feminists, translating these concerns into more abstract terms, conclude that much of the problem derives from principles of autonomy, on which the legal model of marriage as contract is built. They argue instead for a legal regime shaped by relational (feminine) values of care, commitment, and responsibility.⁴⁸

Feminists have also drawn on game theory to challenge the contractual paradigm, arguing that women are socially and psychologically disabled in negotiating the marriage contract in ways that will systematically result in their getting a smaller share of the benefits of marriage. Amy Wax has argued that women's bargaining position is systematically disadvantaged because the value of women in the remarriage market declines relative to that of their husbands. This leads women to accept a smaller share of the marital surplus.⁴⁹ Beyond this, many feminists have argued that women are poorer negotiators than men because of a power imbalance deriving from women's historically subordinated status.⁵⁰

⁴⁶ Herma Kay has argued along the same lines that the current environment is not conducive to creating post-divorce remedies for support of professional education. See Kay, *supra* note 44, at 312-13.

⁴⁷ In an environment in which the clean break norms of divorce dominate, the continuing obligation to support children may be obscured. See Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 Va. L. Rev. 9, 36 (1990) ("[D]ivorce law encourages parties to put the marriage behind them. Many fathers apparently adopt the general norm and fail to preserve their parental role and responsibility.").

⁴⁸ See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L.J. 293, 311-12 (1988); Minow, *supra* note 4, at 885-89. Feminists contrast the feminine values of care and responsibility with the "masculine legal norms of the marketplace" and the individualist notion of the "acontextual self." For a discussion of the communitarian critique from the viewpoint of relational feminism, see Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 Utah L. Rev. 687, 715-17.

⁴⁹ See Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 Va. L. Rev. 509, 591-93 (1998). The evidence for this inequality, Wax argues, is the data that demonstrates that women do more domestic household labor than their husbands, even when both are employed outside the home. See *id.*

⁵⁰ See Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 Denv. U. L. Rev. 1169, 1172 (1996) (arguing that a severe bargaining imbalance exists between women and men because society has advantaged men, and because women

Thus, a contractual model of marriage may systematically disfavor women because women are disabled from asserting their self-interest in pursuit of individual ends.⁵¹

Critics argue that the trend toward private ordering under the no-fault regime threatens the welfare of children even beyond its financial impact on the family unit. The freedom of parents to leave marriage can impose substantial costs on children, who are excluded from decisions to marry and divorce.⁵² Moreover, in bargaining over divorce, parents are free to decide their children's future in a negotiation in which custody and support are the currency of exchange. The withdrawal of the state from its historic role in setting the terms of marriage and supervising the decisions of parents for their children thus harms the welfare of children.⁵³

C. Rethinking the Meaning of Marriage as Contract

The conventional wisdom about how modern family law contributes to the instability of marriage and the decline in social welfare rests on fundamentally flawed assumptions. One assumption is that the contractual paradigm itself is central to the problem of

tend to be "giving selves" instead of "liberal selves"); Wax, *supra* note 49; cf. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 Va. L. Rev. 421, 429-30 (1992) (arguing that "women taken as a group, are more likely to make cooperative moves than men, taken as a group," and thus women acquire less property).

⁵¹ Jana Singer discusses in depth the feminist criticism of divorce mediation as representative of the way in which gender inequality can be exacerbated under a system of private ordering. See Singer, *supra* note 15, at 1540-49.

⁵² See Robert E. Emery, *Marriage, Divorce, and Children's Adjustment* (1988) (analyzing social science research on divorce and its impact on children); Frank F. Furstenburg, Jr. & Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part* (1991) (concluding that children who grow up in a household with one biological parent are generally worse off than children in households with both parents, controlling for other factors); Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 1-2 (1994) (same). Judith Wallerstein, in a follow-up of a longitudinal study, found that the now-adult children of divorce tend to have lower-paying jobs and less college education than their parents, unstable father-child relationships, a fear of commitment and of divorce, a vulnerability in adolescence to drugs and alcohol, and bitter memories of a legal system that forced them into custody and visitation plans. See Judith S. Wallerstein & Sandra Blakeslee, *Second Chances: Men, Women, and Children a Decade After Divorce* (1990). This study has been criticized methodologically because it involved a small sample of children in mental health treatment and had no control group. See Ellman et al., *supra* note 25, at 616-17.

⁵³ See Regan, *supra* note 3, at 656; Scott, *supra* note 47, at 36; Sharp, *supra* note 20, at 349, 355, 369.

marital instability, because contractual obligations are inherently limited and inconsistent with deep commitment. Beyond this, some critics assume that individual freedom and binding commitment are irreconcilable, and that a legal regime that values autonomy must allow the freedom to renege on the marriage contract. Finally, the critics assume that the marital bargain can only be enforced (and the investment of homemakers and children protected) by reintroducing fault to provide a legal remedy for breach.

Communitarian critics associate contract with limited, narrowly self-interested arrangements in which each party negotiates for a short-term commitment that best serves his or her personal ends, one that can be readily set aside if breach is efficient.⁵⁴ It is not surprising that, from this perspective, the trends toward contractual ordering and toward maximizing individual freedom which characterize contemporary divorce law are merged together as contributing in an undifferentiated way to marital instability.⁵⁵ Both elevate the value of autonomy and posit individuals making choices to further their personal ends.

This description caricatures the contractual model of marriage, in large part by misperceiving the core meaning of contract as commitment. To the extent that society has an interest in the stability of marriage, and individuals view lasting marriage as part of a life plan, contracts can serve very well as a basis for an enduring,

⁵⁴ Consider a passage from Regan: "[Market] discourse is based on a model of atomistic individuals motivated by immediate self-interest, who are engaged in more-or-less constant recalculation of the costs and benefits of alternative courses of action. For these individuals, social interaction takes the form of discrete market transactions, the explicit terms of which strictly delimit the parties' obligations to one another." Regan, *supra* note 3, at 626; see sources cited *supra* note 3.

⁵⁵ Hafen is a good example of this confusion: "Under [the current] analytical model, one's framework for meaning begins not from an objective set of natural law principles that surround the individual within a social or even a cosmic context; rather, society and the universe must find *their* meaning by reference to individual interests," a position that "alter[s] the balance between individual and community interests, [and] potentially challenge[s] our long-term social stability." Hafen, *supra* note 3, at 14; see also Galston, *supra* note 3, at 16 ("Americans today place less value on obligation to others, on sacrifice, and on self-restraint. By contrast, we place more value on individualism, on self-expression and self-realization, and on personal choice."). Regan, however, recognizes this distinction. See Regan, *supra* note 3, at 610 ("[T]he rational self-interested actor [does not] necessarily shrink from commitment. The individual may well conclude that it is in his or her long-term interest to forgo short-term advantage, and thereby agree to constraints on the pursuit of near-term self-interest.").

committed relationship. Only two modest assumptions are required: that many individuals entering marriage are motivated to undertake a long-term commitment and wish to secure reciprocal commitments from their partners, and that both partners share the goal of lasting marriage. Substantial empirical research supports this account of the intentions of many individuals entering marriage, and there is little support for the notion that prospective spouses view the commitment that they are undertaking as limited or short term.⁵⁶ To be sure, the view that individual freedom is antithetical to commitment does find expression in modern divorce law, with its emphasis on unilateral termination of marriage. But this view is quite inconsistent with the premise of contract, which holds that individuals can often fulfill their purposes only by voluntarily undertaking legally enforceable commitments that limit their freedom in the future.⁵⁷ Each party to a contract believes that by binding herself and thereby being able to rely on the commitment of the other, she is better able to achieve her goals than if she were to act without so restricting her freedom.

The premises of contract and the premises that underlie the current right of unilateral divorce rest upon very different conceptions of individual autonomy. To the extent that modern divorce law exalts unilateral termination and declines to enforce promises to stay married, it elevates the freedom to renege on a promise (what we might call "ex post autonomy"). But the freedom to renege necessarily forecloses the freedom to make binding commitments (what we might call "ex ante autonomy"). Since the freedom to

⁵⁶ The empirical studies reveal that the majority of Americans plan to marry, and greatly tend to overestimate the chances of their own marital success. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *Law & Hum. Behav.* 439, 443 (1993) (reporting that all survey respondents rejected the possibility of their own divorce); Arland Thornton & Deborah Freedman, *Changing Attitudes Toward Marriage and Single Life*, 14 *Fam. Plan. Persp.* 297, 300 (1982) (reporting that over 80% of high school senior respondents expressed a belief that they will be married to the same person for their entire life).

⁵⁷ See Scott, *supra* note 48, at 692, 720-21; Robert E. Scott & Douglas L. Leslie, *Contract Law and Theory 2* (1st ed. 1988) ("Contract law, then, should give effect to the declared will of the parties by policing their obedience to their self-imposed obligations. [This] theory embraces the principle that individuals should be free to create and modify their own legal obligations; it highlights individual autonomy and consent to the obligation . . .").

commit includes the freedom not to commit, *ex ante* autonomy is a more robust conception of personal freedom. This is illustrated by the rules governing the contracts of infants: Much like divorcing couples today, infants, who are seen as lacking moral imagination, are free to renege on their promises at any time even after they have promised to perform and enjoyed the fruits of the other's performance.⁵⁸ It is well understood that such a "freedom" is actually a limitation on the autonomy of infants, who are unable to make legally binding commitments and thus are disabled from securing the commitments of others.⁵⁹ In short, the very essence of contract—the notion that the law will coercively enforce a promise that is voluntarily undertaken even after the promisor has come to regret the promise—is inconsistent with the freedom to renege.

Applying principles of contract theory to marriage produces a more optimistic picture of the capacity of private ordering to ameliorate the impact of divorce on homemaker wives and children. Using a hypothetical bargain heuristic to analyze the negotiations between homemaker and breadwinner spouses suggests that parties bargaining *ex ante* would devise terms to deal with role specialization and asymmetric investment. To the extent that the investments of wives are not protected under current default rules regulating financial distribution on divorce, these rules depart from those that contract theory would predict. Moreover, nothing in contract law or theory gives contracting parties the authority to devise terms that harm third parties, and thus contract law offers no support for marital provisions that harm children. Again, many of these harmful effects may be attributed to notions of *ex post* autonomy that are inconsistent with contractual norms.

Law and economics critics of modern marriage law employ a contractual model and understand well that contract and commitment are quite compatible.⁶⁰ But at least some of their critiques

⁵⁸ See *Halbman v. Lemke*, 298 N.W.2d 562 (Wis. 1980); *Kiefer v. Fred Howe Motors*, 158 N.W.2d 288 (Wis. 1968); Robert E. Scott & Douglas L. Leslie, *Contract Law and Theory* 366-79 (2d ed. 1993).

⁵⁹ See Samuel M. Davis et al., *Children in the Legal System* 105-06 (2d ed. 1997) (discussing infancy doctrine as restraint on minors' autonomy).

⁶⁰ Brinig and Crafton, Cohen, and Trebilcock and Keshvani have all provided useful analyses utilizing these tools. See Brinig & Crafton, *supra* note 6, at 873 (stressing that even the words of the marriage ceremony give substantive content to the idea of the marriage contract as a lifelong commitment); Cohen, *supra* note 6, at 272-73

also rest on suspect assumptions. In this instance, a key assumption is that law is the sole (or at least the primary) mechanism for enforcing marital promises.⁶¹ Much of the contractual analysis of marriage thus implicitly posits a contractual relationship in which the parties are presumed capable *ex ante* of allocating and assessing responsibility for failures to fulfill the terms of the marital agreement.⁶² In such a world, contract terms are clearly specified, legal enforcement is ubiquitous and straightforward, and expected performance is clear. Marriage does not fit this model well.

But many commercial contracts also do not easily fit the presuppositions of this classical contractual analysis. In relational contexts, where the future contingencies are complex and uncertain, the classical model of contract fails to capture the dynamic and inter-related functions of norms and legal rules, and of informal and formal methods of contract enforcement. Parties to such relational

(positing that the marriage vows are "a species of contract," intended to govern "the remainder of [the spouses'] joint lives"); Trebilcock & Keshvani, *supra* note 18, at 538. Contrast this with the communitarian view of the contractual model of marriage, as a relationship permeated with "a self-focused 'therapeutic attitude [that] denies all forms of obligation and commitment in relationships.'" Hafen, *supra* note 3, at 25 (alteration in original) (quoting Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 85 (1985)).

⁶¹ Those who adopt the law and economics perspective generally tend to ignore extra-legal mechanisms and focus exclusively on legal enforcement, a deficiency that has been widely recognized in recent years. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133, 136 (1996). Those who use this approach implicitly treat it as a contingent term contract, and thus do not explore the role of extralegal enforcement mechanisms, examine the standard of performance, or question whether terms can be specified—important considerations under a relational contract model. Trebilcock and Keshvani, for example, identify several potential sources of contract failure which would require formal judicial intervention into the parties' private bargaining: "(1) inadequacy of background legal entitlements (or default rules); (2) transaction-specific failures (including externalities); and (3) post-agreement contingencies." Trebilcock & Keshvani, *supra* note 18, at 550. They overlook the role of extralegal normative mechanisms, focusing instead on legal mechanisms to address both the procedural and substantive issues in private contracting. See Brinig & Crafton, *supra* note 6, at 872. These authors assume that legal enforcement of wedding vows is critical to maintaining a stable relationship. Lloyd Cohen recognizes the important role of informal enforcement mechanisms, but concludes that they are now ineffective. He is also pessimistic about the ability of law to assume this enforcement role. See Cohen, *supra* note 6, at 290, 303.

⁶² A notable exception is by James Bowers and John Bigelow. See James W. Bowers & John P. Bigelow, *The Economics of Relationships and the Limits of the Law* (July 10, 1996) (unpublished manuscript, on file with the Virginia Law Review Association).

contracts are incapable of reducing important terms of the arrangement to well-defined obligations. Definitive and legally binding commitments may be impractical because the parties are unable to identify in advance uncertain future conditions and specify the complex adaptations required of each, or because they are unable to verify violations of the contractual obligation to third parties. Relational contracts thus create unique, interdependent relationships in which unknown contingencies, the intricacy of the required responses, and the inability to verify nonperformance prevent the specification and enforcement of legal standards of performance.⁶³ A typical response to this problem of complexity and uncertainty is to define the legal obligation in unusually general terms and to rely upon social and relational norms to specify and enforce most of the "terms" of the bargain. The contractual relationships of principals and agents, including the fiduciary obligation that attaches to corporate officers and trustees (and parents),⁶⁴ and the relationships between parties to long-term commercial contracts are only a few examples of how legal and extralegal obligations are interwoven in relational contracts.⁶⁵ Because the terms of these relationships are general and flexible, they require more creative enforcement mechanisms than do conventional contracts. We will argue that marriage fits *this* model of contract quite well, indeed.

Challenging the twin assumptions of short-term commitment and contingent contracting also leads to the conclusion that both communitarian and law and economics critics misunderstand the role of fault in marriage law. Contrary to the communitarian view, marriage vows of fidelity and loyalty are not rendered meaningless under a relational contract model. To the contrary, marital vows play an important role (albeit a more informal role than is understood by the law and economics analysts). Just because marriage vows are legally unenforceable under marriage law does not imply that the hortatory rhetoric associated with marital commitment is devoid of significance. We will argue that the higher level of aspiration in terms of fidelity and commitment that each spouse

⁶³ See Goetz & Scott, *supra* note 8, at 1092.

⁶⁴ See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995) (arguing that parents' role in fulfilling their responsibilities toward their children can be usefully understood as analogous to that of fiduciaries in other settings).

⁶⁵ See Goetz & Scott, *supra* note 8, at 1112-19.

assumes upon marriage substitutes for more commonly observed performance standards in commercial contracts. While these "terms" are enforced through social and relational norms and not by legal action, they remain key features of the network of behavioral controls that cement the marital relationship. In short, the elimination of "fault" under marriage law does not mean that marital bargains are unenforceable, nor would the reintroduction of fault grounds for divorce predictably lead to more stable and enduring marriages.

Characterizing marriage as a relational contract offers a promising perspective from which to understand and evaluate the contemporary trend toward private ordering. In many regards, as in the removal of fault, this framework provides an account of contemporary legal regulation of marriage and divorce which responds to critics' concerns. Modern no-fault divorce law may well promote a shallow commitment to marriage and impose disproportionate costs on women and children. But these deficits cannot be attributed in any significant measure to the law's contractual nature, unless shallow commitment and unprotected investment represent the *ex ante* choices of prospective spouses. Rather, as we have suggested, the deficiencies result largely from policies that are inconsistent with contractual commitment. In Part II we turn to the question of precisely how a legal regime fully grounded in the principles of relational contract would function.

II. A MODEL OF MARRIAGE AS A RELATIONAL CONTRACT

In this Part, we first ask the threshold question of why people choose marriage over informal unions, and conclude that the contractual character of marriage is part of its appeal. As with other private contracts, the state specifies certain mandatory conditions for legal recognition of marital commitments. Our analysis suggests that an optimal contract-based marriage law would, in addition, specify a minimum period of commitment for couples choosing marriage. We then turn to the structure of the marriage contract. Our purpose is to understand the relationship between the legal and extralegal forces that shape marriage and to specify criteria for determining when legal enforcement would be preferred. The analysis also provides the basis for establishing the default rules for commonly enforced terms of the marriage agreement. To isolate

these factors, we develop an informal model using the familiar analytic device of the *ex ante* hypothetical bargain to suggest the terms (including the means of enforcement) that would be agreed upon by a broadly representative group of parties contemplating marriage.⁶⁶

A. Basic Assumptions: The Parameters of the Marriage Contract

Most people contemplating marriage don't bargain explicitly over the terms that will govern the performance of their marital obligations, or consciously select among different enforcement options to ensure that each will behave in the future in ways that advance their shared goals. It is tempting to conclude, therefore, that the idea of a "marital bargain" is entirely hypothetical. But the fact that people seldom bargain explicitly over marriage is, in large part, a function of the relative harmony between their preferences and the societal norms and legal default rules that form the common understandings about marital behavior and of the relative immaturity of tailor-made alternatives to the standard marital regime.⁶⁷ People who marry approach the relationship with a baseline of expectations that are a function of existing societal norms and of the existing legal regime. To incorporate all these expectations into their own relationship, they need only to exchange marital vows in a legally endorsed ceremony. Parties will bargain for a tailor-made marital agreement only when their preferences diverge from the

⁶⁶To be sure, the terms of marriage contracts that any particular couple would agree upon will reflect their specific circumstances. There are, however, a number of key considerations that will be important to a broad number of couples seeking to structure an optimal marriage contract. In the model we develop in Section II.B, we seek to isolate the salient elements of such an agreement.

⁶⁷Similarly, "in markets or transactional contexts with well-developed social norms . . . actors who make no individual calculations of self-interest, but choose instead to act in accordance with . . . well-developed norms, may make the same decisions as a 'steely-eyed utility maximizer.' Social norms may already embody a cost-benefit analysis." Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. Cal. Interdisc. L.J. 59, 68 n.38 (1993). For an overview of the economic and philosophical literature exploring the idea that social norms tend to be efficient, see John Gray, *Hayek on Liberty* (2d ed. 1986); cf. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697 (1996) (arguing that norms in close-knit groups are likely to be inefficient).

baseline of default rules and they are legally free to supplement or trump those rules with well-established alternatives.⁶⁸

Thus, the explanatory and prescriptive force of a contractual paradigm cannot be determined from observations of the behavior of couples contemplating marriage. An alternative approach is to undertake a mind experiment using the familiar heuristic of the hypothetical *ex ante* bargain. This analytic technique begins by assuming that the prospective marital partners are rational actors who seek to maximize their own individual well-being or satisfaction. The model does not imply completely selfish, atomistic actors. Each party can be motivated by altruism, love, and concern for each other. But there is, necessarily, some divergence between self-interest and collective interests. Under these conditions, we can then ask how two prototypical parties who possess these basic endowments might design legal rules to govern a marital relationship.⁶⁹

Assume that two rational utility maximizers, Elizabeth and Robert, contemplate entering into a contract to secure more fully the

⁶⁸ Otherwise the parties would encounter two significant barriers that hinder innovation in contractual bargaining: the burden of escaping from old forms and the difficulty of coordinating a move to new ones. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 289-93 (1985).

⁶⁹ The hypothetical bargain heuristic is not an analytic technique that is capable of developing a formal equilibrium analysis of the interactions between parties contemplating marriage. Indeed, there are multiple, perhaps even infinite equilibria, that could characterize the bargains of parties to intimate relationships. See Bowers & Bigelow, *supra* note 62. It is tempting, therefore, to suggest that contract-based analytic techniques cannot offer any insights to the outcomes of actual bargaining among parties contemplating marriage. But this point proves too much, as it indicts virtually all contract-based default rule analysis in relational settings. Nevertheless, the common law of contract has long embraced the hypothetical bargain heuristic as the analytic technique for the specification of default rules, even in environments in which game theory suggests that bargaining would result in multiple equilibria. See, for example, Justice Benjamin Cardozo's celebrated opinion in *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921). The wisdom of the common law has been the recognition that "majoritarian" default rules specify coordination solutions even in instances where many, if not most, parties would choose to opt for more tailored alternatives. The signaling function of the default rules may explain the historic reluctance of the common law to specify a menu of more finely tailored defaults for parties who would prefer to opt out of the state-supplied default rule. See Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. Legal Stud. 597, 613-15 (1990). In any case, our claim here is a more modest one: that the same tools that are used to understand contractual relationships in other settings are likely to yield insights in understanding marital relationships.

benefits of an intimate relationship.⁷⁰ *E* and *R* face several discrete choices. They must first select between the option of formal marriage and the more informal contractual alternatives available in a cohabitation relationship. In making this choice, *E* and *R* are required to accept without modification the mandatory legal rules that define each category. Thereafter, *E* and *R* are free to bargain over the default rules that comprise the majority of the "terms" of their marital contract. *E* and *R* both contemplate a relationship of extended duration, but they are also aware that both external circumstances and their own reactions to them will change over time. Thus, their challenge is to design a contractual relationship that can adapt to future contingencies as well as accommodate the endowments and preferences each brings to the bargain at the outset.⁷¹

Assume further that, if *E* and *R* choose the option of a formal marriage, they are required to supplement any state-imposed mandatory rules by bargaining in advance for any additional contract terms that they wish to govern their marital relationship. In undertaking this task, they have the option of selecting any set of terms (including sanctions for breach) that would be enforceable in a simple contract between two informed and competent parties. Assume that both bring to the bargain a fully internalized sense of the set of societal norms that are attached to marriage and the marital relationship. Assume finally that they are equally informed about the consequences of any strategies for adjusting the relationship over time or any patterns of cooperation (or noncooperation) that might evolve from repeated interactions within the relationship. Under these assumptions, we ask: *If E and R choose to marry, what marital bargain might they negotiate?*

⁷⁰ Those benefits include sexual intimacy, emotional fulfillment, mutual companionship, the provision of care and support, and the production and rearing of children.

⁷¹ In commercial settings, parties generally enter into long-term contracts only after considering alternative methods of achieving their objectives, including the possibility of vertically integrating several activities into a single firm or of sequentially negotiating a series of recurring short-term contingent contracts. See Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005, 2010 (1987). In a marital context an analogy to the former would be the choice to remain single; to the latter the choice to cohabit.

B. Why Marry?

Parties such as *E* and *R* decide to form intimate relationships in which they share emotional, intellectual, and economic assets because they believe that this relationship will produce "value" greater than the sum of their individual investments. This value may include emotional intimacy, companionship, nurturing, the joys and fulfillment of child-rearing, and financial security and support—especially during times of need. By exchanging contractual commitments, the parties can enhance both the quantity and the quality of this relational surplus. This value has a cost, however. The more formal the contractual commitment, the more difficulty the parties will experience in exiting their relationship should the relational surplus fall below either party's "go it alone" alternatives. Thus, *E* and *R* confront initially the foundational choice between marriage and a more informal union.

1. The Goals and Expectations for Marriage

In contemporary society, couples can live together in intimate relationships without social sanction. Cohabitation relationships are undertaken and discarded with far less cost than marriage, and each cohabiting partner retains a greater measure of personal freedom.⁷² At first glance, it would seem that most of the functions and purposes of marriage could be achieved through an informal cohabitation relationship. No formal status or commitment is needed for a relationship that includes sexual intimacy, mutual companionship, the sharing of assets and income, the production and rearing of children, and the provision of care and support (both emotional and financial) in times of need. Despite the fact that all of these benefits can be obtained in an informal union, however, the evidence is clear that most people believe that their goals can be more fully realized through marriage. Indeed, for most people, an enduring and successful marriage is an integral part of a life plan.⁷³

⁷² See John D. Cunningham & John K. Antill, Current Trends in Nonmarital Cohabitation: In Search of the POSSLOQ, in *Under-Studied Relationships: Off the Beaten Track* 148, 159, 161 (Julia T. Wood & Steve Duck eds., 1995) (noting that the median length of U.S. cohabitations is estimated at only 1.3 years); Steven L. Nock, A Comparison of Marriages and Cohabiting Relationships, *J. Fam. Issues*, Jan. 1995, at 53.

⁷³ See survey evidence cited *supra* note 56.

Why do people conclude that they can better realize their personal ends through marriage than through a more informal cohabitation relationship?

An intimate relationship that involves a sharing of financial, emotional, and intellectual resources requires joint efforts extending over time. Therefore, it also requires a present commitment by each partner to devote efforts now and in the future to achieve the shared goal. People marry because they expect to benefit from undertaking a greater commitment than is possible through other, informal options.⁷⁴ The essence of this commitment is constraint. To be sure, many friendships and cohabitation relationships involve a sense of commitment. Marriage, however, adds an overlay of legal and social sanctions that further restrict the freedom to renege and thus strengthen each partner's commitment.

To a large extent, therefore, what distinguishes marriage from informal unions is what distinguishes contracts from informal cooperation in other settings. Both parties believe that, by formally restricting their own freedom and by being able to rely on a reciprocal commitment from the other party, they will be able to achieve their goals better than if both parties were able at less cost to renege on the commitment—as would be true in a cohabitation relationship.⁷⁵ Parties such as *E* and *R* derive two primary benefits from this constraint: (1) the ability through precommitment (or self-command) to pursue long-term rather than short-term goals; and (2) the ability to secure a reciprocal commitment from the other party.

These constraints on the parties' freedom work together to promote their mutual goals for a lasting relationship. Through the precommitment function of marriage, each spouse will benefit because her own behavior will be constrained. Marriage promises to discourage the individual from acting in ways that reflect transitory preferences that are inconsistent with the long-term goal of a lasting

⁷⁴ A high percentage of cohabitation relationships end in marriage, suggesting that these couples decide to move from a relationship of modest commitment to one of greater commitment. See Cunningham & Antill, *supra* note 72, at 161 (noting that cohabitation ends in eventual remarriage in 59% of the cases); Nock, *supra* note 72, at 53-54 (noting that cohabitation is especially common as a prelude to marriage, as the majority of marriages begun after 1985 started as cohabitation).

⁷⁵ See Cunningham & Antill, *supra* note 72, at 158, 161-62 (positing that "cohabiting couples have lower relationship satisfaction than married . . . couples").

relationship.⁷⁶ A further benefit of marriage to each spouse is that the other is bound. A part of the anticipated advantage of marriage over an informal relationship is that each spouse can more confidently rely on the other's commitment, and have greater assurance that her own investment in the relationship will not be lost because the other spouse defects. This assurance has substantial value. A relationship that serves the many functions of marriage requires significant investments on the part of each spouse. Each party's willingness to make that investment understandably depends on trust that the partner generally can be relied upon to fulfill her end of the bargain. That trust is facilitated and reinforced by the mutual commitment of marriage. A cohabitation relationship, in contrast, is understood to be a more limited undertaking.⁷⁷ Each party, knowing that the other is free to terminate unilaterally, has a choice of either risking the loss of a substantial investment or investing more modestly to protect against future disappointment. Not surprisingly, many parties conclude that the goal of a long-term, intimate relationship can best be achieved by elevating the level of mutual commitment through marriage.

The relative strength of any commitment derives from its enforceability.⁷⁸ As we explore in detail below, the potency of the marital commitment is a product of three distinct sources: social expectations about marriage embodied in widely shared societal norms that are enforced through social sanctions;⁷⁹ relationship-

⁷⁶ See Scott, *supra* note 47, at 24-25.

⁷⁷ Studies have consistently shown that people in cohabitation relationships have lower levels of commitment to each other and other family members. See Marin Clarkberg et al., *Attitudes, Values, and the Entrance into Cohabitation versus Marital Unions*, 74 Soc. Forces 609, 621-24 (1995) (reporting that cohabitation relationship is preferred to marriage by those segments of the population who desire more flexibility in their relationships and who reject the constraints of marriage); Cunningham & Antill, *supra* note 72, at 167; Nock, *supra* note 72, at 72-73.

⁷⁸ See Scott, *supra* note 47, at 53-56, 62.

⁷⁹ By societal norms, we mean broad, societal standards of behavior that shape and define the roles of married persons. We assume that these norms are exogenous to the contracting parties. That assumption is necessary to make the analysis tractable, but it also tracks our intuition and is consistent with the public law scholarship on societal norms. Lawrence Lessig and Cass Sunstein have explored the role of law in shaping norms. See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996). Societal norms are both esteem-based (enforced by shame) and internalized (enforced by guilt). See Richard H. McAdams, *The Origin, Development,*

specific expectations derived from patterns of cooperation that generate self-enforcing "relational norms"; and, should the relationship break down, legal expectations that are enforceable by state-sanctioned coercion. Although each of these forces can be independently described, they function interactively. Together, these extralegal and legal mechanisms reinforce the marital commitment to a greater extent than analogous but weaker constraints that enforce commitment in cohabitation relationships.⁸⁰ Thus, in general, couples such as *E* and *R* will enter marriage with a greater commitment to the relationship than do those who choose cohabitation. They then have available an array of mechanisms that more effectively constrain their actions and thus reinforce their commitment.

2. The Mandatory Terms of the Marital Contract

Contract law routinely embraces arguments for constraining party autonomy.⁸¹ Thus, *E* and *R* will negotiate the terms of their marriage contract within a framework of mandatory rules that may limit their choices. There are three general classes of mandatory rules limiting freedom of contract. One class focuses on defects in the bargaining process. Preserving the key elements of a free, informed and rational choice requires rules that prohibit contractual enforcement where individual promises were the product of duress or unconscionable information deficits or where the parties lacked the capacity and judgment to evaluate the risks being exchanged. A second class of mandatory rules focuses more directly on the bad outcomes of certain bargains. Some bargains—such as contracts

and Regulation of Norms, 96 Mich. L. Rev. 338, 380-81 (1997). Our claim is not that all societal norms function to enhance marital stability, but we do assume that in the aggregate they have such an influence on the margin. The potency of these norms is a function of the extent to which they are amplified in smaller, more closely knit communities to which the parties belong. See *infra* text accompanying notes 128-159.

⁸⁰ Stephen Nock comments: "[W]e lack consensus over what it means to be a cohabiting partner"; therefore, it may be that the lack of social norms governing cohabitation contributes to high dissolution rates in such relationships. Nock, *supra* note 72, at 56. For a similar view, see Jan E. Stets, *The Link Between Past and Present Intimate Relationships*, 14 J. Fam. Issues 236, 240 (1993) ("[C]ompared to marriage, cohabitation carries with it less social integration. . . . When stressful situations arise, either cohabitators will have no one to help, they will not be informed on the normative ways to respond, or both.").

⁸¹ See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1918-35 (1992) (stating that contractual norms "may" justify constraints on the institution of plea bargaining).

of enslavement—are faulty regardless of whether the bargaining process was rational. The third class rests on an independent state interest in preserving the signaling function of contractual obligation. Rules as seemingly diverse as the Statute of Frauds and the doctrine of consideration can be understood as enabling parties to select among clearly identifiable contractual forms that carry prescribed consequences.⁸²

a. Mandatory Rules Governing Binding Commitments Not to Divorce

The first two classes of mandatory rules justify the relatively uncontroversial rules of marriage law that police the capacity of the parties who undertake marital commitments. They grant relief from duress, undue influence, fraud, and unconscionable marital bargains, and limit the terms, including the methods of enforcement, that parties can select.⁸³ A significant issue concerns the freedom that parties should enjoy to choose (or not) binding marital commitments not to divorce. Assume, for example that *E* and *R* declare their intent voluntarily to enter into a binding commitment to make legally enforceable the marriage vow “till death do us part.” Two separate contract-based arguments might be invoked to support a prohibition against enforcement of such a promise never to divorce. The first is grounded in the paternalist claim that the parties are not competent to make rational decisions in the premarital setting, or that even thoughtful decisions may turn out to be mistaken.⁸⁴ If the process of marital decisionmaking is peculiarly susceptible to systematic errors of judgment, then the bargaining process can no longer be trusted to generate socially desirable results. Consider, for example, the now familiar anchoring phenomenon which suggests that the way choices are framed affects individuals’ assessments of the gains and losses of exercising any particular option. Prospective marital partners may suffer from such a cognitive bias if the benefits of the marriage commitment

⁸² See Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 801-02 (1941) (arguing that legal forms allow parties to select legally effective “channels” for the expression of their intentions).

⁸³ See Ellman et al., *supra* note 25, at 187-248.

⁸⁴ This argument is fully developed (and then rejected as a basis for broad restrictions on marital commitment) in Scott, *supra* note 47, at 57-58, 62-68.

are anchored to the prospect of a long and happy life together and not to the prospect of discord and strife—a prospect that may seem remote when the bargain is struck.⁸⁵

By themselves the biasing effects of framing are a slim reed on which to hang prohibitions on inflexible commitment terms. The existence and effects of cognitive biases continue to be the subject of serious dispute among psychologists.⁸⁶ Moreover, there are means of correcting for the biasing effects of framing that do not involve prohibition. Enhanced disclosure and cooling-off periods are the obvious (and familiar) examples from the law of consumer transactions. A prohibition on “no divorce” contracts finds additional support, however, in the long-standing rules against contracts of enslavement. To the extent that contracts of enslavement are grounded in the idea that people should not be permitted to bargain away too much of their liberty, then lifetime marital commitments are similarly suspect.

Experience teaches us, in any case, that unlike the parties to many commercial contracts, *E* and *R* lack the ability to predict the optimal duration of a relationship that depends upon extended investments and emotional maturation. Whether and when the parties have children, the value of the emotional bonds that are generated by the marriage, and the value of alternative relationships

⁸⁵ Anchoring the benefits of a right to divorce to the remote possibility of divorce may irredeemably impair the ability of marital bargainers to evaluate the choice correctly. Moreover, the biases will not be random. According to some studies, individuals tend both to overestimate the likelihood of conjunctive events, such as events leading to a happy marriage, and underestimate the likelihood of disjunctive events, such as marital strife and relational failure. Another cognitive bias, availability, may influence parties to overvalue immediate experiential events (like premarital happiness) and discount remote abstract events (like divorce). See *id.* (discussing the likely impact of cognitive biases on marital decisionmaking). Some research evidence suggests that couples entering marriage may be overly optimistic about the prospective success of their relationship, and thus might undertake a greater than optimal commitment to marriage. See Baker & Emery, *supra* note 56, at 443 (reporting that in a survey of couples about to marry, none believed they would ever divorce); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *Stan. L. Rev.* 211, 254 (1995) (stating that cognitive error at the time of marriage is a “strong justification” for restricting the enforcement of premarital agreements).

⁸⁶ See Gerd Gigerenzer, *How to Make Cognitive Illusions Disappear: Beyond “Heuristics and Biases,”* 2 *Eur. Rev. Soc. Psychol.* 83 (1991) (arguing that most decisionmaking biases stem from errors by testers in presentation of statistical choices); Scott & Stuntz, *supra* note 81, at 1926.

are only a few of the numerous factors that will affect the durability of the relationship. Under these circumstances, although *E* and *R* may aspire to a lifelong relationship, they are properly precluded from making a lifetime contract (or any other "excessive" commitment term) that does not preserve the possibility of escaping the commitment in the future should the returns from the relationship fall below the nonmarital alternatives.

This argument cannot be used, however, to condemn all efforts to undertake a meaningful and binding marital commitment, such as a commitment not to divorce within a clearly prescribed (and limited) period of time. This claim seems unremarkable, particularly if (as we assume to be true) the commitment is not to live together in disharmony and strife, but rather to forgo the right to divorce and to marry again. After all, appropriately limited, but temporally binding, commitments are the essence of contractual constraint in other settings.

b. The Signaling Justification for a Mandatory Commitment Period

The question remains, however, whether such limited commitments should be prescribed by the state or open to individual choice by the contracting parties, perhaps with the specification of a state-supplied default rule. Contract theory supports a mandatory rule that fixes the extent and nature of minimal marital commitment as a signaling mechanism.⁸⁷ As Lon Fuller observed in a classic article on the law of consideration, mandatory rules that prescribe both the form and the essential character of obligation serve to increase deliberation (and thus enhance bargaining process values), enhance the verifiability of commitments, and, most importantly, facilitate

⁸⁷ See Michael J. Trebilcock, *Marriage As A Signal*, in *The Fall and Rise of Freedom of Contract* (F.H. Buckley ed., forthcoming 1999) (manuscript on file with the Virginia Law Review Association); see also William Bishop, 'Is He Married?': Marriage as Information, 34 U. Toronto L.J. 245 (1984) (suggesting that many of the important functions of marriage in modern society can be explained by the model of market signaling). Of course the state may have other interests in having marriage carry a clear meaning as a relationship of commitment, a goal accomplished by establishing mandatory rules regarding marital commitment. Under a modern regime, a mandatory commitment term could be justified on the basis of the social benefit of stable marriage. However, in contrast to the signaling argument for a mandatory commitment term, this interest (and justification) is unrelated to the contractual nature of marriage.

the matching of parties who share similar preferences for commitment.⁸⁸ Thus, contracting parties are disabled from transforming certain oral agreements into enforceable contracts or from making gratuitous, nonreciprocal promises legally enforceable. Only the state can solve the collective action problem that would otherwise lead individual bargainers to dilute the potency of the signal "contract" by opting out of these "categorical" rules.

The signaling function of marriage (as distinct from a cohabitation agreement) serves to reveal a person's preferences toward intimate relationships in which he or she may wish to become involved.⁸⁹ Preferences about long-term relationships are likely to vary widely. Parties can be expected to differ on the desired length of the term of the relationship, the degree of sexual loyalty expected from their principal partner, and the desired level of commitment to the relationship generally. Given this diversity of preference, the legal category of marriage conveys a signal to prospective partners of the signalers' preferences as to the nature of the relationship. Permitting individual parties the freedom to choose from among many varied forms of commitment will inevitably dilute the informational value of the signal.

On the other hand, if the choices are too few in number, the result may be an inefficient pooling equilibrium—one where partners choose to marry (or not) as the best available choice even though they would prefer a different relationship. The number of commitment choices needed to create an efficient separating equilibrium cannot be specified a priori. But it seems clear that, at a minimum, there needs to be a meaningful choice between a relationship without effective binding commitments (cohabitation) and a relationship with a minimum commitment (marriage). Just as gratuitous promises without consideration are unenforceable regardless of the desires of the promisor, a cohabitation agreement permits termination at any time regardless of the desires of the nonterminating party. On the other hand, an exchange of promises binds each party to a contractual obligation regardless of subsequent regret. So too, an option to marry would ideally result in a minimum commitment that would permit termination only following an appropriately

⁸⁸ See Fuller, *supra* note 82, at 800-01.

⁸⁹ See Trebilcock, *supra* note 87, at 5-6.

defined period. In sum, preserving the signal of the core category of marriage calls for a minimum commitment period (say, for example, two or three years) prior to divorce and remarriage.

The signaling function of marriage argues not only for a categorical minimum commitment period, but for a categorical maximum as well. If marriage is to be a clear signal that promotes better choices among options and thus better matches, then parties should similarly be precluded from opting for fixed period commitments longer than any state-imposed maximum. Unlimited freedom to create customized fixed-period commitments will dilute the quality of the signal established by the mandatory minimum period.⁹⁰ (It is an independent question whether the state should create a limited menu of options within the marriage category, say, for example, a category one marriage with a five year commitment and a category two marriage with a two year commitment, etc.) A ban on selecting more extended commitments beyond a designated maximum is supported by the expected costs of designing alternatives to the state-created choices.

The problem *E* and *R* face is one shared by all potential marital partners: Each desires the benefits of a long-term commitment, but each is unwilling to obtain those benefits at the risk of a lifetime trapped in a relationship that is suboptimal. Under these conditions, no single commitment term is likely to satisfy the preferences of a broadly representative group of bargainers. It is possible to imagine an immense array of marriage commitments each ideal for any particular set of marital partners. Thus, the choices for policymakers in fixing the prescribed minimum (and maximum) are clear: Any reduction in the minimum commitment period requires parties to trade off some of the upside returns from long-term commitment so as to minimize the risk of regret. An increase in the minimum period has the opposite effect. On a different dimension, an increase

⁹⁰ Since the minimum period is designed to signal that marriage is a relationship involving commitment, it would seem that the purpose of the mandatory rule would not be undermined by allowing couples broad freedom to undertake even greater commitments (constrained only by any prohibition against "excessive" commitments). Couples, however, would then be motivated to demonstrate their serious intentions by undertaking even greater commitments, thus diluting the signal of the mandatory minimum period. Individual parties would, of course, be free to create customized commitment terms within the parameters of the state-specified minimum and maximum periods. See *supra* text accompanying note 68.

in the number of options dilutes the signaling effects of marriage but increases the prospects of efficient separation of preferences. Quite obviously, these choices turn on a number of complex variables including the diversity of preferences and the calculation of ex ante probabilities of success and failure in marriage.⁹¹

C. Negotiating the Default Terms of the Marital Contract

1. Specifying the Contractual Objective: A Long-Term Relationship of Indefinite Duration

By choosing to negotiate the terms of their relationship within the parameters of the legal category of marriage, *E* and *R* have accepted certain baseline constraints—most significantly the inability to divorce and marry again within a specified commitment period. The choice of marriage also signals their shared belief that, through mutual investments, their relationship can produce an expected “value” greater than the sum of their individual investments. Thus, we might expect the parties to assign each other specific and precise responsibilities according to relative advantages and preferences in order to maximize the expected relational value. In agreeing to such an assignment of responsibilities, of course, each party must be at least as well off under the relational bargain as she would have been otherwise.⁹² But how can *E* and *R* agree to undertake these

⁹¹ The Louisiana Covenant Marriage Act offers options for termination: one with a six month notification period and the other with a two year period (with a fault ground alternative). See La. Rev. Stat. Ann. § 9:307 (West Supp., 1998). To be sure, the choice of a minimum duration is arbitrary, but the complex and interactive nature of marital investments strongly argues for a multi-year minimum baseline. See *supra* note 1.

⁹² *E* must receive at least the value of her investment plus the “go it alone” returns that she could secure if she chose not to cast her lot with *R*. *R* would be willing to give *E*, in turn, an amount equal to but not exceeding the share of the relational surplus equal to the total benefits of the relationship less his investment. A range of indeterminacy defines the gains from the relationship that must be divided through bargaining between the parties. The net value that results from these investments would generate the surplus to be shared or divided between them. Any investment of less than that which maximizes the net value of the relationship will mean that the parties have failed to exploit fully the potential gains from the marriage. Moreover, any investment by either party in which the cost of the investment to the individual is greater than the corresponding benefits to the couple as a unit would be counterproductive and actually diminish the relational surplus.

optimal investments in a world of uncertainty where future circumstances and their relative capacities to adapt to them are uncertain?

When the future contingencies cannot be calculated in advance, the parties cannot reduce the obligation to precise statements. In these circumstances, they are motivated to consider alternative means to achieve their goals. One option that they have discarded by choosing marriage over cohabitation is to undertake a commitment that is terminable at will or otherwise explicitly limited. While carrying other disadvantages, a limited or short-term commitment would permit *E* and *R* more readily to reach agreement on specific marital obligations. Even without a mandatory commitment period, however, most parties choosing marriage would not elect a commitment terminable at will. Under a regime of unilateral termination at will, both parties will be reluctant to invest in the relationship to any level beyond that which they can recoup within its expected duration. Intimate personal relationships, even more than commercial relationships, require long-term, relation-specific investments if the full value from the combined efforts of the couple is to be realized. Moreover, marital investments are often asymmetric. Thus, for example, *R* may elect to stay in a career-limiting job in order to finance *E*'s law school education, on the expectation of sharing in the financial and emotional rewards of her professional career. If the commitment is subject to continual renegotiation, *E* might thereafter be tempted to seek a larger share of the relational surplus as a condition for remaining in the relationship.

Whether *E* would ever act on such a temptation is less important than the fact that the risk of such vulnerability will cause *R* to reduce his investment in the relationship, thus reducing the value of the joint benefits to the parties. Quite obviously, the roles can be reversed several years later when *E* decides to take a few years off from her job as an attorney to stay home with their children. Thus, specialization makes each party more vulnerable to strategic demands by the other. This problem is only exacerbated when specialized investments yield deferred returns, because this creates asymmetrical vulnerability for one partner or the other to threats

of dissolution or other strategic behavior at different times during the life of the relationship.⁹³

There are, of course, specific contractual mechanisms that *E* and *R* might devise to help cope with problems of asymmetric investment and opportunism.⁹⁴ Their choices are constrained, to some extent, by the mandatory rules limiting agreements not to divorce. A remaining option is a commitment to an exclusive relationship for an extended but indefinite duration. Subject to termination, the relationship would potentially continue for a lifetime. Unhappily, indefinite duration contracts, even those potentially lasting "till death do us part," increase the risk of strategic threats of termination, with which the parties must cope in other ways.

2. *The Mutual Obligation of Best Efforts.*

A long-term commitment, even one that might be terminable after a prescribed period, introduces the relational dilemmas caused by uncertainty and complexity.⁹⁵ *E* and *R*, by agreeing to a rela-

⁹³ Both the marriage-specific investment of the homemaker spouse and the investment by one spouse in financing the other's professional training are examples of this problem. This issue is discussed in detail below. See *infra* text accompanying notes 104-109. See generally Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 *Tul. L. Rev.* 855, 856 (1988) (noting that an asymmetric investment in the marriage relationship tempts one of the spouses, usually the husband, to breach the marriage contract strategically unless he is otherwise constrained); Brinig & Crafton, *supra* note 6, at 876 (same); Cohen, *supra* note 6, at 287 (same). For an analysis in the context of commercial contracts, see Goetz & Scott, *supra* note 8, at 1100-05.

⁹⁴ For example, a promise by *E* to pay a sum of liquidated damages upon divorce to compensate for *R*'s investment in her professional training can eliminate some of the precautions that would otherwise reduce the value of *R*'s investment. There are, however, practical and legal limitations on the effectiveness of such mechanisms. See Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *Colum. L. Rev.* 554 (1977).

⁹⁵ *E* and *R* do not know whether they will have children, or how demanding the tasks of child-rearing will be. They cannot anticipate the course or demands of each party's career, or whether illness, disability, or misfortune of any family member will affect their expectations. Domestic duties might be divided at the time of marriage in ways that later prove unsatisfactory. Thus, an agreement that *R* will work at *X* job, providing *Y* dollars income, while *E* will raise *M* children and prepare *N* meals, clean the house, and entertain *R*'s clients will likely prove unsatisfactory. The more specific the description of obligations, the more likely it is that the agreement will be unsatisfactory. The uncertainty and complexity of a long-term marital relationship is greater than almost any imaginable commercial contract. The typical contractual

tionship of mutual dependence and vulnerability, will seek assurances from the other that expected investments will be made. But since the relationship has an extended horizon, the parties cannot specify those investments in terms of fixed and determinate obligations. In such a setting, each party is motivated to promise the other to use his or her "best efforts" to invest optimally in the relationship. Only such a mutual exchange of best efforts will insure that the goal of full development of the potential relationship will be achieved.

Although best efforts terms are frequently used in commercial contracts, the precise legal meaning of a best efforts requirement is not completely clear. As one of us has argued elsewhere, however, this obligation is most sensibly understood as the duty of each party to invest sufficiently to produce the maximum joint value from the relationship.⁹⁶ This interpretation directs the result that best reflects the ideal collective outcome that *E* and *R* could hope to achieve from their relationship. In addition, the optimal relationship definition of best efforts is consistent with fairness principles. Each party is required to treat the marital partner "fairly," giving the other's interests equal weight with her own when investment decisions are made.

A best efforts obligation provides the basis for assigning individual responsibilities to provide the emotional, intellectual, and economic inputs necessary for the relationship to develop optimally. The flexibility and generality of the best efforts obligation make it an attractive option for achieving the parties' purposes but also substantially complicate the problem of assigning individual responsibility for the inevitable failures to perform as promised. By choosing a long-term relationship in which they do the best to maximize their joint returns, *E* and *R* are trading off their ability to make clear and verifiable assignments of individual responsibility. It is tempting to suggest, therefore, that the high cost of monitoring individual efforts might override the theoretical attractiveness of the best efforts option. The wisdom of the best efforts standard of

response to this problem of complexity and uncertainty is to define the standards of performance in "unusually general terms." Goetz & Scott, *supra* note 8, at 1092; see *id.* at 1092-93 (arguing that the ethical standards of attorneys, brokers, and other agents as well as implied fiduciary duties of relational contractors are all examples of how otherwise ambiguous performance standards are articulated in relational contracts).

⁹⁶ See *id.* at 1114.

performance is confirmed, however, once *E* and *R* consider the associated problem of assigning the risks of regret.

3. *Distributing the Risks of Regret*

Contract exists to ensure performance (or its equivalent value) in circumstances where one party or the other experiences some regret owing to an intervening contingency. Thus, parties entering marriage contracts will also agree to distribute the risks of uncertain future events in some fashion.⁹⁷ *E* and *R* will anticipate and plan for the possibility that future contingencies may arise—e.g., financial reversals, poor health, a reduction in the emotional returns from the relationship—that either reduce the benefits from the marriage or make performance of the marital bargain more costly. This element of risk allocation is powerfully expressed in the traditional exchange of marriage vows: “for richer for poorer, in sickness and in health.” In a similar vein, *E* and *R* must distribute between themselves the risks of their joint enterprise.

In general, *E* and *R* will be motivated to allocate risks in ways that reduce the anticipated burden of the risk, either by reducing its incidence or its impact. In broad terms, *E* and *R* face a choice between two alternative risk-bearing strategies. A strategy of *risk control* assigns the entire risk to the party who can exercise some control over the incidence of the risk or the impact of the risk or both.⁹⁸ Under a *risk-sharing* arrangement, by contrast, each party

⁹⁷ For a full discussion of risk allocation under uncertainty, see Scott, *supra* note 71, at 2012-19.

⁹⁸ This is typically the party whose performance will be affected if the contingency materializes. Ordinarily, the performing party is best able to reduce the amount of the risk through cost-effective precautions. A risk-control strategy dominates in most contractual settings because parties are motivated by the prospect of the gains achievable by assigning risks (and responsibilities) to the party who enjoys the comparative advantage in bearing the risk in question. In this context, for example, a risk-control strategy might assign the entire risk of producing income to the principal wage earner. The wage-earning spouse would retain all the benefits of earnings in excess of those that are contributed to joint welfare, but should she lose her job she would be required to borrow funds to maintain the family support at the agreed-upon levels. In turn, the non-wage-earning spouse would pay the other in the form of an enhanced return from the contract to bear the risks for which the wage earner was best suited. In this way, contracting parties can buy and sell insurance from each other to efficiently guard against the risk of an uncertain future. See Scott, *supra* note 71, at 2012-19.

accepts responsibility for a portion of a set of risks that are unchanged by their individual actions. Unlike risk control, this strategy does not look to reducing risk per se but rather seeks to reduce the burdens of risk-bearing. If the contingencies are uncertain and both parties are risk averse, a risk-sharing scheme will reduce the amount of uncertainty and thus reduce the cost of the risk for each party. Thus, parties benefit from a risk-sharing arrangement because it reduces the variance in risk; each has a *higher* probability of incurring a *smaller* future loss.

In many contractual settings, a risk-control strategy—one that allocates entire risks to one party or the other—will be chosen by the parties over a risk-sharing arrangement. This is because the costs of subsequently monitoring and enforcing the agreement as conditions change and contingencies materialize tend to be lower under risk control. It is much easier, for example, to identify and to sanction a failure to perform when one party is entirely responsible for the performance in question. The benefits of such a binary strategy decline sharply, however, in contexts such as a marital relationship where parties share obligations and key risks depend on interactive or interdependent contingencies.

The core of the marital relationship is an emotional commitment that manifests itself in bonds of intimacy, love, nurturing, and sharing that require reciprocal efforts to stimulate and sustain. Both the inputs and the outputs of this emotional core of the relationship are uniquely incapable of being separated. Consider, for example, the risk that *E* may no longer find in *R* the companionship, support, and intimacy that make the relationship more valuable than her “go it alone” alternative. This risk is a function of *E*’s efforts and *R*’s efforts as well as a function of the value that *E* places on the outputs from the relationship. *E* may have a superior ability to bear the risk of the contingency that her “later self”⁹⁹ might not gain the same returns from the relationship as well as the risk that her own efforts may be inadequate, but *R* is better able to guard against his own inadequate efforts that may have contributed to the changes in *E*’s emotional response. In these circumstances, a risk-control strategy simply will not work because *E* and *R* are un-

⁹⁹ See Derek Parfit, *Later Selves and Moral Principles*, in *Philosophy and Personal Relations* (A. Montefiore ed., 1973) (discussing the implications of changing personal identity over time).

able effectively to separate the contingencies, and thus neither can take cost-effective precautions independently.

Some of the contingencies that influence the relationship will not have these interdependencies. Thus, for example, *E* and *R* might be able to assign responsibility for the risks associated with the income-producing efforts that provide the material support for the relationship. But any such attempt necessarily undermines the shared emotional value that is a central motivation for entering into the marriage agreement. It is unlikely, for example, that the parties would require *R* to borrow to fulfill his obligation to provide economic support should his income decline. In general, a strong social norm of sharing (such as, "for better or worse") governs the marital relationship and propels the parties toward a risk-sharing contract. Moreover, the dynamics of a long-term relationship will argue for continuous adjustment in the parties' efforts. Inevitably, some contingencies become more (or less) probable, while others that were beyond calculation materialize. Both parties stand to gain, therefore, if they agree in advance to adjust efforts in response to changed conditions so as to enhance relational benefits and reduce anticipated future costs.

In sum, the interactive and ever-changing character of the contingencies that affect the emotional "value" of the marital relationship, and the common ownership of the relational surplus, will lead *E* and *R* to adopt a broad strategy of shared responsibility and cooperative adjustment. The resulting risk-sharing agreement will require each spouse to adjust their individual efforts in the future in order to minimize the *joint* costs of maintaining the relationship.

Profound implications follow from the decision to share risks as well as to pool efforts. Most fundamentally, the parties are selecting a peculiarly interactive and interconnected form of obligation that they must police themselves during the life of the marriage. While the parties can expect over time to develop finely tuned norms to monitor individual behaviors, they recognize that responsibility for individual failures to perform as promised often cannot be established with sufficient clarity to permit a sanction to be imposed by a court or other third-party decisionmaker. Thus, they must accept the fact that they are uniquely dependent on each other to monitor and enforce the terms of the contract, and that

third-party enforcement will be problematic so long as the relationship continues.¹⁰⁰

4. *Distribution of the Marital Surplus*

One particularly vexing issue facing *E* and *R* in their negotiations concerns the appropriate baseline rules for dividing the anticipated surplus from the marital bargain. While the specific distribution of relational assets will vary in any particular case, the shape of the agreement the parties have negotiated does suggest some broad distributional principles that would command widespread support.

a. *The Concurrent Ownership Principle*

E and *R* confront two separate distributional challenges. First, they must agree upon a principle for sharing the marital surplus during the marriage. Here, the nature of their relationship and the absence of a pricing mechanism argue strongly for a concurrent ownership rule. Under such a rule, *E* and *R* would each have an equal right to an undivided interest in the entire surplus generated during the marriage.¹⁰¹ A concurrent ownership rule is the only practical method by which *E* and *R* can distribute the intangible and emotional products of the marriage. Love, friendship, intimacy, mutual support, and the fulfillment of raising children are indivisible and incommensurable assets. They are "owned" together or not at all.

The concurrent ownership rule may seem more problematic in the case of tangible economic assets, particularly where those assets are generated by only one spouse in a relationship with role specialization. A concurrent ownership rule, however, has the merit of saliency and coherence with the distribution of other assets in the relationship. It is also consistent with the norms of marriage

¹⁰⁰ See discussion *infra* Section II.C.5.

¹⁰¹ In other words, each would have the right to the full enjoyment and possession of the marital surplus, subject to the other's equal rights to enjoy the same surplus. Much as husband and wife own real property as tenants by the entirety, *E* and *R* would own the surplus by the whole and not by the part. See Black's Law Dictionary 532 (6th ed. 1990) (defining "entirety"). Moreover, since neither would own an individual interest in the surplus, neither would be able unilaterally to transfer rights in the surplus to a third party nor to compel a partition of the assets during the life of the relationship.

and offers the parties an alternative to a cohabitation agreement where the default rule of no-sharing of economic assets is available. Starting with a presumption of common ownership is thus a simple and obvious coordination solution even for parties who wish to bargain out of the standard defaults.

b. Distribution of Economic Assets upon Divorce

The distribution agreement becomes more complicated when *E* and *R* contemplate the termination of the marriage. Upon termination, much of the relational surplus evaporates. The net benefits gained from intimacy, love, and other shared emotional experiences are relation-specific and, in general, will not survive the dissolution of the relationship. Typically, therefore, the assets remaining to be divided upon termination are rights in the economic assets and in the children produced by the marriage. In the case of tangible marital property, the pre-divorce sharing principle leads as well to a presumption of equal distribution of marital property rights upon divorce (including the value of business interests and of the goodwill of a professional practice, etc.). Moreover, equal sharing of any tangible property upon divorce is the only principle that will not distort the parties' incentives in choosing between remaining in the marriage or deciding to quit.

To be sure, equal division of existing assets does not address the most difficult issue of all: How do the parties distribute ownership rights in future assets that are produced by individual human capital where that capital was developed through joint efforts? Here, the parties are motivated by the underlying objective of promoting best efforts investment of both spouses. They recognize that a key to realizing their goal will be to provide security to protect individual human capital investments. A failure to do so could lead to underinvestment and opportunistic defection.

i. Marriage-Specific Investment and Alimony. A particularly difficult issue arises in cases where the parties elect to pursue specialized roles during the marriage in order to maximize relational value. Assume, for example, that *E* and *R* decide that they will attain maximum value in their marriage if they assume "traditional" roles: *R* will work outside the home and *E* will devote her energies to producing and rearing children, managing the home, maximizing

the noneconomic values of harmony and stability, and nurturing a mutually supportive family environment.¹⁰² How can the parties structure the distribution of assets upon divorce so as to properly encourage the optimal pre-divorce efforts by both parties?

The equal sharing and equal distribution norm proves unsatisfactory as a basis for distribution upon divorce. Under such a proposed division the parties would assume that each role had been equally valuable in contributing to the relational surplus and, upon divorce, each would retain his or her human capital as a presumptively equal division of assets.¹⁰³ But the different character of their respective investments argues against such an equal sharing and equal division solution. *E*'s investment is in a capital asset that is marriage-specific and has little independent economic value. Thus, she cannot realize significant benefits from her capital investment as a homemaker once the relationship dissolves, and would not agree to this distribution *ex ante*. In order to induce *E* to invest optimally, the parties must provide her upon divorce with an economic equivalent for her efforts within the home. *E* will require insurance against the risk of divorce in order to protect her investment in assets that will have little economic value outside the marriage.

¹⁰² In our view, the efficiency of this role division depends on the preferences and capabilities of the spouses. We do not assume that role division generally is efficient, as have many law and economics analysts. See *infra* note 206.

¹⁰³ An alternative, albeit impractical, solution that would be consistent with the equal sharing norm would be for each party to retain an equal share of the other's future human capital to be divided as it accrues after divorce. The breadwinner's income could, in theory, be divided over time. See Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 Geo. L.J. 2423, 2454-55 (1994) (arguing for full sharing of family income after divorce for a period of time based on the length of the marriage). The products, however, of the homemaker's human capital—family harmony and stability, home management, and nurturing and rearing children—are indivisible and incommensurable. It would be possible to divide the income of the breadwinner and the custody of the children as a crude proxy for the homemaker's output. But, as we argue below, trading off alimony and support for custody rights is destructive of the parent-child relationship and threatens the independent goal of minimizing the harms of divorce to children. See *infra* text accompanying notes 231-236 & note 236. Moreover, such a division would not be available to childless couples in traditional marital roles. In addition to these problems, the parties would anticipate substantial costs in monitoring compliance with such "profit sharing" arrangements. Predictably, even for divisible assets, there would be a high incidence of shirking, chiseling, cost-padding, and other efforts to disguise the true returns from the capital investment. See Goetz & Scott, *supra* note 8, at 1107-08.

E and *R* can agree upon an appropriate method of self-insurance by granting *E* a claim for alimony upon divorce to be paid from *R*'s future earnings.¹⁰⁴

It might appear that *E* would require insurance equal to her ex ante expectation of the economic value of the marriage. But if *E* demands an insurance payout based on her economic expectancy, *R*, who would now face greater risks if the relationship is terminated, will in turn raise the "price" for providing the insurance protection upon divorce. Assuming *E* measures her choices against the alternative of developing her economic human capital, she will demand insurance sufficient to protect this reliance interest. This would require alimony payments in an amount equal to the opportunity cost of her decision to forgo developing independent skills that have economic value outside the marriage.¹⁰⁵ Under this contract term, *E* will know that if the marriage succeeds she will share fully in the expected surplus. If the marriage is terminated, she will be at least as well off as she would have been had she elected not to pursue the homemaker's role.

Structuring alimony as insurance for *E*'s reliance rather than her expectancy interest also serves the purpose of maintaining a cooperative equilibrium during the life of the relationship. A sum of money that would make *E* as well off as she would be if the marriage continued creates a perverse incentive for her to defect in order to claim the "insurance proceeds." Moreover, to solve this moral hazard problem, *E* and *R* would also agree that the insurance proceeds are subject to reduction under an analogue to the subrogation principle that limits the collateral source rule in torts. Thus, the alimony payments will be contingent on the absence of other sources of income that might satisfy *E*'s reliance interest in whole or in part. Should *E* remarry and enjoy economic benefits

¹⁰⁴ Trebilcock and Keshvani also use an insurance model to describe the alimony obligation. See Trebilcock & Keshvani, *supra* note 18, at 557.

¹⁰⁵ See Brinig & Carbone, *supra* note 93, at 877. *E* could also measure her insurance against the next best alternative marriage. This reliance measure would result in a different basis for alimony: the income (support) level that the next best alternative husband would provide. But she would have no basis to assume that the next best marriage would last longer than her marriage to *R*. Thus, her reliance interest is best measured in terms of job opportunities forgone.

from another relationship, or secure a well-paying job, her claims against *R*'s future earnings would be proportionately reduced.¹⁰⁶

A related, but analytically distinct, problem arises if the specialized investments of the parties are asymmetric. It is commonly assumed, for example, that the homemaker's investments are disproportionately greater early in the marriage when children are raised, the family unit is established, and the breadwinner's career is launched. On the other hand, the breadwinner's income is a function of seniority and experience and thus will generally increase over time. Thus, during the early years of the marriage, the breadwinner will be "borrowing" against his future earning capacity in order to reap the benefits of the homemaker's investment in the family unit. The homemaker, in turn, will have made specific investments that yield deferred returns over a lifetime relationship.

If these assumptions hold for *E* and *R*, a decision to pursue specialized roles means that *E* will be vulnerable to a strategic termination unless the parties agree that she is entitled to a payment upon divorce that reflects the present value of her proportionately greater investment in the relationship. Any lesser payment would give *R* a perverse incentive to walk away from the marriage after *E* has produced children and sacrificed her youth and alternative prospects to invest in the marriage. The requirement that the parties' reciprocal investments in the marriage "net out" upon divorce assures the parties that any decision by *R* to terminate the marriage would be based on a nonstrategic assessment that the nonmarital alternative had more value than the fully paid-for returns from the marriage.¹⁰⁷

¹⁰⁶ Insurance equal to *E*'s reliance interest encourages the optimal decision to invest in the homemaker role, but it does not encourage, without more, the homemaker to maximize her efforts in that role. Here, *E* must rely on her equity participation in the shared returns from mutual investment in the relationship. Since the relational value in which she shares equally is destroyed upon divorce, the expected value of her equity share is suboptimal. Parties wishing to encourage greater investment would be required to net out the effects of the moral hazard of a post-divorce financial payment against the pre-divorce efforts that such a payment encourages.

¹⁰⁷ The commercial equivalent of the monetary payment for asymmetrical investments that yield deferred returns is the familiar "buy back" clause that requires a manufacturer or franchisor to buy back inventory and equipment if the distributor's contract is terminated prematurely. This clause assures the vulnerable party a guaranteed market for its specialized physical capital. Similarly, *E* is entitled to a financial payment that reflects the monetary equivalent of the excess of her noneconomic

ii. *Joint Production of Individual Human Capital: The "Professional Degree" Problem.* *E* and *R* face a further distribution problem if they contemplate a joint investment in the individual human capital of one partner. Assume, for example, that *R* agrees to provide financial support for the marriage while *E* earns a law degree. The parties contemplate that, following the educational investment, *E* will pursue a financially rewarding career as an attorney while *R* will remain at home. In this case, the equal sharing and equal division norm yields a relatively straightforward solution. Since both parties have made a joint investment in a single asset, upon divorce both *E* and *R* would have an equity interest in the economic value of *E*'s professional degree. Granting the financing spouse the status of an equity owner ameliorates the problem of asymmetric investments in the relationship and encourages the financing spouse to contribute his best efforts during the extended "research and development" period.

The financing spouse also recognizes that his investment, much like equity investments in other settings, carries some risks. *E* may abandon the practice of law after years of education and training, or she may be a poor student and be unable to get a position appropriate to her degree. If this happens, *R* will lose some or all of the value of his investment. In addition, both parties will bear the "agency costs" of monitoring the efforts of the student spouse. *E* may be motivated, for example, to chisel on her obligation by diverting efforts to activities where the benefits are not shared with *R*. In many commercial financing ventures, the agency costs that result from such conflicts may lead the parties to seek debt financing as an alternative to privately held equity. But in the marriage relationship, the supporting spouse has the advantage of proximity and can more readily monitor efforts and punish defection. The alternative of financing the educational opportunity as a debt owed to the supporting spouse will generate conflicts that are likely to increase the parties' joint financing costs significantly.¹⁰⁸

capital contribution over *R*'s reciprocal investment. While such a payment might be designated as "alimony," it differs in conception from the separate insurance problem discussed above.

¹⁰⁸ An equity interest is also more consistent with the sharing norms of marriage and with the concurrent ownership principle that the parties have adopted. In any case, the important point is that the parties are motivated to select the method of financing

The parties will agree, however, that upon termination of the marriage, the equity interest of *R*, the financing spouse, should be liquidated. Any joint ownership or profit-sharing rule that survives divorce would pose vexing problems for *R* in monitoring against chiseling or other attempts by *E* to disguise the net returns from her professional efforts.¹⁰⁹ Allowing *E* to exit the marriage with full ownership rights in her individual human capital does not, of course, forestall *R*'s claims for payment of the present value of his investment in her professional education.

A troublesome problem for the parties, however, is how to value *R*'s equity interest upon termination of the relationship. Termination of a marriage with joint economic interests is analogous to the dissolution of a close corporation. Upon liquidation, *R*'s interest is a claim against *E*'s post-divorce assets. As with any liquidation procedure, the parties will face difficult valuation problems in calculating the present value of *R*'s interest.¹¹⁰ Determining the optimal method of valuing the supporting spouse's investment involves a classic trade-off between the relative costs and benefits of rules

the capital investment that minimizes their joint financing costs. In this example, debt will generate familiar conflicts of interest, especially the risk of underinvestment or overinvestment by the student spouse. While there are agency costs to equity as well, the proximity of the marriage partners and the interactive nature of the relationship offer the supporting spouse a comparative advantage in monitoring the continuing efforts of the student spouse. It is unlikely, therefore, that most parties would choose to characterize this financial arrangement as a fixed obligation to be repaid under all circumstances other than bankruptcy. Nor do they anticipate that the supporting spouse's participation in the enhanced professional income will be limited to his contribution plus a fixed rate of return. At least for the duration of the marriage, the parties expect to share the upside benefits and the downside risks. See Robert E. Scott, *A Relational Theory of Secured Financing*, 86 Colum. L. Rev. 901, 912-22 (1986). Of course, particular parties are always free to opt out of the equity interest default rule and either choose to negotiate a debt contract between themselves or seek debt financing from a third-party financier.

¹⁰⁹ For a discussion of the problems with profit-sharing arrangements, see Goetz & Scott, *supra* note 8, at 1108 n.36 (discussing widely publicized failures of performers such as James Garner, Robert Wagner, Fess Parker, and Natalie Wood to recover any damages despite the seemingly very profitable nature of their movie ventures).

¹¹⁰ As in the case of bankruptcy reorganizations, the choice of the appropriate discount rate will dramatically affect the determination of the present value of the financing spouse's claim. The discount rate, in turn, is a function of the career choices that *E* might properly exercise. Moreover, *R* is only entitled to a claim for the value of the degree itself, as distinct from future investments in professional experience that are not part of the joint product. Thus, making an accurate determination of the value of *R*'s interest is problematic.

and standards. One option is to value the equity share directly as a percentage of the present value of the professional degree. Under this approach, the parties must also determine the supporting spouse's percentage share. An obvious coordination solution to this problem would be to divide the equity interest equally, an approach that is consistent with the distribution of other property on divorce. It is unclear, however, whether many parties would agree to this division *ex ante*. In contrast to the spouses' negotiations over homemaker and breadwinner role division, the parties have the option in this situation of borrowing the money to finance the investment. The availability of a debt option as an alternative to *R*'s equity investment affects both the decision to finance the degree with equity and the bargaining over relative investment shares. A large differential between the debt value of the financial investment and *R*'s presumptive equity share may be evidence that *R*'s investment in the acquisition of the degree is proportionately less valuable than *E*'s human capital investment. If this conclusion is correct, it suggests that *R*'s share should be smaller than a fifty-fifty default presumption.

The difficulty of directly valuing *R*'s equity share of the degree may argue for the use of crude but clear proxies such as restitution of the economic value of *R*'s financial contribution to *E*'s education.¹¹¹ The use of such inexact valuation proxies may be justified by the high costs of measuring *R*'s equity interest directly. In any case, an optimal proxy requires a rate of return on the investment that is more generous than the equivalent commercial lending rate. This is because, unlike a commercial lender, *R* will bear the risk during the marriage (as an equity owner) that the educational venture will fail and he will have no claim for reimbursement in that instance.

c. Child Custody and Support

The parties face a different set of issues when they bargain over the rights to custody of children of the marriage. During marriage,

¹¹¹ For a somewhat different analysis of this issue, see Katherine Wells Meighan, *For Better or for Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce*, 5 Geo. Mason L. Rev. 193, 213-26 (1997) (analogizing the working spouse's contribution to the student spouse's professional degree to a hybrid debt-equity investment).

there is a presumption of equal sharing of undivided rights and responsibilities, and both parents would have an equal right to share custody and to make parental decisions together. This presumption has salience because of the equal sharing norms that ground the relationship while the marriage is intact. The difficult issue, however, is how to distribute *future* rights to custody of the children upon divorce. In providing for divorce, the parents will pursue two compatible goals: They will want both to maintain an ongoing relationship with their children, and to protect human capital investment in child-rearing.¹¹² Thus, the optimal division of custody rights is proportional to each party's investment in the relationship with the children prior to divorce, and each party is presumed to continue to invest at that level afterward.¹¹³

Assume, for example, that *E* plans to invest far more energy and effort in child-rearing than *R*. *E* should be entitled to custody upon divorce proportionate to her greater investment in child-rearing during the marriage.¹¹⁴ Such an "approximation" approach¹¹⁵ encourages optimal investment, because each parent's investment will be protected on termination. It also balances the incentives for both spouses to remain in the marriage. For example, if the parties adopt a plan for traditional role division, *R*, who has invested principally in income-producing human capital, will anticipate losing some portion of the shared custody that he enjoyed during marriage if the marriage ends. In contrast, an equal division of custody on divorce would create incentives for him to defect. He would be able to escape the marriage with the ownership of his human capital,

¹¹² The second of these purposes points away from an agreement to share custody equally. In theory, joint custody can serve both *ex ante* bonding and *ex post* monitoring purposes. See Margaret F. Brinig & F.H. Buckley, Joint Custody: Bonding and Monitoring Theories, 73 Ind. L. Rev. 393 (1998). In practice, however, a provision for joint custody can be used strategically by a noninvesting husband to renegotiate the financial terms of the divorce. See Elizabeth Scott & Andre Derdeyn, Rethinking Joint Custody, 45 Ohio St. L.J. 455, 478 (1984).

¹¹³ Thus, in contrast to a provision for economic termination, there will be no liquidation of either party's equity interest.

¹¹⁴ See Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 Cal. L. Rev. 615, 617-18 (1992) (arguing that each parent's share of custody should approximate their direct investment in child-rearing during marriage).

¹¹⁵ *Id.* at 617.

subject, of course, to *E*'s claim for alimony, and lose none of his shared custody rights.¹¹⁶

Under an "approximation" approach for allocating custody on divorce, *R* would be entitled to continue his equity interest in parenting but necessarily in a somewhat different form. For example, *R* might be granted joint legal custody and a share of physical custody that would be based on his pre-divorce parental investment. Since the parental relationship is ongoing, the custody decision operates more like a reorganization than a liquidation. *E* and *R* are awarded new equity interests in a post-divorce family that are equal in value to their respective investments in parenting in the intact family. As is true in the liquidation of economic interests, valuing each party's investment and resulting interest in future custody may be difficult, leading the parties to agree to proxies to simplify the decision.¹¹⁷

The question of child support is necessarily linked to any custody determination. On one level, reaching an *ex ante* agreement on child support is relatively straightforward. *E* and *R* would both agree that each would have continued responsibility to support their children, financially and otherwise, in the same ways and with the same efforts as they exercised during the marriage. Indeed, these responsibilities run to the state as well as to each other. *E* and *R* both have a fiduciary obligation to devote the highest degree of fidelity and loyalty as well as their best efforts to provide for their children's physical, emotional, and intellectual development.¹¹⁸

Problems arise, however, in marriages where the parties have agreed upon a division of roles in order to realize anticipated benefits from specialization. In our example, *R* has devoted his primary efforts to earning income for the family and *E* has devoted her principal efforts to rearing and caring for the children. Upon divorce, *R* will lose some of the value of his parental rights, while his

¹¹⁶ If the parties shared child-rearing responsibility equally during marriage, they presumably would agree *ex ante* to shared parenting after divorce. Under these circumstances, both would also invest in their own human capital during marriage. In this situation, the custody decision would likely not affect the divorce decision.

¹¹⁷ Thus, *E* and *R* might include three or four options for custody, depending on the extent of sharing of parental responsibility. The options might range from fully shared joint custody, to be awarded if parents invest equally, to an award of full custody to one parent and minimal visitation to the other.

¹¹⁸ See Scott & Scott, *supra* note 64, at 2419.

obligation to make child support payments will continue in proportion to total income. The parties can anticipate, therefore, that *R*'s best efforts obligation to continue child support payments upon divorce will create a substantial conflict of interest. *R* will have a strong incentive to chisel on his obligation since, in making decisions to perform as promised, he will measure his lower returns from parenting against the continuing (presumably higher) child support obligation. In structuring the child support provisions of their contract, therefore, *E* and *R* are motivated to create more potent enforcement mechanisms. The goal is to have *R* recognize that his retained ownership of human capital is part of the contractual compensation for his promise to provide continuing support to his children upon divorce.¹¹⁹

5. *Terminating the Marriage: The Right to Divorce*

No more important issue confronts *E* and *R* than to specify the conditions under which either can terminate the relationship. The parties must develop their understandings about the conditions for termination within the constraints of the state-supplied mandatory commitment terms. As our earlier analysis suggested, by choosing to marry, *E* and *R* are subject to a mandatory period of commitment that specifies both the minimum (and maximum) fixed marital term. However, a mandatory commitment term leaves significant room for negotiation over the conditions under which the parties are entitled otherwise to terminate the relationship and the conditions for any notification prior to termination.

The termination question is particularly difficult because the marital partners may be motivated to terminate the marriage in three distinct circumstances, each of which raises different concerns. First, the parties can imagine a *retaliatory* termination by one spouse in response to a substantial failure by the other to perform as promised. As is the case with most bilateral contracts, *E* and *R* both understand that the best efforts promise of each spouse is dependent on the other party's reciprocal performance. Thus, if *E* defects significantly from the cooperative norm by having an

¹¹⁹ Of course, much of this analysis applies to alimony as well, since the incentive to chisel on a financial obligation to a former spouse is likely to be greater than the incentive to chisel on the obligation to pay child support.

extramarital affair or otherwise substantially neglects the relationship, *R* is entitled to quit his efforts as well. In addition, granting the injured spouse the unilateral right to terminate the marriage is a self-enforcing contract term that can effectively bond the promisor to faithful performance of the marital obligations. At least in theory, both parties would be motivated to offer the strongest possible bonds to reassure the other. Thus, the most potent right of retaliatory termination would be one that is exercisable unilaterally by the injured spouse without requiring prior notice or an extended waiting period. The threat of a prompt sanction for a major breach of the contract will reduce the temptation to cheat on the agreement and encourage mutual investment in the relationship.¹²⁰

The question is more complicated, however, because the parties must accommodate the trade-offs generated by the risk of a *strategic* termination. This second motivation to terminate is a perverse incentive that results from asymmetric investments undertaken by either party at different points in the life of the relationship. Thus, *R* may be tempted to terminate after *E* has invested many years in child-rearing and nurturing and prior to the time when his investment obligations require more efforts than hers. Even though the parties have agreed to contract terms that are designed to reduce these incentives, the threat cannot be eliminated in a world of costly enforcement.¹²¹ Strategic terminations have, by definition, no social utility to the parties and, if unchecked, the threat of such behavior leads to underinvestment by the vulnerable party. If the parties were able to verify a strategic termination to a third party, therefore, the simple solution would be to penalize all strategic terminations (perhaps by the forfeit of a stipulated penalty upon divorce). Unhappily, although the conditions that distinguish a retaliatory termination from a strategic termination are observable to the parties, they are peculiarly incapable of verification by a third party. The good faith of the spouse who is seeking to terminate

¹²⁰ See discussion of the relational norms and the cooperative equilibrium that emerges from a mutual strategy of conditional cooperation, *infra* text accompanying notes 132-140.

¹²¹ Enforcement of spousal support is extremely costly under current law, and a high percentage of judgments go unsatisfied. Payee spouses who also receive child support may benefit from the comprehensive state enforcement system that is designed to promote enforcement of child support. Others may find alimony enforcement to be much more costly. See *infra* text accompanying notes 196-203.

will depend upon privately held motivations that are a product of complex interactions and easily malleable behaviors.

The problem of sorting out the motivations that underlie a decision to terminate the marriage is even more difficult once the parties acknowledge that the relationship may fail to provide either or both spouses the anticipated surpluses that exceed their "go it alone" alternatives. This could happen because the initial marriage decision was a mistake, perhaps because one or both spouses lacked sufficient information about the other, or because either or both spouses change over time. Thus, both *E* and *R* will wish to reserve a right to terminate for *relational failure* whenever the returns from the marriage for either spouse are less than those anticipated from other options. However, since the costs and benefits of marriage and of the alternatives to marriage may fluctuate over time, *E* and *R* are also motivated to guard against short-term miscalculations of the relative costs and benefits of either continuing or terminating the marriage.¹²²

Thus, if *E* and *R* could be assured of perfect accuracy in adjudication, they would prohibit strategic termination, permit retaliatory termination at the unilateral option of the aggrieved spouse, and authorize termination for relational failure following an agreed-upon notice period.¹²³ Unhappily, *E* and *R* will abandon this first-best solution once they consider the difficult challenge of enforcing the termination provisions of their agreement.¹²⁴ A third-party adjudicator is simply incapable of reliably distinguishing strategic termination from either retaliatory or relational failure termination. This problem of nonverifiability threatens the integrity of any scheme that permits termination without notification as well as any purported waiver of the notification requirement.

E and *R* can respond to these concerns by agreeing to a unilateral right of termination (following the mandatory period of commitment) but subject to a notification requirement—such as a two year waiting period from the time of notification before divorce. A

¹²² See Scott, *supra* note 47, at 24-25 (arguing that these calculations may be distorted by the dissatisfied spouses' inability to separate their short-term and long-term interests).

¹²³ See *id.* at 76-77 (arguing that a waiting period may improve decisionmaking).

¹²⁴ See *supra* text accompanying notes 10-11 (noting the difficulty of ascertaining fault due to the complexity and the dynamic nature of the relationship).

waiting period serves useful functions even beyond its role as a precommitment mechanism assuring the parties that the desire to divorce does not reflect transitory preferences.¹²⁵ By raising the barriers to exit, a notification period also increases the costs of termination and encourages long-term investments that may not pay off in the short term. In addition, a notification requirement reduces the risk of asymmetric investment and encourages each party to invest optimally in the relationship even though the spouse's reciprocal investment is deferred.¹²⁶ As a matter of theory, an *ex ante* agreement to prohibit modification or waiver of the waiting period serves to transform the notification rule into a binding precommitment that, once selected, ties both parties' hands so as to eliminate the temptation to act strategically thereafter.¹²⁷

¹²⁵ For a similar argument, see Scott, *supra* note 47, at 50.

¹²⁶ A mandatory period of delay also serves an independently useful function of reducing cognitive error in the decisionmaking process. In experimental research, observers have found that cognitive error can be reduced by giving decisionmakers tools to avoid the cognitive heuristics that lead to bias. Time to reflect is a particularly useful tool. See *id.* at 76-78; Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. Cal. L. Rev. 329, 348 (1986) (discussing the cooling-off period for door-to-door sales). To be sure, the optimal "cooling off" period to improve judgment will likely be shorter than the extended delay necessary to protect the integrity of a long-term commitment.

¹²⁷ See Scott, *supra* note 47, at 76-78 (arguing that binding precommitments to delay prior to divorce serve three functions that strengthen the stability of the family and lessen the chance of ill-considered decisions to divorce). There is considerable doubt that such a bilateral commitment not to modify an agreement would be enforceable under current contract doctrine. See, e.g., Restatement (Second) of Contracts § 311 cmt. a (1979) ("The parties to a contract cannot by agreement preclude themselves from varying their duties to each other by subsequent agreement."). Parties can, however, create a contractual duty to a beneficiary that cannot be varied without the beneficiary's consent. See Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. Legal Stud. 203, 204 (1997) (explaining how a commitment to stick with an original contract, even if both parties later want to modify that contract, may improve the parties' welfare in certain settings). Under the modern rule, good faith modifications of a contract are enforceable without separate consideration. This rule is supported by the plausible argument that the parties will always wish to reserve the right to modify the agreement to adjust optimally to changed conditions. See Scott & Leslie, *supra* note 58, at 337-39. Contract theory would also recognize the parties' right, in contexts where they realize that they are unable to distinguish good faith efforts to modify from strategic behavior involving "hold up" and "chicken" games, to prohibit subsequent modification of the contractual terms. Choosing from a menu of alternatives, one of which involves a

An extended waiting period does, however, generate some associated problems. The parties must be alert to the risk of strategic or spiteful behavior, such as dissipation of economic assets and refusal to provide continuing economic support. *E* and *R* thus must establish terms governing their relationship during the period prior to divorce. These terms would specify *pendente lite* rights to custody, support, and preservation of the parties' economic assets.

6. Enforcing the Contract

At the time of contracting, *E* and *R* will share the same goal: to structure the contract so as to promote cooperation and reduce conflicts of interest (situations that compromise fidelity and loyalty) at the least cost. The parties recognize that selfish considerations will affect each party's behavior from time to time, and that one or the other party may regret a contractual obligation and be tempted to "chisel" or otherwise defect from the shared objectives. In other long-term relationships, parties devise bonding and monitoring mechanisms (both informal and formal) to encourage each party to act in the interests of the other as well as her own. Similar enforcement mechanisms are available to *E* and *R* as well. Bonding arrangements are precommitments that align the interest of each spouse with that of the other through self-limiting constraints.¹²⁸ Such arrangements promote trust as they broadcast each spouse's cooperative intentions. Monitoring arrangements assist each spouse with detecting and sanctioning selfish spousal conduct in the partner.¹²⁹

E and *R* can utilize both extralegal and legal mechanisms to encourage faithful performance and enforce contractual understandings. Extralegal enforcement mechanisms include endogenous relational norms (the understandings about marital obligations that emerge through the couple's interaction over time), together with prescribed conventions, traditions, and exogenous societal norms that define acceptable behavior and attitudes in marriage. In seek-

precommitment not to modify, is an entirely appropriate second-best solution to insurmountable enforcement problems.

¹²⁸ See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308 (1976). The wedding ring is a very concrete mutual bonding mechanism.

¹²⁹ See *id.*

ing to design efficient arrangements, *E* and *R* know that extralegal enforcement mechanisms are substitutes for more costly legal mechanisms.¹³⁰ Thus, their strategy is to anticipate the evolution of relationship-specific norms, assess the potency of existing social norms, and, thereafter, specify legal enforcement only where legal rules are more efficient substitutes for the existing and evolving normative framework.¹³¹

a. Extralegal Enforcement: The Discipline of Continuous Relations and the Evolution of Relational Norms

While the problems of monitoring individual performance may seem daunting, the parties can anticipate developing a finely tuned set of relational norms that will enable them to detect and sanction failures by either spouse to perform as promised. The intimate character of the relationship and the iterated nature of the interactions will influence the spouses to develop reciprocal patterns of cooperation over time. The pervasive social norm of reciprocity is particularly relevant to long-term interactions,¹³² offering a particularly stable foundation for an evolving pattern of conditional cooperation.

¹³⁰ Legal scholars have begun to focus intensively on the role of social norms as a means of regulating behavior, and on the relationship between norms and legal regulation. Robert Ellickson studied the relationship between farmers and ranchers in Shasta County, California, and argued that in a close-knit community disputes are likely to be settled according to social norms rather than legal rules. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 135 (1991); see also Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1645-46 (1996) (arguing that informal regulation is frequently more efficient and flexible than legal enforcement, and that lawmakers should legislate interstitially); McAdams, *supra* note 79 (offering a comprehensive theory for the development of norms); Posner, *supra* note 61, at 135-36, 196 (arguing that law should defer to regulation by cohesive informal groups that pursue desirable social goals); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 Am. Econ. Rev. 365, 368 (1997) (arguing that law "complements and substitutes for norms"). For further discussion of societal norms, see *infra* text accompanying notes 141-159.

¹³¹ We will argue that, in the current social climate, the effectiveness of societal norms in enforcing the marital contract will depend on whether broadly endorsed but weakly enforced norms are amplified through the couple's immediate community.

¹³² This norm encourages parties to behave cooperatively long enough for them to discover the relationship's long-run benefits, thus bridging the gap between short-term and long-term payoffs.

Of critical importance to the stability of the relationship are the patterns of interaction for resolving disputes and restoring a cooperative equilibrium. Although these are largely a function of the personalities of the individuals and the interpersonal dynamics of the particular relationship, certain patterns are predictable in ongoing relationships such as a marriage. The fact that the married couple anticipates continuing interaction in the future will assist them with establishing patterns of cooperative interaction. Either *E* or *R* may be tempted on a given occasion to act selfishly, as some short-term preference (such as to work late, flirt with a third party, invest excessively in leisure activities, or spend excessively) overwhelms the long-term benefits of a cooperative relationship.¹³³ Because *E* and *R* have bound themselves to a long-term relationship, however, the prospect of future interaction will influence their behavior in responding to conflict situations. Since both parties retain the ability to evade responsibility or to cooperate in the future, each must consider the effect of her choice not only in the immediate context but also on later conflict situations.¹³⁴

The dynamics of repeated interactions of indefinite duration suggest, therefore, that a pattern of cooperative conflict adjustment frequently will emerge. If one party begins by adjusting cooperatively and the other responds, mutual cooperation is introduced and then reinforced by a "lock-in" effect.¹³⁵ Indeed, at least in theory, *E* and *R* can promote a cooperative equilibrium at the outset by announcing their mutual commitment to conditional cooperation

¹³³ Moreover, as conditions change the burdens of mutual effort may no longer be equitably distributed, leading to shirking, feet dragging, and other opportunistic behavior.

¹³⁴ *E* and *R* might initially adopt widely different decision strategies to meet the challenge of repeated interactions. One spouse may attempt to exploit the other by consistently refusing to cooperate, or, conversely, she may respond to any action of the other by adjusting cooperatively. Alternatively, either spouse can pursue a *responsive* or contingent strategy, one that varies between cooperation and defection depending upon the actions of the other. For example, a strategy based on the principle of reciprocation, or "tit for tat," begins with cooperation when the first conflict choice is presented, and by emulating the other's actions in the previous interaction.

¹³⁵ Empirical studies of cooperative interactions indicate that lock-in effects are very strong. See Scott, *supra* note 71, at 2026-27 nn.60-62 (citing sources). These effects tend to make the parties behave like each other; the tendency is intensified as the interactions continue. Thus, if a pattern of cooperation can be established initially, a cooperative equilibrium will emerge. Each spouse's self-interest will induce her to maintain this productive pattern.

in any conflict situation.¹³⁶ The marriage vows implicitly serve this precommitment function. By the expedient of punishing defection and rewarding cooperative adjustment, each party can "bring out the best" in the other and thereby reinforce the cooperative equilibrium.¹³⁷ In this way, over time, *E* and *R* will develop detailed and precise "rules" governing the daily interactions that form the core of the marriage relationship. Through a trial and error process those rules will become appropriately calibrated to mete out proportional punishment for defection¹³⁸ and equivalent rewards for cooperation. Unlike broad commitments to pool efforts and share risks, these relational norms are highly contextualized and precise. As long as the relationship continues, relational norms are the dominant instruments for enforcing the parties' reciprocal commitments.

Despite a precommitment to conditional cooperation, however, marital breakdowns can occur. A single retaliatory response of equal consequences will not always deter noncooperation, and, therefore, a retaliatory pattern of noncooperation and defection can emerge over time.¹³⁹ This pattern is also subject to "lock-in" effects. A series of mutual recriminations erodes the initial commitment to

¹³⁶ The precommitment to cooperate is a reliable promise; each spouse knows that she cannot with impunity suddenly switch strategies once conflict situations arise. Thus, the other spouse will maximize his respective utility by also cooperating. The precommitment strategy facilitates the commencement of a cooperative pattern. Thereafter, in an ongoing relationship with repeated interactions, both parties will "lock-in" the cooperative equilibrium.

¹³⁷ If *E* and *R* announce such a precommitment to *conditional* cooperation, each will agree to punish defection by the other, but then, after a single retaliation, forgive the noncooperative behavior and return to the cooperative pattern. Experimental research in game theory indicates that conditional cooperation—"tit for tat"—is the best strategy to maintain a cooperative equilibrium in a long-term strategic game relationship. See Robert Axelrod, *The Evolution of Cooperation* 30-33 (1984); Anatol Rapoport & Albert M. Chammah, *Prisoner's Dilemma: A Study in Conflict and Cooperation* 65-66 (1965); see also *supra* note 135 (noting strong "lock-in" effects of cooperative equilibrium in marriage).

¹³⁸ "Punishment" could include withdrawal of affection, verbalized anger, in kind retaliation, etc.

¹³⁹ The relative payoffs from cooperative and noncooperative actions will have an important influence on the outcome. The lower the returns from evasion or defection relative to cooperation, the greater the probability of a cooperative equilibrium. Conversely, when the temptations to defect are greater, the prospect of mutual conflict increases.

cooperation, and eventually leads to relationship breakdown.¹⁴⁰ The "lock-in" effect, therefore, tends to push the parties either toward a stable pattern of cooperation or the trap of mutual conflict.

Can *E* and *R*, through their marriage contract, create an environment that discourages defection and thus promotes a long-term cooperative equilibrium? The major threat to a cooperative equilibrium is the variance in the payoffs between cooperation and defection. The parties realize that temptations to defect may be powerful at times because defection yields short-term rewards while cooperation generates discounted long-term benefits. Contemplating this possibility, *E* and *R* must turn to supplemental enforcement systems in order to maintain the relative advantages of long-term cooperation over short-term defection.

b. Extralegal Enforcement: The Function of Societal Norms

i. Traditions, Conventions, and Broad Societal Norms. In long-term commercial and social relationships, informal social norms play an important role in promoting cooperation, one that reinforces and often supplants legal enforcement mechanisms.¹⁴¹ Because *E* and *R* have chosen marriage over an informal union,

¹⁴⁰ For a fictional case study of marital breakdown which provides a good example of this retaliatory pattern, and of its tendency to escalate, see *The War of the Roses* (Twentieth Century Fox Film Corp. 1989).

¹⁴¹ See discussion *supra* note 130. In an early study, Stewart Macaulay described how social norms influence merchants to stand behind their products and provide service beyond that required by law. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963); see also Vilhelm Aubert, *Some Social Functions of Legislation*, 10 *Acta Sociologica* 98 (1966) (arguing that the 1948 Norwegian Housemaid's Law setting minimum hours had little effect on the relationship between domestic servants and employers). More recently, the intense interest in social norms among legal scholars can be traced to Robert Ellickson's classic study of farmers and ranchers in Shasta County, California. See Ellickson, *supra* note 130. Ellickson criticized the perspective of traditional legal scholars (particularly law and economics scholars) as "legal-centric," in that it assumes the primacy of law and ignores other influences on behavior. Ellickson found that norms can supplant the legal rules in resolving disputes in close-knit communities. See *id.* at 137-55; see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 *U. Pa. L. Rev.* 1765 (1996) [hereinafter Bernstein, *Merchant Law in a Merchant Court*] (describing the interactive role of extralegal and legal commitments in business contracts); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115 (1992) [hereinafter Bernstein, *Opting Out of the Legal System*] (describing extralegal mechanisms used in a close-knit trading community).

social norms can be expected to play a large role in enforcing their marital contract. First, marriage is subject to many tangible social conventions that announce and reinforce the parties' commitment. Beyond this, behavior in marriage is subject to long-standing societal expectations that tend to constrain the parties' freedom and influence them toward trustworthiness, fidelity, honesty, and altruism. The threat of social censure discourages conduct inconsistent with the announced norms.¹⁴² Moreover, social norms that are internalized by each party are self-enforcing in the sense that the behavior "goes without saying." Both *E* and *R* expect to be constrained by their social roles as married persons and each has the assurance that the other is similarly constrained.¹⁴³

Many social customs and traditions surrounding marriage serve a bonding function, reinforcing the parties' commitment to maximize relational value.¹⁴⁴ These conventions signal to the community the serious and exclusive character of the relationship which the couple is undertaking; through their established social meaning these conventions assure broad community recognition of the commitment. The community, in turn, responds with certain behavioral expectations of the married couple. Engagement periods announce the impending change of status. Engagement and (particularly) wedding rings symbolize the couple's bond, announcing to the world that the married individual is not available for an intimate relationship and is subject to the social norms that define spousal roles. The wedding ceremony, gifts, and celebratory reception signal the importance of the couple's commitment and change of status in the community. The marital vows represent a public declaration of the parties' intentions, accompanied by hortatory language that expresses the seriousness of the obligation that each spouse is undertaking.¹⁴⁵ Finally, the celebration of wedding anni-

¹⁴² Richard McAdams argues that social norms originate through the relatively low-cost mechanism of withholding or withdrawal of approval or "esteem." McAdams, *supra* note 79, at 355-75.

¹⁴³ As we discuss below, the potency of social norms promoting commitment to marriage will vary depending on whether the social community in which the couple is situated strongly endorses the norms. See *infra* text accompanying notes 154-159.

¹⁴⁴ For a discussion of bonding arrangements, see *supra* note 128.

¹⁴⁵ The ceremonial bonds for faithful performance by couples entering into marriage and couples in marriage find parallels in adult baptism in some religious sects. For example, entrance into the Amish community is by voluntary choice which entrants

versaries reminds the couple of the seriousness and importance of their commitment.

Aside from these tangible ways of providing a bond for faithful performance, internalized societal norms define optimal and unacceptable behavior in marriage, reinforcing the couple's commitment to use their best efforts to develop fully a relationship that serves their collective welfare. Norms of trustworthiness, solidarity, openness, honesty, harmony, and fulfillment of obligation between spouses and toward children are widely accepted and frequently serve both bonding and monitoring functions.¹⁴⁶ Take, for example, the norm of marital fidelity. Acts of infidelity are costly to transact, because they must be kept secret not only from the spouse but from others as well. The prospect of guilt generated by internalization of the norm and societal disapproval serves a bonding function.¹⁴⁷ In addition, friends and acquaintances are likely to be observant monitors, disapproving of conduct that is inconsistent with marital fidelity.¹⁴⁸ Thus, the risk of detection may loom large, deterring the tempted spouse.

In the same vein, norms of truth telling and open communication in marriage serve both bonding and monitoring purposes. These norms encourage interdependence and trust, which makes extrication from the relationship costly, and they promote mutual oversight by each spouse of the other's activities through disclosure and information sharing.¹⁴⁹ The sharing of secret and intimate personal information serves a particularly useful bonding function. Because such information is subject to disclosure, each spouse holds the secret as a hostage that can be used if the other defects from the

signify at a public ceremony through the taking of a vow of water baptism. The baptismal vow includes the promise to abide by the *Ordnung*, the rules of the Amish church-community. See John A. Hostetler, *The Amish and the Law: A Religious Minority and its Legal Encounters*, 41 Wash. & Lee L. Rev. 33, 35-36 (1984).

¹⁴⁶ See *supra* note 130 (discussing studies).

¹⁴⁷ Survey evidence consistently demonstrates a strong public consensus endorsing the proposition that married persons should not engage in extramarital sexual relationships. See Stephen Nock, *Marriage in Men's Lives* (1998). A 1990 study by the National Opinion Research Center at the University of Chicago found that people in their twenties were as statistically conservative regarding marital fidelity as were those in their sixties. See *A Vote for Fidelity*, *Indianapolis Star*, Oct. 1, 1996, at A6.

¹⁴⁸ Consider the typical reaction to married individuals in social settings (restaurants, theaters, etc.) with a "date" who is not a spouse.

¹⁴⁹ This norm would seem to be internalized by women more than men. If so, this imbalance could have an impact on the relationship.

relational objective.¹⁵⁰ Marital misbehavior is also discouraged and cooperation promoted by norms of harmony and solidarity that deter serious spousal conflict (particularly if it affects children or involves violence).¹⁵¹ Further, married couples are subject to social expectations that each spouse expend considerable efforts to resolve problems, accept shared responsibility for problems, and not defect in difficult times. This norm of mutual effort may be simply a recognition that the personal commitment undertaken by the parties to a marriage contract derives from a social context that supports and endorses it. Finally, norms defining family obligations of financial and emotional support discourage selfish conduct that destabilizes the relationship.¹⁵²

The precise effect of social norms on marital conduct cannot be predicted, but two distinct influences can be identified. First, each

¹⁵⁰ Viewed ex post, such disclosure during divorce and custody disputes is often seen as gratuitous and spiteful. But viewed ex ante, the risk of disclosure of secrets in retaliation for defection is a credible commitment that can enforce the marital bargain and maintain a cooperative equilibrium. Secret (and embarrassing) information is an ideal hostage. Unlike an economic hostage (*E* holds a \$10,000 bond which becomes hers if *R* defects), this bond has no independent value to the holder, and thus she has no temptation to encourage defection. See Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 Colum. L. Rev. 730, 748-49 (1989) (describing the perfect hostage as the "puny prince," of value only to his parents).

¹⁵¹ It is unclear how potent are the norms of harmony and solidarity. Certainly, they have traditionally been a weaker constraint on male behavior in marriage than on behavior among acquaintances and strangers. See Ellman et al., *supra* note 25, at 161-79 (discussing domestic violence). The informal norms against domestic violence appear to be strengthening in recent years.

¹⁵² For example, consider the spouse or parent who fails to attend to an illness or childbirth, because of business or (even worse) recreational activities. Consider also the social sanction of fathers who are branded "deadbeat dads" for failure to pay child support. Some states have recently tightened penalties for deadbeats. See, e.g., *Deadbeat License Law Begins to Bite*, Morning News Trib. (Tacoma), Nov. 20, 1997, at A12 (reporting that noncustodial parents who fall at least six months behind on their child support payments face the penalty of having their professional, business, or recreational licenses suspended); Hamil R. Harris & Sylvia Moreno, *Officials in the Area Team Up to Arrest Deadbeat Parents: Nearly 200 Are Apprehended This Week*, Wash. Post, Nov. 8, 1997, at B1 (reporting that in an effort to stigmatize deadbeat parents, police affixed blue and pink steel boots to their tires); Sylvia Moreno, *State Raising the Stakes on Deadbeat Parents: Cars Impounded as Part of Crackdown*, Wash. Post, Nov. 21, 1997, at D4 (reporting that 89 delinquent parents were arrested in Northern Virginia for nonpayment of child support in a new car-booting program under which such parents have a choice of either paying their child support or losing their cars). Interestingly, disapproval of the failure to pay spousal support seems weaker.

spouse may anticipate social approval or disapproval depending on whether he or she conforms to social expectations. Social sanctions include reputational harms from gossip, reduced social acceptance, and ostracism. The social costs of violating norms about marital conduct will vary in their severity, depending on the nature of the violation and the social context. In addition to the obvious psychological costs, violating social norms can also have financial consequences, to the extent that conforming to norms about marriage helps business or professional advancement. Moreover, social norms and a sense of the acceptable boundaries of marital roles are likely to be internalized, constraining individual behavior through habit and the anticipation of anxiety or guilt for misconduct.¹⁵³

ii. The Amplification Effect: Community Expression of Norms. The power of societal norms effectively to enforce compliance with marital obligations rests on the extent to which the norms are internalized by the parties, and on whether serious social sanctions for violation are anticipated.¹⁵⁴ If norms that support stability in marriage are strong, *E* and *R* will be motivated to undertake cooperative adjustments, resolve disputes within the framework of the relationship, and expend efforts (beyond that which individual self-interest may direct) to promote their collective welfare. If societal norms only weakly endorse cooperative roles and conduct in marriage, then social expectations will be less effective in reinforcing the couple's cooperative commitment. If *E* and *R* look around their social world and observe infidelity and opportunistic behavior

¹⁵³ Cooter argues that social norms are not effective unless they are internalized as preferences by individuals. See Cooter, *supra* note 130; see also Gary S. Becker, *Accounting For Tastes* 225 (1996) (defining norms as group values "internalized as preferences"). Richard McAdams, who recognizes the important role of internalization (guilt), also emphasizes external sanctions (shame). See McAdams, *supra* note 79, at 374-81.

¹⁵⁴ See, e.g., Cooter, *supra* note 130, at 1665 ("[A] social norm or custom exists in a community when enough people internalize it to make it effective."); Bernstein, *Merchant Law in a Market Court*, *supra* note 141, at 1798 (claiming the "effectiveness [of relationship-preserving norms] depends on social or reputational sanctions imposed by members of a particular market or social group"); see also McAdams, *supra* note 79, at 374-75 (describing how broad compliance to norms raises the cost of violation).

as common among other married couples, their original cooperative intentions may be undermined.¹⁵⁵

Broad societal norms are mediated through smaller social groups, and norms supporting marriage are likely to vary in their impact on individual behavior depending on whether they are amplified or ignored in the couple's immediate social contexts. In general, norms function most effectively to regulate behavior in close-knit social communities, in which members interact on an ongoing basis.¹⁵⁶ Under these circumstances, monitoring of violations is facilitated, and the sanctions of disapproval or ostracism carry a high cost. The couple's community could be of several types—extended family, social group, religious group, or geographical community, and different communities can overlap in enforcing norms about marital behavior. Predictably, amplification will be powerful if the couple belongs to several close-knit groups that strongly endorse marital commitment.¹⁵⁷ On the other hand, if the couple's social affiliations are attenuated¹⁵⁸ or if marital obligation is not reinforced in their social context,¹⁵⁹ the broader societal norms are likely to have a much more modest impact on behavior.

¹⁵⁵ See Hardin, *supra* note 12, at 36-37 (suggesting that a party's expectations of a spouse's behavior might turn in large part on the party's expectations of behavior of other people in the party's society who are like the spouse); *id.* ("For commonsense epistemological reasons, we individually have to live with the larger society's coordination on a particular pattern of expectations. For example, I cannot reasonably expect you to be dramatically different in your long-run commitments than others are.").

¹⁵⁶ Ellickson's study provides powerful evidence that the norms of close-knit communities significantly influence behavior, even when those norms are inconsistent with legal rules. See Ellickson, *supra* note 130, at 177-81; see also Bernstein, *Opting Out of the Legal System*, *supra* note 141 (describing norms in close-knit trade group); Posner, *supra* note 61 (describing how cohesive groups regulate members' behavior); Posner, *supra* note 130. The power of subgroup norms is demonstrated by delinquent adolescent subcultures, which encourage antisocial behavior in the face of severe sanctions under law and broader societal norms. See Elijah Anderson, *Streetwise: Race, Class and Change in an Urban Community* 76 (1990) (describing norms supporting risk-taking behavior in an urban African-American community).

¹⁵⁷ For example, the couple could live in a small town, belong to a conservative religious group, and have large families living nearby who subscribe to norms of life-long marital commitment.

¹⁵⁸ Perhaps they frequently move from one city to another, live in high-rise apartment buildings, and have few friends.

¹⁵⁹ Perhaps they are jet-setters or work in the entertainment business in Hollywood.

c. Legal Enforcement of the Marital Bargain

i. The Dynamics of Legal Enforcement. *E* and *R* will not rely exclusively on either relational or social norms to ensure a cooperative equilibrium. They will also consider the extent to which legal enforcement mechanisms are needed to buttress the stability of the relationship and encourage optimal investment in the marriage. *E* and *R* will not agree to legal enforcement of the terms of the marital bargain, however, unless formal sanctions would provide a more efficient substitute for, or a complement to, informal normative sanctions. There are a number of reasons to believe that this criterion would preclude legal enforcement of almost all intramarital promises. The marital relationship is peculiarly interdependent because of the parties' commitment to pooling efforts and to sharing burdens and benefits. The interactions that frame any particular marital conflict are thus highly relation-specific and interactive. There is no reason to believe that the complex web of behaviors known to and observable by the parties alone can be verified by a court or other third-party adjudicator. Not only would legal enforcement of intramarital promises—such as the parties' wedding vows—impose substantial direct costs on the parties, but the risk of error would be unacceptably high. The parties risk a court incorrectly identifying the sequence of defection and retaliation and thus permanently disrupting the delicate patterns of reciprocity necessary for a cooperative equilibrium. The law's tools are simply too crude to adjust conflicts in intimate ongoing relationships that are shaped by subtle and delicate dynamics. Rather than stabilizing a cooperative equilibrium, legal enforcement of intramarital performance is as likely to undermine the relational norms that stimulate mutual efforts and adjustment.¹⁶⁰

Moreover, legal enforcement during the marriage of the terms of the marital bargain will threaten the efficacy of the social norms that otherwise discipline marital behavior. Legal adjudication is structured as a single iteration zero-sum game, setting the parties against each other as adversaries. The adversarial system implicitly presumes that the contestants deal at arm's length, or at least that they will not resume an intimate relationship. Legal enforcement

¹⁶⁰ For a similar argument using a formal model, see Bowers & Bigelow, *supra* note 62 (arguing that it is rational for successful relating parties to reject the law).

effectively trumps the social norms of harmony, reciprocity, and solidarity, and thus a credible commitment to litigate conflict is fundamentally incompatible with many of the social norms that surround marriage.¹⁶¹ It may appear that legal enforcement will undermine internalized social norms only if the parties are forced to litigate. But the potency of any legal sanction requires the threat of litigation to be credible. In sum, at least in ongoing intimate relationships, legal mechanisms are imperialistic and do not function effectively in concert with extralegal forces. Given their goal of promoting stability in an ongoing intimate relationship and of resolving conflicts at least cost, *E* and *R* would choose not to resolve intramarital conflicts through formal adjudication.¹⁶²

ii. Legal Enforcement upon Termination: The Problem of Verifiability and the Irrelevance of "Fault." Upon termination of the relationship, *E* and *R* face the further question of whether to seek legal resolution of serious disputes that arose during the marriage. The marriage ceremony includes explicit promises and implicit agreements about the limits of appropriate behavior in marriage. The understanding that adultery, physical and mental cruelty, and desertion are unacceptable spousal behavior was captured under traditional law in fault grounds for divorce which gave a right to

¹⁶¹ Eric Posner comments: "Judicial intervention [in the family] might reduce this [abusive behavior among family members]; but it would also reduce family solidarity (in the 'good' families as well as the 'bad' ones) and, as a result, social wealth. The same can be said for trade groups, unions, and religious groups." Posner, *supra* note 61, at 190. Bernstein also suggests that "legal interference in the [extralegal group regulation] will one day destroy the traditional way of doing business." Bernstein, *Opting Out of the Legal System*, *supra* note 141, at 157.

¹⁶² The intuition that adversarial adjudication is a costly mechanism for resolving disputes in ongoing family relationships underlies the increased use of mediation to resolve child custody disputes. See *supra* note 24. These disputes involve an ongoing relationship between the parents, in which cooperation is important. They also involve complex facts that create difficult third-party verification problems. It is an independent question whether the rule that withholds legal enforcement of intramarital promises should be made mandatory (thus precluding individual parties from opting out). A mandatory prohibition on legal enforcement is justified to the extent that the state has an independent interest in not engaging in costly adjudication of non-verifiable contract disputes. See, e.g., Restatement (Second) of Contracts § 33 (1979) (denying enforcement of agreements with "uncertain" terms); cf. U.C.C. § 2-204 (1977) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.").

terminate the marriage to the "innocent and injured" spouse. Clearly, *E* and *R* would agree that prohibited behavior (such as adultery, desertion, or cruelty) would constitute a breach of the marriage contract, excusing the other from performance of her marital duties. Moreover, serious misbehavior could be the subject of criminal or tort sanction.¹⁶³ The important question here is whether, under a modern marriage contract, these agreements about bad marital behavior would be subject to formal legal enforcement upon termination.

At first blush, there seems to be a strong case for legal enforcement of fault provisions upon divorce. Legal enforcement of contractual provisions prohibiting conduct that is likely to undermine or destroy the relationship can deter major defections and promote marital stability.¹⁶⁴ Moreover, the divisive effects of formal adjudication are less important upon termination of the relationship. Nevertheless, *E* and *R* will be inclined to reject the legal enforcement of fault provisions upon divorce because "fact finding" problems of isolating and evaluating spousal defection are simply too formidable. Disputes in marriage are embedded in a complex framework of multiple expectations and understandings, which makes assigning responsibility and providing an appropriate remedy extremely difficult. In the subtle continuous interactions of an ongoing marriage, implicit assent or dissent from questionable spousal conduct will be hard to discern, and protest may be genuine, jocular, or strategic. Moreover, it will often be impossible for a neutral third-party adjudicator to distinguish accurately between a straightforward breach and one that is a retaliatory response to a defection by the other spouse (which itself may be a retaliatory act). Conflicts that arise in this most intimate relationship will be

¹⁶³ Criminal sanctions for domestic violence are wholly compatible with any stance the parties might take about legal enforcement of contractual terms.

¹⁶⁴ Brinig and Crafton argue that removing any remedy for breach of the fault provision may encourage opportunism by a spouse. See Brinig & Crafton, *supra* note 6, at 871. In their view, the marriage contract has become illusory under no-fault divorce law because no penalty is imposed in response to a violation of any marital promise. See *id.* Without a penalty for breach, they conclude, the spouses will have no incentives to avoid opportunistic behavior. See *id.* They advocate a remedy for breach of the behavioral terms of the marriage contract by taking fault into account in property settlement and support. See *id.* at 874, 893. They assume that husbands will be burdened by their proposal and that wives will benefit. See *id.* at 883-84.

peculiarly hard to untangle.¹⁶⁵ The bright line rules that are embodied in traditional law fail to capture the complexity of what is often shared responsibility for marital failure. To be sure, some failed marriages may involve the stark example of one defecting spouse and one fully performing partner, but the process of sorting these cases from those in which the behavioral strands are intertwined will be extremely difficult and error prone.

Given the difficulty in accurately assessing responsibility for behavioral defections, *E* and *R* would perceive a substantial risk that fault claims would be used strategically. If alimony and property distribution claims were affected by a fault determination, both parties would be vulnerable to strategic claims by the other. In practice, however, these risks would be more acutely felt by the homemaker spouse, because of her economic vulnerability. Those critics who argue for a return to fault determinations in making financial settlement awards fail to recognize that fault claims are a two-edged sword.¹⁶⁶

In rejecting legal enforcement of fault grounds, *E* and *R* will weigh the relative advantages of alternative methods of enforcement. Bad behavior certainly justifies retaliation in the context of the parties' relational norms. Thus, for example, *E* can consider separation and termination of reciprocal efforts as a retaliatory response to *R*'s adultery. Moreover, social norms prescribe acceptable marital behavior and proscribe spousal abuse, desertion, and adultery.¹⁶⁷ Although divorce is far more acceptable than was true

¹⁶⁵ To be sure, in a world of perfect information, fault grounds would be a basis for unilateral and immediate retaliatory termination. But, as we discussed above, retaliatory termination creates a grave risk of strategic claims of fault and would undermine the independent value of the notification requirement. See *supra* text accompanying notes 122-124.

¹⁶⁶ See Brinig & Crafton, *supra* note 6. Under traditional law, for example, the homemaker against whom a fault ground was proved was not entitled to alimony. See Ellman et al., *supra* note 25, at 187-91.

¹⁶⁷ For example, research indicates that most people disapprove of extramarital sex and also that this behavior is not common. See Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45, 55-56 (1991-92) (reporting that 87% of respondents indicated that extramarital relations were "always wrong" or "almost always wrong"). Fidelity is, indeed, still the ideal for many people, even if they don't live up to it. See Frank Pittman, *Private Lies: Infidelity and the Betrayal of Intimacy* 29 (1989). Empirical evidence also suggests that social disapproval of domestic violence plays an important role in discouraging violent behavior. See Antony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence*:

a generation ago, there is no evidence that standards for behavior in marriage have declined. Indeed, some behaviors such as spousal and child abuse and desertion are subject to greater social disapproval today than in an earlier era. Moreover, non-contractual remedies such as criminal penalties for abuse and nonsupport and social service intervention are more effective than before. Indeed, there may be less tolerance of marital misbehavior in an era in which divorce is more readily available. Given the high costs of sorting bad behavior from merely inadequate efforts, therefore, *E* and *R* are motivated to rely instead on the established framework of extralegal mechanisms to sanction a spousal fault.

iii. The Role of Legal Enforcement. Legal enforcement of the marriage contract will thus play a modest but important role when the marital relationship terminates. The parties' foundational understandings have produced agreement on the terms for divorce, property settlement, alimony, ownership of economic assets, and child custody and support. Unlike the intramarital obligations that function to maintain the relationship and are governed largely by social and relational norms, the obligations that are triggered by a termination of the marriage are efficiently enforced by legal coercion. The requirements of prior notice, division of economic assets, and even child custody and support, focus on assignments of individual rights and responsibilities and turn on facts that can be verified by a court. Thus, the parties will agree to live under two sets of rules: a more flexible set of rules for social and relational enforcement during the marriage, and a stricter set of rules for legal enforcement upon divorce.

The prospect of legal enforcement upon divorce plays an important role during the marriage. Introduction of formal legal enforcement upon termination of the relationship provides a powerful signal that the relationship has broken down and that the "rules of

The Dade County Spouse Assault Experiment, 57 Am. Soc. Rev. 691, 695 (1992); Joan Zorza, Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies, 28 New Eng. L. Rev. 929, 936 (1994) ("Combining social sanctions with formal criminal sanctions is believed to enhance the deterrent effect [on incidence of domestic violence]."). The recent enthusiasm for tough child support enforcement provides indirect evidence of the power of informal norms against desertion (which can be taken to mean leaving the spouse and abdicating marital responsibility) when children are involved. See *supra* note 152.

the game" have changed. It thus creates a threshold across which the parties will hesitate to cross. Without such a "large strike" capability, each party would be subject to the other's defection whenever the short-term gains from defection exceed the present discounted value of future cooperation. Thus, *E* and *R* will develop a supplemental system to enforce their foundational understandings regarding distribution of economic assets, alimony and support, and custody of children. Social and relational norms are unsatisfactory safeguards to protect these individual "paid in" investments in the relationship.

Consider a familiar example. Assume that *E* and *R* agree that *R* will work to support the family while *E* attends medical school. Thereafter, *E* and *R* can share the lifestyle made possible by a physician's income. Should the marriage falter shortly after *E* completes her medical training, she may be tempted to leave the relationship and retain the entire benefit of her accumulated human capital without compensating *R* for the value of his investment. A legally enforced termination rule that requires *E* to wait two years after notification before securing a divorce coupled with a rule that permits *R* to claim a portion of the outputs of *E*'s human capital will deter *E* from strategic defection. *R* in turn will be motivated by the protection of the law's umbrella to use his best efforts to invest in *E*'s career development. Without legal enforcement, the risk of *E*'s uncompensated default will lead *R* to underperform and the parties will suffer a loss of relational surplus.¹⁶⁸

Legal enforcement mechanisms are also important *ex post*. *E* and *R* appreciate that, should the relationship end, the social and relational norms that promote cooperation in marriage will exert little influence on their behavior (indeed, norms about behavior in the midst of divorce are ambiguous at best). Moreover, the relational dynamics that create incentives to cooperate in ongoing relationships will have deteriorated. Each party, looking toward the end of the relationship, is no longer motivated to consider the interest of the spouse or their mutual benefit.¹⁶⁹ Thus, in the example, *E*, as

¹⁶⁸ An even more typical example of spousal investment that requires protection upon divorce involves the spouse whose marriage-specific investment as homemaker creates a vulnerability without the assurance of legal enforcement.

¹⁶⁹ Further, the cost of formal enforcement to the ongoing relationship is no longer a consideration. See Axelrod, *supra* note 137, at 129.

the newly minted physician, is no longer inclined by either relational or social norms to credit or to compensate *R* for his investment in her career. Once again, legal enforcement in this setting substitutes for inadequate normative constraints and insures a clear and predictable termination process.

We conclude the discussion in this Part with a word of caution. The contract that the model predicts *E* and *R* are most likely to execute does not reflect the terms of marriage contracts that any particular couple would agree upon. A hypothetical bargain between two rational utility-maximizers provides instead a template for the specification of default rules that would suit the purposes of a broad number of couples entering into marriage. Central to any system of contractual default rules is the invitation to individual parties to opt out of any majoritarian default rule that ill-suits their goals, and to design their own tailored alternative. Such rules are efficient, therefore, if they save most (or at least many) bargainers the time, effort, and error of replicating the process that *E* and *R* have engaged in.¹⁷⁰ As a first step in specifying optimal default rules for marriage, the model developed above suggests a series of foundational terms that address the nature and duration of the marital commitment, the mechanisms to facilitate cooperation and enforce contractual obligation, the means by which each party can protect his or her investment in the relationship, and the conditions for termination. We turn, in Part III, to an analysis of the descriptive and prescriptive implications of the relational model for the contemporary law of marriage and divorce.

¹⁷⁰ In addition to majoritarian default rules, contracting parties will agree to "information-forcing" default rules whenever one party possesses key information necessary for the other party to calibrate properly the value of a return promise. A classic example of such a rule is the limitation on consequential damages embodied in the rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854). See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 91 (1989); Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1270-81 (1980). A more complex model than the one developed here would thus relax the assumption of symmetric information to consider the optimal mix of majoritarian and information-forcing defaults.

III. MARRIAGE AS CONTRACT UNDER NO-FAULT DIVORCE LAW

In this Part, we apply the model of marriage as relational contract to contemporary family law. We argue that our model explains much of the deep structure of the law regulating marriage and divorce, and that many features of the legal regulation of marriage and divorce can be derived from the relational model. Within this framework, most modern legal doctrines regulating divorce are best understood and analyzed as majoritarian default rules. We focus primarily on key problem areas of divorce law—alimony, the treatment of one spouse's investment in the other's professional education, and child custody. These seemingly unrelated legal doctrines reflect the characteristic features of marital relationships, in particular the issues raised by specialized role division and asymmetric investment.

The relational paradigm offers as well a coherent normative criterion for evaluating the legal doctrines regulating divorce.¹⁷¹ A central normative implication of our analysis is that important default rules governing divorce fail adequately to protect marital investments. The analysis also reveals the relative immaturity of the contractual regime. Despite considerable contractual freedom, couples today are unable to undertake a substantial legal commitment to marriage. This restriction on commitment, coupled with the erosion of societal norms promoting cooperation in marriage, provides a powerful explanation for why so many marriages fail despite the *ex ante* intentions of the spouses.

A. The General Contours of Marriage as Relational Contract

The strongest evidence of a contractual regime is the freedom of parties to opt out of the state-provided legal rules. On that basis, the contractual nature of the modern law of marriage is indisputable. It is simply inaccurate to describe the legal regulation of marriage today as a "basket of immutable obligations."¹⁷² Although

¹⁷¹ See, e.g., Trebilcock & Keshvani, *supra* note 18, at 551-52 (using the hypothetical bargain heuristic to criticize divorce law as producing suboptimal default rules).

¹⁷² Eric A. Posner, *Family Law and Social Norms*, in *The Fall and Rise of Freedom of Contract*, *supra* note 87 (manuscript at 22, on file with the Virginia Law Review Association).

mandatory rules govern who can marry and on what basis,¹⁷³ such constraints are fundamental to all contractual regimes. In fact, most of the rules governing marriage today are default rules. Under the Uniform Premarital Agreement Act, for example, parties have broad freedom to contract before marriage about a wide range of issues, and courts routinely enforce these agreements under contract principles.¹⁷⁴ Moreover, divorcing couples today have the freedom to opt out of almost all of the legal rules surrounding divorce. They can (and do) set their own terms for distribution of property, alimony, and (in practice) even child support and custody.

As the relational model predicts, the default terms of modern marriage law are enforceable through a combination of extralegal and legal mechanisms. Thus, extralegal mechanisms are used to ensure performance in the intact marriage, and legal enforcement is seldom available.¹⁷⁵ Courts may chastise the miserly husband

¹⁷³ Such restrictions include minimum age requirements, prohibitions of marriage by parties related to certain degrees, and the like.

¹⁷⁴ See discussion of premarital contracts in Section I.A *supra*. Parties can execute a contract that will determine property distribution and spousal support on divorce. They cannot set enforceable terms for child custody and child support under premarital agreements, owing to the state's independent interest in provisions affecting children. See Unif. Premarital Agreement Act § 3(b), 9B U.L.A. 373 (1983). The Uniform Act makes the standard contract defenses of fraud, duress, unconscionability, and incompetency available to the party who seeks to avoid enforcement, but does not (at least in theory) permit agreements to be set aside simply because enforcement is disadvantageous to one party. See *id.* § 6, 9B U.L.A. 376 (1983). In jurisdictions that have not adopted the Uniform Act, premarital contracts are recognized, but equity at the time of enforcement is a basis for setting aside the agreement. See *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984) (holding that enforcement of premarital contract's maintenance terms would be unconscionable because husband's assets had increased from \$500,000 before marriage to \$6 million); *Button v. Button*, 388 N.W.2d 546 (Wis. 1986) (setting agreement aside because of changed circumstances after execution). Even in states that have adopted the Uniform Act, which specifically purports to apply standard contract principles to premarital agreements, courts seem reluctant to enforce contracts in which one spouse to a long marriage is seriously disadvantaged by the outcome. See *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988). This response seems to recognize that parties to a prenuptial agreement do not anticipate many of the contingencies that may arise in a long marriage, and that had they considered the matter, they would have agreed to make adjustments in rights and responsibilities over time. In short, though it is not put in these terms, courts may be applying a default rule requiring good faith adjustment in response to unanticipated contingencies. Such a default rule, of course, is consistent with the risk-sharing norms developed in the model.

¹⁷⁵ See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993) (refusing to enforce the parties' contract under which wife was supposed to receive compensation

who refuses to provide adequately for his homemaker wife despite ample financial means, but they view judicial intervention to enforce his support obligations as destructive of the harmony of marriage.¹⁷⁶ Even under the Uniform Premarital Agreement Act, which seems to permit contracting over intramarital issues, there is little evidence that courts are prepared to resolve any resulting disputes.¹⁷⁷ Implicitly, this policy endorses reliance on extralegal enforcement

for the nursing services to her husband); *In re Marriage of Bennett*, 587 N.E.2d 577 (Ill. App. Ct. 1992) (holding an agreement to raise children in the Jewish faith unenforceable); *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App.) (en banc), rev'd in part on other grounds, 339 So. 2d 843 (La. 1976), cert. denied, 431 U.S. 966 (1977) (holding agreement according to which the parties would "limit sexual intercourse to about once a week" unenforceable, thus rejecting husband's claim that wife was not entitled to alimony because she was at fault for breaching the agreement by seeking intercourse more often); *Koch v. Koch*, 232 A.2d 157 (N.J. Super. Ct. App. Div. 1967) (holding unenforceable an oral agreement providing that husband's mother would come and live in the parties' household).

Severe breaches that violate criminal laws, such as acts of domestic violence, also were once viewed as subject to private "resolution" within the family. In recent years, however, criminal prosecution in domestic violence cases has become the norm. Moreover, with the withdrawal of inter-spousal tort immunity, victims can pursue private tort actions, particularly upon divorce. These are not contractual remedies, however.

¹⁷⁶ See *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953). At common law, the husband was required to provide financial support for the wife and in return she was to provide services. See *Manby v. Scott*, 86 Eng. Rep. 781 (K.B. 1659). Many of the cases involve suits by wives for support. In *McGuire*, the court stated that "[t]he living standards of a family are a matter of concern for the household, and not for courts to determine." *McGuire*, 59 N.W.2d at 342. The court emphasized that legal enforcement was available if the parties were legally separated. For a critical assessment, see Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L.J. 558, 566 (1974) (arguing that the response can be explained in terms of respect for husband's authority, and fear that wife would be capable of leaving if she could sue for support). This, of course, does not explain the bilateral application of the response, or its current viability. We are unaware of cases, for example, in which a husband successfully sues his wife who is a slovenly housekeeper in an intact marriage.

¹⁷⁷ The Uniform Premarital Agreement Act § 3(a)(8) allows the couple to contract about "any . . . matter, including their personal rights and obligations, not in violation of public policy." Unif. Premarital Agreement Act § 3(a)(8), 9B U.L.A. 373 (1983). We are unaware of any appellate opinions applying this section during marriage. The comment to § 3 states that "an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on." Unif. Premarital Agreement Act § 3 cmt., 9B U.L.A. 374 (1983). States that have adopted the Uniform Act, however, do not seem to enforce such contracts, and some have seemingly inconsistent statutory provisions. See Cal. Fam. Code § 1620 (West 1994) ("Except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property.").

and acknowledges that adversarial adjudication would undermine the informal mechanisms that generally promote cooperation in intact relationships.¹⁷⁸

Legal enforcement of the marriage contract is focused, as the model predicts, on the termination of the relationship. Substantive legal issues surrounding divorce include distribution of financial assets and provision for the future care of the children of the marriage. The legal duty to provide for family financial needs is formally enforced through alimony and child support orders upon divorce. The state's interest in the welfare of children generally results in explicit supervision of parenting decisions on the grounds that divorcing parents can no longer be presumed to cooperate regarding child-rearing decisions.

The trend toward the abolition of fault grounds for divorce and the removal of fault as a factor in support and property distribution is also explained by the relational framework.¹⁷⁹ No-fault reform was justified, in part, by the formidable enforcement problems associated

¹⁷⁸ Eric Posner argues that legal enforcement of many disputes in solitary groups (like families) undermines the informal dispute resolution mechanisms that these groups otherwise use. See Posner, *supra* note 61, at 148. Arguments against contracting about performance in marriage often describe the inappropriateness of formal adjudication (ignoring the function of informal mechanisms). See Gregg Temple, *Freedom of Contract and Intimate Relations*, 8 Harv. J.L. & Pub. Pol'y 121, 163-65 (1985) (refuting the argument that formal dispute resolution is a necessary incident of marital contracting).

A similar intuition about the costs of adversarial dispute resolution to ongoing family relationships is expressed in the recent trend toward mediation of divorce custody disputes. If divorced parents both remain involved with their child (as is presumed desirable), they are effectively locked into a relationship with each other. The child's welfare will be promoted if that relationship is cooperative. Proponents of mediation have long argued that third-party adjudication of custody issues in an adversarial proceeding promotes conflict and hostility between the parents. A principal benefit of mediation, on this view, is that it promotes cooperation between parents as they make decisions about their child's future with the help of a mediator. See Emery & Wyer, *supra* note 24; Elizabeth S. Scott & Robert Emery, *Child Custody Dispute Resolution: The Adversarial System and Divorce Mediation*, in *Psychology and Child Custody Determinations: Knowledge, Roles, and Expertise* 23 (Lois A. Weithorn ed., 1987).

¹⁷⁹ For a general discussion of the transition to a no-fault divorce regime and its implications, see Kay, *supra* note 44; see also American Law Inst., *supra* note 26 (stating that the objective of compensatory spousal payments is compensation for financial losses attributable to marriage, without regard to fault and not predicated on need).

with judicial efforts to verify bad behavior under traditional law.¹⁸⁰ The perception that fault determinations carry substantial enforcement costs supports the contention that the exclusion of fault is not the fatal flaw that makes a marriage contract "illusory."¹⁸¹

While the model predicts the deep structure of legal regulation of marriage and divorce, the contemporary regime deviates from the model in several notable respects. Societal norms supporting marriage are less potent forces for ensuring performance than the model assumes. In general, divorce, including unilateral termination, is more acceptable today,¹⁸² and normative sanctions for defection are relatively modest. This point should not be exaggerated, however. Within some close-knit religious, ethnic, and geographical communities, social norms continue to function effectively to promote marital stability.¹⁸³ Even in the broader society, marital infidelity, disloyalty, and cruelty are still met with disapproval. Indeed, a heightened awareness of the costly impact of divorce on children has generated disapproval of parental selfishness, complicating the tolerant social attitude of the 1970s and 1980s.¹⁸⁴ Nonetheless, it is

¹⁸⁰ No-fault reformers recognized that fault was an artificial construct and pointed to the modern understanding of marital failure as seldom deriving from one spouse's conduct. See Scott, *supra* note 47, at 16 n.20; see also Kay, *supra* note 44, at 291, 298-99 (discussing the motivations behind divorce reform in California).

¹⁸¹ Brinig & Crafton, *supra* note 6, at 873; see Cohen, *supra* note 6, at 274-77, 299-301. Both of these critics are concerned with opportunistic defection from the marriage by husbands who have enjoyed the benefits of their wives' performance, and leave the marriage before the wives can enjoy the benefit of the husbands' performance. As we argue below, the kind of opportunistic defection that is of principal concern to many critics who advocate revitalizing fault can be deterred under optimal default rules regulating alimony and the like without a need to resort to fault. Brinig and Crafton also claim that removal of fault promotes spousal abuse. See Brinig & Crafton, *supra* note 6, at 887-92. However, tort and criminal liability can deter this conduct.

¹⁸² Consider, for example, the public response to divorced presidential candidates: Nelson Rockefeller in 1964, and Ronald Reagan in 1980. Rockefeller's divorce was the subject of intense criticism, while Reagan's was unimportant.

¹⁸³ See *supra* text accompanying notes 141-159. Some religious groups encourage fulfillment of marital obligations and discourage divorce. The activities of the Million Man March and particularly the Promise Keepers—groups dedicated to encouraging men to be good husbands—can be seen as efforts to amplify and strengthen pro-marriage norms. See Michael Janofsky, *Debate on March, and Farrakhan, Persists as Black Men Converge on the Capital*, N.Y. Times, Oct. 16, 1995, at B6; Mary Stewart Van Leeuwen, *A Bit of Evangelical Evasion*, N.Y. Times, Oct. 4, 1997, at A15.

¹⁸⁴ During that period, many subscribed to the view that marriage should continue only if it was a source of self-realization for both parties, and that children are better off if their unhappy parents divorced. See Schneider, *supra* note 16, at 1855; Scott,

surely true that an important part of the regulatory scheme for enforcing the marital contract does not function today with optimal effectiveness. Moreover, parties' inability to undertake legally binding commitments, as we will argue, further contributes to the attenuation of social norms supporting marriage and also limits couples' ability to create supplemental enforcement mechanisms.

B. Designing Default Rules for Marriage and Divorce

In the absence of a premarital agreement, the legal terms of the marriage contract will be the regime of legal rules dealing with the termination of marriage. Contract theory posits that lawmakers formulate legal rules regulating marriage and divorce that embody the terms that plausibly would be agreed to by the broadest number of informed, rational actors in the premarital context.¹⁸⁵ In the absence of overriding public policy considerations that justify restricting the parties' contractual freedom,¹⁸⁶ these default rules function to save many (if not most) parties the time, expense, and error of crafting a premarital agreement that would expressly include all the terms for dissolving their marriage. Thus, the substantive legal rules defining the conditions for divorce, alimony, spousal support, and, to a lesser extent, child custody,¹⁸⁷ are usefully analyzed as contract default rules. From this perspective, the contract terms generated by the relational model can function as the basis for both an explanatory theory and a normative critique.

Analyzing the legal regulation of divorce as a system of default rules generated within a contractual framework responds to the

supra note 47, at 26. This assumption is not confirmed by the research, and social attitudes seem to be changing in the face of evidence that children suffer enormous costs when their parents divorce. See McLanahan & Sandefur, *supra* note 52.

¹⁸⁵ See Scott, *supra* note 69, at 607.

¹⁸⁶ In the fault era, of course, society's interest in setting the terms of marriage trumped that of the parties, and the spouses' preferences regarding the terms of their relationship did not drive legal regulation. Spouses could not alter the terms of marriage; it was entered into on a take-it-or-leave-it basis. See *Maynard v. Hill*, 125 U.S. 190 (1888). Today, the most important remaining constraint on contractual freedom in the premarital context is the interest of children of the marriage. Further, as we argued in Part II, a relational contract model would include mandatory rules defining minimum and maximum commitment terms.

¹⁸⁷ The couple will have less freedom to devise contract terms that affect their children's welfare than they do when only their own welfare is at stake. Similarly, rules regulating child custody and child support will be subject to state supervision.

feminist challenge that the interests of wives are harmed under a no-fault regime. Each party to a hypothetical bargain is presumed to be rational, informed, and self-interested. The parties voluntarily agree to terms (which then constitute the default rules) that further their mutual objectives for the relationship. Each party stands to gain more from the resulting contract than they could achieve under their "go it alone" alternative. Subject to these constraints, default rules regulating divorce are likely to satisfy the minimum interests of both husbands and wives, because otherwise the conditions for (hypothetical) agreement could not be achieved. These baseline conditions reduce the risk that the resulting legal rules will impose a disproportionate burden on a particular group or gender.¹⁸⁸ To be sure, the contractual paradigm does not promise distributional equality of the marital surplus, especially since background social conditions may result in a disparity in bargaining positions.¹⁸⁹ The hypothetical bargain framework does reduce, however, the impact of cultural and historical gender-linked traits that could make women less effective bargainers.¹⁹⁰ If women are less assertive and less likely to pursue self-interest single-mindedly (or are more likely than men to identify with the welfare of others), then they may be disadvantaged in negotiating a (real) marital contract. However, these differences will be excluded from negotiation in the *ex ante* hypothetical bargain, and thus will not be reflected in the legal default rules that establish a baseline for subsequent negotiations.¹⁹¹

In designing optimal default rules for property division, alimony, reimbursement of investments in professional education, and child custody and support, the challenge is to translate theoretically ideal terms into workable and cost-effective legal rules. Thus, in each

¹⁸⁸ Parties to a prenuptial agreement often opt out of the default rules because one party is seeking to protect his assets. Thus, the initiating party believes that he will do better under the agreement than he would if the background legal rules were applied. For a description of the execution of premarital agreements that confirms this view, see Julie Salamon, *Popping the Pre-Nup Question*, *New Yorker*, Aug. 25 & Sept. 1, 1997, at 70. The implication is that the default rules offer a more equitable division.

¹⁸⁹ See Wax, *supra* note 49.

¹⁹⁰ See, e.g., Becker, *supra* note 50; Rose, *supra* note 50, at 454-59; Wax, *supra* note 49.

¹⁹¹ Women who are less assertive negotiators than men will be more likely to hold onto the default baseline than to bargain aggressively in environments where legal claims are uncertain.

case, lawmakers are led to consider the use of crude but clear proxies to accommodate difficult measurement and valuation dilemmas.

1. Distribution of Property

The rules relating to property ownership and division are broadly congruent with the predictions of the relational model. Under the community property approach to property distribution, spouses share ownership of all property acquired during the marriage and (generally) divide it equally upon divorce.¹⁹² This system embodies explicitly the common ownership principle that the model predicts most couples would choose *ex ante*. In equitable distribution jurisdictions, ownership is determined by title during marriage, but, upon divorce, all property acquired during the marriage is divided.¹⁹³ The title approach allows parties to choose the form of ownership during the marriage, but invites sequestration and dissipation of assets by the spouse who owns the property rights. This incentive is muted, however, by the equitable distribution rule, which directs a legally enforceable division of property

¹⁹² In some community property states, equal division is required. See Cal. Fam. Code § 2550 (West 1994); La. Rev. Stat. Ann. § 9:2801(4)(b) (West 1997); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993). Other states (Arizona, Texas, and Idaho) apply a presumption of equal division, and in the rest, courts have discretion to order unequal distribution. See Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *Divorce Reform at the Crossroads*, *supra* note 13, at 6.

¹⁹³ Some states either require or presume equal division. See, e.g., W. Va. Code Ann. § 48-2-32 (Michie 1996); *Brown v. Brown*, 914 P.2d 206, 209 (Alaska 1996); *Cherry v. Cherry*, 421 N.E.2d 1293, 1298-99 (Ohio 1981) (holding that although there is no legal presumption, rebuttable or otherwise, of equal division, "a potentially equal division should be the starting point of analysis for the trial court"). In others, courts have discretion to order unequal distribution. See 23 Pa. Cons. Stat. Ann. § 3502(a) (West 1991) (listing factors for equitable property division). Generally, the equal division presumption does not apply to property acquired before marriage and other "separate" property; however, some states still subject this property to some type of division. The Uniform Marriage and Divorce Act includes two alternative provisions for defining the pool of property that can be distributed on divorce. One alternative includes all property of either spouse "however and whenever acquired." Unif. Marriage and Divorce Act § 307 (Alternative A), 9A U.L.A. 238 (1973). The other limits equitable distribution to property acquired during the marriage, and excludes separate property. See Unif. Marriage and Divorce Act § 307 (Alternative B), 9A U.L.A. 239 (1973). See generally Ellman et al., *supra* note 25, at 269-89, 293-97 (discussing the presumption of equal division of property and difficulties involving separate property).

upon divorce.¹⁹⁴ In general, although courts have considerable discretion, the norm upon divorce is a roughly equal division of property acquired during the marriage.¹⁹⁵

Upon divorce, spouses retain ownership of their individual human capital, even though future earning capacity and related assets are acquired during the marriage, often with the support of the other spouse. Although the default rule of individual ownership of human capital after divorce is relatively settled, important questions remain about what kinds of post-divorce claims against a spouse's earning capacity will be recognized.

2. Specialized Family Roles and Spousal Support

a. The Contemporary Legal Regime

The law of alimony raises some of the most difficult challenges for analysis in the relational contract framework. Because alimony appears to have lost its doctrinal and conceptual moorings under the no-fault regime, its structure and rationale have been the subject of considerable debate and uncertainty. Under traditional law, the husband's obligation to pay alimony was a logical extension of the lifelong duty to support his wife. Under a no-fault regime, each spouse has a unilateral right to terminate marriage and the norm of lifelong obligation has been replaced by a principle of individual freedom to renege. Courts continue to award alimony to dependent

¹⁹⁴ Many statutes (of both types) direct courts determining the distribution of marital property on divorce to consider whether one spouse dissipated assets. See Ariz. Rev. Stat. Ann. § 25-318(A) (West 1991); Ohio Rev. Code Ann. §§ 3105.171(A)(1), 3105.171(E)(3) (Anderson 1996); 23 Pa. Cons. Stat. Ann. § 3502(a)(7) (West 1991).

¹⁹⁵ See generally Ellman et al., *supra* note 25, at 269-89 (describing courts' tendencies when dividing property); see also Idaho Code Ann. § 32-712(1) (Michie 1996) (requiring equal division "unless there are compelling reasons" not to); Or. Rev. Stat. Ann. § 107.105(1)(f) (Butterworth 1990) (creating a rebuttable presumption of equal contribution to acquisition); W. Va. Code Ann. § 48-2-32 (Michie 1996) (requiring equal division of marital property, with exceptions). This presumption is affected by the scope of the property subject to distribution on divorce. See Ellman et al., *supra* note 25, at 273-75. Whether courts actually apply the equal division doctrine in dividing property is less clear. For example, New York courts hold that contributions to the marriage are considered to be of equal value. See *O'Brien v. O'Brien*, 489 N.E.2d 712, 716 (N.Y. 1985). At least one study, however, suggests that women are awarded less than half of marital assets. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 Brook. L. Rev. 621, 671 *tbl.16* (1991).

spouses on the grounds of need, but this justification begs the question of *why* the former spouse, rather than, for example, the state, should bear the burden of support.¹⁹⁶

As was true under traditional law, alimony generally is not a vested claim by one spouse against another.¹⁹⁷ Courts retain jurisdiction to modify and terminate alimony orders, and payments are contingent on continued financial need. The most important contingency, of course, is the former homemaker's employability. Alimony also ends upon remarriage of the payee spouse, and upon the death of either spouse. In many jurisdictions, fault is excluded from consideration in awarding alimony, although it continues to play a role in some states.¹⁹⁸

Contemporary law discourages long-term alimony, on the grounds that neither spouse has a lifelong duty to support the other after divorce. Although some modern law reform proposals advocate fully compensating the homemaker for loss of earning capacity¹⁹⁹ or for her continuing interest in her former spouse's human capital,²⁰⁰

¹⁹⁶ Ira Ellman has argued that modern alimony law lacks an underlying theory and does not explain why need should be the basis of support. Further, Ellman points out that need might be understood as subsistence needs, needs as established by the standard of living in the marriage, or as something in between. See Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1, 4-5 (1989).

¹⁹⁷ Sometimes, what may appear to be a vested claim is called "alimony," as when compensation for support of a professional degree is described as "reimbursement alimony." *Mahoney v. Mahoney*, 453 A.2d 527, 535 (N.J. 1982). Such payments, however, do not serve the traditional purposes of alimony, since the payee spouse is financially self-sufficient.

¹⁹⁸ The clear trend is to remove fault as a consideration in alimony. See Ellman, *supra* note 27, at 773, 809, 826 (describing the trend and arguing against retention of fault as a factor in alimony or property distribution). Not all states have fallen in line. Fault can still be a bar to alimony in a few states. See, e.g., Ga. Code Ann. § 19-6-1(b) (1991) (adultery and desertion); S.C. Code Ann. § 20-3-130(A) (Law Cop 1985) (adultery). Even so, some courts award support if the circumstances are dire. See *Hammonds v. Hammonds*, 597 So. 2d 653 (Miss. 1992) (awarding alimony to wife after a long-term marriage, despite her adultery). In other states, fault by either spouse can affect the amount of support, and the division of property. See, e.g., Md. Code Ann., Fam. Law § 11-106(b)(6) (Supp. 1997) (alimony); Mass. Gen. Laws Ann. ch. 208, § 34 (West 1998) (alimony and property); R.I. Gen. Laws § 15-5-16 (1996) (alimony); R.I. Gen. Laws § 15-5-16.1(a) (1996) (property).

¹⁹⁹ See Ellman, *supra* note 196, at 49-50; American Law Inst., *supra* note 26.

²⁰⁰ See Singer, *supra* note 103, at 2455; Sugarman, *supra* note 13, at 160. Another objective that is often discussed, but not pursued, is to maintain the homemaker at the standard of living enjoyed during the marriage. This may be relevant to the alimony award in the sense that a formerly wealthy homemaker will do better than one

courts currently do not pursue either goal. Rather, alimony generally provides support so that the formerly dependent spouse can "re-tool," acquiring the necessary education and training to become self-sufficient.²⁰¹ A relatively small percentage of divorces include alimony awards, suggesting that the ability to obtain even modest employment disqualifies a former homemaker from support.²⁰² Courts order permanent alimony only when a homemaker who has been in a long-term marriage is functionally unemployable because of age, chronic illness, or disability.²⁰³

b. Analysis in a Contractual Framework

In some regards, contemporary alimony doctrine functions as the relational model predicts.²⁰⁴ For example, the trend away from

who is poor. Courts, however, seldom try to replicate the wife's standard of living. See *Neal v. Neal*, 570 P.2d 758, 760 (Ariz. 1977) (finding that a wife with custody of two children who was capable of supporting herself as a cleaning lady was not needy).

²⁰¹ The preference for rehabilitative alimony is embedded in the Uniform Marriage and Divorce Act, adopted by many states. Unif. Marriage and Divorce Act § 308, 9A U.L.A. 347 (1973). The Uniform Act requires a finding that the spouse is unable to support herself with appropriate employment, unless her role as custodian of a child makes seeking employment inappropriate. Some courts will order support that permits the spouse to pursue the career of her choice. See, e.g., *Olah v. Olah*, 354 N.W.2d 359 (Mich. Ct. App. 1984) (awarding wife the amount of money she needed to complete her schooling in computer science); *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984). More typically, courts will order minimal alimony so that the dependent spouse can prepare for any suitable job. See, e.g., *In re Marriage of Goldstein*, 423 N.E.2d 1201 (Ill. App. Ct. 1981) (ordering temporary alimony of \$200 for twelve months while wife searches for a new job).

²⁰² A study in California, based on data from the 1970s, found that 16.5% of divorced women were awarded alimony; before the no-fault law, that number was 18.8%. See Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 169 tbl.13 (1985). A policy awarding minimal alimony clearly contributes to the well documented decline in income for divorced women and their children. See Duncan & Hoffman, *supra* note 13 (reporting data on financial consequences of divorce for women and children); Sugarman, *supra* note 13 (same).

²⁰³ See, e.g., Md. Code Ann., Fam. Law § 11-106(c)(1) (Supp. 1997) (allowing alimony award for an "indefinite period" only if the court finds that "due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting").

²⁰⁴ See *supra* note 202. Many commentators have assumed that if marriage is understood in contractual terms, spousal support must constitute damages, awarded to the homemaker because the breadwinner has defected before rendering full performance. See Brinig & Crafton, *supra* note 6, at 876; Cohen, *supra* note 6, at 275; see also *supra* text accompanying notes 39-41 (discussing fault grounds). Of course,

considering fault recognizes the essential function of alimony as insurance against financial loss upon divorce for the spouse who undertakes substantial marriage-specific investments. The typical treatment of spousal support as a claim that is contingent on "need," to be adjusted according to the availability of other sources of support, is also consistent with the model. An optimal contract-based alimony award insures only that a promised level of support will be maintained, and the claimant should be indifferent as to whether the source of her support is her former husband, a new husband, or her own earnings.²⁰⁵

In significant respects, however, contemporary alimony law does not include the default rules that would be adopted in an explicitly contractual regime. The model suggests that parties who conclude that it is mutually beneficial for one spouse to undertake a role that involves substantial marriage-specific investment,²⁰⁶ would predictably agree to insure her reliance interest, such that she will be at least as well off upon divorce as she would have been had she

nothing in the contractual approach requires a provision for spousal support on divorce to be contingent on breach by either party.

²⁰⁵ Most of the specific contingencies that are recognized under the law can be derived from the relational model. Alimony will terminate upon remarriage and the death of either spouse. See generally Ellman et al., *supra* note 25, at 473-77 (discussing the effects of marriage on alimony). Some states give the alimony recipient an insurable interest in the obligor's life. See, e.g., N.Y. Dom. Rel. Law § 236(B)(8)(a) (McKinney 1986). Alimony also terminates of course when the payee is employed and self-sufficient. The rule that alimony terminates on remarriage may not always result in a substitute source of income that fully replaces alimony. It seems probable, however, that *ex ante* the parties would agree to terminate the obligation on remarriage, particularly given their reluctance to link fault and alimony. Otherwise, the wife could be tempted to leave her husband for another, knowing that her right to alimony would be unaffected by a new marriage.

²⁰⁶ Most law and economic analysis has assumed that traditional role specialization in marriage is efficient. See Gary S. Becker, *A Treatise on the Family* 30-53 (enlarged ed. 1991); Landes, *supra* note 6; Ellman, *supra* note 196, at 46-48. We see no reason to make this assumption. Rather, we assume that some couples may choose role division as a means to maximize joint utility in their marriage contract, and that those who do will wish to provide the homemaker with insurance protection to encourage optimal investments. For a challenge to the claim that traditional role division is efficient, see Singer, *supra* note 103, at 2438-39. Singer argues, in part, that the law and economics assumption ignores the psychic costs of specialization for both men and women; thus "an efficient union would entail both partners having significant ties to the paid labor force and spending significant time with their children." *Id.* at 2439; see also Margaret F. Brinig, Comment on Jana Singer's *Alimony and Efficiency*, 82 Geo. L.J. 2461, 2477 (1994) (questioning that there is any scientific justification for relegating women to the sphere of domestic specialization).

not undertaken the specialized marital role. Contemporary alimony law falls far short of this standard, providing the homemaker with a suboptimal level of protection against marital failure.

The source of the problem is the lack of an underlying theory to explain why one spouse's financial need triggers a support obligation on the part of the other.²⁰⁷ Under the relational model, the obligation does not arise out of continued dependence by the homemaker on the estranged spouse who conveniently can be assigned the social burden of her care. Nor does it arise because the homemaker is accustomed to a particular standard of living in the marriage and would like it to continue. The first rationale reinforces undesirable gender-based dependency stereotypes, and the second seems to reflect outmoded norms of marriage as a relationship involving lifelong obligations. In contrast, the contractual justification for alimony removes support from the category of private charity or outdated convention, and groups it with legally enforceable insurance payments.

i. Rehabilitative Alimony and Self-sufficiency Norms. The rules governing the award of rehabilitative alimony provide a particularly salient example of both the broad consistencies and the conceptual confusion that characterizes contemporary doctrine. The objective of promoting self-sufficiency that drives the trend toward rehabilitative alimony is consistent with the relational model. A vested right to alimony (measured by the homemaker's reliance interest at divorce) would create a moral hazard, tempting the

²⁰⁷ The law's conceptual confusion is revealed in its failure to understand clearly the source of the need that gives rise to the support obligation. See Ellman, *supra* note 196. The failure to understand alimony as inhering in the homemaker's marriage-specific investment is illustrated by the tendency to award alimony based on exogenous disability. To the extent that spousal support substitutes for the disability coverage that the homemaker would have obtained were she employed, the need for support results from her noneconomic investment in marriage. If the claimant spouse was employed at the time the disability arose, however, and the disability was unrelated to any marriage-specific investment, then the contractual framework provides no basis for holding the payor spouse responsible for post-divorce support. See *In re Marriage of Wilson*, 247 Cal. Rptr. 522 (Cal. Ct. App. 1988) (awarding five years of alimony to non-homemaker wife injured in a fall and unable to work after four years of marriage and two years before couple separated). If spousal support is ordered in this situation, the court is simply relieving the state of a burden it would otherwise assume by substituting the former husband as social insurer.

former homemaker not to invest efficiently in developing her own earning capacity. Ex ante, the parties would agree that she should devote appropriate efforts after divorce to developing job skills and seeking employment. Two households necessarily are more costly than one, and a reduction in the standard of living for all family members will be anticipated if only the pre-divorce breadwinner is employed.²⁰⁸

Although the norms of rehabilitative alimony are consistent with contract theory, current law deviates from the model in its understanding of both the basis for and the extent of the obligation of the income-earning spouse. Modern rehabilitative alimony appears designed only to enable the former homemaker to become minimally self-supporting. This typically involves short-term support until she acquires skills for an entry level job, or, at best, until she resumes her career at the point where it was interrupted.²⁰⁹ Awards are not structured to supplement income until the former homemaker reaches the earning level she would have attained had she not under-

²⁰⁸ Courts encourage support recipients to obtain job skills, by requiring the exercise of reasonable diligence, and terminating support if it is not exercised. In California, for example, courts will issue a *Richmond* order, limiting support to a period of time that is estimated to be sufficient for the recipient spouse to become self-supporting, if reasonable diligence is exercised. Thereafter, to seek modification of the order, she must demonstrate that, despite the exercise of reasonable diligence, she was unable to become self-supporting. See *In re Marriage of Richmond*, 164 Cal. Rptr. 381 (Cal. Ct. App. 1980). If the court concludes that her efforts were desultory or her pursuits frivolous, support will be terminated. See *Berland v. Berland*, 264 Cal. Rptr. 210 (Cal. Ct. App. 1989).

²⁰⁹ See *supra* note 197. For example, support may be ordered for a year or two, while the former homemaker updates her certification so that she can resume a teaching career abandoned many years before. See, e.g., *In re Marriage of Miller*, 532 N.W.2d 160 (Iowa Ct. App. 1995) (awarding 45 year old wife \$300 per month for three years, which the court believed would enable her to obtain a position in accounting for which she had earlier received initial training); *Kincaid v. Kincaid*, 912 S.W.2d 140 (Tenn. Ct. App. 1995) (awarding 58 year old wife \$300 per month for three years for adult education and computer literacy classes). Occasionally, courts set the goal of rehabilitative alimony as enabling the homemaker to develop a set of skills necessary for achieving the standard of living commensurate with the marital standard. See, e.g., *Enfinger v. Enfinger*, 566 So. 2d 261 (Fla. Dist. Ct. App. 1990) (remanding for determination of the amount of rehabilitative alimony to enable wife to support herself at the standard of living enjoyed during marriage). Although some courts set a fixed term for alimony, in many jurisdictions the court retains jurisdiction to extend the term. See *In re Marriage of Morrison*, 573 P.2d 41 (Cal. 1978).

taken a specialized marital role. Thus, the level of support often falls far short of the opportunity cost of homemaking.²¹⁰

The emphasis on promoting self-sufficiency in the formerly dependent spouse, together with the "clean break" norms of the no-fault regime have raised questions about whether there is a modern rationale for long-term support of one spouse by another after divorce. Some states create a strong presumption against permanent alimony,²¹¹ while others treat the payor's continuing obligation as an alternative to public assistance for an individual who otherwise would be a burden on society. The relational model visualizes permanent alimony as a claim by an insured party who is permanently foreclosed from the labor market. The homemaker's opportunity cost increases with ongoing marriage-specific investments, and, after many years, her prospects for market employment will decline greatly. At some point, she will be unlikely to recoup her lost opportunity cost without a permanent subsidy from her former spouse.

ii. Optimal Alimony and Marital Stability. Optimal alimony rules should be crafted so that neither party is motivated to initiate divorce for strategic reasons. A default rule that uses a reliance measure as the basis of spousal support serves this purpose well. Since the homemaker's reliance interest is never greater and generally less than her expectancy, the expected payout will not tempt

²¹⁰ This goal would often extend the period of "rehabilitation" far beyond that contemplated under contemporary law. Thus, for example, an optimal award might provide post-divorce support of the former homemaker's legal education as a more efficient investment than recertification to be a school teacher. In any case, under the default rule derived from the model, the income of the former homemaker would continue to be supplemented until her income approximated that which she would have earned had she elected not to pursue the specialized investment.

²¹¹ See Ark. Code Ann. § 9-12-312(b) (Michie 1998) (allowing alimony only "in fixed installments for a specified period of time"); Del. Code Ann. tit. 13, § 1512(d) (1993) (setting maximum duration of any alimony award at "50% of the term of the marriage," with a single exception for marriages lasting longer than 20 years); Ind. Code Ann. § 31-15-7-2 (Michie 1997) (limiting alimony to rehabilitative maintenance of not more than three years' duration, with only two narrowly drawn exceptions for caretakers of young children and incapacitated persons); Md. Code Ann., Fam. Law, § 11-106(c) (Supp. 1997) (allowing permanent alimony only when the recipient cannot be "self-supporting" or the "respective standards of living of the parties will be unconscionably disparate").

the homemaker to leave the marriage.²¹² At the same time, once her expectancy is frustrated—for example, when the value of the marriage declines below her “go it alone” alternative—she will not be deterred from leaving the now-unfulfilling relationship. A greater challenge is to deter the breadwinner from opportunistic defection. Because of the asymmetric character of their investments, the breadwinner may be tempted to leave after receiving substantial benefits from the homemaker’s contributions to the marriage and before his own obligations have fully matured. Without an obligation to pay alimony, his temptation to defect increases as his own income increases and the marginal value of the homemaker’s performance declines. Thus, the optimal alimony obligation also increases in direct proportion to the declining value of the homemaker’s marital contribution. This causes the breadwinner to internalize the homemaker’s past contributions to the relationship.²¹³

Current alimony law distorts these incentives by imposing on the homemaker a disproportionate share of the financial costs of divorce. She is over-deterred from leaving an unfulfilling marriage by the prospect of an undercompensatory alimony award. On the other hand, the breadwinner has a positive financial incentive to initiate divorce having captured the benefits of the homemaker’s

²¹² As a matter of theory, the homemaker’s reliance interest can never be greater than her expectancy. This is a logical implication of the relationship between expectancy and reliance. Since reliance measures the “path not taken,” it can never be greater than expectancy, although in well-developed markets, reliance and expectancy converge. See Scott & Leslie, *supra* note 58, at 89-90 (“To paraphrase Robert Frost, reliance represents the path not taken.”); Goetz & Scott, *supra* note 170, at 1284. If she were awarded her expectancy interest, she would be indifferent (financially) between continued marriage and divorce.

²¹³ As the model demonstrates, two analytically separate factors are at work here. The first is the opportunity cost of the homemaker’s marriage-specific investment. The second is the differential in the value of each party’s accumulated performance at any given point in time. Under the model, the parties would agree to an accounting upon divorce to “net out” the asymmetric investments. The homemaker should be entitled to a credit to the extent that the value of her early investment in the marriage exceeds the deferred investment of the breadwinner. This “investment credit” is a separate obligation from that which is captured by protecting her reliance interest in the homemaking role. The problem, as we discuss below, is developing cost-effective methods of valuing such claims under a contract in which the parties have undertaken a commitment that has a limited minimum duration.

prior investment and knowing that his future earning capacity is subject to an undercompensatory alimony claim.²¹⁴

Optimal alimony default rules can provide both a coherent foundation for alimony law and, to a considerable extent, correct the inequities under current law. They are not a panacea, however. First, the default rule does not ameliorate gender inequalities that inhere in different employment expectations and opportunities for men and women. The nurse who marries a doctor will not benefit on divorce from his future earning capacity; her entitlement is determined by her own earning capacity. Moreover, the measurement problems that arise in determining a given homemaker's reliance interest are likely to be formidable, and may be virtually insoluble if courts are also called upon to render an accounting for relative differences in the value of each party's performance at various points in the marriage.²¹⁵ In this situation, courts may elect instead to adopt crude but clear proxies for the theoretically optimal alimony award. For example, a payment schedule that bases alimony on years of marriage, breadwinner's income, and other concrete criteria could be such a proxy, if the award is measured against the goal of insuring the homemaker's reliance interest.²¹⁶ Such pragmatic default rules are superior to the approach taken under current doctrine because they rest on a solid conceptual foundation. They serve primarily a coordination function, facilitating the efforts of parties

²¹⁴ The inefficiencies created by the current spousal support rule also affect the dynamics of the marital relationship. In a traditional marriage, the homemaker wife, evaluating her reduced future earning capacity and declining prospects for remarriage, is disadvantaged in bargaining during the marriage. She may have a greater interest than her husband in the continuation of the marriage, and may make concessions to prevent his defection. The husband, because of the disparity in their financial prospects on divorce, can extract concessions by strategically threatening defection. Amy Wax has argued that the bargaining inequality between spouses created by their very different prospects upon divorce explains why husbands enjoy more leisure time than wives. See Wax, *supra* note 49, at 584. Although the disparity in remarriage prospects cannot be attributed to the legal regulation of divorce, minimalist spousal support under current law clearly contributes to women's disadvantaged position.

²¹⁵ These problems do not become easier under the proposal of Trebilcock and Keshvani that the measure be somewhere between the value of the homemaker's reliance interest and her expectancy. See Trebilcock & Keshvani, *supra* note 18, at 555-56. The authors appear to be combining the two claims of the homemaker: the value of her lost opportunity, and the differential in the value of the parties' "paid in" performances at the time of the divorce.

²¹⁶ See American Law Inst., *supra* note 26.

to opt out. A well-developed menu of alimony options can then correct for the ill-fitting and imprecise nature of the default rule.

Even if couples can create more precise and tailored alimony rules, the homemaker still can anticipate substantial problems enforcing a money judgment for support. The insurance metaphor should not be understood to provide the homemaker the equivalent of a third-party insurance policy. Self-insurance, with payments to be made by an estranged former spouse, will impose substantial collection costs on the former homemaker. Social norms enforcing continuing obligations between former spouses are far weaker in the no-fault era than the obligation of non-custodial parents to support their children. Further, it is unlikely that enforcement of alimony orders will receive the priority under state law that is given to the enforcement of child support orders.²¹⁷ These factors contribute to the underlying costs of role specialization in marriage, and, in practice, may discourage couples from pursuing this relational option.

3. Joint Investment in Human Capital: The Problem of Professional Degrees

Another difficult issue involves situations in which one spouse provides financial support so that the other can earn a professional degree or license. Often the supporting spouse subordinates his own career to accommodate the educational aspirations of the student spouse. At a minimum, the bulk of the family income is invested in the human capital of the student, with the expectation that both spouses will enjoy her enhanced earning capacity in the future. If divorce follows shortly after the degree or license is secured, this expectation will not be realized. Further, because most of the marital income was invested in the development of the professional asset, there usually will be little other marital property to be divided.

There is an emerging consensus that some compensation for the supporting spouse is appropriate, but courts are uncertain about how to treat the obligation. Most courts seem to understand that the supporting spouse has acquired an equity-like interest in the

²¹⁷ Currently, the elaborate child support enforcement system is employed to enforce spousal support orders only if they are linked to child support orders.

student spouse's professional career. Thus, repayment of the supporting spouse's contribution is never required when the student spouse elects not to pursue her career. But courts are uncertain about how best to value this interest in specific cases. Some courts simply conclude that the efforts of the supporting spouse can be considered in the division of other assets or in a spousal support award, if one is warranted.²¹⁸ Other courts effectively treat the supporting spouse's contribution as a fixed obligation, to be repaid upon divorce as restitution or reimbursement alimony.²¹⁹ A few courts have treated the professional degree or license as a marital asset, giving the supporting spouse a share of its value upon divorce. This approach characterizes the earning spouse's contribution as a straightforward equity investment.²²⁰

²¹⁸ Some courts describe the contribution as an investment in the student spouse's future earning capacity, and then take those earnings into account in calculating ordinary alimony and the division of property. This response is unlikely to be satisfactory in many cases, because there is little property to be divided and the supporting spouse often is not eligible for alimony. See *Stevens v. Stevens*, 492 N.E.2d 131, 134 n.4 (Ohio 1986) (stating that the future value of the degree must be considered in reaching an equitable award of alimony pursuant to the statute which lists "[t]he relative earning abilities of the parties" as one of its factors) (citing Ohio Rev. Code Ann. § 3105.18 (Anderson 1996)); *Downs v. Downs*, 574 A.2d 156 (Vt. 1990) (stating that increased earning capacity can be a factor in calculating maintenance award and in property division); see also *In re Marriage of Graham*, 574 P.2d 75 (Colo. 1978) (reversing a holding that an advanced degree constituted property).

²¹⁹ Thus, courts generally do not characterize the obligation straightforwardly as a debt, although functionally it is treated as such. The supporting spouse gets reimbursement, or repayment of her contribution, although it is never described as a loan transaction. For example, in *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982), the court described the purpose of the award to the supporting spouse as compensation for the lost future earnings of the student spouse, which suggest that it understood the investment to be an equity interest. See *id.* at 533. The award, however, was limited to reimbursement for direct educational and living expenses, which seems more like debt. See also *McConathy v. McConathy*, 632 So. 2d 1200 (La. Ct. App.), writ denied, 637 So. 2d 1052 (La. 1994) (reimbursing the supporting spouse for the actual direct contributions toward educational and living expenses of the student spouse); *Bold v. Bold*, 574 A.2d 552 (Pa. 1990) (providing "equitable reimbursement" to the extent that it reimburses the supporting spouse for her contributions in excess of the bare minimum she was otherwise legally bound to provide).

²²⁰ New York is the only state that consistently applies this approach. See, e.g., *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985) (awarding wife 40% of the present value of the husband's medical degree); *Allocco v. Allocco*, 578 N.Y.S.2d 995 (N.Y. Sup. Ct. 1991) (awarding wife 50% of the projected increased lifetime earnings due to the husband's promotion to police lieutenant, although he claimed that the degrees he earned during marriage were not prerequisites for his promotion); *Elkus v. Elkus*,

The various approaches warrant further description. Courts valuing the interest as a fixed claim upon divorce often recognize the equity character of the supporting spouse's investment, but most award only the equivalent of restitution. The student spouse is required to repay the contribution to her education and (sometimes) living expenses.²²¹ Some courts allow a return on the investment in the form of interest, but many do not.²²² No effort is made by courts adopting the restitution measure to compensate the supporting spouse fully for his disappointed expectation of a share of the professional spouse's higher income. He also generally receives no compensation for opportunity costs incurred in his efforts

572 N.Y.S.2d 901 (N.Y. App. Div. 1991), appeal dismissed, 588 N.E.2d 99 (N.Y. 1992) (awarding husband a share of his opera singer wife's career appreciation). Other courts have occasionally held degrees and licenses to be divisible marital property. Michigan has a split of authority on the issue. Compare *Postema v. Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991) (holding that a law degree is a marital asset subject to the supporting spouse's "equitable claim"), with *Krause v. Krause*, 441 N.W.2d 66 (Mich. Ct. App. 1989) (holding that a dental degree is not a marital asset, and its value is irrelevant to determination of post-divorce support). At least one Kentucky court has held a professional degree, but not a license, to be property. See *Moss v. Moss*, 639 S.W.2d 370 (Ky. Ct. App. 1982). There is considerable variation in judicial response, and the description in the text simplifies the picture somewhat. Sometimes a mixed debt-equity approach is also utilized. See, e.g., *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989) (calculating remedy on the basis of the wife's homemaking and financial contributions to the husband's education plus a share of his future earning capacity attributable to capital contribution during marriage).

²²¹ Courts ordering reimbursement alimony typically allow recovery for direct financial inputs toward the student spouse's educational costs and his share of living expenses. See, e.g., *McConathy*, 623 So. 2d at 1205-07; *Mahoney*, 453 A.2d at 535-36. Sometimes, however, reimbursement for household expenses is expressly excluded, under the reasoning that the supporting spouse is obligated to provide basic support during marriage as a legal incident of the marriage. See *Bold*, 574 A.2d 552. Some states adopt this approach by statute. See Cal. Fam. Code § 2641 (West 1994); Ind. Code Ann. § 31-15-7-6 (Michie 1997). Cases allowing reimbursement for homemaking services during the student spouse's education, especially if the non-student spouse did not contribute financially, are very rare. Compare *Wisner v. Wisner*, 631 P.2d 115 (Ariz. Ct. App. 1981) (declining to compensate the supporting spouse), with *Francis*, 442 N.W.2d 59 (compensating the supporting spouse).

²²² *Mahoney*, the most influential opinion on reimbursement alimony, and many other opinions, do not mention interest payments. Other courts are split. Compare *McConathy*, 623 So. 2d at 1206 (awarding interest), and *In re Marriage of Lundberg*, 318 N.W.2d 918 (Wis. 1982) (same), with *Reiss v. Reiss*, 500 A.2d 24 (N.J. Super. Ct. App. Div. 1985) (awarding no interest), and *Bold*, 574 A.2d 552 (excluding interest). Some states, like California, provide for an award of interest by statute. Cal. Fam. Code § 2641 (West 1994).

to assist his spouse with achieving the education that will lead to higher earning capacity.²²³

In the well-known case of *O'Brien v. O'Brien*,²²⁴ the New York Court of Appeals attempted to value the equity interest of the financing spouse directly. *O'Brien* concerned a couple who divorced shortly after the husband had acquired his medical license. During most of the nine years of the marriage, the husband had pursued his medical training, while his wife supported him by working as a school teacher.²²⁵ The court concluded that the medical license was marital property under the equitable distribution law and, as such, was to be divided upon divorce. The court stated:

Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute [F]ew undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. . . . [T]hese contributions represent investments . . . and . . . the product of the parties' joint efforts . . . should be considered marital property.²²⁶

The court proceeded to divide the value of the husband's medical license between the spouses. The wife was awarded a forty percent share of the present value of the license, which the court determined

²²³ Thus, he will not recover for the disruption of his career, or the dislocation of family, or for his share of her lost income (or the value of the lost contribution to domestic work). In a scenario with which we are very familiar, the spouse who leaves a promising position on the staff of a United States Senator to move to Charlottesville, Virginia, so that her husband can go to law school may only be able to find employment at The Gap. If the couple divorces three years later, she may be repaid for the earned income that she contributed to his educational efforts, but she will not be compensated for the costs to her career. Only infrequently are opportunity costs implicated in the compensation awards to supporting spouses. See, e.g., *Haugan v. Haugan*, 343 N.W.2d 796, 802-03 (Wis. 1984) (holding that maintenance or property award to wife may be calculated on the basis of her financial and non-financial contributions to her husband's education and her forgone career opportunities).

²²⁴ 489 N.E.2d 712 (N.Y. 1985).

²²⁵ A part of the husband's training occurred in Mexico, thus requiring the wife to give up permanent teacher certification in New York to accompany him. *Id.* at 714.

²²⁶ *Id.* at 716.

was his future earning capacity over the course of his career as a physician, less the present value of his income with a B.S. degree.²²⁷

The relational model predicts that a rule awarding the supporting spouse an equity interest in the professional degree is congruent with a marital relationship in which both parties agree to pool efforts and to share risks and returns.²²⁸ However, the parties' understanding of the nature of the investment during the marriage does not necessarily determine the way that the obligation should be valued if the marriage ends in divorce. Upon divorce, the equity interest of the supporting spouse must be liquidated, and difficult valuation questions arise.

The approach used by the court in *O'Brien* demonstrates the problems with a rule that seeks to value the equity interest directly. In addition to selecting an arbitrary percentage share of the medical license, the court erred in overvaluing the career asset at the time of divorce—and thus overvaluing the supporting spouse's interest. The present value of the supporting spouse's interest in the career asset does not include value that results from post-divorce investments by the professional spouse that increase her earning capacity. Thus, by including the present value of the physician's entire future earning stream in the value of the marital asset, the *O'Brien* court included value that was partly attributable to *future* professional experience, skill development, and seniority. Since the supporting spouse's contribution ends at the time of divorce, she is overcompensated if this future asset value is included in marital property. The fact that the New York approach has not been followed by other courts may reflect the intuition that the award is excessive, especially given the availability of commercial

²²⁷ See *id.* The amount awarded by the trial court was \$188,000. The court does not explain how it determined that Ms. O'Brien was entitled to 40%. New York courts have applied *O'Brien* to the assets of celebrities' careers. See *Elkus v. Elkus*, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991), appeal dismissed, 588 N.E.2d 99 (N.Y. 1992) (opera singer); *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988) (actress).

²²⁸ To be sure, unlike the noneconomic investments in the marital relationship, parties could structure their individual contributions to the economic capital of the relationship as either debt or equity. But there are strong reasons to believe that equity participation would be the dominant choice because it is likely to reduce better the conflicts of interest that would otherwise increase the joint costs of financing the educational project.

debt financing as an alternative to the equity investment of the supporting spouse.

The difficulty in determining and valuing the supporting spouse's equity share may explain why most courts award a fixed claim as a proxy for the optimal equity share.²²⁹ However, those courts adopting a restitution alimony approach have also erred in not granting an appropriate rate of return on the supporting spouse's investment. The relational model argues instead for a return on the investment sufficient to reflect the risk assumed by the supporting spouse that the investment may fail.²³⁰

4. Custody and Child Support

Rules regulating the custody and financial support of children after divorce are not pure default rules, because children are not parties to the contract and the state has an important interest in their welfare. Nonetheless, from the *ex ante* perspective of the hypothetical bargain, parents' interests can generally be assumed to be aligned with those of their future children, an assumption that probably cannot be made *ex post* in the context of the divorce itself.²³¹ Thus, although the provisions that parents would make for their children after divorce are subject to state oversight, their hypothetical *ex ante* agreement may serve as a sound basis for devising default rules for custody and child support.

²²⁹ As with any bright line rule, the "restitution" rule has the benefit of clarity and ease of measurement, but since it will either undervalue or overvalue the investment, it produces some significant behavioral inefficiencies. If divorce occurs as the student spouse is launching a successful professional career, the restitution rule will undervalue the investment of the supporting spouse. In this situation, the professional spouse is tempted to defect. She would receive support while she earned the degree, sharing the risk of failure with the equity holder. When the investment begins to pay off in higher income, she could capture most of the gains by leaving the marriage. On the other hand, should the degree prove less valuable than the anticipated award, the temptation to defect shifts to the supporting spouse.

²²⁹ We can find no case where a court has awarded reimbursement to the supporting spouse even though the educational venture was abandoned or otherwise failed to achieve the parties' objectives. As we argue above, see *supra* notes 108-111 and accompanying text, the assumption of this risk by the supporting spouse justifies a higher rate of return than that of a straightforward commercial loan.

²³¹ See Scott & Scott, *supra* note 64, at 2442-43. Robert Mnookin argues that third-party effects (particularly involving children) impose limits on private ordering on divorce. See Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. Mich. J.L. Reform 1015 (1985).

Although the law historically recognized parental investment in child-rearing as the basis of child custody allocation on divorce,²³² that factor has been obscured under the modern decision rule until recently. The tender years presumption awarded custody to mothers in recognition of the traditional maternal role of primary caretaker. As more egalitarian norms began to dominate family law generally,²³³ the preference for mothers was replaced by the gender-neutral best-interest-of-the-child standard, although mothers continue to assume primary responsibility for child care. The modern standard is notoriously indeterminate, allowing the court to base the child's future custody on virtually any factors that are deemed relevant to the child's future welfare.²³⁴

The best interest standard is an unlikely candidate for an optimal custody default rule because it does not explicitly protect parental investment in child-rearing, and uncertainty about custody decisions may discourage optimal investments in parenting during the marriage. Moreover, parents cannot opt out of the best interest standard by setting the terms of custody by agreement (although courts tend to defer to custody agreements made at the time of divorce).²³⁵ The broad standard itself, and the allocation of authority to courts rather than parents, is justified on the ground that the state has an overriding interest in the child's welfare (and thus freedom of contract is constrained by public policy concerns). Nevertheless, as one of us has argued elsewhere, a rule for resolving custody disputes on divorce that protects parental investment in child-rearing serves the state's interest as well as that of the parents. This conclusion is based on empirical evidence about the importance of

²³² Under the tender years presumption, mothers were awarded custody because it was presumed to be in the child's interest to continue in the care of her primary caretaker. See Ellman et al., *supra* note 25, at 804-09.

²³³ The tender years presumption was subject to successful Equal Protection challenges, beginning in the 1970s. See *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986) (holding that the tender years rule violates the Equal Protection Clause and perpetuates outdated stereotypes).

²³⁴ See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, *Law & Contemp. Probs.*, Winter 1975, at 226.

²³⁵ The court retains authority to decide custody inconsistently with the parents' agreement, on the basis of its *parens patriae* authority. Many observers suggest that courts recognize that parental agreement is probably the best basis for the decision. See Mnookin, *supra* note 18; Mnookin & Kornhauser, *supra* note 18; Scott & Scott, *supra* note 64; Scott, *supra* note 114.

stability and continuity of caregiving relationships for children's welfare, and some modest assumptions about the benefit of promoting parental involvement.²³⁶

The debate about reform of child custody law in recent years has focused in part on whether parental investment in child-rearing should receive substantial protection, and, if so, how this protection can best be achieved. Thus, feminist support for the primary caretaker preference is grounded in the belief that the mother's role as principal caretaker is discounted under the best interest standard.²³⁷ Opponents argue that a preference for the primary caretaker undervalues other factors that are important to the child's welfare, that it ignores the involvement of the secondary parent (usually the father),²³⁸ and that it offers no guidance for cases involving parents who have substantially shared child-rearing responsibilities. While the first objection to the primary caretaker preference discounts the importance of parental investment, the others argue instead that the preference itself provides *inadequate* protection for such investment in many cases. Advocates for a rule favoring joint custody argue that such an arrangement is the only means of assuring that two parents who have shared child-rearing responsibilities can

²³⁶ This argument is developed in Scott, *supra* note 114. A key point is that both psychological attachment theory and child development research support the claim that there is no better basis for the decision about the child's future custody than the past participation of parents in child-rearing, because of the critical importance of not disturbing existing parent-child bonds. Moreover, a rule that promises that investment will be protected encourages involvement by both parents. Finally, at least theoretically, a rule based on past participation discourages costly strategic bargaining by parents, because such a rule will divide custody in a way that is most likely to track parental preferences. See *id.* at 643-56.

²³⁷ The West Virginia Supreme Court, in an opinion by Justice Richard Neely, expressed this concern in adopting a presumption favoring the primary caretaker. See *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See discussion in Scott, *supra* note 114, at 633. See also Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 770-71 (1988) (arguing for primary caretaker presumption to protect mothers); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 Wis. L. Rev. 107 (criticizing use of social science by some scholars as favoring fathers and undermining mothers' importance).

²³⁸ See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477 (1984). Chambers ultimately supports a weak primary caretaker preference for young children, but provides much developmental psychology evidence of the importance of the father's role.

continue to do so after divorce.²³⁹ Opponents of joint custody counter that few parents invest equally and, thus, a shared custody rule provides a windfall to the less involved parent.²⁴⁰

The *ex ante* perspective suggests that the joint custody and primary caretaker alternatives represent an advance over the best interest standard in focusing on the factor of parental investment, but that neither is an optimal default rule in a world in which families vary greatly in their child-rearing arrangements during marriage. An approximation rule that allocates future custody on the basis of parental investment is likely to be preferred by most parties *ex ante*, because it maximizes beneficial investments and minimizes the incentives for strategic defection. There is some evidence that law reform is moving toward this approach.²⁴¹ As in the case of attempts to measure human capital investments in other contexts, courts employing an approximation standard can be expected to develop proxies to reduce the inherent problems of measurement and valuation.

C. No-Fault Divorce Law as an Immature Contractual Regime

Although the law regulating divorce conforms in many respects to the relational contract model, contractual principles are not fully realized under the no-fault regime. A mature contractual regime would offer parties entering into a marital contract the opportunity to undertake legally binding commitments. In an ironic contrast to the constraints faced by parties under traditional law, where lifelong commitment was mandatory, contemporary divorce law permits unilateral termination at any time regardless of the commitment

²³⁹ See Scott, *supra* note 114, at 624-27.

²⁴⁰ See Scott & Derdeyn, *supra* note 112, at 462 (stating that the joint custody movement has been traditionally opposed by women who argue that the "theoretically sex-neutral" best interest standard more adequately represents their marital contribution in child-rearing); Fineman, *supra* note 237 (arguing against a joint custody rule as dis-serving the interests of mothers, and challenging divorce mediation, because mediators tend to coerce joint custody agreements).

²⁴¹ The American Law Institute has recently adopted an approximation rule in its Principles of the Law of Family Dissolution. See 1 American Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.09 (Council Draft No. 4, 1997). Under the recommendation, the factor given most important weight in the custody decision if the parents cannot agree is "the proportion of caretaking functions each parent performed for the child prior to the parents' separation." *Id.*

promises that have been exchanged.²⁴² In this Section, we examine the effects on the marriage relationship of legal limitations on parties' freedom to commit, as well as the feedback effects on the already stressed social norms promoting cooperative behavior in marriage.

1. Legal Restrictions on the Freedom to Commit

Conventional wisdom holds that contemporary regulation of marriage is shaped by principles of private ordering. In fact, the options available to couples who are interested in substantial commitment are limited in several ways. First, in most states couples are not free to specify a duration to their marriage that restricts their freedom to exit. Under the unilateral no-fault rule, all marriages are functionally terminable at will. Most courts today are unlikely to enforce a term in a premarital agreement that provides for a waiting period prior to divorce.²⁴³ Moreover, the limits on parties' freedom to undertake contractual commitment extends beyond durational provisions. Parties are generally unable to opt out of no-fault provisions by imposing a monetary penalty enforceable against either party for serious defection or by conditioning divorce on fault.²⁴⁴ Even a contractual provision to undertake marital counseling before leaving the marriage is probably not enforceable in most jurisdictions. Thus, the foundational rules that prescribe

²⁴² See Unif. Marriage and Divorce Act §§ 302, 305, 9A U.L.A. 181, 211 (1973) (divorce on ground of irretrievable breakdown). The unilateral no-fault divorce rule is the majority rule in practice. See Ellman et al., *supra* note 25, at 206-07. Some states limit divorce to a greater extent than the majority rule. New York, for example, only allows no-fault divorce if the parties agree. See N.Y. Dom. Rel. Law § 170 (McKinney 1986).

²⁴³ See Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453 (1998) (describing this trend and advocating that couples be permitted to increase commitment by contract); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. Rev. 879 (1988) (advocating reintroduction of restrictions on divorce by contract).

²⁴⁴ A few courts have upheld such agreements. See Rasmussen & Stake, *supra* note 243, at 462 n.42 (citing cases). It is of course true that, by premarital agreement, parties can impose monetary penalties on *one* party by restricting alimony or property rights if the marriage ends. Such contract terms generally systematically constrain the spouse with fewer assets and income, and probably function to motivate the disadvantaged party to remain in the marriage.

duration, conditions of termination, and penalties for breach collectively define marriage as a relationship without legal commitment.

These restrictions on contractual freedom to commit are puzzling. One explanation is that the no-fault reformers, reacting to the oppressive restraints on individual freedom under the fault regime, presumed erroneously that commitment is antithetical to personal autonomy.²⁴⁵ Put differently, the architects of contemporary divorce law have confused *ex ante* autonomy, which includes the right to restrict one's future freedom, with *ex post* autonomy, the freedom to renege on promises.²⁴⁶ Another rationale for restricting contractual freedom to commit to marriage is that the parties are not "competent" to make rational decisions in the premarital setting, or that even thoughtful decisions may turn out to be mistaken.²⁴⁷ Such mistakes could be costly if the relationship fails, and the marriage provides less value to one or both spouses than the alternative of going it alone. In this situation, a commitment term that makes divorce extremely difficult (a ten year waiting period or a large fine, for example) could bind the parties to a relationship with little social value. Such concerns form the basis of a claim that restrictions on divorce, even when they are voluntarily assumed by the parties, violate public policy and should be prohibited.

As our previous analysis suggests, the concern that some parties will be bound to unhappy marriages may justify a public policy prohibition of extremely inflexible commitment terms, such as a term which forbids divorce altogether.²⁴⁸ Restrictions on more

²⁴⁵ The reforms developed during the 1970s, a period in which the norm of self-actualization was elevated in popular culture and the values associated with commitment were at a low ebb. Carl Schneider traces these developments and looks at their impact on divorce law, although he does not address legal restrictions on commitment. See Schneider, *supra* note 16.

²⁴⁶ See discussion *supra* Part I.

²⁴⁷ This argument is developed in Section II.B.2.a *supra*. One kind of "mistake" may result if one or both spouses change fundamentally over time. Derek Parfit offers a theory of changing personal identity over time. See Parfit, *supra* note 99. According to Parfit, an individual's self evolves over time, relying upon psychological connections, such as memory, character traits, plans, etc., and depending upon the degree of those connections for its own continuity. Thus, as the person develops new traits, makes new plans, learns new things and forgets the old ones, the person's identity may change significantly, such that the later self is not the same as the earlier self.

²⁴⁸ See discussion *supra* Section II.B.2. Anthony Kronman argues that such contracts could be prohibited on grounds akin to the prohibition of self-enslavement. See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *Yale L.J.* 763,

tempered commitments, however, cannot be explained on these grounds. The potential for regret exists in every contract; otherwise, legally enforceable commitment would be unnecessary. As long as the conditions of contract formation are free from impediments that impair rational and voluntary choice, contract theory argues for the freedom to commit notwithstanding the risk that either party may later come to regret the commitment.²⁴⁹ Moreover, concerns about cognitive impairments evaporate should the state elect to define the category of marriage in terms of mandatory commitment periods. As we suggested in Part II, the signaling function of marriage is a strong argument for state-specified commitment parameters within which customized commitment options would be enforceable.²⁵⁰

2. The Effects of Restrictions on Commitment

The legal constraints on the freedom to commit to marriage have substantial effects. To be sure, any legal prohibition on contracting limits the parties' range of choice in deciding how best to maximize their joint utility. These constraints, however, undermine the parties' foundational choice to bind themselves voluntarily through contractual commitment. The relational model argues for granting parties the right to signal their desire to constrain their future freedom by choosing to marry. Thus, the law's hostility toward legally binding marital commitment undermines the ability of parties to find partners with matching preferences and, thereafter, to achieve the basic purposes for the relationship.

The relational model suggests that these restrictions will have significant feedback effects on marital relationships. Parties who seek a stable, lasting marriage can make a long-term commitment and rely on extralegal enforcement mechanisms,²⁵¹ but are limited

775-82 (1983); *supra* text accompanying note 82. Of course, restrictions on divorce do not imply that the parties must continue to live together, but only that they are not free to remarry.

²⁴⁹ Eric Rasmussen and Jeffrey Stake argue that couples should have greater freedom to execute premarital agreements to increase commitment. See Rasmussen & Stake, *supra* note 243.

²⁵⁰ Our analysis in Part II also argues for a default rule that provides for an extended notification period prior to divorce.

²⁵¹ These include the societal norms supporting marriage, as well as the formal wedding, the public exchange of vows, sharing embarrassing personal secrets, and writing articles on marriage as relational contract.

in their ability to use legally enforceable substantive terms to assist them in achieving their goal.²⁵² It is commonly assumed that the societal norms surrounding marriage function less effectively to enforce cooperative behavior in contemporary social life than was true a generation ago. To the extent that this is true, legal enforcement of long-term commitments is a particularly valuable method of bolstering extralegal norms.²⁵³ Our analysis shows that the background threat of legal enforcement can have a stabilizing effect on cooperative interactions in marriage. Retaliatory patterns of noncooperation are less likely to develop, and parties are less motivated to defect from the relationship.²⁵⁴

Restrictions on legally enforceable commitments also have an indirect effect on the enforcement of a marriage contract. The law's hostility toward marital commitment reduces the potency of societal norms promoting fidelity, loyalty, and cooperation in marriage. The option of unilateral exit at will signals that commitment in marriage is not distinguishable from commitment in cohabitation relationships. There is thus a disconnection between the formality and seriousness with which many people undertake the commitment to marriage and the ease with which the bond can be legally severed. In short, the legal account of marriage is of a relationship of limited investment. The impact of these messages on the social norms surrounding marriage may have contributed to the instability of marriage as reflected in the current divorce rate.

There is some evidence that the law is moving in the direction of permitting couples to legally commit to marriage. Some courts have enforced the premarital agreements of couples who have decided that legal enforcement of behavioral promises (regarding fidelity and sobriety, for example) was an important condition of

²⁵² As we have argued, the adoption of optimal default rules regarding alimony, child custody, etc., will serve this function to some extent.

²⁵³ An extended notice period creates a barrier to divorce that promotes considered decisionmaking. Further, some couples may view the risk that either party will engage in particular offensive conduct as a threat to the marriage and wish to deter the behavior with an enforceable sanction. Consider, for example, the party with a history of excessive drinking which is troubling to the other, or one who has been unfaithful in previous relationships.

²⁵⁴ Legally enforceable commitments do not, of course, constrain physical abuse and other harmful behaviors. Independent criminal and civil sanctions are required to ameliorate and deter wrongful or abusive behaviors.

their marital commitment.²⁵⁵ Further, and most significant, the Louisiana Covenant Marriage Act²⁵⁶ invites parties to choose between alternative commitment options. The statute does not impose a requirement that fault be established before divorce is granted, as do the recently rejected Michigan bill and other proposals for reform of no-fault divorce law.²⁵⁷ Under the Louisiana statute, couples are presented with two options for the termination of their relationship which involve different levels of commitment. One is the standard no-fault rule, while the other allows divorce only on fault grounds or after a two-year separation. Couples are free to choose the commitment option which best corresponds with their mutual goals for the relationship.²⁵⁸

The statute is a first step toward a more mature contractual model of marriage.²⁵⁹ It is revolutionary among the reform proposals directed at no-fault divorce law in that the parties can opt for a legally binding commitment. To be sure, the commitment option provided by the statute may not be optimal if, as the model predicts, many couples would choose the termination term, but not the

²⁵⁵ See *Stadther v. Stadther*, 526 So. 2d 598 (Ala. Civ. App. 1988) (upholding premarital agreement providing for payments on divorce if husband engages in heavy drinking or causes bodily injury leading to divorce); *MacFarlane v. Rich*, 567 A.2d 585 (N.H. 1989) (upholding a premarital agreement clause conditioned on the husband's fidelity).

²⁵⁶ 1997 La. Acts 1380 (amending La. Civ. Code Ann. art. 102-103 (West Supp. 1998) and La. Rev. Stat. Ann. §§ 9:234, 9:245(A)(1), 9:224(C), 9:225(A)(3), 9:272-275, 9:307-309 (West Supp. 1998)); see *supra* note 1.

²⁵⁷ The Michigan bill is much more typical of the proposals for reform. See H.R. 4432, 88th Leg., Reg. Sess. (Mich. 1995) (reintroduced in 1996 session). It does not fit comfortably in a contractual framework, however, since couples entering marriage do not have the freedom to opt out of the fault term.

²⁵⁸ See La. Rev. Stat. Ann. 9:273 (West 1998). The Louisiana statute has other interesting features. A period of counseling (presumably to promote considered decisionmaking) is required before a couple can choose the covenant marriage option. See La. Rev. Stat. Ann. 9:273(A)(2)(a) (West 1998). Thus, the statute seeks to reduce regret, mitigating one cost of legally binding commitments. The availability of two commitment options also serves an information-forcing function, as both parties must consider for themselves and disclose to each other the level of commitment they desire in marriage.

²⁵⁹ The Louisiana statute has generated enormous interest in the media, and several legislatures are considering covenant marriage bills. See H.R. 1049, 110th Gen. Assembly, 1st Reg. Sess. (Ind. 1997); S. 1377, 1997-98 Reg. Sess. (Cal. 1998); see also Amitai Etzioni & Peter Rubin, *Opportuning Virtue: Lessons of the Louisiana Covenant Marriage Law: A Communitarian Report* (1997); William A. Galston, *Making Divorce Harder is Better*, Wash. Post, Aug. 10, 1997, at C3.

fault grounds. Nonetheless, the progression to a broader menu of options could allow couples greater capacity to customize their marriage contract to their particular needs.

CONCLUSION

The relational contract analysis goes far toward resolving a troublesome puzzle about modern divorce law: Why are marriages so peculiarly prone to fail? The structure of the law governing marriage and divorce conforms in large part to the regulation of relational contracts in other settings both in the reliance on nonlegal enforcement mechanisms and in the function of legal default rules governing the terms for separation and divorce. It is clear, however, that the combination of extralegal and legal enforcement mechanisms functions less effectively to promote cooperative equilibrium in marriage than it does in other relational contexts.

The analysis suggests that several factors undermine the effectiveness of the various mechanisms that reinforce commitment to marriage. First, the societal norms promoting cooperative behavior in marriage have weakened in the past generation, in part because of the signaling effects of no-fault divorce. Spousal defection and marital failure are far less stigmatic today than they once were. This effect is magnified, of course, if dissatisfied spouses observe others leaving their marriages with ease. Thus, one clear implication of the analysis is that an important impediment to successful enforcement of the marriage contract is exogenous to the relationship itself, inhering in the social and cultural environment.

This raises interesting questions about the role of the state in reinforcing or diluting social norms that promote marital cooperation. If the state extends privileges and benefits to married couples that are not offered to individuals or cohabiting couples, the value of marriage increases as compared to alternatives, and getting and staying married becomes more attractive.²⁶⁰ Arguably, the state has

²⁶⁰ Eric Posner has argued that the state can promote solidarity in groups and discourage defection by transferring resources to the group rather than to the category of individuals who make up the group. See Posner, *supra* note 61. Posner argues that the stability of a group inheres in the cooperation-defection differential, which is the difference between the benefits of continued group membership and the benefits of defection. If the differential is large, members are less tempted to leave either by an increased burden on membership (which lowers its value) or a temptation which

an independent interest in promoting marital cooperation. Stable families fulfill many functions that the state would otherwise be required to provide at greater cost (such as the care of sick and elderly members). Most importantly, children benefit if their parents' marriage endures.²⁶¹ Traditional law gave marriage a highly privileged status, and opting out was extremely costly.²⁶² While marriage continues to carry some legal privileges,²⁶³ the trend is clearly toward less differentiation between married couples and cohabiting couples or single persons. The relational model, by focusing attention on the significance of extralegal enforcement, suggests that the withdrawing of legal privileges from marriage, and the general stance of neutrality toward intimate relationships, may have indirect costs to marital stability. One question that emerges from the analysis is whether a modern policy of privileging marriage could subtly strengthen the social norms supporting marriage, without imposing undue costs on other families.²⁶⁴

increases the benefit of defection (which raises the value of the alternative). Our model incorporates this insight in the structure of optimal default rules that seek to discourage strategic defection when the value of marriage declines for one party. Posner's argument focuses on the influence that the state can have on family stability by extending benefits to families rather than to its members as individuals. He points to zoning ordinances that reserve attractive residential neighborhoods to families, legitimacy and inheritance rules, public schools, and other group-based rules that favor families and increase the cooperation-defection differential. See *id.* at 186-88.

²⁶¹ This statement is true categorically in terms of children's economic welfare. Children's psychological welfare is promoted by divorce only in the relatively small category of cases in which interparental conflict is intense. See Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* 237 (1997).

²⁶² Under traditional law, rules about legitimacy of children, inheritance rights, and the nonrecognition of cohabitation relationships signaled that the legal status of marriage carried benefits not otherwise available.

²⁶³ Examples include social security survivor benefits for spouses, intestate succession laws giving spouses priority, family health insurance benefits, residential zoning ordinances defining "family" to include married, but not cohabiting couples, and beneficial tax treatment for traditional married couples filing jointly. Other marital privileges include preferences for married couples in adoption, guardianship and medical consent rules, presumptions about paternity of children born to a married woman and the like. For a comprehensive discussion of privileges associated with marriage, see David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *Mich. L. Rev.* 447 (1996) (arguing that the right to marry be extended to gays).

²⁶⁴ For a description of policies that privilege marriage, see Posner, *supra* note 61, at 186-87. Tax policy would seem to be a promising tool for privileging marriage, one that is not used with full effectiveness currently, since a tax penalty is imposed on some couples when they marry. There are, however, troublesome costs associated

The dilution of social norms has a particularly costly impact because couples are not free to substitute legal mechanisms to reinforce their commitment. The law's preference for ex post autonomy over ex ante autonomy has particularly acute costs in an environment in which extralegal mechanisms function suboptimally. This tendency is captured most forcefully in the mandatory unilateral termination rule. Finally, this rule, and the default rules for alimony and for compensation for educational support, fail to respond to the ubiquitous problem of asymmetric investment. By providing inadequate protection for the spouse whose investment has marriage-specific value, or who invests heavily in the marriage early in the relationship, the law discourages what may be optimal investment for some couples, and tempts the spouse who benefits from the early investment to defect.

A contractual framework both clarifies the structure of the marriage relationship and illuminates key deficiencies in the current regulatory regime. It also provides a guide for designing legal default rules that would better reinforce marital stability. A mature contractual regime does not correct structural social inequality. It does offer the couple who desires a long-term committed relationship a means to pursue their self-defined goals.

with privileging marriage, as Posner recognizes, and caution is warranted. Policies that privilege marriage may impose unacceptable costs on families that do not receive the benefits of the privileged status. This is particularly a concern when the costs fall on children. Thus, for example, some have advocated public assistance allocations favoring poor families in which parents are married. See Amy L. Wax, *The Two Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 *Mich. J. Race & L.* 491 (1996). This approach may, indeed, encourage the formation of such families, but at a cost to single parent families that may be unacceptable. Policies that impose costs on children of unmarried parents are worrisome, in part because children have no voice in their parents' marriage decisions.