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### Social Norms and the Legal Regulation of Marriage

Elizabeth S. Scott

*Columbia Law School*, [escott@law.columbia.edu](mailto:escott@law.columbia.edu)

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# SOCIAL NORMS AND THE LEGAL REGULATION OF MARRIAGE

*Elizabeth S. Scott\**

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\* University Professor and Robert C. Taylor Research Professor, University of Virginia School of Law. I would like to thank Bill Stuntz, Richard McAdams, and Brian Bix, who read and commented on an earlier draft of this Essay. Thanks also to participants in the Olin conference that was the basis of this symposium issue, and to participants in workshops at the University of Pennsylvania, Quinnipiac, and William and Mary Law Schools. Thanks are also due to Amy Potter and Shannon Rogers, who provided outstanding research assistance. Most importantly, I thank Robert Scott, whose unflagging interest and enthusiasm for this project (together with his careful reading and comments) were enormously helpful. Remaining deficiencies and errors, of course, are mine.

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#### INTRODUCTION

AMERICANS have interesting and somewhat puzzling attitudes about the state's role in defining and enforcing family obligations. Most people view lasting marriage as an important part of their life plans and take the commitment of marriage very seriously. Yet any legal initiative designed to reinforce that commitment generates controversy and is viewed with suspicion in many quarters. For example, covenant marriage statutes,<sup>1</sup> which offer couples entering marriage the option of undertaking a modest marital commitment, are seen by many observers as coercive and regressive measures rather than ameliorating reforms.

The law tends to reflect—and perhaps contributes to—this wariness about legal commitment in marriage. No-fault divorce law

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<sup>1</sup> See Ariz. Rev. Stat. Ann. §§ 25-901–25-906 (West 2000); La. Rev. Stat. Ann. §§ 9:224(C), 9:225(A)(3), 9:234, 9:245(A)(1), 9:272–275, 9:307–309 (West 2000). The Louisiana law allows couples contemplating marriage to choose between marriage regulated under conventional divorce law and covenant marriage, which allows divorce on fault grounds or after two years' separation. Since the existing statute included some fault grounds, the primary differences are the required premarital counseling and the default two-year separation ground for divorce.

signals that marriage is a transitory commitment, one that is easily set aside. Moreover, there is continuing reluctance to permit spouses to use private agreements to reinforce their marital commitment. Few courts, for example, would enforce a premarital agreement incorporating covenant marriage terms.<sup>2</sup>

In the business context, in contrast, legal enforcement of reciprocal promises is routine and uncontroversial. It is well understood that the availability of legal enforcement expands the freedom of contracting parties by offering them the option of a binding commitment. Contract promotes cooperation by reinforcing informal social norms of reciprocity and discouraging opportunistic behavior. Thus, it protects (and encourages) investment in the relationship to the mutual benefit of the contracting parties.<sup>3</sup> But even though the metaphor of marriage as a contract is well established, many people shy away from applying these lessons to marriage.<sup>4</sup> At the same time, a divorce rate of fifty percent suggests that informal norms are often not successful in sustaining cooperation in marriage. As Russell Hardin put it, “[I]f contracts become as shaky as marriage, then our society will be in danger of collapse.”<sup>5</sup> Contracts are not as unstable as marriage, in part because the parties understand that the commitment will be legally enforced. Why then is legal commitment associated with choice in contract, but with coercion in marriage?

A simple explanation of the puzzle is that regulation of family relationships is the domain of social norms and not of formal legal enforcement. Thus, the argument goes, the law does not (and perhaps should not) regulate behavior in intimate relationships. This response has some truth, but ultimately it is unsatisfactory. Legal

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<sup>2</sup> See Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. Rev. 879, 901–04 (1988); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453, 454–55, 462–63 (1998).

<sup>3</sup> 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, 267 (1985); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005, 2024–30, 2040–42 (1987) [hereinafter Scott, *Conflict and Cooperation*].

<sup>4</sup> See Sir Henry Sumner Maine, *Ancient Law* 180, 190–92 (10th ed. 1930); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 1227–28 (1998).

<sup>5</sup> Russell Hardin, *Trustworthiness*, 107 Ethics 26, 35 (1996).

regulation of family obligations is both accepted and effective in some contexts. For example, although parental responsibilities in intact families are generally regulated by informal social norms, the law prescribes minimal parental duties and intervenes readily when parents deviate from accepted norms.<sup>6</sup> Further, legal reforms designed to reinforce desirable social norms of parental obligation, such as the recent child support enforcement legislation, have been at least somewhat effective and relatively uncontroversial.<sup>7</sup> So it would seem that sometimes the law functions usefully as a “norm manage[r],”<sup>8</sup> reinforcing norms of family obligation, and that at other times norm management efforts meet resistance and are ineffective (as many people predict will be the fate of the covenant marriage laws).

Marriage is thus a particularly fertile environment in which to explore the influence of law on norms, a subject attracting much interest in the legal literature. Legal scholars have tended to analyze the state’s role in shaping norms in terms of isolated rules directed at discrete social problems such as littering or smoking in public places. In the domain of marriage, however, law and social norms have been intricately interwoven to form a complex scheme of social regulation. Traditional law reinforced and prescribed both gender norms and commitment norms in marriage. Gender norms prescribed hierarchical and differentiated roles for husbands and wives, while commitment norms defined marriage as a cooperative relationship of lifelong obligation. The law also privileged marriage and stigmatized other intimate relationships. This duality reinforced the elevated social status of marriage. At the same time, the legal responsibilities of marriage, the barriers to exit, and the substantive fault grounds for divorce made marriage a serious business. Thus, the willingness to make the legal commitment was a powerful signal of good intentions to the other party and to the

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<sup>6</sup> The law preempts parental authority in some areas, requiring compulsory school attendance and restricting child labor. When parents deviate from minimum standards of care, state agents intervene under child abuse laws. See *infra* notes 23–27, 63–67 and accompanying text.

<sup>7</sup> Beginning in the mid-1980s, a complex network of federal and state legislation has contributed to more effective child support enforcement. See *infra* notes 124–130 and accompanying text.

<sup>8</sup> Cass R. Sunstein, *Social Norms and Social Roles*, 96 *Colum. L. Rev.* 903, 907 (1996).

community.<sup>9</sup> Although the relative impact of law and norms in shaping expectations about marital behavior cannot be quantified, it is uncontroversial that the institution of normative marriage is defined in important ways by its legal framework.<sup>10</sup>

This legal framework has undergone major adjustments in recent years. First, the law has embraced egalitarian gender norms, categorically withdrawing support from hierarchical, differentiated marital roles. Beyond this, a substantial portion of the legal framework of marriage has been dismantled through reforms that can fairly be described as *deregulation* of marital commitment norms. Deregulation deserves more attention than it has received from norms scholars because it illuminates the ways that legal reforms affecting social norms can have unanticipated (and sometimes undesirable) consequences. Thus, for example, no-fault divorce law—conceived as a modest modernizing reform—effectively abolished concrete rules of marital commitment, leaving the standard of behavior to be interpreted by spouses themselves. This legal move, together with the trend toward deprivileging marriage, may have inadvertently undermined beneficial norms that contributed to marital stability.

It is clear that traditional family law reinforced commitment norms and that they have become much weaker in the no-fault era—in part as an unintended consequence of legal reform. It is less clear, however, whether any legal corrective would be effective or beneficial. Although the commitment norms and gender norms that regulate the marriage relationship are analytically distinct, they became interwoven (perhaps inextricably) and embedded in traditional spousal roles. Thus, efforts to reintroduce legal enforcement of spousal commitment—such as covenant marriage—are presumed by opponents to be associated with regressive social policies and gender stereotypes. In contrast, legal enforcement of commitment norms that define parental obligation has not trig-

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<sup>9</sup> Several scholars have applied signaling theory to the analysis of marriage. See William Bishop, 'Is He Married?': Marriage As Information, 34 U. Toronto L.J. 245 (1984); Eric A. Posner, Family Law and Social Norms, in *The Fall and Rise of Freedom of Contract* 256, 259–62 (F.H. Buckley ed., 1999); Michael J. Trebilcock, Marriage as a Signal, in *The Fall and Rise of Freedom of Contract*, supra, at 245.

<sup>10</sup> See Steven L. Nock, Marriage in Men's Lives 23 (1998). Nock describes domestic relations law as an embodiment of collective ideals about marriage. See id. He uses law as one basis for defining the institution of normative marriage. See id. at 41.

gered associations with the inequity and coercion of traditional marital roles, a difference that may facilitate the positive response to the legal regulation of parenting.

The "bundling" of gender and commitment norms in marriage points to a more general obstacle to the state functioning as a norm manager in the family context. Marriage has become a battleground in the culture wars, pitting cultural and religious conservatives against political liberals and feminists. This polarization tends to silence the expression of intrinsic preferences by individuals who seek to avoid informal sanctions.<sup>11</sup> In an environment in which public discourse tends to mask private preferences, predicting responses to legal policy initiatives becomes highly problematic. I will suggest that the response to covenant marriage (and to other family law reforms) may reflect this dynamic. Thus, while it is possible to tell a plausible story about the law's past influence on the social norms surrounding marriage, predictions about the impact of future legal reforms are far more uncertain.

This Essay proceeds as follows. In Part I, I will develop a taxonomy of marital norms and of the mechanics of norm enforcement that clarifies the complex scheme of normative regulation. In Part II, I will suggest the means by which law can affect marital norms, using the traditional legal framework as a case study. Part III will trace the modern social history of marriage through the evolution of marital norms and the dramatic changes in the legal regulation of the marital relationship. Using this analytic framework, in Part IV, I will argue that norm bundling explains the puzzling variations in the effects of the legal reform movement on contemporary marital norms. I will conclude that the complexity of the interaction of law and norms in marriage, together with the problem of disguised preferences, frustrates efforts to use explanatory theories of how law influences norms to predict the consequences of future changes in the legal regulation of marriage.

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<sup>11</sup> For an enlightening analysis of how preference disguise makes the prediction of social change difficult, see Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* 247, 256 (1995).

## I. THE NORMATIVE STRUCTURE OF TRADITIONAL MARRIAGE

Marriage is a status in which a couple, usually through a formal ceremony, agrees to be subject to a complex set of behavioral expectations defining the roles of spouse and parent, expectations that will restrict their freedom and guide their behavior in the relationship. Although other roles in life involve a similar formal change in status accompanied by voluntary agreement to be bound by a set of norms, few are as broad in scope or as commonly experienced as marriage.<sup>12</sup> As in other norm contexts, the social norms surrounding marriage create in the individual spouse a sense of obligation to behave as expected, stimulated in part by the recognition that violations result in sanctions in the form of both self-imposed guilt and of disapproval by the spouse and other members of the community.<sup>13</sup> The way in which these norms function is both interdependent and complex. To appreciate this complexity and its consequences, I will develop in this Part a taxonomy of the norms that gave traditional marriage its social meaning and of the mechanisms by which marital norms are enforced.

### *A. A Taxonomy of Marital Norms*

The set of norms that the spouses adopt and by which they agree to be bound in traditional marriage includes both commitment

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<sup>12</sup> Entering military service or becoming president are similarly all-encompassing roles that are formally assumed.

<sup>13</sup> The definition of "social norm" has not been free from controversy. Some of the debate focuses on whether conventions or behavioral regularities constitute norms. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1656–57 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 350–51 (1997). Richard McAdams's definition is simple, but satisfactory, for my purposes. "[N]orms . . . refer[] to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both." *Id.* at 340. Creation of a sense of obligation to behave as expected is the key attribute, in my view, together with the expectation of informal community enforcement. Norms also are often, but not always, self-enforced through guilt. I do not include conventions in my definition of norms. Thus, the conventions and traditions surrounding marriage—the wedding ceremony and reception; announcements; and wedding and engagement rings, for example—are not norms, because noncompliance carries no sanction. These conventions and traditions are important symbolically and have a signaling function—but, in my view, they are not norms. See *infra* notes 33–36 and accompanying text.



norms and gender norms, which together regulate both the spousal and the parental roles.<sup>14</sup> Spousal commitment norms prescribe the general obligations of spouses to one another, while a somewhat different set of commitment norms define parental obligations. Commitment norms deter selfish behavior and encourage the alignment of individual interest with that of the spouse or child. Gender norms regulate the roles of women as wives and mothers and of men as husbands and fathers. There is substantial overlap in the obligations created by commitment and gender norms, which have historically been intricately intertwined. I argue, however, that the two types of norms are quite different in both function and utility. Commitment norms assist the couple in achieving their mutual goal of a lasting, cooperative, intimate relationship, and motivate both spouses to act in their children's interest. The utility of gender norms is tenuous; they have tended to reinforce women's dependency, and to structure marriage as a relationship that serves the interests of husbands, but subordinates that of wives. Commitment norms are essential to successful marriage, as it is conventionally understood, while gender norms for the most part are, or should be, severable and expendable.

## *1. Commitment Norms*

### *a. Spousal Commitment Norms*

Spousal commitment norms restrict individual freedom for the purpose of discouraging selfish behavior and encouraging each spouse to identify her own interest with that of the other. At the outset, I assume that commitment norms regulate the behavior of husbands and wives evenhandedly—that is, each spouse voluntarily agrees (by getting married) to be bound by the same behavioral restrictions, and each will be subject to similar sanctions for violation. I also assume that, although the couple customizes the social norms regulating marriage to some extent, the commitment framework creates a template of standards and rules that generally guides marital behavior. This is not to say that commitment norms function as an onerous burden, coercively imposed on the married

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<sup>14</sup> Note that this taxonomy categorizes norms in traditional marriage, and thus is the historic baseline against which norm change is examined. As will become clear, although I use the present tense, it is not meant to describe contemporary marriage.

couple by an intrusive community. To the contrary, these mechanisms are assumed voluntarily and function to promote cooperation in marriage; they assist the couple to achieve their ambitious goal of a mutually satisfying, lasting, intimate relationship. Indeed, a hypothetical couple, presented with the task of devising a set of behavioral expectations designed to optimize the prospect of successful marriage, would likely replicate the existing collection of commitment norms.

The couple entering marriage faces a significant challenge, despite their emotional bond and firm resolution that their relationship will endure. Each believes that the marriage will serve individual long-term interest and that the prospect of a happy life together promises substantial payoffs. Both understand, however, that investing substantial financial and emotional resources in a single, exclusive, long-term relationship is a risky venture. They know that each will be tempted many times to behave in ways that undermine the stability of the marriage, and they believe that selfish behavior, although it sometimes promotes individual short-term interest, threatens their mutual and individual long-term interest—and their marriage.

If this is a plausible account of the dilemma facing the couple contemplating marriage, then commitment norms represent a response that allows the couple to make credible commitments to one another, reducing the risk of opportunistic behavior and defection. These norms function as both precommitment and commitment.<sup>15</sup> They reinforce the intentions of each spouse to behave cooperatively; they also provide security for the marital investment through the assurance that the other spouse is similarly bound. Some commitment norms are marital expressions of standards of behavior much like those that promote cooperation in long-term commercial or social relationships—norms of reciprocity, solidarity, loyalty, honesty, and trustworthiness.<sup>16</sup> The marital obligation is more extensive

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<sup>15</sup> Precommitments are self-command strategies, which allow individuals to act according to their self-defined long-term interests. See Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 *Am. Econ. Rev. (Papers & Proc.)* 1 (1984); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 *Va. L. Rev.* 9, 40 (1990). Commitments are enforceable promises to other persons.

<sup>16</sup> Several scholars have examined the operation of these norms in long-term commercial relationships. See Lisa Bernstein, *Opting Out of the Legal System:*

than that of business partners or friends, of course, reflecting the broader scope and intimacy of the relationship. For example, loyalty is expected of business partners, but loyalty in marriage requires giving the highest priority to the relationship, with the expectation that it will last for life. Other marital norms encourage sexual fidelity, openness, emotional sharing, and altruism. These norms are less important or are irrelevant in the commercial context; they create behavioral expectations that distinguish the intimate and personal nature of marriage and promote its stability. Commitment norms express, as general standards of behavior, what each spouse can expect of the other, as well as guidelines for self-management. Often, these broad norms also are particularized in concrete behavioral rules.<sup>17</sup>

Commitment norms serve a bonding function, in that each spouse, by agreeing to adhere to the behavioral expectations embodied in the norms, becomes vulnerable to heavy costs should he or she later defect.<sup>18</sup> For example, marriage is subject to norms of open communication and truth telling. These norms promote trust and interdependence that reinforce the emotional bond, but which can be expected to exacerbate the disruption of divorce. The sharing of intimate personal information serves another bonding function, with each spouse holding the other's secrets hostage and both anticipating that disclosure (in a divorce proceeding, for ex-

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Extralegal Contractual Relations in the Diamond Industry, 21 *J. Legal Stud.* 115 (1992); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963); Scott, *Conflict and Cooperation*, supra note 3, at 2040-42.

<sup>17</sup> For example, concrete social norms encourage spouses to avoid extramarital sex; to share financial resources, household tasks, time, and private thoughts; to keep family secrets, to support each other in sickness and adversity; to remember anniversaries and birthdays; and to forgive and forget hurt feelings and arguments.

<sup>18</sup> Bonding arrangements are self-limiting constraints that align the interests of each spouse with the other by increasing the costs of defection. Monitoring mechanisms, on the other hand, facilitate detection and sanctioning by each spouse of norm violations by the other. 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) (describing the use of bonding and monitoring arrangements to reduce agency costs by managers). The precommitment function is important but under-emphasized. Many persons entering marriage aspire to be good spouses (because they love the other spouse, want a happy marriage, because it is consistent with their self image, etc.), but realize that they will be tempted to stray from their self-defined goals. See Scott, supra note 15, at 42-44. Norms assist them to stay the course.

ample) would be costly.<sup>19</sup> Communication and honesty also facilitate mutual monitoring by encouraging disclosure and information sharing between spouses. If silence and non-disclosure are assumed to be unusual behavior, they may be expected to trigger spousal scrutiny.

Similarly, by promising to “forsake all others,” each spouse agrees to be bound by the norm of sexual fidelity. The mandate to treat marriage as a sexually exclusive relationship prohibits the spousal behavior that is assumed to represent the greatest threat to maintaining a cooperative equilibrium in marriage. The broad behavioral standard prescribing marital fidelity has been stable over time, but its boundaries have been defined through concrete rules that have varied in different time periods and social contexts.<sup>20</sup> Not surprisingly, social disapproval of marital infidelity has traditionally been strong and widespread.<sup>21</sup> Thus, the spouse who is tempted to pursue an illicit encounter anticipates that she will incur significant costs should the adulterous violation be detected.<sup>22</sup> Moreover, because of the widely shared consensus that adultery is bad behavior, the potential defector can expect both spousal and community monitoring, which increases the prospect of detection.

Assessment of the social welfare effects of spousal commitment norms requires some simplifying assumptions. Conformity with these norms will sometimes be inconsistent with short-term interest—hence, the temptation to act selfishly. However, if enhancing

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<sup>19</sup> See Scott & Scott, *supra* note 4, at 1290–91. Disclosures of unflattering information shared by spouses during marriage are a distasteful part of divorce proceedings, as they seem to be motivated by spite. *Ex ante*, however, the risk of disclosure makes the communication of the secret an act of trust, and serves as a credible precommitment. Sharing secrets can function as self-enforcing contract terms, where the penalty is triggered by the breach.

<sup>20</sup> See Nock, *supra* note 10, at 22. The boundaries of the norm have been quite variable. For example, for wives, different rules regulate flirting, the meaning of socializing with other men, appropriate attire, etc., depending on whether the context is a Hasidic community, Manhattan in the 1990s, or the Midwest in the 1890s.

<sup>21</sup> See *id.* Surveys have shown Americans view extramarital sex as “more reprehensible” than most other types of sex. *Id.* Indeed, 77% of Americans view extramarital sex as “always wrong.” *Id.* It is true, of course, that sanctions have varied in different historical periods and social groups.

<sup>22</sup> These costs include feelings of guilt from internalization of the norm, together with the sanction imposed by the spouse and the likely disapproval of friends and family. Moreover, the efforts to escape detection induce psychological costs associated with furtive, sneaky behavior.

the security and stability of the relationship is consistent with individual and joint long-term interests, then commitment norms can be said to enhance social welfare. This condition may often hold. If, however, individual long-term interest is not furthered by the normative constraints, the case for the efficiency of these commitment norms becomes weaker.

*b. Norms of Parental Obligation*

Traditionally, marriage was the only socially acceptable venue for producing and raising children, and, even today, the prospect of having a child will often lead cohabiting couples to marry.<sup>23</sup> The parental role is assumed to be an important part of marriage, and married couples are expected to have children (unless they marry later in life).<sup>24</sup> Parental commitment norms include the shared obligations of parents to rear the children of the marriage to healthy productive adulthood. Parents are obligated to feed, clothe, shelter, discipline, socialize, educate, support, and love their children and to protect them from harm.

Primary responsibility for many parenting tasks traditionally was allocated on a gendered basis, with residual responsibility in the other parent. Norms of parental obligation, like spousal commitment norms, are expressed in broad behavioral standards that are particularized through behavioral rules that may change over time. Changes may reflect new information about child development, which makes the older rule seem inefficient or harmful. For example, parents of an earlier generation were unlikely to involve themselves with their children's athletic activities or homework, while modern parents feel guilty for missing a soccer game, believ-

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<sup>23</sup> See *infra* note 76. Out-of-wedlock parenthood was a serious social offense until relatively recently, creating stigma for both the parent and the child. Illegitimate children also suffered from serious legal disabilities, having no inheritance rights and no entitlement to paternal support. See Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 *Colum. L. Rev.* 67-70 (1995). Both the stigma of unmarried parenthood and its responsibilities fell heavily on mothers. Traditionally, unmarried fathers were absolved of legal duties toward their children.

<sup>24</sup> Nock suggests that one of the defining traits of normative marriage is the assumption that the couple will have children. See Nock, *supra* note 10, at 6. This assumption is usually realized. According to Nock, only 11% of ever-married women age 44 are childless. See *id.* at 32.

ing that such involvement provides psychological benefits to the child.<sup>25</sup>

Like spousal commitment norms, norms of parental obligation function to deter selfish behavior, encouraging parents to identify their own interests with those of their children. These norms serve an important function, because the relationship is one in which the parents have power and authority over children who, because of their immaturity, are unable to assert their own interests.<sup>26</sup> In this context, as in the spousal relationship, social norms reinforce bonds of emotional attachment to reduce conflicts of interest and encourage long-term investment in the relationship. These norms are usually deeply internalized, and failure to adequately perform generates substantial feelings of guilt. Evidence of poor parenting (as when children are unsupervised, badly behaved, dirty, or undernourished) also generates criticism and social sanctions by neighbors and other community members. Monitoring parental behavior is difficult, however, because children usually are not able to monitor or sanction violations themselves, and deference to family privacy impedes community monitoring.<sup>27</sup> Thus, successful norm enforcement in this context depends heavily on bonding, and particularly on the internalization by parents of their commitment to child rearing.

In general, parental commitment norms serve the beneficial social function of promoting adequate care for children. They also further an important individual and collective goal that is shared by

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<sup>25</sup> They also may be subject to gossip by other parents if they regularly fail to attend (or admired for faithful attendance). Similarly, faithful performance of the obligation to provide for the healthy physical development for children now requires regular visits to the pediatrician and dentist for preventative examinations.

<sup>26</sup> See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995). The relationship between parents and children presents a problem familiar in the regulation of agents in the commercial context. In other contexts involving analogous power imbalance between principals and agents (such as trust beneficiary and trustee or shareholders and directors), norms of fiduciary obligation encourage the agent to identify her interest with that of the principal.

<sup>27</sup> Monitoring does play a role as the parent anticipates that spouses and neighbors may detect violations either by observing parental behavior directly, or indirectly by observing the children. Child abuse reporting statutes encourage neighbors, teachers, and others to monitor parents' behavior and report gross deficiencies. See, e.g., Ala. Code § 26-14-3 (Supp. 1999); Ariz. Rev. Stat. Ann. § 13-3620 (West Supp. 1999); Cal. Penal Code § 11172 (West 1999).

spouses in many marriages—the successful rearing of children. By deterring parents from selfish behavior and encouraging faithful performance, these norms promote parents' utility and enhance social welfare.

## 2. Gender Norms

Gender norms created sharply differentiated spousal and parental roles in traditional marriage. Women have been held primarily responsible for child care and homemaking tasks, while men were (and are) expected to provide primary financial support for their families.<sup>28</sup> Gendered spousal roles were hierarchical. The husband was the head of the household, with primary authority over its resources, location, and general governance decisions. An array of marital norms encouraged the husband to exercise authority in the family (“wearing the pants,” as it were) and the wife to submit cheerfully and to provide domestic services to her husband so that he could successfully fulfill his breadwinner role. Gendered parental norms are more complicated. Mothers raising their children performed an important and respected social function, which gave them authority in the family. This role also contributed to inequality in marriage, however, because it reinforced women's financial dependency on their husbands.<sup>29</sup> The “good” wife and mother devoted her efforts to serving her family's needs, subordinating her own interests and preferences, while the “good” husband equated his family's interests with the fulfillment of his individual wage earner goals. Further, as I will argue below, the wife's dependency and husband's autonomy functioned to bind them differentially to the marriage, indirectly skewing the application of spousal com-

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<sup>28</sup> I describe gender norms as part of traditional marriage and thus use the past tense. These norms, of course, continue to shape roles in contemporary marriage. See Nock, *supra* note 10, at 58–59; Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 Va. L. Rev. 509 (1998).

<sup>29</sup> Ultimately, mothers' responsibility for child care has been the principle obstacle to equality with men in the workforce (and thus economic and political equality). Joan Williams argues persuasively that radical reform of the model of the “ideal worker” is necessary for real change. Currently, the role of ideal worker presumes minimal family responsibilities, making the role one that many mothers cannot fulfill. See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000).

mitment norms, and resulting in greater restrictions on the freedom of wives than of husbands.

Are gender norms efficient? Like other marital norms, gender norms regulate behavior to encourage spouses to fulfill the obligations of their marital roles faithfully. From one perspective, role division promises efficiency as each spouse invests human capital in developing the skills associated with a narrow range of functions.<sup>30</sup> The efficiency of divided roles is undermined if the stability of the marriage becomes uncertain, however, because much of the wife's investment is not transferable to productive roles outside the marriage: Efficiency aside, the fairness of gender norms and roles is questionable. Unlike commitment norms, gender norms either inherently or implicitly tend to subordinate the interests of wives to those of husbands and subject spouses to unequal treatment. Spousal and parental commitment norms can be understood as mechanisms that predictably might evolve by spousal agreement because they serve the mutual objectives of the parties. In contrast, it is difficult to understand why parties in a Rawlsian original position, ignorant of their future assigned gender roles, would agree to gender norms (especially spousal gender norms) in marriage.<sup>31</sup>

Gender norms were closely interwoven with commitment norms in defining the traditional roles of husband and wife. This "bundling" of norms is most obvious in the context of parental obligation, where most responsibility fell on mothers; fathers' duties, aside from financial support, were residual. Spousal commitment norms were not formally gendered, but in a variety of ways, they functioned to constrain the behavior of wives more than husbands. Sometimes the threatened sanction was disproportionately harsher for wives than

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<sup>30</sup> Gary Becker and other economists have argued for the efficiency of gendered role division in marriage. See Gary S. Becker, *A Treatise on the Family* 14-37 (1981); Elisabeth M. Landes, *Economics of Alimony*, 7 *J. Legal Stud.* 35, 40 (1978); see also Ira Mark Ellman, *The Theory of Alimony*, 77 *Cal. L. Rev.* 1, 40-48 (1989) (noting both the economic rationality of such specialization, as well as its inherent dangers for women).

<sup>31</sup> Gender norms do not seem to reflect the efficiency and welfare-enhancing quality that norms scholars predict will characterize informal social control mechanisms that solve community collective action problems. Rather, they may represent another category identified by sociologists and anthropologists—norms that emerge to serve the interests of powerful groups in society. See Jean Ensminger & Jack Knight, *Changing Social Norms: Common Property, Bridewealth, and Clan Exogamy*, 38 *Current Anthropology* 1, 4-5, 11-14 (1997).



husbands. For example, violation of the norm of sexual fidelity carried far higher social costs for women than for men.<sup>32</sup> More subtly, the gendered structure of marriage differentially encouraged conformity to commitment expectations. Because the wife's gendered marital tasks created human capital that was marriage-specific, marital stability was more tangibly critical to her welfare. The stakes were higher for her because the costs of marital dissolution were higher. Finally, the behavioral objectives of commitment norms—to discourage selfish behavior and encourage each spouse to identify his or her self-interest with that of the other—are fully compatible with wives' gendered obligations, but in tension with the autonomy-enhancing roles of husbands.<sup>33</sup> Thus, behavioral expectations for husbands and wives may differ in subtle ways, and wives may submit to these norms more faithfully, a response that may exacerbate inequality.

### *B. The Enforcement Structure of Marital Norms*

The complexity of the normative framework regulating marriage is mirrored in the equally complex enforcement structure. The elaborate ceremony and distinctive customs surrounding marriage set the stage for enforcement of marital obligations. These traditions serve several functions. First, the ceremonial change of status memorializes the couple's explicit (and implicit) agreement to be subject to marital norms, and thus reinforces both the bonding and monitoring functions of the normative structure. Further, the couple's exchange of promises directly to one another and before their

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<sup>32</sup> At common law, adultery was an offense only if the woman was married. Adultery by a married woman interfered with her husband's property interest in her, including his interest in her sexual services. See Melissa Ash Haggard, Note, *Adultery: A Comparison of Military Law and State Law and the Controversy this Causes Under our Constitution and Criminal Justice System*, 37 *Brandeis L.J.* 469, 470-71 (1998); see also Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 *Hastings L.J.* 195, 201-21 (1986) (chronicling the historical development of adultery laws and demonstrating how they favored men).

<sup>33</sup> The symbolic importance of the traditional custom of wives assuming husbands' surnames and of the wearing of engagement and wedding rings by wives, but not husbands, captures the "contamination" of commitment norms by gender norms. The modern tradition of exchange of wedding rings suggests evolution toward marriage as an egalitarian relationship binding both parties. See Margaret F. Brinig, *Rings and Promises*, 6 *J.L. Econ. & Org.* 203, 212-13 (1990) (addressing the symbolic importance of the engagement ring).

community underscores the multilayered structure of enforcement. The parties understand that marital norms will be enforced on four levels: through individual precommitment to abide by the obligations, through both spousal and community sanctions, and ultimately (if informal mechanisms fail) through legal enforcement. The role of spousal enforcement underscores the complexity of marital norms and of the enforcement structure. In a real sense, the married couple constitutes a distinct norm community, functioning within the larger community.

### *1. The Customs and Traditions of Marriage*

By exchanging wedding rings and ceremonial promises, the couple bind themselves to one another in a way that signals both the seriousness of their intentions to undertake the many obligations of marriage and their nonavailability for other intimate relations.<sup>34</sup> Through the solemn public expression of enduring commitment, each spouse signals that he or she is what Eric Posner has called a “good type,” a reliable person who can be counted on for the long haul.<sup>35</sup> This public announcement expresses a mutual willingness to be held accountable for faithful performance and to be subject to sanctions should they later defect.

Wedding traditions underscore the idea that spousal accountability extends to the community as well as to the partner. Engagement bands, engagement and wedding announcements, and the participation of family and friends in the wedding ceremony all suggest the importance of community witness to the mutual expression of commitment. Weddings are important celebrations in which the couple symbolically invites the community to monitor their future

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<sup>34</sup> The wedding ring serves both bonding and monitoring functions. It functions as a precommitment (and thus as a bonding arrangement) because it is likely to reduce the incidence of future temptation (and thus defection), by signaling to outsiders that the spouse is unavailable for an intimate relationship. It also promotes monitoring, by inviting third parties to evaluate the spouses' behavior against the expectations of married persons. These functions underscore the importance of the traditional convention of wives, but not husbands, wearing wedding rings.

<sup>35</sup> See Posner, *supra* note 9, at 260. As Posner and others have pointed out, marriage serves a signaling function, which allows individuals with low discount rates (and thus serious intentions for a long-term relationship) to identify one another. It thus facilitates efficient matching. See Bishop, *supra* note 9, at 250; Posner, *supra* note 9, at 260–262; Trebilcock, *supra* note 9, at 250.

marital behavior.<sup>36</sup> The ceremonial rite of passage underscores the fact that both the spouse and the community now have expectations of, and an enforceable stake in, future marital behavior.

## 2. *Self-Enforcement*

The vows undertaken by each spouse in the marriage ceremony are the basis for self-enforcement of marital norms. Long before marriage, however, most individuals are familiar with the traditions and ceremony, and are socialized to understand the importance of the behavioral expectations for the role of husband or wife. Thus, for many people, the social meaning of marriage and the associated behavioral expectations have become internalized by the time they consider marriage themselves.<sup>37</sup> The ceremony itself may reinforce that internalization process, so that the individual enters marriage resolved to fulfill the obligations of the spousal role—a resolution that is intensified and supported by a strong emotional bond to the spouse. Thereafter, engaging in behavior that is harmful to the other's interests is likely to result in feelings of guilt, a sanction that operates even if the misbehavior goes undetected by others.

Self-enforcement thus plays a particularly important role in marriage. Given the broad scope of the relationship and the complexity of marital obligations, it is difficult for others (including the spouse) to detect norm violations. The privacy and intimacy of the relationship limits monitoring by outsiders, and excessive monitoring between the spouses threatens to undermine the relationship.<sup>38</sup> Thus, self-enforcement of marital norms through guilt is essential to maintaining a cooperative equilibrium.

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<sup>36</sup> All norm enforcement by third parties involves monitoring and the imposition of sanctions for violations. To describe community enforcement of marital norms as employing monitoring arrangements as that term is understood in agency theory is particularly apt, because of the voluntary contractual nature of the change of status that subjects the couple to the norms. See Jensen & Meckling, *supra* note 18, at 308.

<sup>37</sup> Although girls may be socialized to understand the expectations in marriage to a greater extent than boys, the ceremonial bachelor party shortly before the wedding suggests that the meaning of the impending change of status is salient for men as well as for women.

<sup>38</sup> The norm of trust complements norms that restrict marital behavior so as to inspire trust. It seems fair to say that excessive monitoring of a spouse's behavior signals trouble in the marriage.

### 3. *Relational Norms—Enforcement Within Marriage*

Marriage itself—the relationship between the spouses—is a distinct norm community, a fact that complicates the system of norm definition and enforcement in this context.<sup>39</sup> The married couple lives intimately together in an exclusive relationship, interacting frequently over a long period of time. Thus, their relationship with each other is different both in quality and in scope from their relationship with the larger community.

Each married couple develops a complex set of expectations and patterns of behavior that evolve over time. Through these “relational norms,” the couple pursues the goal of a stable cooperative relationship by devising behavioral rules that reflect their individual values and preferences (and each party’s relative power in the relationship). Thus, a couple may have specific expectations about the performance of household duties, behavior in social settings, reconciliation after arguments, how leisure time is spent, and many other matters. Some relational norms are enforced only by the spouses themselves.<sup>40</sup> Indeed, outsiders may not be aware of many of the rules and understandings that are important in promoting cooperation in a marriage. Thus, for example, a couple may have a private understanding that the more outgoing spouse should not abandon the timid spouse at big social gatherings. Other relational norms, such as the norm of sexual fidelity, create expectations about appropriate marital behavior that are broadly applicable and are enforced by the community as well as by the spouses. Both variations are derived from the commitment and gender norms described earlier.<sup>41</sup>

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<sup>39</sup> A similar complexity may exist in the employment context, where a given workplace may constitute a norm community, within the larger community governed by general workplace norms. See Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. Pa. L. Rev. 1913, 1920–22 (1996). As in marriage, workplace norms may be customized in particular workplaces. See *infra* note 55.

<sup>40</sup> This underscores the fact the marriage itself is a norm community (with only the spouses as members) within the larger community.

<sup>41</sup> In earlier work, Robert Scott and I treated the first type of relational norms as a category distinct from broader social norms, which we called societal norms. See Scott & Scott, *supra* note 4, at 1256–57 & n.79. I am now inclined to think that these norms are simply customized rules derived from the broader social norms regulating marriage, and that what is distinctive about them is that they are only enforced by the spouses and not by the broader community. For example, the community expects

The enforcement of relational norms by spouses is a complex, dynamic process of continuous interaction. I have previously analyzed marriage as a two-person strategic interaction game of indefinite duration.<sup>42</sup> Game theory predicts that the couple may be able to maintain a stable equilibrium by using a tit-for-tat strategy, one in which each spouse returns cooperation with cooperation, punishes norm violations when they occur, and then returns to cooperation in subsequent interactions.<sup>43</sup> However, the emotional bond of marriage and the intensity of interaction distinguish it from other relationships in ways that may increase the variance between cooperation and defection. On the one hand, for each spouse, the other's esteem is uniquely important, and the withholding of esteem through anger or withdrawal is a particularly effective sanction.<sup>44</sup> Moreover, the foundation of affection and

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loyalty between spouses. What loyalty requires in a given marriage (for example, "Don't leave me at the party") may vary among married couples. Couples may also customize to a certain extent marital norms that are enforced by the community. For example, the general norm of sexual fidelity is enforced by third parties. In a given marriage, the couple's understanding may be that flirting with others is permitted behavior or that it constitutes a serious violation. With powerful norms such as sexual fidelity, the variations are likely to hover around a mean. A good example of the general conservatism is the response to "open marriage," a model of marriage advocated enthusiastically in the 1970s, in which the norm of sexual fidelity was greatly relaxed. See Nena O'Neill & George O'Neill, *Open Marriage: A New Life Style for Couples* (1972). The skeptical reaction to and the short-lived interest in this book, as well as the divorce of the authors, suggest that important marital norms cannot be dramatically customized.

Couples sometimes devise customized rules for marriage that are contrary to societal expectations under commitment or gender norms. Thus, a couple may agree that the wife will be the wage earner and the husband the homemaker. Within the norm community of a particular marriage, this role allocation may be deemed optimal, despite disapproval of the broader community. Deviations from dominant norms occur in many norm contexts, when small groups (utopian communities and delinquent gangs, for example) adopt norms that are inconsistent with those of the broader society.

<sup>42</sup> See Scott, *supra* note 15.

<sup>43</sup> See Robert Axelrod, *The Evolution of Cooperation* 30-33 (1984) (describing patterns of cooperation in an iterated game); Scott, *Conflict and Cooperation*, *supra* note 3, at 2009-30 (developing a game-theoretic model to distribute risk in long-term contractual relationships).

<sup>44</sup> I am persuaded by Richard McAdams's argument that people comply with norms in part because they care about the esteem of others. See McAdams, *supra* note 13, at 355-57. This approach is not incompatible with Eric Posner's signaling analysis. See Posner, *supra* note 9, at 259-62. A husband may give his wife an expensive gift out of straightforward devotion or to signal that he is a good husband. Assuming the latter motivation dominates, desire to retain or enhance esteem may be an incentive.

commitment inclines both spouses toward cooperation initially, and facilitates a return to cooperation after a norm violation has been punished. On the other hand, the intensity of the emotional bond can make even trivial violations particularly hurtful (think of the forgotten birthday), sometimes leading to excessive retaliation that can trigger a destabilizing spiral of mutual recriminations. In this context, the background norm of enduring loyalty and the expectation of a lifelong relationship play a particularly important role, facilitating escape from a pattern of destructive interactions and a return to a cooperative equilibrium.

#### *4. Community Enforcement*

Although the effectiveness of norm enforcement rests heavily on the extent of internalization by the spouses and the couple's ability to maintain a cooperative equilibrium through mutual enforcement, it depends also on whether the couple anticipates reputational harm or other social sanctions for defection.<sup>45</sup> Because marital privacy is

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<sup>45</sup> Community norm sanctions can include gossip, criticism, social ostracism, and financial penalties, such as a refusal to do business with a norm violator. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 207-13 (1991). Violation of marital norms can damage professional advancement, although less today than in an earlier era. Consider the derailing of the appointment of Army General Joseph Ralston to the position of Joint Chief of Staff when it was revealed that he engaged in extramarital affairs. See *Joint Chiefs Nomination Less Certain*, USA Today, June 6, 1997, at 1A. General Ralston removed himself from consideration for the position, but was later appointed Supreme Allied Commander of the NATO forces despite protests from many. See Richard J. Newman, *The New NATO Chief*, U.S. News & World Rep., May 15, 2000, at 12. Mike DuBose, the head football coach for Alabama, suffered from negative publicity and the possibility of losing his coaching job after it was revealed that he had an extramarital affair and lied about it. The Alabama Board of Trustees later decided to reduce his salary by \$360,000 as punishment. See Brian P. Dunleavy, *Game Misconducts*, The Village Voice, Dec. 28, 1999, at 190.

Violation of marital norms can be punished severely in the political arena. Consider, for example, Nelson Rockefeller, who was humiliated at the Republican Convention in 1964 because he was divorced. He was harassed during his campaign because of his divorce and subsequent remarriage to a woman who gave up custody of her four children from a previous marriage. See, e.g., Linda Chavez, *The Bad Choices Made in the 1970s*, The Indianapolis Star, Feb. 29, 2000, at A8. Remember also Hillary Rodham Clinton, whose suggestion in her husband's 1992 campaign that her role was not to stay home and bake cookies generated intense criticism. See, e.g., Steve Rubenstein, *Having Cookies, Tea Can be a Hard Lot*, S.F. Chron., March 27, 1992, at D24.

highly valued in our society, the community enforcement role is somewhat limited. Nonetheless, marital commitment and gender norms traditionally were the subject of broad societal consensus, and couples could expect community monitoring of their performance and censure for violations.

Even when such a consensus exists, however, the effectiveness of community regulation will vary depending on how strongly marital norms are endorsed in the couple's immediate social context. A couple's community could include extended family, neighbors, social group, or religious community, and several communities may overlap in enforcing marital norms.<sup>46</sup> In a small, highly integrated community that strongly endorses marital norms, the societal consensus will be amplified, and community norm enforcement predictably will be highly effective.<sup>47</sup> Small communities are effective norm enforcers for several reasons. Monitoring is facilitated because community members all know one another and interact on an ongoing basis. This is important in several ways. Community members themselves are motivated to enforce norms to gain reputational benefits as supporters of approved norms.<sup>48</sup> Indeed, norms theorists have argued that community members respond to secondary enforcement norms, under which the failure to show disapproval of norm violators may itself lead to sanctions.<sup>49</sup> Moreover, sanctions are particularly effective because in a small community, the potential norm violator is likely to value highly the esteem of community members.<sup>50</sup> In contrast, if the couple's com-

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<sup>46</sup> One key factor in norm enforcement is the couple's degree of integration in the community. Another might be the extent to which the various communities are consistent in their values that implicate marital norms.

<sup>47</sup> See Ellickson, *supra* note 45, at 177-82.

<sup>48</sup> Norm scholars have suggested that a secondary norm develops to encourage norm enforcement, because community members do not want to be sanctioned as tolerant of defectors from important norms. McAdams argues that norm enforcement works because all that is required is the withholding of esteem from the violator, an act that is relatively costless. See McAdams, *supra* note 13, at 357, 372-75; see also Cooter, *supra* note 13, at 1645-46 (arguing that the enforcement of custom in advanced economies is essential to true efficiency).

<sup>49</sup> See McAdams, *supra* note 13, at 372-73 (explaining why community members enforce norms).

<sup>50</sup> Richard McAdams makes this point in explaining why individuals—for example, gang members—conform to the norms of a social subgroup that are inconsistent with the norms endorsed by society. Gang members care more about their reputation within the gang than about societal approval. See *id.* at 386-90.

munity only weakly endorses marital norms, if their various communities express different attitudes (sending inconsistent signals),<sup>51</sup> or if the couple's social affiliations are tenuous, then social expectations will play a much weaker role in enforcing marital obligations.<sup>52</sup> Each spouse's intentions to perform faithfully may be undermined if they observe others in their social world violating marital norms without cost. The couple comes to expect of each other and of themselves what their social community seems to expect of married couples.<sup>53</sup>

## II. THE INFLUENCE OF LEGAL REGULATION ON NORMATIVE MARRIAGE

### *A. Legal Influence on Family Norms*

Specifying the impact of the legal regime on the norms surrounding marriage is a speculative undertaking, complicated by the fact that family relationships are generally understood to be outside the domain of direct legal regulation. Direct legal coercion is not commonly employed to enforce family obligations in intact marriages, even on matters that are subject to legal regulation.<sup>54</sup> For the most part, legal enforcement occurs only when family relations break down, either due to divorce or to major defections from acceptable behavior (like assault or abuse). At first glance, therefore, it would seem that in regulating family relationships, law and social norms operate largely in two separate and distinct spheres.<sup>55</sup>

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<sup>51</sup> For example, the couple's family may strongly endorse marital norms, while their social group is indifferent.

<sup>52</sup> Even in an era when marital norms generally were strongly enforced, the level of enforcement varied in different contexts (as it does today). Thus, community enforcement predictably would play a more modest role in the behavior of city dwellers, Hollywood celebrities, and people who move frequently, or have no family and few friends. It might be a more powerful force in a small town or a conservative religious community.

<sup>53</sup> See Hardin, *supra* note 5, at 36-37.

<sup>54</sup> Thus, absent dire circumstances, the husband's traditional legal duty to support his wife was not enforced during marriage. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (refusing to sanction a husband for failure to provide his wife with basic amenities, despite having the financial means to do so).

<sup>55</sup> This is the pattern that Lisa Bernstein observes (and argues for) among diamond merchants and others, where parties typically agree not to subject disputes to



In reality, the law functions in two ways to influence the social norms surrounding marriage. First, the legal enforcement of family obligations constitutes the outer layer of the enforcement structure described above. The law sanctions serious norm violations when informal enforcement is inadequate, and through feedback mechanisms, deters defection and strengthens norms. Second, the law plays a role in defining marital norms and in influencing their evolution. Claims about the extent to which the law has influenced norms in this setting, or even the direction of the influence, must be tentative. Nonetheless, it seems clear that a dialectical pattern characterizes the interaction between social norms and the law and that they regulate marital behavior in tandem.

### *1. The Role of Law in the Enforcement of Norms*

The role of law in enforcing family obligation is generally invoked when family relationships have broken down. It is well understood that legal enforcement is particularly important upon termination of long-term relationships, when the parties' interests are no longer aligned, and the effectiveness of informal mechanisms for enforcing obligations declines or disappears.<sup>56</sup> The availability of legal enforcement also has an *ex ante* effect, which is the key to its role in reinforcing norms. It operates as a feedback mechanism, discouraging defection and encouraging behavior according to normative prescriptions. For example, the parent who is inclined to violate a norm of parental obligation by inflicting severe physical punishment on her child (and for whom the temptation would override concern about informal enforcement by spouse and neighbors) may be deterred by the anticipation of legal intervention or the loss of custody of the child. In this sense, legal

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litigation. See Bernstein, *supra* note 16, at 115. In their analysis of the employment relationship, Edward Rock and Michael Wachter argue that parties should be allowed to choose between law (contractual obligation) and norms, and that courts should not enforce the norm against discharge without cause. See Rock & Wachter, *supra* note 39, at 1938-52.

<sup>56</sup> See Scott, *Conflict and Cooperation*, *supra* note 3, at 2034-44; Scott & Scott, *supra* note 4, at 1295-300. In general, this is why the state enforces many marital obligations on divorce (such as spousal and child support) that are enforced through informal means during marriage.

enforcement represents a final (and powerful) layer of enforcement in a multilayered system.<sup>57</sup>

Changes in the level of legal sanctions can strengthen a weak norm, and even influence norm change. Imposing stronger or different legal sanctions reinforces informal enforcement mechanisms and may clarify an emerging norm consensus where behavioral expectations may have previously been uncertain. A good example of the dynamics of this process is the recent trend toward criminal prosecution in domestic violence cases. Acts of domestic violence have been the subject of increasing social censure, as advocacy groups, acting as “norm entrepreneurs,” have publicized information about the harms to women.<sup>58</sup> But community enforcement alone has not been particularly effective, owing to the power imbalance between offender and victim and the secrecy of the behavior. Although domestic assaults were legally prohibited, enforcement was historically lax. As the social norm became stronger, political pressure for more effective legal enforcement increased. Research evidence suggests that, although the effectiveness of legal reforms that promote criminal arrest and prosecution of domestic abusers has been mixed, the response has been positive among potential offenders with community ties—a group for whom anticipated reputational harms may carry substantial weight.<sup>59</sup>

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<sup>57</sup> Other examples are legal enforcement of the child support obligation and of spousal commitment norms, as I will discuss in Part IV.

<sup>58</sup> Lawsuits against police departments, protests, and other publicity by advocates lead to changes in how police deal with domestic violence, and general changes in attitudes about husbands' rights to physically assault their wives. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp 1521 (D. Conn. 1984) (refusing to dismiss Thurman's suit against the Torrington Police department for failing to protect her from her abusive husband); Ira Mark Ellman et al., *Family Law: Cases, Text, Problems* 163, 170–71 (3d ed. 1998). These advocates were norm entrepreneurs, leaders who aimed to influence and shape norms by criticizing existing norms and behavior. See McAdams, *supra* note 13, at 394–95; Sunstein, *supra* note 8, at 909–10, 929.

<sup>59</sup> See Jeffrey Fagan et al., *The Specific Deterrent Effects of Arrest on Aggression Against Intimates*, *Criminology* (forthcoming 2000); Lawrence W. Sherman, *Policing Domestic Violence: Experiments & Dilemmas* (1992). Studies of initiatives by communities to respond to domestic violence incidents with criminal arrest indicate that men who have ties to the community (through employment, long residence, etc.) are deterred by community enforcement. This is not surprising, since these men are likely to value community esteem and to anticipate high reputational costs from further incidents. Further, the anticipated loss of employment is likely to serve as an effective deterrent.

Sometimes legal sanctions function not only to strengthen social norms but also to stimulate informal enforcement. Consider, for example, a policy enacted by the Virginia Child Support Enforcement Agency. The agency recently began disabling the vehicles of parents who are delinquent in their child support payments by installing well-marked pink and blue boots. The boots serve as a conventional legal enforcement tool—the vehicle cannot be reclaimed until the payments are made. They also presumably serve to shame the defector among friends, neighbors and colleagues, thus encouraging informal community enforcement. This policy will predictably promote compliance, not only because the obligor parent anticipates the loss of his car, but also because he wants to avoid community disapproval.<sup>60</sup>

## 2. *The Role of Law in Defining and Influencing Norms*

Beyond its enforcement role, legal regulation can play a role in shaping normative behavior in marriage in at least three ways.<sup>61</sup> First, legal rules can clarify and announce the specific behavioral expectations embodied in social norms. The state can also influence norm change through deregulation, by withdrawing legal rules that define family obligation and thereby weakening the norms that are reinforced by those rules. Finally, the state, through the law's expressive function, subtly shapes the definition of marital roles and norms even while leaving enforcement to the existing normative structure.

Legal regulation functions to particularize the broader behavioral standards embodied in social norms.<sup>62</sup> Bright-line legal rules clarify precisely what behavior is required of spouses and parents

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<sup>60</sup> See generally *Boot It!*, Richmond Times-Dispatch, Jan. 7, 2000, at A12 (discussing Virginia's plan to enforce child support by "booting" the cars of parents who have not paid child support); Ledyard King, *Deadbeat Parents' Cars Get the Boot From State: Officials Count On The "Shame Factor,"* Virginian-Pilot, Jan. 3, 2000, at A1 (same).

<sup>61</sup> It is apparent that no clear line distinguishes the state's role in reinforcing marital norms through legal enforcement and its role in influencing the direction of norm change. As the example of domestic violence prosecution suggests, legal enforcement may facilitate the emergence of a norm that otherwise might evolve differently.

<sup>62</sup> This insight was first noted by Richard McAdams. See McAdams, *supra* note 13, at 402.

under the relevant norm.<sup>63</sup> For example, parents are subject to an abstract commitment norm encouraging them to educate their children and prepare them to be productive citizens. In the early twentieth century, compulsory school attendance statutes defined one requirement for complying with the norm. Before these laws were enacted, parents interpreted the norm according to their own values and exigencies. The attendance law signaled parents that compliance with the norm required a concrete minimum amount of schooling (until age sixteen, usually), and that withdrawing a child from school at a younger age violated the norm. These laws affected behavior directly by sanctioning parents who violated them. Eventually, parents internalized the legal requirement as establishing a baseline of what good parenting required. At that point, most parents would have felt guilty if they violated the norm and would disapprove of parents who cheated on this obligation.<sup>64</sup> Recently, some states have concluded that this norm is weakening and have sought to strengthen it by enacting truancy statutes that impose liability on parents as well as children for violations.<sup>65</sup>

Bright-line legal rules that particularize an abstract norm serve principally to clarify and amplify the normative prescription. Whether the legal mandate influences the normative landscape will depend in part on whether the new rule is broadly consistent with community expectations about the kind of behavioral obligations required under the norm.<sup>66</sup> Often a legal rule will announce a norm consensus. Those who previously may have been uncertain about the strength of the norm may be motivated to comply, to avoid informal sanctions as well as a legal penalty.<sup>67</sup> If the legal requirement departs

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<sup>63</sup> See *id.* at 407–08. McAdams uses the example of laws requiring the use of child safety restraints in cars.

<sup>64</sup> Casual empiricism suggests that school attendance laws expanded parents' sense of obligation to educate their children. The legal requirement established the minimum obligation, and the norm became completion of high school.

<sup>65</sup> See, e.g., Fla. Stat. Ann. §§ 232.09, 232.19 (West Supp. 2000); Iowa Code Ann. §§ 299.1–299.6 (West 1996 & Supp. 2000).

<sup>66</sup> As I indicate below, preference disguise makes the assessment of community opinion difficult and the prediction about the impact of legal reform uncertain. See *infra* notes 179–189 and accompanying text.

<sup>67</sup> See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603, 1603–08 (2000). For example, a law requiring child restraints in cars may reveal to a parent that concern about her child's safety requires that she have a safety seat. She may be motivated to comply, even if the law is minimally

substantially from the expectations created by the norm standard, however, resistance is predictable and legal enforcement is likely to be costly.<sup>68</sup> Thus, a compulsory attendance statute that required school attendance until age 21 likely would be ineffective in influencing parental commitment norms.

The state might also affect norm change when a bright-line rule that previously reinforced an existing normative standard is abolished. If the abandoned legal rule expressed a concrete prescription for behavior under the norm, deregulation may create uncertainty about what constitutes acceptable conduct under the standard. Deregulation may be seen as signaling the community that the old norm is obsolete, or at least not worthy of legal legitimacy.<sup>69</sup> Thus, for example, the replacement of the tender years presumption favoring maternal custody with the best interest standard as the decision rule for resolving child custody disputes may be understood as signaling legal rejection of differentiated parenting roles.

Some norms scholars have argued that law influences norms through its expressive function.<sup>70</sup> Although claims about this role of

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enforced, because, as one who wants to be viewed as a good mother, she fears reputational harm among neighbors and friends.

<sup>68</sup> Paul Robinson and John Darley argue that to be effective, criminal law should track social norms. See Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 4-7 (1995); see also Tom R. Tyler, *Why People Obey the Law* 22-27 (1990) (noting that compliance depends on legitimacy and public acceptance).

<sup>69</sup> This in turn may encourage norm violation by those who privately disliked the old norm, but feared social sanction. Increased deviation and uncertainty about the viability of the norm may increase third party enforcement costs, thus discouraging enforcement. See *infra* Section IV.B.2.

<sup>70</sup> See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 *J. Legal Stud.* 725, 754-55, 761-63 (1998); Sunstein, *supra* note 8, at 953-65. An interesting debate has emerged in the legal literature over the viability of expressive theories of law. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 *U. Pa. L. Rev.* 1363 (2000); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 *Colum. L. Rev.* 2121 (1990). I do not mean to engage the claims for or against the robustness of such theories. I join a number of norms scholars in assuming that the law influences and reinforces social norms at some level through its expressive function, although measuring the influence may not be possible. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 *Va. L. Rev.* 1649 (2000). Robert Cooter equates the creation of norms by courts with the expression of social values. See Robert Cooter, *Expressive Law and Economics*, 27 *J. Legal Stud.* 585, 585-86 (1998). For my purposes, the law's influence on social norms through its expressive function simply describes the impact on norms (including norm enforcement) other than that created directly by legal sanction. Some

law are speculative, it seems plausible that law influences marital attitudes and behavior beyond or apart from its legal enforcement function. Indeed, the expressive function of the law seems particularly salient in the family law context because legal prescriptions often are not formally enforced.<sup>71</sup> The role of legal regulation in the evolution of gender norms provides a good example. The traditional endorsement of sharply differentiated gender norms in marriage under traditional family law only occasionally involved legal enforcement. Much of the law's importance was expressive: It gave family governance authority to husbands and implicitly assigned family roles, while discouraging women from functioning in the public sphere. The necessities doctrine,<sup>72</sup> the tender years presumption,<sup>73</sup> the husband's duty of support and authority to decide marital domicile, and the denial to women of access to professions and of the right to vote expressed and supported hierarchical gender roles and traditional marital norms with little legal intervention in the "private" realm of the family.<sup>74</sup> Today, the state's attitude toward marital roles and norms is strongly egalitarian, but again its importance is largely expressive and facilitative, shaping attitudes rather than directly motivating spousal behavior.

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norms scholars adopt a much narrower definition, excluding any effect on sanctions. See McAdams, *supra*, at 1652, 1676-78, 1709-10.

<sup>71</sup> Some scholars seek to demonstrate that law can influence norms without influencing even informal sanctions. See McAdams, *supra* note 70, at 1652, 1676-78, 1709-10.

<sup>72</sup> This doctrine allowed merchants to sue husbands for the costs of necessities provided to his wife, creating an indirect remedy for a wife whose husband failed to provide support. See Ellman et al., *supra* note 58, at 138.

<sup>73</sup> The tender years presumption assumes that it is in the interest of young children to continue in the care of their mother, who was thus usually awarded custody, unless unfit. See *id.* at 614-16.

<sup>74</sup> Consider also the 1872 opinion of *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872), in which the Supreme Court expressed strong support for differentiated gender roles in upholding an Illinois law prohibiting women from being licensed to practice law. In his concurrence, Justice Bradley opined that there is "a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring). Frances Olsen argues that the view of family and the market as separate spheres has hampered efforts at reforms to equalize women's place in society. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1560-78 (1983).

The mechanisms by which law through its expressive function influences social norms are unclear, and the extent of influence impossible to measure. Moreover, causation issues are complicated, as norms and law interact through complex feedback mechanisms. Sometimes the law simply communicates a settled normative consensus, and independent legal influence is hard to detect. But, as Richard McAdams argues, a legal enactment can also publicize a new consensus about desirable behavior,<sup>75</sup> or even, I would suggest, push public opinion toward that new consensus. The legal reforms directed toward promoting gender equality would seem to belong in the last category.

*B. The Legal Framework of Traditional Marriage:  
A Case Study of Norm Management*

Traditional legal policy regulating marriage reflected unbounded enthusiasm for the role of the state as active norm manager. Although religion and morality played an important part in shaping commitment and gender norms, a rigid legal framework coercively structured the marital relationship and powerfully amplified informal enforcement mechanisms with legal compulsion. Thus, until relatively recently, family law and marital norms formed an internally coherent and mutually reinforcing system for defining and enforcing parental and spousal obligations. The traditional framework thus provides an excellent case study of the complex interactions between law and norms.

Parental commitment norms found concrete expression in preemptive rules such as vaccination requirements, school attendance laws, and the prohibition of child labor. In general, however, legal intervention in intact families was reserved for gross violations under child abuse regulation, or for situations in which a child's behavior revealed that parental discipline was inadequate. Gendered parental obligations were enforced primarily in divorce regulation. The tender years presumption awarded custody to mothers who adequately fulfilled their primary caretaking role. A legal presumption was warranted because most mothers complied. Divorced fathers were obliged to support the children of the mar-

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<sup>75</sup> See McAdams, *supra* note 13, at 402. See *supra* notes 61-68 and accompanying text for a discussion of how this may influence behavior.

riage financially. Care and support of illegitimate children rested in the mother. Fathers had no legal obligation to these children, signaling the stigma attached both to illegitimacy and to the status of motherhood outside of marriage.<sup>76</sup>

Spousal commitment norms, in turn, were amplified indirectly by symbolic legal expression and directly by legal sanctions. Criminal prohibition of adultery, although seldom enforced, endorsed the norm of sexual fidelity in marriage, as did the tort sanctioning third party interference with marital relations.<sup>77</sup> Fault grounds for divorce—adultery, desertion, and physical cruelty—censured violators of marital commitment norms. Through these prohibitions, the law reinforced the core obligations of marriage, signaling to the community that violations were so reprehensible that the injured spouse was relieved of his or her duty to perform marital obligations. The legal enforcement of marital obligations upon divorce also strengthened commitment norms directly, by adding a serious sanction for violation. Divorce, with its often humiliating public reckoning, substantial financial costs, and formal change in status, became a threshold that many spouses would hesitate to cross.

Beyond the content of fault grounds for divorce, the fact that divorce law created a substantial barrier to exit underscored that marriage was a lifelong commitment, reinforcing the norm of marital loyalty. This barrier also generated feedback effects, which reinforced cooperative patterns of behavior that emerged as rela-

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<sup>76</sup> Fathers bore no responsibility and were not subject to social sanction for failure to support, nurture, or even recognize their children born outside of marriage—although they might experience some social disapproval for producing such children. See Shanley, *supra* note 23, at 67–69. This difference signaled the shameful status of illegitimacy and the privileged status of marriage as the only socially acceptable context for producing children. It also suggests that men and women who violated the norms against producing illegitimate children were sanctioned quite differently. See *supra* note 23.

<sup>77</sup> See generally Richard Wightman Fox, *Trials of Intimacy: Love and Loss in the Beecher-Tilton Scandal* (1999) (describing the scandal surrounding the alienation of affections suit brought by Theodore Tilton against the prominent preacher Henry Ward Beecher in the late nineteenth century, in which Tilton alleged that Beecher seduced his wife Elizabeth, a parishioner; after a highly publicized five-month trial, the jury concluded by a 9–3 vote that Tilton had failed to provide sufficient evidence of the tort); see also Ellman et al., *supra* note 58, at 184 (discussing liability for interference with marital relations and its professed purposes).



tional norms.<sup>78</sup> Opportunistic behavior was deterred because each spouse realized that exit was not an easily available option, and that retaliation from the spouse could be expected for defection.

The state's endorsement of marriage as a formally licensed, privileged status reinforced the social norms regulating marriage in ways that may well be unique to this complex legal institution.<sup>79</sup> The legal privileges associated with marriage, together with the harsh sanctions imposed on other intimate relationships,<sup>80</sup> announced that marriage was a highly esteemed status. For example, married couples enjoyed inheritance rights, unique rights of co-ownership, tax benefits, a testimonial privilege protecting communications, and legitimacy status for their children.<sup>81</sup> Because marriage offered substantial tangible and intangible legal benefits, the anticipated loss of these benefits on divorce was significant. Thus, traditional law created a powerful combination of carrots and sticks such that fulfillment of marital obligations promised rewards and defection resulted in serious sanctions.

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<sup>78</sup> Game theory suggests that in a long-term relationship, the anticipation of indefinite future interactions deters opportunistic behavior. See *supra* note 43. In marriage, this notion might be expressed as follows: "We're in this relationship for the duration, and we may as well make the best of it." See Scott, *supra* note 15, at 42-44.

<sup>79</sup> Traditional marriage was a privileged status, which carried, as Eric Posner puts it, a "basket of immutable obligations." Posner, *supra* note 9, at 270.

<sup>80</sup> Cohabitation was a "meretricious" relationship, warranting no legal recognition or protection. *Marvin v. Marvin*, 557 P.2d 106, 112-13 (Cal. 1976) (detailing the legal history of cohabitation); see also *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209-11 (Ill. 1979) (capturing the view that cohabitation did not warrant legal protection); *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1330 (Ind. App. 1980) (reserving the right to define certain relationships as illicit and against public policy).

<sup>81</sup> The testimonial privilege underscored the norm of open communication and truth-telling in marriage. This privilege was legally invoked on occasion, but it also stood as a symbolic recognition of the special status of marital communications. See Ellman et al., *supra* note 58, at 180-83; Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 Va. L. Rev. 2045, 2092, 2106-07, 2113-25, 2156 (1995). Tax benefits are available to married couples, although two-career couples with roughly comparable income are often penalized by owing a higher tax rate for their joint income than each would pay individually. This "marriage penalty" suggests endorsement of traditional marriage with differentiated roles. See Ellman et al., *supra* note 58, at 84. Some privileges continue to be available exclusively to married couples. Only married couples can own property as tenants by the entirety. See Jesse Dukeminier & James E. Krier, *Property* 323 (4th ed. 1998). Spouses also have inheritance rights that cannot be set aside by will. See Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts & Estates* 472, 480 (6th ed. 2000).

More generally, the sharp legal boundaries of traditional marriage—its well-understood obligations, privileges, and restrictions on entry and exit—reinforced its clear social meaning.<sup>82</sup> This signaling function served several purposes, which, in combination, tended to stabilize marriage and to reinforce commitment norms. First, it facilitated a matching process, allowing those with similar intentions to accurately identify themselves and each other as good prospects for successful marriage. Marital status was also a clear signal to the community that the parties were unavailable for other intimate relationships, and thus should not be pursued.<sup>83</sup> This status also indicated the parties' stability, reliability, and adherence to conventional values. Indirectly, this reputational benefit tended to encourage married persons to conform to the behavioral expectations associated with the role, at least in public, so as to reap the benefits of a respected status. Finally, because the package of legally mandated behavioral restrictions was well understood, the clear social meaning of marriage facilitated community enforcement.<sup>84</sup>

A caveat is in order here. The powerful legal privileging of traditional marriage, together with the stigma attached to other intimate relationships, undoubtedly constrained choices and led some individuals to marry whose private preferences might have been for another arrangement. This coercive influence likely undermined the effectiveness of the matching function and distorted the accuracy of marriage as a signal. Some reluctant individuals may have been more likely to violate marital norms—although as married persons, they would be subject to the powerful enforcement mechanisms (except for guilt, perhaps) that encouraged compliance.<sup>85</sup> For others, the normative and legal constraints defining the social meaning of marriage undermined their capacity to

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<sup>82</sup> The effectiveness of the marriage signal is dependent on the clarity of the social meaning of marriage. See Bishop, *supra* note 9, at 253–54; Posner, *supra* note 9, at 270; Trebilcock, *supra* note 9, at 250–51.

<sup>83</sup> See Bishop, *supra* note 9, at 250. Indeed, a secondary norm reinforces marital fidelity by discouraging such behavior. Historically, this norm was embodied in the criminal prohibition of adultery and in the tort of alienation of affections.

<sup>84</sup> See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 956–61 (1995).

<sup>85</sup> These would include, of course, the barriers to exit, which might give pause to the seeker of a casual relationship.

pursue self-defined life goals. Given the tendency to internalize potent social values and norms, the extent of reluctant compliance under the traditional regime is unclear. Nonetheless, these effects must be counted as inefficiencies of the legal and normative framework of traditional marriage.

The legal reinforcement of spousal commitment norms was accompanied by an equally powerful validation of hierarchical gender roles and differentiated legal enforcement of commitment obligations. Indeed, it is fair to say the social roles of women were more flexible and less starkly hierarchical than the account expressed by legal regulation. Martha Minow has argued that nineteenth-century women exercised authority within their families and political influence in society, despite the fact that they were effectively denied legal personhood.<sup>86</sup> Legal reification of sharply differentiated gender roles, which subordinated the interests of women, persisted well past the mid-twentieth century. The marital rape exemption in criminal law, the differential enforcement of the criminal adultery prohibition, the division of property upon divorce on the basis of title, the rules of marital domicile, and the tender years presumption in custody law—all told a sharply gendered story of marriage.<sup>87</sup>

Traditional marriage law promoted the bundling of gender and commitment norms. The costs of divorce regulation fell disproportionately on wives, who had far more to lose than did husbands if the marriage failed. The wife against whom a fault ground was proven was not entitled to alimony and was likely to lose custody of her children as well.<sup>88</sup> For her, an extramarital affair carried a

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<sup>86</sup> See Martha Minow, "Forming Underneath Everything that Grows:" Toward a History of Family Law, 1985 Wis. L. Rev. 819, 826-27.

<sup>87</sup> See *Liberta v. Kelly*, 839 F.2d 77, 78-79 (2d Cir. 1988) (describing, but rejecting, the common law marital rape exemption extended to a husband raping his wife), cert. denied, 488 U.S. 832 (1988); see also *Saff v. Saff*, 410 N.Y.S.2d 690, 694-95 (N.Y. App. Div. 1978) (stating there is no harm to the non-income producing spouse when property is divided by title at divorce), appeal dismissed, 389 N.E.2d 142 (N.Y. 1979). The tender years presumption was the dominant custody rule until the 1970s. See Ellman et al., *supra* note 58, at 615. It is seldom used today, but some commentators view the primary caretaker preference in child custody as a gender-neutral application of the tender years presumption. See *id.* at 663.

<sup>88</sup> See generally Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 Ariz. St. L.J. 773 (1996) (examining modern divorce law, the variable treatments of fault, and the justifications for and complications with assigning fault).

disproportionate risk of onerous legal and social penalties.<sup>89</sup> She could become impoverished and be publicly labeled a bad wife and mother. There is little evidence that unfaithful husbands were the objects of similarly harsh sanctions. Moreover, even if the wife was the “innocent and injured” party, she was likely to receive minimal spousal support. Thus, the legal regime reinforced the gendered and disparate application of spousal commitment norms to husbands and wives.<sup>90</sup>

By all appearances, traditional marriage was regulated by an extraordinarily stable legal and normative structure, consisting of a highly integrated set of norms embedded in a multilayered enforcement structure. Gender and commitment norms defining the marital relationship were endorsed by spouses, and consistently reinforced by the larger community. These norms were highly interconnected within a rigid legal framework that functioned to define and enforce community expectations. The result was a regulatory scheme that was quite effective in encouraging spouses to perform their obligations faithfully—although, as I have suggested, the scheme was more effective with wives than with husbands.

### III. A SOCIAL HISTORY OF MODERN MARRIAGE

The subsequent history of the evolution of legal and normative marriage has revealed that the apparent stability of traditional marriage was illusory. Beginning in the 1960s, powerful social forces challenged traditional spousal norms as inconsistent with modern values, and lawmakers sought to respond by restructuring the legal framework to reflect modern notions of bounded commitment and gender equality. The overall impact has been a more passive legal role in reinforcing marital commitment together with systematic efforts to express an egalitarian vision of marriage. Meanwhile, parental commitment norms and the supporting legal framework have remained remarkably stable, despite changes in family structure.

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<sup>89</sup> See *supra* note 32.

<sup>90</sup> Custody and child support regulation expressed gendered accounts of parental commitment obligations.

*A. Social Change and the Evolution of Marital Norms*

The broad outlines of the story of sweeping changes in marriage and family roles in the past generation are familiar. With the technological revolution, women, able to control fertility and less burdened by domestic tasks, moved into the workplace in large numbers. Sharply differentiated marital roles have become somewhat blurred, and at least a theoretical commitment to gender equality has dominated political and social discourse (although in practice, women have continued to bear primary domestic responsibilities).<sup>91</sup> Marriage has become a more unstable relationship. Although lasting marriage continues to be a cherished goal for most people, many have become pessimistic about its achievement in the face of increases in divorce rates.<sup>92</sup> Further, marriage no longer retains its privileged status as the only acceptable intimate relationship. For many couples, cohabitation precedes or substitutes for marriage. Meanwhile, single parent households have become common, mostly headed by unmarried or divorced women.

In general, these social changes are reflected in the dilution of the gender and commitment norms that defined spousal roles in traditional marriage. In the 1960s and 1970s, feminists deployed the egalitarian values manifested in the civil rights movement to challenge hierarchical marital roles as well as the associated discrimination against women in the public sphere. Although fundamental gender role change remains an unrealized ideal, norms censuring gender hierarchy have emerged in much of society and the rhetoric of marriage as a partnership dominates public discourse.<sup>93</sup> Marital commitment norms have changed as well. For

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<sup>91</sup> See Arlie Hochschild, *The Second Shift* 188–203 (1989); Wax, *supra* note 28, at 514–15; see also Joseph H. Pleck, *Working Wives/Working Husbands* 15, 53–58 (1985); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 Cal. L. Rev. 615, 660 n.145, 662 n.152 (1992).

<sup>92</sup> See The National Marriage Project, *The State of Our Unions 1999: The Social Health of Marriage in the United States* 29 (Rutgers 1999) (noting that although teens hope for a long-term marriage, they are pessimistic about having such a marriage).

<sup>93</sup> For example, the husband who expresses his disapproval of his wife's working will be subject to criticism in many circles. Even Dr. Laura Schlessinger, a conservative advocate for traditional parental roles and opponent of day care, withheld unqualified support for a husband who called in to her radio talk show to complain about his wife's desire to return to work after the birth of their baby. Dr. Laura's response

most people, the vow of commitment "until death do us part" is conditional not only on the spouse's compliance with behavioral norms, but also on an acceptable level of personal fulfillment. Beyond this qualification, the erosion of commitment norms may also be due to their historic association with norms supporting gender hierarchy. As spousal gender norms have become increasingly disfavored, commitment norms, intimately bundled with the discredited norms, have also declined. Finally, the privileged status of normative marriage has declined. A new liberal tolerance and respect for autonomy are reflected in deference to individual self-realization and acceptance of diverse choices in intimate relationships.<sup>94</sup>

The picture is more complex than this account suggests, of course, and I hasten to qualify it in several ways. First, the contemporary account of marriage and intimate relationships does not enjoy the same public consensus that once characterized traditional marriage. An outspoken religious and cultural subgroup actively seeks public support for re-institution of traditional roles and norms. More generally, norm change has not been as dramatic as it would first appear. Although rigidly divided gender roles are less typical today, parental obligations continue to be assigned on the basis of gender. This allocation reinforces women's dependency and, in subtle ways, perpetuates hierarchy in marriage.<sup>95</sup> Attitudes about commitment are also complex. Lifelong marriage continues to be an aspiration for many people, and divorce is often experienced as a costly personal failure.<sup>96</sup> Further, bad behavior in

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(clearly unexpected by the caller) was that he should quit work to care for the child. See *The Dr. Laura Show* (Premiere Radio Networks radio broadcast, Aug. 16, 1999). As Joan Williams argues, however, in general, women are constrained in their choices about balancing work and family obligations. Many find themselves unable to fulfill their parenting obligations satisfactorily while pursuing a demanding career and "choose" to set aside or reduce their professional role, a choice that most men do not consider. See Williams, *supra* note 29, at 6.

<sup>94</sup> See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1842-46 (1985).

<sup>95</sup> See Martha Albertson Fineman, *The Neutered Mother, the Sexual Family* 157-64 (1995); Williams, *supra* note 29, at 1-2. Steven Nock reports that most people view the husband as the head of the household. See Nock, *supra* note 10, at 28-30. In his view, the financial dependency of wives is the key ingredient of continued power disparity in marriage. See *id.* at 132-33.

<sup>96</sup> This suggests that many spouses continue to internalize commitment to lasting marriage.

marriage (particularly adultery) continues to generate criticism in most social contexts, although it may no longer lead to social ostracism. Indeed, some behavioral norms, such as the prohibition of physical violence, are stronger today than previously. Moreover, couples with successful and enduring marriages enjoy social approval, and those who experience repeated failure risk at least mild gossip and censure.

Finally, parental commitment norms have not become weaker. Parents today continue to be held responsible for the care and support of their children, and, indeed, there is some evidence that this obligation may be expanding. Casual empiricism suggests that modern parents feel obliged to be more involved in their children's education and social lives than was true a generation ago, and are more concerned about promoting their children's healthy psychological development.<sup>97</sup> Moreover, the public discourse surrounding the recent increase in youth violence suggests that parents are held morally responsible for the harms caused by their children.<sup>98</sup> Another development that indicates that the scope of parental responsibility may be expanding is the change in attitudes about the parental duties of unmarried fathers. Formerly absolved of responsibility for (or even acknowledgment of) their children, unmarried fathers today are assumed to be bound by their parental role to provide support.<sup>99</sup> In general, the obligation of parents to

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<sup>97</sup> Parental involvement in organized youth sports, homework, and the completion of college applications has increased dramatically over the past few decades. More parents now consult mental health professionals for their children's emotional problems. See, e.g., Debra Nussbaum, *How a Speeded Up Society Trickles Down to Children: From Infancy to Academics, the Race is On*, N.Y. Times, Oct. 31, 1999, § 14, at 1; Linda Schlueter & Heather Creed, *Parents Are No Longer Silent Partners in Education: Educators and Parents Work Together for Excellence*, Tex. Law., Aug. 7, 2000, at 27; Elizabeth Simpson, *Children and Prescription Drugs: Medication Trend Raises Concerns, Discipline Needed, Not Pills, Critics Say: Others Laud Help in Behavior*, Virginian-Pilot, Aug. 20, 2000, at A1.

<sup>98</sup> See, e.g., Lisa Belkin, *Parents Blaming Parents*, N.Y. Times, Oct. 31, 1999 (Magazine), at 61; Jeff Kass, *Columbine Shooters' Tapes Raise Questions on Parents' Duties: Legal Standards, Experts' Advice Can Vary*, Dallas Morning News, Dec. 22, 1999, at 8A.

<sup>99</sup> Much modern child support legislation is directed at unmarried fathers, a dramatic change from the law's traditional stance. See 18 U.S.C. § 228 (2000) (making it a federal crime for anyone, including unmarried fathers, to willfully refuse to pay child support for a child in another state); Md. Code Ann., Fam. Law § 5-1028 (1999) (requiring information be furnished to unmarried mothers informing them of their

promote their children's welfare is at least as powerful today as it was historically.<sup>100</sup>

### *B. Legal Reform of the Marriage Relationship*

In the relatively brief historical period since the 1960s, the legal framework that shaped traditional marriage has also undergone revolutionary change. First, legal support for hierarchical and differentiated gender roles in marriage has been systematically dismantled. Legal discrimination against women in employment, education, and other public contexts, which reinforced the gender disparity in marriage, has also been prohibited. During this same period, no-fault divorce reforms removed most restrictions on divorce. Finally, the sharp contrast between marriage and other intimate relationships has blurred considerably, as legal protection has been extended to cohabitation arrangements. In short, although the legal landscape of marriage would not be unrecognizable to an observer from mid-century, the scenery would be very different.

Much of the revolution in gender regulation can be understood as an extension from race to gender of the principles of the civil rights movement and its egalitarian legal reform. Sex discrimination in employment and education became the target of state and federal legislation and has been the subject of successful constitutional challenges as well.<sup>101</sup> In combination, these legal reforms

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rights to establish paternity and collect child support); Unif. Parentage Act, 9B U.L.A. 287 (1973 & Supp. 2000) (addressing paternity, presumptions of fatherhood, and procedures for bringing an action to determine paternity); Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 *Fam. L.Q.* 519, 520–24 (1996); see also Ellman et al., *supra* note 58, at 1038–40 (discussing the Uniform Parentage Act that has been adopted in Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington, and Wyoming).

<sup>100</sup> Moreover, characterization of parents as having a property-like interest in their children has weakened considerably over the past century. See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce* and the Child as Property, 33 *Wm. & Mary L. Rev.* 995, 1041–51 (1992). This position is contestable, of course. Increased divorce and out-of-wedlock childbirth suggests a weakening of parental responsibility. However, as I suggest below, divorce is often justified as offering benefits to children, and unmarried parents are held financially responsible for their children's welfare.

<sup>101</sup> See Title IX of the Education Amendments Acts, 20 U.S.C.S. § 1681(a) (West Supp. 2000) (prohibiting discrimination in education); Title VII of the Civil Rights



invited women to move beyond the constraints of gendered family roles and facilitated women's efforts to succeed in the public sphere.

In the regulation of marriage itself, egalitarian legal reform took the form either of abolishing privileges, entitlements, or restrictions that differentially affected husbands and wives, or of extending them to both spouses. Thus, the marital rape exemption has been abolished in most states, while eligibility for spousal support was extended to husbands who met the functional requirements.<sup>102</sup> Both parents are now liable for child support, and both have authority to determine marital domicile. Neither is privileged to physically "discipline" the other. Sometimes—as in the case of abolition of the marital rape exemption and extension of alimony to husbands—the determination to apply egalitarian principles to marriage seems mostly to serve a symbolic function.<sup>103</sup> Other reforms—such as the enactment of equitable distribution statutes, with their potentially broad redistributive effects—have had important practical consequences. Not all the reforms have benefited women. Replacing the tender years presumption with the best interest standard created uncertainty about mothers' custody claims and has been regretted by many feminists.<sup>104</sup> The consistent

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Act of 1964, 42 U.S.C. § 2000e (2000) (prohibiting discrimination in employment). The Supreme Court has played an important role in prohibiting sex discrimination on constitutional grounds. See, e.g., *United States v. Virginia*, 518 U.S. 515, 540 (1996) (holding that the male-only admissions policy of a state-funded military academy violates the Equal Protection Clause); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (holding that statutory classifications based on sex are inherently suspect).

<sup>102</sup> See *Liberta v. Kelly*, 839 F.2d 77, 78–79 (2d Cir. 1988). In *Orr v. Orr*, 440 U.S. 268, 283 (1979), the Supreme Court held that Alabama's statute, under which only wives were eligible for alimony, violated the Equal Protection Clause of the Constitution.

<sup>103</sup> Husbands in intact marriages are almost never charged with rape, absent serious physical injury. See Ellman et al., *supra* note 58, at 176–78.

<sup>104</sup> See Fineman, *supra* note 95, at 77–79, 82–83, 88–89 (arguing that the mother should receive legal protection); Carol Smart & Selma Sevenhuijsen eds., *Child Custody and the Politics of Gender* 133–36 (1989); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 135, 154–58 (1992) (discussing male bias in decisionmaking in child custody proceedings and favoring a maternal deference standard); Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415 (1991); Polikoff, *Gender And Child Custody Determinations: Exploding The Myths, in Families, Politics And Public Policy: A Feminist Dialogue On Women and The State* (Irene Diamond ed., 1983); Scott, *supra* note 91, at 618–22; Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 4–58 (1988).

theme of these reforms has been a commitment by the state to formal gender equality in marriage. Sometimes these legal developments seem to follow changes in social norms. The abolition of the marital rape exemption is of this type. Sometimes, as in the statutory reform favoring joint custody, they represent an aspirational norm or simply a symbolic egalitarian statement.<sup>105</sup>

The no-fault divorce reforms have altered dramatically the termination of marriage in ways that may have influenced marital behavior and weakened spousal commitment norms. Surprisingly, the reformers who initiated this sweeping change had rather modest objectives. There was no public clamor for reform of divorce law; indeed contemporaneous surveys revealed public concern about increasing rates of divorce.<sup>106</sup> The academics, practitioners, and judges who initiated divorce reforms believed that the removal of fault grounds would reduce the adversarial character of divorce proceedings, and would also protect the proceedings' integrity, which was threatened by collusion of couples who agreed that their marriage had failed.<sup>107</sup> The objective of the Governors' Commission in California in the 1960s, which proposed a no-fault statute that became a model for later reforms, was to modernize the process of terminating marriage, while promoting reconciliation through counseling.<sup>108</sup> The reform laws initially permitted divorce on the basis of a long separation or irretrievable breakdown, as determined by the court or mutually recognized by the spouses.<sup>109</sup>

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<sup>105</sup> The trend in the 1980s toward favoring joint custody is an example of the legal embodiment of an aspirational norm, since most parents do not share child caretaking responsibility. See Scott, *supra* note 91, at 624-25. The availability of spousal support to dependent husbands was for the most part of symbolic importance.

<sup>106</sup> Surveys indicated minimal support for making divorce easier. A commonly expressed view was that most people did not try hard enough to make marriage work. See Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* 54-55 (1988); Scott, *supra* note 15, at 17-23.

<sup>107</sup> Under these circumstances, collusion was encouraged by the requirement that one spouse prove a fault ground against the other before divorce would be granted. See Richard H. Wels, *New York: The Poor Man's Reno*, 35 *Cornell L.Q.* 303, 315-19 (1950) (describing fraudulent testimony in New York).

<sup>108</sup> In the California legislative process, the costly counseling provisions were abandoned, and the statute was enacted without them. See Jacob, *supra* note 106, at 58, 61.

<sup>109</sup> See *McKim v. McKim*, 493 P.2d 868, 869-72 (Cal. 1972) (requiring irreconcilable differences be shown before a divorce would be granted); Elayne Carol Berg, Note,

The early no-fault reformers did not promote the revision of divorce laws as social reform. And certainly they did not argue for the redefinition of marriage as a relationship of casual commitment. No-fault bills were treated as routine legislative business; for the most part, they were processed without public hearings or press coverage.<sup>110</sup> Implicit in the reforms, however, was the recognition of change in marital commitment norms and of the state's more circumscribed regulatory role. In abandoning fault, the reformers acknowledged that the causes of marital failure are complex and difficult for an outsider to evaluate. Moreover, marital breakdown was understood to be often a matter of shared responsibility; thus, assigning fault to one spouse was a simplistic distortion. The reforms also acknowledged implicitly that modern marriage had become a more limited commitment, and that divorce should be allowed not only on the basis of the other party's offense, but also on grounds of relational failure. Moreover, the determination of inmarital failure did not need to be mutual. Early in the no-fault era, courts routinely began to allow divorce on the basis of one party's desire to be released from a marriage.<sup>111</sup>

The upshot of the reforms was the abolition of any legal enforcement of the marital commitment, and a transfer of the authority to regulate the relationship from the state to the individual spouses. In a relatively short period of time, state coercion of marital commitment was replaced by neutrality and by the parties' freedom to terminate marriage at will. In most states, the legal norm has become quick, easy, unilateral divorce, reinforced by property division and spousal support policies facilitating "effi-

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Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions, 7 *Loy. L.A. L. Rev.* 453, 487-88 (1974).

<sup>110</sup> See Jacob, *supra* note 106, at 50, 62-63, 66, 102.

<sup>111</sup> In practice, the effect of statutes requiring a finding by a court that the marriage is "irretrievably broken" is to authorize unilateral divorce. Most observers agree that, in most states, divorce will be ordered on the petition of one spouse despite the objection of the other, regardless of statutory language. See Ellman et al., *supra* note 58, at 198-207; Alan H. Frank et al., *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 *Neb. L. Rev.* 1, 65-66 (1978); Sass, *The Iowa No-Fault Dissolution of Marriage Law in Action*, 18 *S.D. L. Rev.* 629 (1973); Berg, *supra* note 109. But see Amy L. Stewart, Note, *Covenant Marriage: Legislating Family Values*, 32 *Ind. L. Rev.* 509 (1999) (discussing the availability of unilateral divorce and noting that it was not formally available in all states and often only in the cases in which an innocent spouse wanted a divorce from a guilty spouse).

cient" termination of marital obligations.<sup>112</sup> It appears that, having rejected the legitimacy of state coercion under traditional law, lawmakers determined that any legal enforcement of the marriage contract was illegitimate. Thus, ironically, under the modern regime, voluntary contractual agreements undertaken to reinforce marital commitment are unlikely to be legally enforced.<sup>113</sup> Only recently, with the introduction of covenant marriage laws, have couples been offered the option of legally binding commitments.<sup>114</sup>

Another development that has influenced the social meaning of marriage is the legal recognition of non-marital cohabitation relationships. In many states, courts routinely enforce contractual agreements of cohabiting parties regarding property division and support upon termination of the relationship. Once the morality of cohabitation no longer represented an obstacle, the primary problem for legal enforcement was determining the existence and terms of the contract.<sup>115</sup> A few jurisdictions have gone further, suggesting that legal obligations between cohabiting parties may arise simply on the basis of the relationship or on equitable grounds.<sup>116</sup> The legal status of cohabitation relationships has been further recognized under civil union and domestic partnership laws that extend bene-

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<sup>112</sup> This trend is also represented by the decline in permanent spousal support and increase in short-term rehabilitative support, as well as a preference for division of assets at the time of divorce. See Scott, *supra* note 15, at 18; Scott & Scott, *supra* note 4, at 1310–11.

<sup>113</sup> Thus, for example, a provision in a premarital agreement providing for a two-year waiting period before divorce would probably not be enforced. See Scott, *supra* note 15, at 21; *supra* note 2.

<sup>114</sup> See the discussion of covenant marriage as commitment device *infra* at Section IV.C.2.

<sup>115</sup> In *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976), the California Supreme Court announced that express and implied contracts between unmarried couples regarding property and support were enforceable. Many other courts have followed suit. See *Wilcox v. Trautz*, 693 N.E.2d 141, 146 (Mass. 1998) (“[U]nmarried cohabitants may lawfully contract concerning property, financial, and other matters relevant to their relationship.”); *In re Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (“[C]ourts must ‘examine the . . . relationship and . . . make a just and equitable disposition of the property.’”) (quoting *Latham v. Hennessey*, 554 P.2d 1057 (Wash. 1976)).

<sup>116</sup> *Marvin* suggests that property transfers or support might be ordered on equitable grounds, though later California decisions have retreated from this suggestion. Washington, in theory, contemplates liability on the basis of cohabitation status—that is, without contract—but courts have interpreted this narrowly. See Ellman et al., *supra* note 58, at 963–67.

fits traditionally reserved for marriage to both homosexual and heterosexual cohabiting couples.<sup>117</sup>

In sum, the legal regulation of marriage has undergone transformative change in the past generation. The reforms progressed in different doctrinal contexts without coordination, but at least two related themes emerge. First, individuals are far freer to arrange their intimate relationships without state coercion or even legal intervention. Following the no-fault reforms, lawmakers have declined to dictate commitment terms in marriage and have endorsed a private ordering regime, but at the same time have declined to enforce even voluntary marital commitment.<sup>118</sup> Second, the state has embraced principles of equality, both between spouses and between persons in families formalized by marriage and those in other relationships. Modern legislatures and courts have been less passive in regulating gender roles, systematically promoting equality between spouses and discouraging differentiation and hierarchy. Distaste for inequality, together with deference toward individual choice, has stimulated the removal of legal stigma from non-marital family relationships. Some of these reforms, such as the prohibition of gender distinctions, were the product of a broad and coherent policy agenda, the goals of which have been only modestly fulfilled. Others, like no-fault divorce law, were narrower in their purpose, but have produced substantial, largely unintended effects. Through a piecemeal process, the reforms have created modern legal marriage, a very different relationship from its traditional version, but one in which, I will ar-

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<sup>117</sup> See *id.* at 977–86. Vermont has enacted a civil union statute, in response to a Vermont Supreme Court decision, prohibiting state discrimination against gay couples by withholding the privileges of marriage. See 2000 Vt. Acts & Resolves 91, available at <http://www.leg.state.vt.us/docs/2000/acts/act091.htm>; *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999). France recently enacted a statute allowing couples to legalize their “cohabitation” with a civil contract and receive some of the benefits of married couples without the religious ties. See Kim Willsher, *When Michel and Philippe Got ‘Married’: A New French Law Is Allowing Gay Couples (and Straight Couples Who Don’t Like Religious Vows) To Get Officially Hitched*, *Evening Standard* (London), June 8, 2000, at 33.

<sup>118</sup> For a discussion of the trend toward private ordering, see Jana B. Singer, *The Privatization of Family Law*, 1992 *Wis. L. Rev.* 1443. For a discussion of the reluctance of courts to contractually enforce commitment provisions, see Haas, *supra* note 2; Scott & Scott, *supra* note 4, at 1327–32.

gue in the next Part, gender and commitment continue to be linked in subtle but important ways.

In striking contrast to the state's *laissez-faire* attitude toward marriage, legal enforcement of parental obligations has expanded in both scope and strength in recent years. Legal reforms imposing responsibility on parents for the misconduct of their children effectively hold parents liable for failure to perform child-rearing tasks adequately. These laws represent an effort to strengthen parental commitment norms, perhaps in response to a perception that they are vulnerable and need reinforcement.<sup>119</sup> Of broader importance are the changes in legal policy toward children born to unmarried women. These children now are entitled to the same rights to care, support, and parental property as children whose parents are married.<sup>120</sup> The primary effect of this change is to impose financial support obligations on all fathers regardless of marital status, obligations that are defined and enforced through a complex network of federal and state child support regulations. The legal reforms also have strengthened the obligations of non-custodial divorced parents. Contrary to the predictions of some observers in the 1980s, the general attenuation of family commitment in the no-fault divorce era has not diminished responsibility for child support.<sup>121</sup> Indeed, there is evidence of a perceived need to justify the freedom which modern divorce law gives parents. Thus, the move to no-fault unilateral divorce has been justified on the ground that

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<sup>119</sup> Many modern curfew and truancy ordinances impose penalties on parents for violations by their children. Many states also have more general statutes subjecting parents to limited liability for their children's "criminal or delinquent acts." Colo. Rev. Stat. Ann. § 19-2-919 (West 1999); see also, e.g., Del. Code Ann. tit. 10, § 1009 (1999); Wyo. Stat. Ann. § 14-6-244 (Michie 2000). The parents of the victims of recent school shootings are seeking to push the frontier of parents' legal responsibility in lawsuits against the parents of the perpetrators. The theory of these cases is that these parents were at least negligent for failure to recognize their children's psychological distress or to supervise them adequately. See Belkin, *supra* note 98. Although the prospect for success of these claims is highly uncertain, their plausibility represents a change in attitude and a new openness to holding parents responsible for their children's harmful conduct.

<sup>120</sup> The Supreme Court has prohibited discrimination on the basis of illegitimacy. See *Clark v. Jeter*, 486 U.S. 456, 457, 465 (1988) (right to parental support); *Lalli v. Lalli*, 439 U.S. 259, 261, 264-67 (1978) (inheritance rights).

<sup>121</sup> See David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 Mich. L. Rev. 1614, 1625 (1982).

an unhappy marriage harms the psychological development of children.<sup>122</sup>

#### IV. LEGAL REFORM AND THE CHANGING SOCIAL MEANING OF MARRIAGE

It is uncontroversial that the social norms regulating marriage have changed, and it seems clear that the legal reform of traditional marriage has played a role in these changes. However, claims about the extent of the law's influence and the precise mechanisms that have effected change are necessarily speculative. Moreover, the impact of family law on social norms seems to vary in different contexts in ways that are rather puzzling. Sometimes, formal legal expression of the desired behavior seems to have promoted and reinforced normative change in a relatively straightforward way.<sup>123</sup> Sometimes, however, the state's efforts seem to have little impact, and sometimes those efforts produce unintended effects.

Analysis of the interaction between legal reform and the evolution of spousal and parental norms over the past generation suggests some underlying patterns. The state has functioned rather well as a norm manager in reinforcing parental commitment norms. On the other hand, legal change has had more limited effects on gender norms. Legal support of equality in marriage has reinforced an egalitarian trend, but both men and women have been reluctant to share parental responsibility. Finally, the law's influence on spousal commitment norms has been powerful, but in my view, largely inadvertent. No-fault divorce laws, together with the deprivileging of marriage, have undermined norms of marital commitment.

My argument is that variation in the impact of legal change on marital norms has much to do with the residual effects of norm bundling, the intertwining of gender and commitment norms in traditional marriage. The taxonomy of marital norms reveals that as gender and commitment norms functioned within a formal regu-

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<sup>122</sup> See Scott, *supra* note 15, at 29.

<sup>123</sup> Many legal initiatives regulating parental obligation are in this category. I will examine child support laws, but child labor laws and statutes requiring that children wear safety restraints are other examples. See McAdams, *supra* note 13, at 407-08.

latory framework, they gradually became intertwined. When norm bundling occurs, disaggregation can be difficult. I suggested earlier, for example, that the discrediting of gender hierarchy weakened spousal commitment norms. This phenomenon also can impede legal efforts to influence the evolution of a marital norm through reforms that seek either to promote change in a disfavored norm or to reinforce a favored norm. Historically, commitment norms and gender norms were bundled within a legal regulatory framework that cohesively defined traditional marital roles. Modern legal reformers seeking to shape marital norms—such as the proponents of covenant marriage—must contend with the confounding effects of this historic association.

Clarifying the role of norm bundling provides a purchase that facilitates better understanding of the impact of legal change on the social norms regulating marriage. But predicting the impact of legal initiatives remains a very uncertain business. Contemporary marital and family norms are evolving in a polarized social context, which inhibits the expression of private preferences. Preference disguise makes prospective evaluation of the likely impact of legal initiatives a speculative endeavor and inhibits the development of a predictive theory.

#### *A. Comparing the Effects of Legal Change on Parental Commitment Norms and Gender Norms*

The law has played its most effective role in both extending and reinforcing norms of parental obligation over the past generation. Children consistently have been the objects of benign paternalistic intentions, and a broad societal consensus supports imposing responsibility on all parents for the care and development of their children.<sup>124</sup> Defections by parents generally are criticized harshly. Thus, in the 1970s and 1980s, when norm entrepreneurs publicized data showing that many divorced fathers failed to pay child sup-

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<sup>124</sup>This consensus reflects principled judgments about the fair allocation of the burden of promoting children's welfare, as well as political self-interest, since parental responsibility relieves society of a financial and care-taking burden. Opposition comes from a few feminists, such as Martha Fineman, who would absolve fathers of responsibility and impose the burden of financial responsibility on society. See Fineman, *supra* note 95, at 211–19.



port, defaulters were stigmatized as "deadbeat dads."<sup>125</sup> The extension of this obligation to children of unmarried parents occurred relatively seamlessly, bolstered by egalitarian values and sympathy for these children as the innocent products of parental choices.<sup>126</sup>

Analyzing the impact of these child support statutes on parental norms offers some insight into the mechanisms by which law can effectively influence social norms. First, there appears to have been compatibility between the law's behavioral directives and a general societal consensus about parents' financial obligation to support their children. As easy divorce became more common and marital obligations more attenuated in the 1970s and 1980s, there was initially some uncertainty about the parameters of parental responsibility and the precise boundaries of acceptable behavior of non-custodial divorced parents. Early in the no-fault period, legal enforcement of child support obligations was lax.<sup>127</sup> Child support legislation expressed a societal consensus that non-custodial parents continue to bear responsibility for their children and that the weakening of spousal commitment norms did not extend to children. Beginning in the mid-1980s, the federally mandated guidelines provided concrete rules to quantify the obligation, and the vast interstate and federal enforcement system powerfully reinforced informal mechanisms.<sup>128</sup> Informal enforcement alone is predictably inadequate in this context because defecting parents can often escape sanctions from spouses and the community. Without legal enforcement, the norm would erode as defections went unpunished. However, as I have suggested, some of the legal strategies to enhance parental responsibility seem to have been tailored to stimulate norm internalization and to employ informal community enforcement as a supplement to formal sanctions.<sup>129</sup>

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<sup>125</sup> See, e.g., Patricia Avery, *On the Trail of Those Deadbeat Dads*, U.S. News & World Rep., Mar. 21, 1983, at 70.

<sup>126</sup> The primary objective of the legislative focus on unmarried fathers, of course, was financial. Congress enacted comprehensive legislation in the 1980s to locate unmarried fathers and hold them accountable for child support, in part to relieve government of the burden of supporting children in single-parent families. See Ellman et al., *supra* note 58, at 1036-38.

<sup>127</sup> See *id.* at 573-75.

<sup>128</sup> See Child Support Recovery Act, 18 U.S.C. § 228 (2000).

<sup>129</sup> The Virginia vehicle disabling policy mentioned above, *supra* note 60, may be the most creative, but other states withdraw driving privileges and professional licenses,

Furthermore, in the context of child support legislation, the compatibility of the legal reform with the underlying parental commitment norm was not undermined by its association with disfavored gender norms. Although gender norms in marriage prescribed fathers' obligation of financial support, the legal enforcement of that obligation does not invoke association with gender hierarchy; nor does it reinforce women's subordination. Instead, child support reduces mothers' dependency and lightens their child-rearing burden. Thus, the effectiveness of this norm management initiative can be attributed in part to the absence of the confounding effects of norm bundling, as well as to the stability of norms of parental obligation.<sup>130</sup>

Compare the impact of legal reforms promoting egalitarian marriage. Lawmakers have systematically withdrawn support from gender hierarchy in marriage, and modern law offers an ideal of marriage as an equal partnership of autonomous individuals.<sup>131</sup> The legal model of egalitarian marriage also implicitly discourages differentiated roles. For example, replacing the tender years presumption with the best interest standard amounts to a deregulation of the maternal child care obligation. Some legislatures go a step further, either basing custody on the division of parental responsibility during the marriage,<sup>132</sup> or endorsing joint custody and

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sanctions that are likely to become known and to generate community gossip. See, e.g., Mass. Gen. Laws Ann. ch. 209D, § 3-305 (West 1998) (providing a wide array of powers to tribunals of the commonwealth to withhold income, set aside property, and "grant any other available remedy").

<sup>130</sup> To test this proposition, consider a hypothetical policy initiative to promote the welfare of children (and thus reinforce norms of parental obligation) by discouraging parents from placing their children in day care—perhaps based on research evidence that parental care is better for children. The policy could be a prohibition, imposition of expensive, burdensome regulation that greatly increases the cost of day care, or the removal of tax benefits. Such a policy is likely to evoke associations with traditional coercive gender roles. The predictable response would be outrage.

<sup>131</sup> Legal prohibitions and sanctions have also directly targeted some behavior by husbands—such as physical assault and rape—that was tolerated in traditional marriage. The abolition of the marital rape exemption particularly stands as a powerful statement endorsing the status of wives as autonomous agents. See *Liberta v. Kelley*, 839 F.2d 77, 78–79 (2d Cir. 1988), cert. denied, 488 U.S. 832 (1988).

<sup>132</sup> See W. Va. Code Ann. § 48-11-206 (Michie 1999). West Virginia has legislatively adopted the American Law Institute standard based on a model which I proposed and designated the approximation standard. See Scott, *supra* note 91.

thus encouraging parents to share child care responsibility.<sup>133</sup> More subtly, modern divorce law discourages gender role differentiation by denying wives who pursue traditional roles adequate insurance against the risk of divorce.<sup>134</sup> These reforms together challenge traditional gender norms in marriage. If the legal initiatives were effective, then gender equality in marriage should be well established.

On one level, there has been remarkable progress toward egalitarian marriage. The endorsement of gender equality dominates public discourse. Moreover, there is every reason to believe that public support for equality in marriage is reflected in changed private attitudes, and that distaste for patriarchy and for subordination of wives is widespread. Casual empiricism suggests that most people believe that husbands and wives are equal partners in marriage. Nevertheless, role differentiation continues to be evident in the division of marital obligations, most importantly in the assignment of responsibility for children. In most families, both mothers and fathers accept the norm that mothers bear primary responsibility for children.<sup>135</sup> Even women who have demanding jobs tend to function as the managers of their children's lives, a role most women do not wish to relinquish.<sup>136</sup> This leads, in turn, to career choices that accommodate parenting duties, reinforcing gender difference and women's dependency.<sup>137</sup> Gendered parenting norms continue to be internalized by mothers, self-enforced through guilt, and reinforced by community expectations about parental behavior. The continued robustness of these norms remains the primary impediment to fully developed norms of egalitarian marriage.

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<sup>133</sup> See Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 *Berkeley Women's L.J.* 9, 32-33 (1986).

<sup>134</sup> Further, child support and alimony are awarded on a gender-neutral basis.

<sup>135</sup> See Hochschild, *supra* note 91, at 152-55; Cynthia Fuchs Epstein, *Toward a Family Policy: Changes in Mothers' Lives*, in *The Changing American Family and Public Policy* 157, 165-66 (Andrew J. Cherlin ed., 1988); Michael E. Lamb, *The Role of the Father: An Overview*, in *The Role of the Father in Child Development* 1, 26 (Michael E. Lamb ed., 1976).

<sup>136</sup> See studies cited in Scott, *supra* note 91, at 656-60.

<sup>137</sup> Joan Williams challenges the view that mothers make "choices" to make the accommodations that seem necessary to adequately care for children. She argues that the demands on the "ideal worker" force many women out of the work force or into low-paying or part-time jobs. See Williams, *supra* note 29, at 6.

The resistance to egalitarian parenting norms can be seen as a function of two factors. First, gender norms that encourage mothers to be primary caretakers are not inherently linked to hierarchy, although they contribute to women's dependency, and ultimately reinforce power imbalance in marriage. In this context, role differentiation is not equated to subordination. Some feminists exalt the maternal role as central to women's identity, and for many women, child rearing is very rewarding.<sup>138</sup>

Resistance to norm change also can be understood as a function of norm bundling. In traditional marriage, parental commitment norms were deeply intertwined with gender norms. For women, being a good parent meant being a good mother, which meant taking primary responsibility for children. Because these norms were traditionally bundled, and because norms of parental obligation have continued to be robust during the recent period of social change, mothers may be less responsive to legal reforms that support a new norm of shared parenting. Because women have long internalized the obligation to assume primary responsibility for their children's care, gender norms regulating parenting may be more entrenched and resistant to change than those that shape the spousal relationship. The upshot is that, in this context, norm bundling undermines legal efforts to promote change in parenting norms that have become inefficient<sup>139</sup> because these norms have long been associated with other norms that continue to be strongly endorsed.

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<sup>138</sup> Relational feminists have focused on women's identity as nurturing caretakers. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 159–60, 164, 167 (1993); Robin West, *Caring for Justice* 33–36 (1997); Katharine T. Bartlett, *Feminism and Family Law*, 33 *Fam. L.Q.* 475, 476, 486–87 (1999). Indeed, claims about the importance of this role have been the basis of a dispute in the feminist movement, with lesbian feminists and others objecting to the notion that motherhood is an essential part of women's identity. See *id.* at 36–37. In contemporary discourse, feminists who focus on motherhood do not tend to make essentialist identity claims, but nonetheless, elevate mothering as a feminine role. See Fineman, *supra* note 95, at 232–34.

<sup>139</sup> Any argument that gendered parenting norms are efficient surely fails in a world in which a high percentage of marriages end in divorce, leaving women without adequate human capital to support themselves and their children.

*B. The Effects of Legal Change on Spousal Commitment Norms**1. Deregulation and Marital Commitment*

Divorce law reforms of the past generation grew out of the perception that the legal structure was out of step with other broader values. The notion of a coercive state dictating that marriage be a lifelong commitment, without regard to personal fulfillment, violated contemporary norms. However, no-fault divorce law did far more than adjust legal regulation to express modern values of marital commitment. It undermined and weakened these norms in ways that have contributed to marital instability. The reforms were not intended to express a dramatically revised vision of marriage as a casual commitment, and most people do not view the relationship in that way. Nonetheless, this is the account of marriage offered by the modern legal régime, which facilitates easy termination of the relationship while at the same time discouraging contractual commitment. This account seems likely to affect the way people think about marriage and the way they act.

One effect of the legal deregulation of marriage has been to leave the boundaries of marital commitment undefined. Outmoded fault grounds were once the concrete rules that prescribed both behavioral expectations and also the conditions for excuse from the obligations of marital commitment. These have been abolished, but no rules have been substituted to provide direction (to spouses and to other enforcers) about modern norms of commitment. The upshot of this deregulation is that the broad normative commitment standard embraced by most individuals entering marriage is no longer particularized by guidelines describing specific behavioral expectations. Thus, for example, if relational failure justifies divorce, what effort must be expended before declaring that the relationship has truly failed? To what extent and in what ways are the parties obliged to act so as to avoid marital failure? The absence of guidelines leaves each spouse to interpret whether his or her behavior conforms to the now vaguely defined commitment expectations. Predictably, the spouse who is tempted to defect may be inclined to interpret the requirements to suit his immediate in-

terest.<sup>140</sup> The vagueness of the standard also undermines community enforcement, since deciding whether any misbehavior or defection constitutes a norm violation becomes less certain.

Deregulation has also removed legal enforcement as a mechanism that strengthens spousal commitment norms. Under the no-fault regime, substantial legal barriers to divorce have been removed and the cost of exit from marriage has been lowered significantly.<sup>141</sup> One effect of this legal change is that the precommitment function of legal enforcement is lost to those spouses whose long-term interest lies with marital stability and cooperation. With deregulation of commitment, the couple must rely exclusively on informal mechanisms to maintain—or restore—a cooperative equilibrium. The dynamics of spousal interaction can be intense, and conflict can escalate into a retaliatory pattern that may be harder to reverse if exit is always an option. The threat of instability is further exacerbated because each party knows the other is also free to leave at any time. In contrast, the realization that the traditional marriage relationship could not easily be abandoned may have encouraged both parties to avoid behaviors that could lead them to confront the costly decision to divorce.<sup>142</sup>

If this analysis is correct, the deregulation of commitment under no-fault law does more than serve the legitimate purpose of releas-

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<sup>140</sup> In this situation, the individual's short-term and long-term interests may conflict, but because of a tendency to discount the future, she may overvalue short-term interest. See Scott, *supra* note 15, at 68.

<sup>141</sup> See *supra* notes 112–117 and accompanying text. The costs could include public embarrassment of a fault proceeding, financial costs of litigation, and time costs, particularly if divorce is granted on the basis of separation. For some spouses, the costs would include a trip to Nevada and six weeks of residency. See Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States 152–58* (1962). At one time, informal social costs associated with loss of esteem in the community would be added to these formal legal costs. Nelson Rockefeller's humiliation is a case in point. See *supra* note 45.

<sup>142</sup> The incentive of parties in long-term relationships to cooperate explains the popularity of mediation and other nonadversarial methods for resolving disputes in on-going relationships. For example, in employment and divorce custody disputes, the parties must continue to deal with each other, and are motivated to resolve disputes in a way that allows future cooperation. It is possible, of course, that some people might respond to barriers to exit by misbehaving, knowing that the partner cannot easily leave. In traditional marriage, moreover, wives had more to lose if the marriage failed and thus greater motivation to cooperate. See *supra* notes 88–90 and accompanying text.

ing unhappy spouses from marriages that cannot be saved. It may also destabilize relationships in which legal reinforcement of informal norms could help spouses to achieve their goal of marital fulfillment. The absence of clearly defined commitment expectations and the availability of easy exit weaken the norms that encourage spouses to renew their efforts when stresses and temptations threaten the relationship. This may result in marital failure for some couples whose marriages might have weathered hard times if legal reinforcement of commitment norms were available to deter defection. Thus, in an effort to correct an outmoded expression of commitment, the legal reforms inadvertently destroyed a useful mechanism that encouraged mutually beneficial cooperation for many parties.

On a societal level, no-fault divorce law arguably has weakened commitment norms by making divorce easier and therefore more common. Following the withdrawal of legal enforcement, the relative (as well as the absolute) number of persons divorcing increased.<sup>143</sup> It can fairly be assumed that this number included both those who formerly would have been imprisoned in failed marriages and those for whom the withdrawal of legal enforcement undermined marital stability. In theory at least, as divorce became more common, secondary norms that promoted community enforcement weakened, and enforcement became less effective.<sup>144</sup> This likely further weakened commitment norms, which, in turn, contributed to greater marital instability, leading to more divorce. Through such a spiraling process, commitment norms could eventually unravel altogether. This has not happened, of course. Nonetheless, contemporary divorce law at least indirectly has undermined the effectiveness of informal enforcement of spousal commitment norms, and in this way contributed to a weakening of the norms themselves.

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<sup>143</sup> Although divorce rates increased in the 1970s and 1980s during the period of no-fault reforms, controversy surrounds the question of the extent to which the legal reforms have contributed to the increase in divorce. See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 *J. Legal Stud.* 869, 879, 887-92 (1994).

<sup>144</sup> Divorce represents noncompliance with spousal commitment norms. As the number of norm violators grows, enforcement costs grow, and community members become less willing to enforce the norm through sanctions. The secondary norm weakens because reputational benefits from enforcement decline. See Cooter, *supra* note 13, at 1669-75; McAdams, *supra* note 13, at 393-94.

## 2. *Deregulation and the Signaling Effect of Marriage*

Choosing marriage once signaled an election to undertake a serious commitment to a lifelong relationship governed by clear behavioral expectations. The signal carried by the marriage decision today is far more ambiguous. Because choosing marriage no longer carries significant commitment costs, both those who desire serious commitment and those who seek a more casual relationship might reasonably select marriage.<sup>145</sup> Moreover, premarital agreements allow couples considerable latitude to customize the marriage relationship so as to further reflect their individual preferences and expectations. Finally, the differences between marriage and informal unions are becoming less distinct. Individuals have considerable freedom to exit in both types of intimate relationships. In both, the parties can tailor their legal relationship contractually to limit or extend relational obligations (other than making a binding commitment). In both marriage and informal unions, couples may vary in their behavioral expectations of one another.

The impact of these many changes is to dilute the quality of the signal sent by a decision to marry. Individuals searching for lifelong marriage partners have been deprived of one key means by which they can indicate the seriousness of their desire to make an enduring commitment to the relationship.<sup>146</sup> They also have lost a tool for evaluating whether prospective partners are similarly interested in a lasting marriage. The pooling of individuals with different tastes for commitment is likely to increase the incidence of inefficient matching in the marriage market. In general, it may be uncertain whether modern individuals entering marriage mean to be subject to the obligations and behavioral expectations that traditionally defined the relationship. Moreover, the power of marital status as a signal to the community has become weaker as the line between

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<sup>145</sup> In signaling theory terms, the problem is that the signal has become too cheap and is easily copied by those who would not be ready to bear the cost of a serious commitment. Posner makes this point. See Posner, *supra* note 9, at 260–61.

<sup>146</sup> In theory, the earnestly committed spouse could offer a bond by executing a premarital agreement that provided for a favorable divorce settlement should she defect. However, this might represent an enticement to a fortune seeker, and would create incentives for opportunistic behavior on the part of the other spouse. More promising would be mutual bonds, executed by both spouses. Currently, most such agreements would be unenforceable. See *supra* notes 113, 118 and accompanying text.



marriage and informal cohabitation has blurred. Community monitoring and sanctioning of spousal misbehavior become difficult if behavioral expectations vary across marriages and no clear standards of marital obligation exist.<sup>147</sup>

It would be inaccurate to suggest that for most people marriage no longer functions as a signal of serious intentions, or that marriage and informal unions are interchangeable in the extent to which they are regulated by commitment norms. Individuals seeking enduring commitment in an intimate relationship continue to choose marriage over cohabitation, and couples in informal unions marry at the point when they are ready to undertake a greater commitment. Social science data show clearly that cohabitation relationships are both less stable and less satisfying than marriage.<sup>148</sup> In part, this is due to self-selection, as those persons who believe that greater personal fulfillment will come from a lasting relationship are willing to bear the (now reduced) marginal costs of compliance with marital norms. What has changed as a result of the legal reforms is the power of the signal. Modern marital law offers individuals only a very modest opportunity to make a credible commitment, and thus choosing marriage no longer signals intentions or triggers expectations as reliably as it once did.

### *C. Norm Management: Legal Reinforcement of Spousal Commitment Norms*

#### *1. The Theoretical Case for Norm Reform*

A few lessons about norm management emerge from the recent reforms in family law. First, the experience with no-fault reforms suggests that deregulation can be as important as regulation in influencing the evolution of norms. Deregulation is most likely to have the effect of undermining existing norms for which the abolished rules provided reinforcement. Another lesson is that seemingly unrelated legal changes to a complex institution can have amplified and often

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<sup>147</sup> The weaker the signal, the less reputational benefit it carries, either for the spouse (to the community) or for community members seeking reputational benefit through enforcement.

<sup>148</sup> See Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 *J. Fam. Issues* 53, 73 (1995); Linda J. Waite, *Does Marriage Matter?*, 32 *Demography* 483, 485 (1995).

unintended effects. The combined impact of privatization reforms in multiple family law contexts plausibly has been to destabilize marriage, though none of the reforms had this purpose.

If family law reforms have inadvertently undermined spousal commitment norms, the question becomes whether lawmakers can act as norm managers to correct the problem by providing couples with effective means to strengthen marital commitment. "Effectiveness" would be measured by the readiness of couples to utilize the legal mechanisms and the actual impact of these mechanisms on commitment norms. A further consideration is whether such legal options can be structured so as not to undermine other important legal and normative objectives.

In theory, the option of legally enforceable commitment would seem to provide a useful tool to individuals contemplating a long-term, intimate relationship. The evidence that marriages are both more stable and more satisfying than cohabitation arrangements suggests that many couples may benefit from the availability of a distinctive marriage option. By differentiating marriage with legal commitment from other unions, such an option would embody a clearer signal of commitment, thus facilitating better matching of individuals at the outset of a relationship. Indeed, a modern commitment option, created in a context in which other intimate relationships are socially acceptable alternatives, should function as a more accurate signal than did traditional marriage.<sup>149</sup>

A marriage commitment option expands the available relationship choices and thus is wholly compatible with modern values of personal autonomy. This point deserves elaboration, because the deregulation of marital commitment that is embodied in easy exit policies is often mistakenly understood to be a necessary incident of contemporary law's deference to personal autonomy in intimate relationships. Although moralistic legal restrictions on intimate relationships would be discordant in the modern context, legal passivity is not the only alternative to the coercive policies that are now discredited. State coercion and state enforcement of voluntarily assumed legal obligations are quite different actions. As is well understood in the realm of commercial contracts, legal enforcement expands rather than restricts individual autonomy. To be

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<sup>149</sup> See *supra* Section III.B.

sure, legal enforcement limits “ex post autonomy,” or the freedom of individuals to renege on their promises.<sup>150</sup> But what is lost under modern divorce law is “ex ante autonomy” or the freedom to commit. Since the freedom to commit includes the freedom to choose not to commit, ex ante autonomy is the more robust conception of personal freedom. The law of contract is based on this premise.<sup>151</sup>

A commitment option may also generate social value beyond the benefit to parties choosing legal marriage. The financial security, emotional support, and mutual care that marriage partners provide to one another over time potentially reduce the burden on society. In this sense, society has a stake in the stability of marriage, one that becomes more substantial in marriages with minor children. As spousal commitment norms become weaker, parents may end marriages that are only moderately unhappy.<sup>152</sup> Empirical social science studies that examine the impact of divorce on the adjustment and development of children consistently indicate that this trend is worrisome. The research offers little support for the conventional justification of divorce as a move that usually promotes the welfare of the affected children. For most children, divorce has a harmful impact on their future social integration, educational and occupational attainment, and psychological well-being. The unsettling headline is that unless the level of conflict between parents is intense, most children would be better off if their unhappy parents stayed married.<sup>153</sup> The research findings put unconstrained parental

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<sup>150</sup> Scott & Scott, *supra* note 4, at 1246–47. Ex post autonomy receives maximum protection under current divorce law, which functionally prohibits the freedom to commit.

<sup>151</sup> See *id.*

<sup>152</sup> Thus, as spousal commitment norms weaken and are not enforced, the costs of exit decline, and the threshold of unhappiness that leads one spouse (or both) to terminate marriage may decline. Paul Amato and Alan Booth make this point in their large-scale study of the impact of divorce on children. See Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* 11 (1997).

<sup>153</sup> Amato and Booth concluded that 20% of the children in their study were in high-conflict families. See *id.* Mavis Hetherington and her colleagues observed that children in divorced families functioned worse than those in intact families at two months and one year, but had improved substantially by two years after divorce. Girls were more compliant than boys. In a six-year follow up, boys in divorced families continued to be less compliant than boys in intact families. See E. Mavis Hetherington et al., *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 *J. Am. Acad. Child Psychiatry* 518, 527 (1985); see also E. Mavis Hetherington et

choices in a more negative light. At a minimum, the data suggests that commitment mechanisms that promote marital stability in marriages with children may have broader social utility.

## *2. Covenant Marriage as a Norm Management Initiative*

Covenant marriage statutes, such as the recent enactments in Louisiana and Arizona, offer an option for reinforcing spousal commitment norms.<sup>154</sup> Couples who choose covenant marriage over marriage regulated by conventional no-fault divorce law agree to premarital counseling and to divorce only upon the establishment of fault or after a significant period of separation. No other basis for divorce is available. The most important features of covenant marriage are the foreclosing of easy exit from marriage, even by contemporaneous agreement, and the separation period, which is usually two years.<sup>155</sup> Although critics have targeted covenant marriage as the revival of fault, Louisiana, at least, has never abandoned fault grounds in its divorce law, but simply added a no-fault option.<sup>156</sup> Thus, statutory authority to bring divorce claims on fault grounds is not an innovation.

The legislative movement to promote covenant marriage statutes might be seen as heralding the emergence of a new norm of marital commitment. By choosing covenant marriage, prospective spouses can signal their serious intentions to each other and to the community. The availability of covenant marriage may facilitate matching, because it provides real options based on level of commitment and encourages the couple to disclose information about their aspirations to one another.<sup>157</sup> The restrictions on divorce pro-

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al., *Effects of Divorce on Parents and Children*, in *Nontraditional Families: Parenting and Child Development* 233 (Michael E. Lamb ed., 1982) (noting that custodial mothers were less communicative and affectionate with their children and more inconsistent and less effective in setting limits than were mothers in intact families, and that custodial mothers particularly had problems dealing with their sons).

<sup>154</sup> See *supra* note 1. Legislatures in more than 20 states are considering covenant marriage bills. See Americans for Divorce Reform, *Covenant Marriage Links*, at <http://www.divorcereform.org/cov.html> (last visited Sept. 27, 2000).

<sup>155</sup> See *Ariz. Rev. Stat. Ann.* § 25-903 (West 2000); *La. Rev. Stat. Ann.* § 9:307 (West 2000).

<sup>156</sup> *La. Civ. Code Ann.* art. 103 (West 1999).

<sup>157</sup> It seems plausible that some couples might have revealing conversations with one another about whether they should undertake covenant marriage. Modern covenant

vide concrete rules clarifying behavioral expectations for commitment. Although, as Robert Scott and I have argued, basing divorce on fault grounds is problematic,<sup>158</sup> the mandatory separation period usefully establishes the extent of spousal effort required before the relationship can be abandoned.<sup>159</sup> This obstacle to divorce functions as a precommitment mechanism directly by discouraging defection; it also reinforces norms promoting cooperation in marriage. Widespread election of covenant marriage could reduce the incidence of divorce, which in turn could independently strengthen commitment norms.

### *3. Impediments to Norm Management: The Bundling Effect*

Although covenant marriage appears promising as a legal mechanism to reinforce marital commitment norms, it is unclear whether it will function effectively in the contemporary setting. Moreover, the impediments to success suggest some formidable obstacles that confront legal efforts at norm management in this context. First, legislatures considering covenant marriage face a challenge setting terms of commitment that will function effectively as a signal without threatening contemporary values of equality and tolerance. Covenant marriage, like any signal, purports to separate the reliable, committed types who choose this option from the more shallow ones who do not. To be effective, the signal must be sufficiently costly to deter those whose commitment is tentative. If it is not, a pooling equilibrium is possible, in which everyone chooses covenant marriage, even those who do not have serious intentions, in order to secure the reputational benefits from the signal. Alternatively, if the signal is perceived as costly by the less committed types and is selected only by the most committed types, it risks stigmatizing those who do not choose covenant mar-

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marriage may be a more effective signal than traditional marriage because coercion and stigma will not affect the choice.

<sup>158</sup> See Scott & Scott, *supra* note 4, at 1326–32. Basing divorce on fault is problematic for several reasons. Marital failure is usually a matter of joint responsibility, and one party's conduct that constitutes fault may be a retaliation in response to the other party's defection. Even if one party has defected, a third party factfinder may be unable to accurately evaluate responsibility in the context of a complex and private relationship. Finally, under covenant marriage statutes, fault grounds may be used strategically to facilitate a quick divorce that evades the separation period.

<sup>159</sup> See Scott, *supra* note 15, at 76–77.

riage. This risk is inherent in any reform that elevates the status of marriage over other unions or family groups. Thus, an inherent tension exists between privileging marriage as a distinctive status in order to induce a separating equilibrium, and promoting tolerance regardless of family status.<sup>160</sup>

The impact of a covenant marriage statute (or of any other norm management reform) depends on the social meaning that the reform comes to assume.<sup>161</sup> On the one hand, if covenant marriage is viewed as inconsistent with modern values—as an effort to revive the disfavored marital norms of an earlier era—it likely will not be widely chosen and will have little impact. On the other hand, covenant marriage may be seen as usefully offering persons who want commitment in marriage the means to find partners who share this goal and to reinforce their relationship. Although the attitudes of many Americans toward marriage might suggest that the latter scenario is more likely, the former is also possible. Public opinion, editorial commentary, and media reaction to early covenant marriage legislation have been mixed, suggesting that the response may be complicated by contemporary social currents and influenced by deep historical associations.<sup>162</sup> For many people, aspirations for lasting marriage coexist with a deep distrust of legal enforcement of marital commitment.

What explains the distaste for legally enforceable marital commitment, even in the relatively innocuous form of the existing

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<sup>160</sup> Another limitation on the effectiveness of covenant marriage from a signaling perspective is suggested by Eric Posner. The availability of several marriage options dilutes the signal conveyed. If covenant marriages, conventional marriages, and customized marriages structured contractually all exist in a society, community members either will have to differentiate among marriages in enforcing norms or will have limited behavioral expectations. This may dilute the effectiveness of enforcement. See Posner, *supra* note 9, at 272. The problem may not be as serious as it seems, however, because the most effective community enforcers are those who know the couple best. This group is more likely to be informed about the level of commitment.

<sup>161</sup> See Lessig, *supra* note 84, at 956–61.

<sup>162</sup> The national media response to covenant marriage has been relatively hostile, particularly among liberal and feminist commentators. See *infra* notes 163–166, 168. Many participants in a Louisiana survey, however, responded positively to the option, particularly to the premarital counseling provisions. It is difficult to predict whether attitudes in Louisiana are representative, since it is a state with conservative social attitudes. See James D. Wright et al., *Covenant Marriage: Louisiana Update*, Responsive Community, Fall 1998, at 86.

covenant marriage statutes? Many of the objections are curious and do not withstand close inspection.<sup>163</sup> Legal enforcement of marital commitment is apparently understood by critics as government coercion.<sup>164</sup> Its choice-enhancing properties are ignored, even where (as with covenant marriage) it is voluntarily chosen by the parties from a menu of options. Some feminists have articulated strong opposition, seeing constraints on divorce as a threat to women's freedom to escape unhappy marriages.<sup>165</sup> Although critics argue that covenant marriage (and restrictions on divorce generally) will trap women in abusive marriages, surely legal mechanisms could be constructed to protect against this risk.<sup>166</sup> Moreover, marriage breakdown usually inflicts greater costs on women than on men.

This anxiety points to a deeper resistance to legal enforcement of spousal commitment. Although, in theory, spousal commitment norms can be dis-aggregated from gender norms, a strong association continues between the two sets of norms that structured the traditional marriage relationship. Over a long period of time, within the unifying legal framework of traditional marriage, commitment norms and gender norms became bundled, perhaps inextricably. In my view, the legal regime of coercive restrictions on marriage forged a bond between these two sets of norms, which interacted in apparent harmony, powerfully reinforcing each other to collectively shape marital behavior.<sup>167</sup> Over the last generation, it has been widely understood that gender subordination was coercively imposed on women, most powerfully by the traditional legal

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<sup>163</sup> Some argue that legal enforcement is unnecessary to reinforce marital commitment. If this means that informal norms are presumed sufficient, it is factually incorrect for many marriages. Other critics raise the traditional objection that divorce is better for children. See Lynne Z. Gold-Bikin, *Let's Eliminate the Idea of Covenant Marriage*, Chi. Trib., Sept. 7, 1997, § 13, at 9.

<sup>164</sup> See John McCarthy, *ACLU Says Proposed Marriage Law Intrusive*, Clev. Plain Dealer, Sept. 3, 1997, at B2.

<sup>165</sup> See Katha Pollitt, *What's Right about Divorce*, N.Y. Times, June 27, 1997, at A3.

<sup>166</sup> See Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 Tul. L. Rev. 1435, 1443-46 (1992) (criticizing Scott's proposal, predating covenant marriage reforms, which included a mandatory waiting period before divorce). A straightforward response to an abusive spouse is legal separation with spousal support, if appropriate, together with an injunctive restraining order.

<sup>167</sup> Although privately many women must have objected to their subordinated status, a strong public consensus favored gender hierarchy and silenced private objections.

regime. Support for gender equality has come to dominate public discourse. In this climate, legal enforcement of commitment (such as covenant marriage) threatens to resurrect discredited spousal gender norms, and is viewed with deep distrust.<sup>168</sup> Such policies, in this view, are tainted by their long association with legal enforcement of gender hierarchy.<sup>169</sup>

The suspicion that legal enforcement of spousal commitment creates the threat of resurrecting gender hierarchy is not wholly groundless. Gender equality in marriage is far from firmly established. Gender roles continue to be differentiated and still tend to restrict the freedom of wives more than that of husbands. Thus, the reintroduction of legally enforceable commitment raises the specter of restrictions on women's tenuous autonomy in marriage. More concretely, as the expressed concerns about spousal abuse suggest, legal commitment threatens to bind some women to relationships grounded in patriarchal domination. Although spousal commitment norms are endorsed, the endorsement is often qualified by the preference for ex post autonomy. What remains is a very thin conception of commitment.

Some feminists hold that marriage is so contaminated by its traditional patriarchal gendered structure that it should be abolished, or at least given no special legal recognition. Thus, Martha Fineman argues that the law should protect and privilege the mother-child dyad as the core family group, and leave intimate adult relationships to the realm of contract.<sup>170</sup> Many feminists, however, recognize the value of marriage as a stable, potentially fulfilling relationship that can serve the interests of women and children as well as men.<sup>171</sup> For these scholars, the project is to promote equality

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<sup>168</sup> See Terry A. O'Neill, *This Law Hurts Women*, USA Today, Aug. 14, 1997, at A14. O'Neill, president of the Louisiana chapter of NOW, argues that covenant marriage "support[s] a fundamentalist, patriarchal vision of marriage." *Id.* She also argues that men will find it easier to exit covenant marriage than women, and that the barriers to exit will harm victims of domestic violence.

<sup>169</sup> Although spousal commitment norms have eroded somewhat generally, in part due to norm bundling, they continue to be endorsed as long as they are not subject to legal enforcement.

<sup>170</sup> See Fineman, *supra* note 95, at 226-36.

<sup>171</sup> See Williams, *supra* note 29, at 1-4; Bartlett, *supra* note 138, at 486-87; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65, 100-11 (1998).



in marriage, either through egalitarian family roles or through legal protection of women who undertake differentiated roles.<sup>172</sup> Most of these scholars, as well as many feminists in the public arena, would reject legally enforceable commitment as regressive, although many would generally endorse the value of marital commitment if untainted by gender.<sup>173</sup>

Concern about the lingering association between gender and commitment norms is not alleviated by the debate about marriage and family policy in the political arena. In truth, many modern religious and cultural conservatives would like to return to an earlier era of both stable marriage and patriarchal gender roles. Some of these observers explicitly link family instability and the lamented decline of "family values" to the abandonment by women of their domestic roles.<sup>174</sup> Social conservatives advocate coercive legal intervention in service of the moral agenda of revitalizing the traditional family, by opposing abortion<sup>175</sup> and day care and by reviving legal restrictions on divorce. Many conservatives have embraced covenant marriage statutes, albeit a little reluctantly, as a politically viable means of restricting divorce.<sup>176</sup> In this politically charged setting, the prospects for disaggregation of spousal gender and commitment norms, and the neutral evaluation of legal policies that offer the option of marital commitment seem very remote.

Recognizing the residual impact of norm bundling provides a basis for informed speculation about the success or failure of family law reforms in shaping social norms, and may be useful in *ex post* explanations. The experience with family law reform suggests that norm bundling can play a role both in legal efforts to strengthen an

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<sup>172</sup> See Williams, *supra* note 29, at 5–6; Bartlett & Stack, *supra* note 133, at 28–33; Joan Williams, *Is Coverture Dead?: Beyond a New Theory of Alimony*, 82 *Geo. L.J.* 2227, 2246–47 (1994).

<sup>173</sup> See Silbaugh, *supra* note 171, at 142–43; O'Neill, *supra* note 168; Pollitt, *supra* note 165.

<sup>174</sup> See Patrick J. Buchanan, *Right from the Beginning* 149, 341 (1990); Jerry Falwell, *Listen, America* 124–25 (1979).

<sup>175</sup> See Kristin Luker, *Abortion and the Politics of Motherhood* 138, 145 (1984) (describing a study showing that conservative women in traditional family roles oppose abortion in part because it threatens their life choices).

<sup>176</sup> The Louisiana Covenant Marriage statute was a compromise between those who wanted to return to traditional fault grounds divorce and more moderate forces. See Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 *La. L. Rev.* 63 (1998).

existing norm and in efforts to promote norm change. Thus, legal efforts to reinforce useful but threatened norms—in this case, those of spousal commitment—may be undermined by the strong historic association of those norms with once-powerful but currently unpopular norms—in this case, those enforcing gender hierarchy. Norm bundling may also impede legal reform designed to promote normative change when a norm that is no longer efficient has long been linked to one that remains robust. This may explain the slow pace toward egalitarian parental roles, despite legal support for normative change. In contrast, some efforts at norm management are not undermined by the residual effects of norm bundling. Recent government efforts to reinforce parental commitment norms, for example, have not been impeded by associations with unpopular or obsolete norms.

This insight suggests a strategy for legal reinforcement of marital commitment that might be effective in avoiding negative bundling effects (and indeed in utilizing norm bundling to promote positive associations). Legal reforms that explicitly link spousal commitment with parental commitment might fare better than existing covenant marriage legislation.<sup>177</sup> The accumulating evidence about the harmful impact of divorce on children undermines a key justification for parental freedom to leave unhappy marriages. If this information becomes well known, it may affect attitudes about divorce.<sup>178</sup> Given the continued robustness of parental commitment norms, it is plausible that new behavioral expectations for parents who are unhappy in their marriage (and a new norm) may emerge. (“If you have children, you should not give up on your marriage until you have tried long and hard to make it work.”) These changes could create greater receptivity to legal initiatives that reinforce the emerging norm. For example, marriages involving minor children could be subject to more extensive separation peri-

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<sup>177</sup> Lessig suggests that a strategy to influence social meaning is to tie the desired new meaning to an established social meaning that will have influence by association. This technique, known as “tying,” has been used frequently, for example, in endorsement advertising. As Lessig explains, when Michael Jordan endorses Nike shoes “some of his social capital is transferred to the product endorsed, and the meaning of wearing Nike shoes changes.” See Lessig, *supra* note 84, at 1009–10.

<sup>178</sup> Richard McAdams points out that one contributor to norm change is new information which casts doubt on the desirability of the old norm. See McAdams, *supra* note 13, at 395–96.

ods under covenant marriage statutes (or covenant marriage could be limited to this group).

At most, these observations constitute a first tentative step in an explanatory theory of the impact of law on the social norms regulating the complex institution of marriage. It is unclear whether these observations can be generalized to other norm settings. Even in the marital context, a careful examination of the effects of norm bundling does not permit confident predictions about the likely impact of proposed legal initiatives on social norms. As I discuss in the next section, a major obstacle to constructing a predictive theory is the difficulty in discerning *ex ante* the intrinsic preferences of people who will be affected by the law.

#### *4. Disguised Preferences and the Problem of Prediction in Norm Management*

Predicting the impact of legal reforms is complicated by the phenomenon of disguised preferences—gaps between expressed public opinion and private preferences.<sup>179</sup> Preference disguise is likely to occur to a certain extent in many norm contexts. The very existence of a norm prescribing certain behavior will tend to generate both compliance and public expressions of support, because of a desire to avoid the reputational costs associated with non-compliance. Thus, the wife who hates child care and housework may conform to her prescribed role for fear of criticism, not acknowledging publicly her distaste. Moreover, if she violates “good mother” norms, community members may publicly sanction her to signal their endorsement of the norm, even if they privately are neutral about the behavior.<sup>180</sup> The upshot is that social pressure to conform to norms may obscure variations in private preferences and distort the apparent strength of the norm.

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<sup>179</sup> Much of the analysis of disguised preferences is drawn from the insightful model of social change developed by Timur Kuran. See Kuran, *supra* note 11, at 174, 177–78, 347. Kuran seeks to explain why social change sometimes occurs rapidly, and sometimes slowly through an evolutionary process. He explains the important role in this process of the tendency of individuals to falsify preferences in response to social pressure. See *id.* at 247, 256.

<sup>180</sup> See *supra* notes 46–53 and accompanying text for a discussion of secondary enforcement norms.

Preference disguise not only occurs when there is a dominant norm which many people dislike. It also arises when public opinion is polarized on a sensitive topic and competition develops over appropriate attitudes and behavior. In recent years, family roles and values have become a battleground in a culture war, with social and religious conservatives battling liberals and feminists to define family roles and norms.<sup>181</sup> Each side attempts to dominate public discourse and to impose costs on the expression of attitudes with which they disagree. In this environment, candid expression of private preferences becomes more costly, and preference disguise can be expected. It is generally assumed that most people have more complex and less polarized views on gender roles, divorce, abortion, and other sensitive family law topics than those reflected in public discourse.<sup>182</sup>

Predictions about the success of any legal initiative that implicates these issues are highly uncertain. Consider covenant marriage, for example. I have suggested that norm bundling appears to influence responses to this reform. At this point, the extent of that influence is hard to assess or predict, in part because private preferences are likely varied and hard to measure.<sup>183</sup> Individuals considering marriage may perceive covenant marriage as a coercive political initiative by those with a "family values" agenda. Alternatively, the legislation may be taken to legitimate a norm that had seemed to be in decline, emboldening those who secretly regretted this trend. A range of responses is plausible, and, *ex ante*, people may not be forthright about private preferences.<sup>184</sup> A further complication is that, in this polarized political and social environment, individual decisions may be affected by perceived costs or benefits of association with the public supporters or oppo-

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<sup>181</sup> See James Davison Hunter, *Before the Shooting Begins: Searching for Democracy in America's Culture War* 3-11, 114-21 (1994).

<sup>182</sup> See, e.g., *id.* at 10, 85-90.

<sup>183</sup> In Louisiana, for example, there is some evidence that private opinion about covenant marriage is more positive than the public debate would suggest. See Wright et al., *supra* note 162.

<sup>184</sup> Some people may privately prefer traditional marital roles and be emboldened by the statute to act on those preferences. Others might take the enactment of the statute to express a modern egalitarian commitment norm, which is compatible with their preferences. For others, legal commitment may generate anxiety or disdain, because of its traditional associations or because of enthusiasm for personal freedom.

nents of legislation.<sup>185</sup> For example, if covenant marriage is identified with conservative Christian proponents, moderates who might otherwise choose this commitment option may fear that its social meaning is "contaminated," and that they will be sanctioned by the social group with which they identify.<sup>186</sup> If public opinion moves in one direction or another, that itself may influence preferences, and it will certainly influence willingness to express preferences. The extent to which reputational concerns influence choices will vary, of course, depending on the intensity of the private preferences and the extent of the perceived reputational effect.<sup>187</sup>

The key point is that, in assessing the likely impact of legal initiatives that implicate "family values," we are disabled from making confident predictions. We have no clear picture of the pattern of private preferences that could affect decisions about covenant marriage, or the extent to which these preferences are disguised in public discourse. Thus, predicting the decisions that people will make, and more broadly the impact of the legislation, becomes an uncertain business. Attitude surveys can provide some information,<sup>188</sup> but surveys are not effective at gauging intensity of preferences, or the point at which individuals would *express* a different preference (or make a different decision) in response to shifts in public opinion that alter reputational costs.<sup>189</sup> The framework developed in this Essay may

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<sup>185</sup> Recall that no-fault divorce reform was enacted with little public discussion or controversy, perhaps making the decisions of unhappy spouses less subject to concern about reputational effects. See *supra* note 110 and accompanying text.

<sup>186</sup> Cokie and Steven Roberts describe how opinion about covenant marriage has become polarized because of the support for the Louisiana law by religious conservatives. They suggest that liberals oppose the law, not on the merits, but because of its supporters. See Cokie Roberts & Steven Roberts, Louisiana's New 'Covenant Marriage' Law Makes Good Sense, Salt Lake Trib., Aug. 31, 1997, at AA3. In Oklahoma, a covenant marriage bill was supported by many members of the state legislature because they feared reprisals from the Christian Coalition. See Brian Ford, "I Really Do," Tulsa World, Feb. 22, 1999, at 1.

<sup>187</sup> Kuran explains how these factors can combine to result in seemingly rapid shifts in public opinion as people become willing to express preferences that they previously disguised. See Kuran, *supra* note 11, at 247, 256.

<sup>188</sup> See Laura Sanchez et al., Setting the Clock Forward or Back: Covenant Marriage and The Divorce Revolution, 22 J. Fam. Issues (forthcoming Apr. 2001).

<sup>189</sup> See Kuran, *supra* note 11, at 35-38. Thus, if choosing covenant marriage were to become a widely endorsed signal of marital commitment, those whose intrinsic preferences were mildly negative might either actually become more positive (as public opinion influenced their intrinsic preferences) or choose covenant marriage despite continued reservations because of concern about reputational harm. Those

assist the project of (tentative) explanation and interpretation of the influence of legal reforms on the evolution of social norms in this context. It does not provide the means to predict with any confidence what will be the consequences of any given legal change.

#### *D. Summary*

An analysis of the dialectical relationship between recent family law reforms and evolving social norms regulating marriage suggests that two factors affect the impact of a legal innovation on the evolution of any particular norm. First, the degree to which norms are bundled may be important, specifically the degree to which a target norm is associated with a favored or disfavored norm. Second, the success of a legal reform may depend on the coincidence between the legal prescription and community opinion. Legal initiatives that deviate substantially from an emerging community consensus or that appear to support other disfavored norms are unlikely to have substantial impact on the target norm. Lawmakers can misjudge community values and preferences because they are subject to interest group pressure,<sup>190</sup> or because public opinion distorts private preferences. Under these conditions, the new rule will get little informal community enforcement, and predictably will be subject to evasion or disapproval.

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whose intrinsic preferences were intensely negative might continue to resist. Timur Kuran discusses the complex relationship between the intensity of intrinsic preference, changes in reputational costs, and changes in expressed preferences. See *id.*

<sup>190</sup> For example, reforms favoring joint physical custody failed to influence behavior because they apparently were inconsistent with the private preferences of parents regarding custodial arrangements. These laws expressed support for equal sharing of child care responsibility, but the predicted role change has not occurred. Joint custody advocates in the 1980s (mostly fathers' groups) lobbied for the passage of statutes favoring joint custody. Women's groups opposed them, arguing that joint custody was a windfall for fathers, since in most families mothers were primary caretakers before divorce. See Scott, *supra* note 91, at 626-27; Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455, 456-62 (1984). Robert Mnookin and Eleanor Maccoby's study of parents with joint custody showed that joint custodial arrangements tend to drift toward more traditional residential arrangements, suggesting that, once the divorce proceedings were behind them, both mothers and fathers preferred arrangements in which mothers had primary child care responsibility. See Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 167-70, 267-70 (1992).

Despite these impediments, legal change can influence both the pace and direction of normative change. Individuals vary in the extent to which they are ready to tolerate the reputational costs of challenging existing norms. For each individual, this will depend on how much the norm distorts private preferences, the level of anticipated sanctions for violation, and the value of acting honestly on preferences.<sup>191</sup> As I have suggested, norm entrepreneurs may advocate for new norms, encouraging others to express and act on their intrinsic preferences. A legal rule expressing the new norm can act as a catalyst and may be embraced by those whose intrinsic preferences it reflects. If many individuals were silenced by the old norm, rapid norm change may occur. Prediction is highly uncertain, however, because the extent of private dissatisfaction with the old norm and the readiness of individuals to risk censure for violation may be impossible to measure *ex ante*.

#### CONCLUSION

This account of the relationship between family law and the social norms surrounding marriage is a cautionary tale for norms scholars. Although the story suggests that legal reforms can influence social norms, it does not offer much encouragement to those who are attracted to the idea of norm management as a legal policy tool. This Essay is a first step toward a comprehensive understanding of the interaction between law and social norms in the regulation of the most complex of human relationships—marriage. Studying that relationship during a period of dramatic change in both the legal and normative regulatory framework yields some insights about the intricate interaction between these two regulators of human behavior. It also reveals how much we have to learn about the mechanisms by which law influences norms in the marital context.

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<sup>191</sup> See Kuran, *supra* note 11, at 35–38.