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SOCIAL NORMS AND THE LEGAL REGULATION OF MARRIAGE

Elizabeth S. Scott*

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, 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.¹

In general, the law has tended to reflect (and perhaps has contributed to) this wariness about legal commitment in marriage. No-fault divorce law 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.²

In the business context, in contrast, legal enforcement of reciprocal promises is routine

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¹ 2La. Rev. Stat. Ann. §§9:234, 9:245(A)(1), 9:224(C), 9:225(A)(3), 9:272-275, 9:307-309 (West Supp. 1999); Ariz. Rev. Stat. Ann. § 25-901-906 (West 1999). 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 2 year separation ground for divorce. Some commentators have been quite critical of covenant marriage statutes, seeing them as state coercion and as a serious threat to women. See Katha Pollitt, O'Niell

²Theodore F. Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C. L. Rev. 879, 909-10 (1988); Eric Rasmussen & Jeffrey Evans Stake, Lifting the Veil of Ignorance: Personalizing the Marriage Contract, 73 Ind. L.J. 453, 462-63 (1998).

and uncontroversial. 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.² But even though the metaphor of marriage as a contract is well established, many people shy away from applying these lessons to marriage.³ At the same time, a divorce rate of 50% suggests that informal norms are often not successful in sustaining cooperation in marriage. As Russell Hardin put it, “If contracts become as shaky as marriage, then our society will be in danger of collapse.”⁴ 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 and 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 law does not (and perhaps should not) regulate behavior in intimate relationships. This response has some truth, but ultimately it is unsatisfactory. Legal 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 parental duties and intervenes readily when parents deviate from accepted norms.⁵ Further, legal reforms designed to reinforce desirable social norms of parental obligation, such as the recent child support enforcement legislation, have been

²Charles 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, 2030-34, 2040-42 (1987).

³Sir Henry Maine; Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998).

⁴Russell Hardin, *Trustworthiness*, 107 Ethics 26, 35 (1996).

⁵The 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 t.a.n._ to _ infra.

effective and relatively uncontroversial.⁶ So it would seem that sometimes the law functions usefully as a “norm manager,”⁷ reinforcing norms of family obligation, and sometimes that role meets resistance and is 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 differential 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 community.⁸ Although the relative impact of law and norms in shaping expectations about marital behavior can’t be quantified, it is uncontroversial that the institution of normative marriage is defined in important ways by its legal framework.⁹

This legal framework has undergone major adjustments in recent years. First, the law has embraced egalitarian gender norms, categorically withdrawing support from hierarchal,

⁶ Beginning in the mid-1980's, a complex network of federal and state legislation has contributed to more effective child support enforcement. See t.a.n. _ to _ infra.

⁷ Cass Sunstein, *Social Norms and Social Roles*, 96 *Colum. L. Rev.* 903, 907 (1996).

⁸ Several scholars have applied signaling theory to the analysis of marriage. William Bishop, “Is He Married?”: Marriage As Information, 34 *U. Toronto L.J.* 245 (1984); Eric Posner, *Family Law and Social Norms*, in *The Fall and Rise of Freedom of Contract* 256 (F.H. Buckley ed., 1999); Michael J. Trebilcock, *Marriage As A Signal*, in *The Fall and Rise of Freedom of Contract* 245.

⁹ Steven Nock, *Marriage in Men’s Lives* (1998). Nock describes domestic relations law as an embodiment of collective ideals about marriage. He uses law as one basis for defining the institution of normative marriage.

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 *de*-regulation of marital 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 de-privileging 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. It is less clear, however, whether any legal reform 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 have not triggered 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.¹⁰ In an environment in which public discourse tends to mask private preferences, predicting responses to legal policy initiatives becomes highly problematic. I 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

¹⁰ For an enlightening analysis of how preference disguise make the prediction of social change difficult, see Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* 174, 347 (1995).

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 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 suggest the means by which law can affect marital norms, using the traditional legal framework as a case study. Part III traces 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 argue that norm bundling explains the puzzling variations in the effects of the legal reform movement on contemporary marital norms. I conclude that the complexity of the interaction of law and norms in marriage together with the problem of disguised preferences frustrate efforts to use explanatory theories of how law influences norms to predict the consequences of future changes in the legal regulation of marriage.

I. THE NORMATIVE STRUCTURE OF TRADITIONAL MARRIAGE

Marriage is a status in which a couple, usually through a formal ceremony, agree 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 that is accompanied by voluntary agreement to be bound by a set of norms, few are as broad in scope or as commonly experienced.¹¹ As in other norm contexts, the social norms surrounding marriage create in the individual spouse a sense of obligation stimulated in part by the recognition that violations result in sanctions both in the form of self-imposed guilt and disapproval by the spouse and other members of the community.¹² The way in which these norms function is both interdependent and complex. To

¹¹Entering military service or becoming president are similarly all-encompassing roles that are formally assumed.

¹²The definition of “social norm” has not been free from controversy. Some of the debate focuses over 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; Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 350-51 (1997). Richard McAdams’ definition is simple, but satisfactory, for my purposes. “[N]orms...refer to behavioral regularities

appreciate this complexity and its consequences, I 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 which the spouses adopt and by which they agree to be bound in traditional marriage includes both commitment norms and gender norms, which together regulate both the spousal and the parental roles.¹³ 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 will argue, however, that the two types of norms are quite different in their function and in their utility. Commitment norms assist the couple to achieve 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

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, on my view, they are not norms. See infra note _.

¹³Note 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.

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 - - i.e., that each spouse voluntarily agrees (by getting married) to be bound by the same behavioral restrictions, and that 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 which generally guides marital behavior. This is not to say that commitment norms function as an onerous burden, coercively imposed on the married 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 face 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 interests 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 which allow 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. 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 expressions in marriage 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.¹⁴ The marital obligation is more extensive than is 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 are less important (or irrelevant) in the commercial context, creating behavioral expectations that define this intimate personal relationship 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.¹⁵

Commitment norms serve a bonding function in that each spouse, by agreeing to adhere to the behavioral expectations embodied in the norms, makes herself vulnerable to heavy costs should she later defect.¹⁶ For example, marriage is subject to norms of open communication and truth telling. These norms promote trust and interdependence which 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 example) would be

¹⁴ Several scholars have examined the operation of these norms in long term commercial relationships. See Lisa Bernstein, (1992); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc.Rev.* 55 (1963); R. Scott, *supra* note 3, at 2040-42

¹⁵ 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.

¹⁶ Bonding arrangements are self limiting constraints which align the interests of each spouse with the other, by increasing 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, and because it is consistent with their self image, etc.), but realize that they will be tempted to stray from their self-defined goals. See Elizabeth Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 *Va. L. Rev.* 9 (1990). Norms assist them to stay the course.

costly.¹⁷ 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 vary in different time periods and social contexts.¹⁸ Not surprisingly, social disapproval of marital infidelity has traditionally been strong and widespread.¹⁹ Thus, the spouse who is tempted to pursue an illicit encounter anticipates that she will incur significant costs should the adulterous violation be detected.²⁰ 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 the security and stability of the relationship is consistent with individual and joint long-term interests, then

¹⁷See Scott & Scott, *supra* note 4, at 1290. 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.

¹⁸ See Steven Nock, *Marriage in Men’s Lives*, *supra* note _ at _. 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 1990’s, or the Mid-west in the 1890’s.

¹⁹ Nock, *supra* note _ at 22. 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.

²⁰These 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.

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.²¹ 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).²² Parental commitment norms include the shared obligations of parents to rear the children of 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, believing that such involvement provides psychological benefits to the child.²³

Like spousal commitment norms, norms of parental obligation function to deter selfish behavior, encouraging parents to identify their own interest with that of their children. These

²¹See note _ supra. Out-of wedlock parenthood was a serious social offense until relatively recently, creating stigma for both parent and child. Illegitimate children also suffered from serious legal disabilities, having no inheritance rights, and no entitlement to paternal support. See Mary Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 *Colum. L. Rev.* 60, 69-70. Both the stigma of unmarried parenthood and its responsibilities fell heavily on mothers. Traditionally, unmarried fathers were absolved of legal duties toward their children.

²² Nock suggests that one of the defining traits of normative marriage is the assumption that the couple will have children. Nock, *supra* note _ at 6. This assumption is usually realized. According to Nock only 11% of ever married women age 44 are childless. *Id.* at 32.

²³ They also may be subject to gossip by other parents if they regularly fail to attend (and admired for faithful attendance). Similarly, faithful performance of the obligation to provide for children healthy physical development now requires regular visits to the pediatrician and dentist for preventive examinations.

norms serve an important function, because the relationship is one in which the parents have power and authority over their children, who, because of their immaturity, are unable to assert their own interests.²⁴ 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 perform adequately 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 family privacy impedes community monitoring.²⁵ Thus, successful norm enforcement 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 spouses in many marriages--the successful rearing of children. By deterring parents from (hopefully only) occasional 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.²⁶

²⁴See Elizabeth Scott & Robert Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2433 (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.

²⁵Monitoring also plays 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. Cite

²⁶I 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 __, 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).

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 also gave her authority in the family. This role also contributed to inequality in marriage, however, because it reinforced women’s financial dependency on their husbands.²⁷ The “good” wife and mother devoted her efforts to serving her husband’s and family’s needs, subordinating her own interests and preferences, while the husband’s role encouraged him to equate family interest with 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 commitment 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.²⁸ The efficiency of divided roles is undermined if the stability of marriage becomes uncertain, however, because much of the wife’s investment is not transferrable. Efficiency aside, the fairness of gender norms and roles is questionable. Unlike commitment norms, gender norms either inherently or implicitly tend to subordinate the interest of wives to that of husbands and subject spouses to unequal treatment. Spousal and parental commitment norms can be understood as mechanisms that predictably might evolve by spousal

²⁷ 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 can not fulfill. See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (2000).

²⁸ Gary Becker and other economists have argued for the efficiency of gendered role division in marriage. Gary S. Becker, *A Treatise on the Family* 30-53 (enlarged ed. 1991); Elisabeth S. Landes, *Economics of Alimony*, 7 *J. Legal Stud.* 35 (1978). See also Ira Ellman, *The Theory of Alimony*, 77 *Cal. L. Rev.* 3, 40-47 (1989)

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 norms) in marriage.²⁹

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, and 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 husbands. For example, violation of sexual fidelity norms carried far higher social costs for women than for men.³⁰ 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 self-interest with that of the other-- is fully compatible with wives’ gendered obligations, but in tension with the autonomy- enhancing roles of husbands.³¹ Thus, wives may submit to these norms more readily than husbands, a response that may exacerbate inequality.

²⁹ 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 interest groups in society. See Jean Ensminger & Jack Knight, *Changing social Norms: Common Property, Bridewealth, and Clan Exogamy*, 38 *Current Anthropology* 1 (Feb. 1997).

³⁰ 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 his wife, including his interest her sexual services. 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, 470-72 (1998). See also, Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 *Hastings L.J.* 195 (1986)(chronicling the historical development of adultery laws and how they favored men.

³¹The symbolic importance of the traditional custom of wives assuming husbands’ surnames and of the wearing of 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 & Promises*, 6 *J.L. Econ & Org* 203 (1990).

B. The Enforcement Structure of Marital Norms

The complexity of the normative structure 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 community underscores the multi-layered structure of enforcement. The parties understand that marital norms will be enforced on four levels – through individual precommitment to abide by the obligations, and through 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 constitute 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 non-availability for other intimate relations.³² Through the solemn public expression of enduring commitment, each spouse signals that s\he is what Eric Posner has called a “good type,” a reliable person who can be counted on for the long haul.³³ 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 that spousal accountability extends to the community as

³²The 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 behavior against the expectations of married persons. These functions underscore the importance of the traditional convention of wives, but not husbands, wearing wedding rings.

³³ See E. Posner, *supra* note _ at 260 note, *supra*. 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. *Id.*; Bishop, *supra* 9, at 250; Trebilcock, *supra* note 9, at 250.

well as to the partner. Engagement banns, 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 marital behavior.³⁴ The ceremonial rite of passage underscores the fact that both the spouse and the community now have expectations 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.³⁵ 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

³⁴All 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 the of the voluntary contractual nature of the change of status which subjects the couples to the norms. Jenson & Meckling_ supra note _ at 308.

³⁵Although 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.

undermine the relationship.³⁶ Thus, self enforcement of marital norms through guilt is essential to maintaining a cooperative equilibrium.

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. The married couple live together intimately in an exclusive relationship, interacting frequently over a long period of time. Thus, their relationship with each other is different both in quality and 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 pursue 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 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.³⁷ 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 an 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.³⁸

³⁶ 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.

³⁷This underscores the fact the marriage itself is a norm community (with only the spouses as members) within the larger community.

³⁸In 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, *Marriage as Relational Contract* . 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 loyalty between spouses. What loyalty requires in a given marriage (“don’t leave me at the party”) may vary among married couples. Couples may also customize to a certain extent marital norms that are

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.³⁹ 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.⁴⁰ The emotional bond of marriage and the intensity of interaction distinguishes it from other relationships in ways that may increase the variance between cooperation and defection. Since, for each spouse, the other's esteem is uniquely important, the withholding of esteem through anger or withdrawal is a particularly effective sanction.⁴¹ Moreover, the foundation of affection and commitment inclines both spouses towards 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 which can trigger a destabilizing spiral of mutual recriminations. In this context, the background norm of

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 1970's, 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 and the short-lived interest (and the divorce of the authors) suggest that important marital norms can not 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.

³⁹ Elizabeth S. Scott, *Rational Decision-making in Marriage and Divorce*, -Va. L. Rev. -(1989).

⁴⁰ See Robert Axelrod, *The Evolution of Cooperation* 30- 33 (1984) (describing patterns of cooperation in an iterated game); R. Scott, *supra* note 3, at 2009-2030 (developing a game-theoretic model to distribute risk in long-term contractual relationships)

⁴¹I am persuaded by Richard McAdams' argument that people comply with norms in part because they care about the esteem of others. See McAdams, *supra* note 14, at 355-57. This approach is not incompatible with Eric Posner's signaling analysis. Posner, *supra* note 9, at 260-62. 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.

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 anticipate reputational harm or other social sanctions for defection.⁴² Because marital privacy is 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 where 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 can overlap in enforcing marital norms.⁴³ In a small highly integrated community that strongly endorses marital norms, the societal consensus

⁴²Community norm sanctions can include gossip, criticism, social ostracism, and financial penalties, such as a refusal to do business with a norm violator. Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 208-11 (1991). Violation of marital norms can damage professional advancement. Consider the derailing of the appointment of Army General Joseph Ralston to the position of Joint Chiefs of Staff, when it was revealed that he engaged in extramarital affairs. See *General's Affair Re-Ignites Debate Over policy*, USA Today, June 6, 1997, at 1A. Marv Albert lost his position as an NBA Commentator on NBC when it revealed in a divorce proceeding that he physically assaulted his wife. He has subsequently returned to broadcasting. Marylyn Schwartz, *A Shot Most Foul: What's Marv Albert doing on NBC?*, Houston Chron., December 20, 1999, at 2.

Violation of marital norms can be punished severely in the political arena, viz Nelson Rockefeller, who was humiliated at the Republican presidential convention in 1964 because he was divorced. He was harassed during his campaign because of his divorce and subsequent re-marriage to a woman who gave up custody of her four children from a previous marriage. Cite 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 Hard Lot*, San. Fran. Chron, March 27, 1992, at D24.

⁴³One 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.

will be amplified, and norm enforcement predictably will be highly effective.⁴⁴ 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.⁴⁵ Moreover, sanctions are particularly effective because in a small community, the potential norm violator is likely to value highly the esteem of community members.⁴⁶ In contrast, if the couple's community only weakly endorses marital norms, or if their various communities express different attitudes (sending inconsistent signals),⁴⁷ or if the couple's social affiliations are tenuous, then social expectations will play a much weaker role in enforcing marital obligations.⁴⁸ 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 come to expect of each other (and of themselves) what their social community seems to expect of married couples.⁴⁹

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

⁴⁴Ellickson, *supra* note 48, at 135.

⁴⁵Norm scholars have suggested that a secondary norm develops to encourage norm enforcement, because community members do not want to be sanctioned as one who is 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 which is relatively costless. McAdams, *supra* note 14, at 372-75; Cooter, *supra* note 14, at 1645-46.

⁴⁶Richard McAdams makes this point in explaining why individuals (gang members, for example) 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. McAdams, *supra* note 14, at 386-90.

⁴⁷For example, the couple's family may strongly endorse marital norms, while their social group is indifferent.

⁴⁸Even 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 on 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.

⁴⁹ See Hardin, *supra* note 5, at 36-37.

speculative undertaking, one that is 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.⁵⁰ 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.⁵¹

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

⁵⁰Thus, absent dire circumstances, the husband's traditional legal duty to support his wife was not enforced during marriage. *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (court refuses to sanction husband for failure to provide wife with basic amenities, despite financial means to do so.)

⁵¹This is the pattern which Lisa Bernstein observes (and argues for) among diamond merchants and others, agree not to subject disputes to litigation. Bernstein, *supra* note __, at 1796-1815. 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. *The Enforceability of Norms and the Employment Relationship*, 144 U. Pa L. Rev. 1913 (1996)

disappears).⁵² 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 enforcement represents a final (and powerful) layer of enforcement in a multilayered system.⁵³

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 it 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.⁵⁴ But community enforcement 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 lax historically. As the social norm strengthened, political pressure increased for more effective legal enforcement. Research evidence suggests that although the effectiveness of legal reforms that promote criminal arrest and prosecution has been mixed, the response has been positive among potential offenders with community ties - a group for whom anticipated reputational harms may

⁵² R. Scott, supra note __ at __ E. Scott & R. Scott, *Marriage as Relational Contract*. In general, this is why the state enforces many marital obligations on divorce (such as spousal and child support) which are enforced through informal means during marriage.

⁵³ Other examples are legal enforcement of the child support obligation and of spousal commitment norms, as I will discuss in Part III.

⁵⁴ Law suits 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. Ellman et. al., supra note 59, at 163, 171. These advocates were norm entrepreneurs, leaders who aim to influence and shape norms by criticizing existing norms and behavior. See McAdams, supra note 16, at 394-95; Sunstein, supra note 10, at 909-12, 929..

carry substantial weight.⁵⁵

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.⁵⁶ 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 can not 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. Predictably, this policy will promote compliance, not only because the obligor parent anticipates the loss of his car, but also because he wants to avoid community disapproval.

2. The Role of Law in Defining and Influencing Norms

Beyond (or together with) its enforcement role, legal regulation can play a role in shaping normative behavior in marriage in at least three ways.⁵⁷ 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

⁵⁵Larry Sherman, *Policing Domestic Violence: Experiments & Dilemmas* (1992); Jeffrey Fagan et. al., *The Specific Deterrent Effects of Arrest on Aggression against Intimates*, *Criminology* (in press); Bobby Brame *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.*

⁵⁶

⁵⁷ 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.

social norms.⁵⁸ Bright-line legal rules clarify precisely what behavior is required of spouses and parents under the relevant norm.⁵⁹ 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 20th 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 16, 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, the legal requirement was internalized by parents, 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.

Bright-line legal rules that particularize an abstract norm serve principally to clarify and to 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 behavioral obligations required under the norm.⁶⁰ Resistance is predictable and legal enforcement is likely to be costly if the legal requirement departs substantially from the expectations created by the norm standard.⁶¹ 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

⁵⁸This insight was first noted by Richard McAdams. *Id.* at 402.

⁵⁹*Id.* At 407-08. McAdams uses the example of laws requiring the use of child safety restraints in cars.

⁶⁰ As I indicate below, preference disguise makes the assessment of community opinion difficult, and the prediction about the impact of legal reform uncertain. See *t.a.n.* _ to _ *infra*.

⁶¹Paul Robinson and John Darley argue that to be effective, criminal law should track social norms. *Justice, Liability, and Blame* (1995)

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.⁶² Thus, for example, the replacement of the tender years presumption with the best interest standard as the decision rule for resolving child custody disputes may be understood as signaling legal support for more egalitarian parenting roles.

Some norms scholars have argued that law influences norms through its expressive function.⁶³ Although claims about this role of 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. 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 only occasionally involved legal enforcement. Much of its importance was expressive. The law gave family governance authority to husbands and implicitly assigned family roles, while discouraging women from functioning in the public sphere. The necessities doctrine,⁶⁴ the tender years presumption,⁶⁵ 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 norms with little legal

⁶²This 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 t.a.n. _ to _ infra.

⁶³ See Sunstein, Pildes. An interesting debate has emerged in the legal literature over the viability of expressive theories of law. Pildes, Pildes & Anderson, Adler (in press). 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. Sunstein, McAdams, Cooter. Robert Cooter equates the creation of norms (by courts) with the expression of social values. Cooter, Expressive Law and Economics, 27 J. Legal Studies 585, 585-6 (1998). For my purposes, the law's influence on social norms through its expressive function simply describes impact on norms other than that created directly by legal sanction.

⁶⁴ 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. Ira M. Ellman, et. al, Family Law: Cases, Text, Problems 138 (3 ed. 1998).

⁶⁵The tender years presumption presumes 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. Id. at 614-616.

intervention in the “private” realm of the family.⁶⁶ 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.

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,⁶⁷ 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 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.

⁶⁶ Consider also the 1872 opinion of *Bradwell v. Illinois*, 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. 83 U.S. 130. 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. Frances C. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983).

⁶⁷ McAdams, *supra* note 14 at _.

Parental commitment norms found concrete expression in preemptive rules such as vaccination requirements, school attendance laws and 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 marriage financially. Care and support of illegitimate children rested in the mother. Fathers had no legal obligation, signaling the stigma attached to illegitimate status.

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.⁶⁸ Fault grounds for divorce - - the prohibition of 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 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 across which 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

⁶⁸ See Richard Fox, *Trials of Intimacy* (1999) (describing the scandal surrounding the alienation of affections suit brought by Theodore Tilton against the prominent preacher Henry Ward Beecher in the late 19th century. Tilton alleged that Beecher seduced his wife Elizabeth, a parishioner. After a highly publicized 5 month trial, the jury concluded by a 9-3 vote that Tilton had failed to provide sufficient evidence of the tort.) See also Ellman, Kurtz, and Scott, *Family Law: Cases, Texts and Problems* (1998).

patterns of behavior that emerged as relational norms.⁶⁹ 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.⁷⁰ The legal privileges associated with marriage, together with the harsh sanctions imposed on other intimate relationships,⁷¹ 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.⁷² Because marriage offered substantial tangible and intangible legal benefits, the anticipated loss of these benefits on divorce was significant.⁷³ 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.

More generally, the sharp legal boundaries of traditional marriage--its well-understood

⁶⁹Game theory suggests that in a long term relationship, the anticipation of indefinite future interactions deters opportunistic behavior. See note _ Supra 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 E. Scott, Rational Decisionmaking

⁷⁰Traditional marriage was a privileged status, which carried, as Eric Posner puts it, a "basket of immutable obligations." See E. Posner, supra note _ at .

⁷¹Cohabitation was a "meretricious relationship," warranting no legal recognition or protection. 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. The tax penalty to working couple suggests endorsement of traditional marriage with differentiated roles. Id. at 84. Adultery, fornication laws, status of illegitimate children.

⁷² 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. Ellman, et. al., supra note 59, at 180-83. Tax benefits applied to traditional marriage\ Tax penalty to working couple suggests endorsement of traditional marriage w\ differentiated roles. Id. at 84

⁷³Some privileges continue to be available exclusively to married couples--tenancies by the entirety, inheritance rights, etc.

obligations, privileges, and restrictions on entry and exit--reinforced its clear social meaning.⁷⁴ 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.⁷⁵ The marital status indicated the parties' stability, reliability, and adherence to conventional values. Indirectly, this reputational benefit tended to encourage married persons (at least publicly) to conform to the behavioral expectations associated with the role, so as to reap the benefits of an esteemed status. Finally, because the package of legally mandated behavioral restrictions was well understood, the clear social meaning of marriage facilitated community enforcement.

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 tended to undermine the effectiveness of the matching function somewhat and to distort the accuracy of the signal. Some of these 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.⁷⁶ For others, the normative and legal constraints defining the social meaning of marriage undermined their capacity to 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.

⁷⁴ The effectiveness of the marriage signal is dependent on the clarity of the social meaning of marriage. Bishop; supra note 11, at 253-54; Posner, supra note 11, at 270; Trebilcock, supra note 11, at 250.

⁷⁵ 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.

⁷⁶ These would include, of course, the barriers to exit, which might give pause to the seeker of a casual relationship.

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 19th century women exercised authority within their families and political influence in society, despite the fact that they were effectively denied legal personhood.⁷⁷ Legal reification of sharply differentiated gender roles which subordinated the interests of women persisted well past the mid-20th 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.⁷⁸

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 proved was not entitled to alimony and was likely to lose custody of her children as well.⁷⁹ For her, an extramarital affair carried a disproportionate risk of onerous legal and social penalties.⁸⁰ She could become impoverished and be publicly labeled a bad wife and mother. There is little evidence that unfaithful husbands were the object 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.⁸¹

⁷⁷ Martha Minow, “Forming Underneath everything that Grows:” *Toward a History of Family Law*, 1985 *Wis. L. Rev.* 819, 825-26 (1995).

⁷⁸ *Saff v. Saff*, 62 A.D.2d 452 (N.Y. 1978) (impact of dividing property by title); The tender years presumption 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. Ellman, et. al., *supra* note 59, at 661-65. *Saff v. Saff* (impact of dividing property by title); decline of tender years presumption).

⁷⁹ See generally Ira Ellman, *The Place of Fault in Modern Divorce Law*, 28 *Ariz. St. L.J.* 773 (1996)

⁸⁰ See *supra* note 79.

⁸¹ Custody and child support regulation expressed gendered accounts of parental commitment obligations.

Summary

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 multi-layered 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 which 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, it 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 1960's, powerful social forces challenged traditional spousal norms as inconsistent with modern values, and law makers 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.

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).⁸² Marriage has become a more unstable relationship. Although lasting marriage continues to be a cherished goal for most people, many have become pessimistic of its achievement in the face of increases in divorce rates.⁸³ 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 1960's and 70's, 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.⁸⁴ Marital commitment norms have changed as well. For 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. The erosion of commitment norms may be due, in part, 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. Liberal tolerance and respect for autonomy are reflected in deference to individual self-realization, and acceptance of diverse choices in intimate relationships.⁸⁵

⁸² Arlie Hochschild, *The Second Shift: Working Parents and the Revolution* (1990); Wax, *supra* note 34. Pleck studies and others discussed in E. Scott, *Pluralism*

⁸³ Marriage Project survey (1999).

⁸⁴ 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, an 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 (clearly unexpected by the caller) was that he should quit work to care for the child. August 16, 1999. Caveat--Joan Williams.

⁸⁵ Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *Mich. L. Rev.* 1803 (1985).

The picture is more complex than this account suggests, of course, and I hasten to qualify it in several ways. First, the liberal 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, 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.⁸⁶ 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.⁸⁷ Further, bad behavior in 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 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.⁸⁸ 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.⁸⁹ Another development which 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

⁸⁶See supra note _ Hochschild, Maloney, Nock, man as household head

⁸⁷This suggests that many spouses continue to internalize commitment to lasting marriage.

⁸⁸Youth sports, homework, college applications, consulting mental health professionals

⁸⁹ See, e.g., Jeff Kass , Columbine shooters' tapes raise questions on parents' duties; Legal standards, experts' advice can vary; The Dallas Morning News, December 22, 1999, at 8A; Ardy Friedberg , In wake of school shootings, parents' responsibility for their children a hot topic, The Gazette (Colorado Springs), May 25, 1999.

assumed to be bound by their parental role to provide support.⁹⁰ In general, the obligation of parents to promote their children's welfare is at least as powerful today as it was historically.⁹¹

B. Legal Reform of the Marriage Relationship

In the relatively brief historical period since the 1960's, 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 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

⁹⁰ Historically, unmarried mothers experienced stigma because of their status, and were assigned all of the duties of parenthood. Fathers, in contrast, 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 Mary Shanley, *supra* note 1. 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 violate the norms against producing illegitimate children were sanctioned quite differently. Much modern child support legislation is directed at unmarried fathers, a dramatic change from the law's traditional stance.

The recent publicity surrounding the revelation that basketball star Julius Erving had supported a child, Alexandra Stevenson, by an unmarried woman for many years is instructive in suggesting changed attitudes about parental obligation. Media coverage of this story described observers who questioned whether Erving, married to another woman and the father of her children, had defaulted on his paternal obligations to Ms. Stevenson by not developing a relationship with her. See George Vecsey, *Sports of The Times*; *They'll Miss Pete Sampras Soon Enough*, *N.Y Times*, September 1, 1999, at D1

⁹¹Survey data. Moreover, characterization of parents as having a property-like interest in their children has weakened considerably over the past century. This position is contestable of course. Increased divorce and out of wedlock childbirth suggests a weakening of parental responsibility. However, as I suggest, *infra*, divorce is often justified as offering benefits to children, and unmarried parents are held financially responsible for their children's welfare.

has been the subject of successful constitutional challenges as well.⁹² In combination, these legal reforms 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, 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.⁹³ 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.⁹⁴ 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 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.⁹⁵ The consistent 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 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.⁹⁶

⁹² Title VII; VMI; *Frontiero*

⁹³See *Orr v Orr*, in which the Supreme Court held that Alabama's statute, under which only wives were eligible for alimony, violated the Equal Protection clause of the constitution. 480 U.S. 268 (1979).

⁹⁴Husbands in intact marriages are almost never charged with rape, absent serious physical injury. Ellman, et. al., *supra* note 59, at 176-77.

⁹⁵Fineman, *The Neutered Mother* (1995); Nancy Polikoff; Carol Smart, K. Czapaniskly

⁹⁶The trend in the 1980's toward favoring joint custody is an example of the legal embodiment of an aspirational norm, since most parents do not share child caretaking responsibility. E. Scott, *Pluralism*, at _ The availability of spousal support to dependent husbands was for the most part of symbolic importance.

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.⁹⁷ 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 also protect their integrity, which was threatened by collusion of couples who agreed that their marriage had failed.⁹⁸ The objective of the Governors' Commission in California in the 1960's, 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.⁹⁹ 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.¹⁰⁰

The early no-fault reformers did not promote the revisions 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.¹⁰¹ 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

⁹⁷Surveys indicated minimal support for making divorce easier and endorsement for the notion that most people did not try hard enough to make marriage work. H. Jacobs, *The Silent Revolution*, E. Scott, *Rational Decisionmaking*,

⁹⁸Under these circumstances, collusion was made necessary by the requirement that one spouse prove a fault ground against the other before divorce would be granted. See Wels, *New York: The Poor Man's Reno* 35 *Cornell L.Q.* 303, 315-19 (1950)(describing fraudulent testimony in New York).

⁹⁹ Herbert Jacobs *Silent Revolution*. In the California legislative process, the costly counseling provisions were abandoned, and the statute was enacted without them.

¹⁰⁰ *McKim v. McKim* 493 P.2d 868 (Cal. 1972) (requiring irreconcilable differences be shown); Note, *Irreconcilable Differences: California Courts Respond to No Fault Dissolutions* 7 *Loy. L. A. L. Rev* 453 (1974)

¹⁰¹H. Jacobs, *supra* note _ at _

understood to be often a matter of shared responsibility, and 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 marital 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.

4\17The 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 "efficient" termination of marital obligations.¹⁰² It appears that, having rejected the legitimacy of state coercion under traditional law, law makers 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.¹⁰³ Only recently, with the introduction of covenant marriage laws, have couples been offered the option of legally binding commitments.

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. A few jurisdictions have gone further, suggesting that legal obligations between

¹⁰² 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. E. Scott, *Rational Decisionmaking*; Scott & Scott, *supra* note 4, at 1310-11

¹⁰³ Thus, for example, provision in a premarital agreement providing for a two year waiting period before divorce would probably not be enforced. Stake, Haas, Scott, *Rational Decisionmaking*

cohabiting parties may arise simply on the basis of the relationship or on equitable grounds.¹⁰⁴ The legal status of cohabitation relationships has been further recognized under domestic partnership laws that extend benefits traditionally reserved for marriage to both homosexual and heterosexual cohabiting couples.

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, the state has shifted from a highly coercive stance to a rather passive one in which individuals are far freer to arrange their intimate relationships without 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.¹⁰⁵ 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 legal regulation has 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 argue 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 both in scope and strength in recent years. Legal reforms imposing responsibility on parents for the misconduct of their children effectively hold parents

¹⁰⁴Marvin; Washington statute, cases, other states creating cohabitation status. Recent French legislation. NYTimes

¹⁰⁵For a discussion of the trend toward private ordering, see Jana Singer, *The Privatization of Family Law*, Wisc. L. Rev. For a discussion of the reluctance of courts to contractually enforce commitment provisions, see Haas, *supra* note __; E. Scott, *Rational Decisionmaking*, *supra* note __.

liable for failure to perform child rearing tasks adequately.¹⁰⁶ 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.¹⁰⁷ 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 1980's, the general attenuation of family commitment in the no-fault divorce era has not diminished responsibility for child support.¹⁰⁸ Indeed, there is evidence of a perceived need to reconcile the freedom of parents to divorce with their ongoing parental obligations. Thus, the move to no-fault unilateral divorce has been justified on the ground that an unhappy marriage harms the psychological development of children.¹⁰⁹

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

¹⁰⁶ 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." Cites. The parents of the victims of recent school shootings are seeking to push the frontier of parents legal responsibility in law suits 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 Lisa Belkin, Parents Blaming Parents, N.Y. Times Magazine, October 31, 1999. Although the prospect for success of these claims is highly uncertain, their plausibility represents a change in attitude and openness to holding parents' responsible for their children's harmful conduct. .

¹⁰⁷ The Supreme Court has prohibited discrimination on the basis of illegitimacy. *Lalli v. Lalli* 439 U.S. 259 (1978) (Inheritance rights); *Clark v. Jeter* 486 U.S. 456 (1988) (right to parental support).

¹⁰⁸David Chambers, The Coming curtailment of child support, *Mich. L. Rev.* 1984,

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the desired behavior seems to have promoted and reinforced normative change in a relatively straightforward way.¹¹⁰ 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 de-privileging 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 regulatory framework, they gradually became intertwined. When norm bundling occurs, dis-aggregation 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 for better understanding and explaining 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

¹¹⁰ 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.

norms are evolving in a polarized social context, one in which private preferences may be disguised. 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 object of benign paternalistic intentions, and a broad societal consensus supports imposing responsibility on all parents for the care and development of their children.¹¹¹ Defections by parents generally are criticized harshly. Thus, in the 1970's and 1980's, when norm entrepreneurs publicized data showing that many divorced fathers failed to pay child support, defaulters were stigmatized as “deadbeat dads.”¹¹² 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.

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 1970's and 1980's, 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. 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-

¹¹¹This 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.

¹¹²

1980's, the federally mandated guidelines provided concrete rules to quantify the obligation, and the vast interstate and federal enforcement system powerfully reinforced informal mechanisms.¹¹³ 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.¹¹⁴

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 disfavored aspects of gender norms. First, child support legislation comprehensively targeted all non-custodial parents, diffusing any linkage with gender norms in traditional marriage. More important, enforcement of this parental obligation in no way reinforces women's subordination or traditional gender hierarchy. Instead, child support reduces mothers' dependency and promotes sharing of the burden of child rearing between parents living apart. Thus, the law's effective norm management 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.¹¹⁵

Compare the impact on gender norms of legal reforms promoting egalitarian marriage. Law makers have systematically withdrawn legal support from gender hierarchy in marriage, and

¹¹³ CSEA; Parental Support Act

¹¹⁴The Virginia vehicle disabling policy mentioned above, supra note __, may be the most creative, but other states withdraw driving privileges and professional licenses, sanctions that are likely to become known and to generate community gossip. Massachusetts statute

¹¹⁵To 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 which greatly increase 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 is outrage.

modern law offers an ideal of marriage as an equal partnership of autonomous individuals.¹¹⁶ 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, endorsing joint custody and thus encouraging parents to share child care responsibility.¹¹⁷ More subtly, modern divorce law discourages gender role differentiation by denying wives who pursue traditional roles adequate insurance against the risk of divorce.¹¹⁸ These reforms together represent a challenge to traditional gender norms in marriage. If the legal initiatives have been effective, then gender equality in marriage should be well established and gender norms significantly weakened.

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 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.¹¹⁹ Even where women have demanding jobs, they tend to function as the managers of their children's lives, a role most women do not wish to relinquish.¹²⁰ This leads, in turn, to career choices that accommodate parenting

¹¹⁶ Legal prohibitions and sanctions have also directly targeted some behavior by husbands--such as physical assault--that was tolerated in traditional marriage. The abolition of the marital rape exemption stands as a powerful statement endorsing the status of wives as autonomous agents. *People v. Liberta*. In practice, rape charges are almost never brought against husbands unless the couple is separated or the wife injured in the sexual assault.

¹¹⁷See K. Bartlett & C. Stack, Joint Custody.

¹¹⁸ Further, child support and alimony are awarded on a gender neutral basis.

¹¹⁹ Check cites in Pluralism Cynthia Epstein, Michael Lamb; Hochschild

¹²⁰See studies cited in Scott, *Pluralism, Parental Preferences*.

duties, reinforcing gender difference and women's dependency.¹²¹ 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.

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.¹²² Second, resistance to norm change 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 being primarily responsible 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 express support for a new norm of shared parenting. Because women have long internalized the primary obligation of child 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, because of their long association with other norms that continue to be strongly endorsed.

B. The Effects of Legal Change on Spousal Commitment Norms

1. Deregulation and Marital Commitment

¹²¹Joan Williams challenges the view that mothers make "choices" to make the accommodations that seem necessary to adequate 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 J. Williams, *supra* note __ at __.

¹²²Relational feminists have focused on women's identity as nurturing caretakers. Bartlett, *Feminism in Family Law* (1999); Cites Indeed claims about the importance of this role has 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. In contemporary discourse, feminists who focus on motherhood do not tend to make essentialist identity claims, but nonetheless, elevate mothering as a feminine role. Fineman, *The Neutered Mother*

Divorce law reforms of the past generation grew out of the perception that the legal structure, while supporting spousal commitment norms, was out of step with other broader values. The notion of a coercive state dictating the terms of marriage was inconsistent with contemporary norms of privacy and autonomy. 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 regime, which facilitates easy termination of the relationship while at the same time discouraging contractual commitment. This 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 is expected to be sure 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 her immediate interest.¹²³ 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

¹²³ In this situation, the individual's short term and long term interest may conflict, but because of a tendency to discount the future, she may overvalue short term interest. See Scott, Rational Decisionmaking

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.¹²⁴ 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 which 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. 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.¹²⁵

If this analysis is correct, the deregulation of commitment under no-fault law does more than serve the legitimate purpose of releasing unhappy spouses from marriages that can not be saved. It may also destabilize relationships in which legal reinforcement of informal norms could assist spouses in achieving 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 weakens commitment norms by making divorce

¹²⁴See *tan* _ *supra*. 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. At one time, informal social costs associated with loss of esteem in the community would be added to these formal legal costs. (Remember Nelson Rockefeller!) See note _ *supra*.)

¹²⁵The incentive of parties in long-term relationships to cooperate explains the popularity of mediation and other non-adversarial methods for resolving disputes in on going relationships. Two examples are employment and divorce custody disputes. In both contexts, 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 can not easily leave.

easier and therefore more common. Following the withdrawal of legal enforcement, the relative (as well as the absolute) number of persons divorcing increased.¹²⁶ 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 the number of divorces increases, secondary norms that promote community enforcement should weaken, and enforcement should become even less effective.¹²⁷ This should further weaken commitment norms, which, in turn, contributes to greater marital instability, leading to more divorce. Through such a spiraling process, commitment norms may unravel altogether. To the extent that this process is merely a function of changing attitudes about marital commitment, the legal initiatives themselves may have had little independent impact. But if divorce law distorts widely held notions about marital commitment, it has arguably contributed to the weakening of spousal commitment norms and the instability of marriage.

2. Deregulation and the Signaling Effect of Marriage

Choosing marriage once signaled an election to undertake a serious commitment to a life-long 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.¹²⁸ 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

¹²⁶ Although divorce rates increased in the 1970's and 1980's during the period of no-fault reforms, controversy surrounds the question of the extent of the impact of the legal reform on the incidence of divorce. Ellman, Fault article Most of the claims seem to be made by those with strong views for or against the reforms. At the extreme pole, legal restrictions on divorce certainly have an impact.

¹²⁷ Divorce represents non-compliance 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. Cooter, Decentralized Law, supra note _ at _. McAdams, supra note _

¹²⁸ 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 _

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 of indicating the seriousness of their desire to make an enduring commitment to the relationship.¹²⁹ 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 becomes weaker as the line between marriage and informal cohabitation is blurred. Community monitoring and sanctioning of spousal misbehavior become problematic if behavioral expectations vary across marriages and there are no clear standards of marital obligation.¹³⁰

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 where 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.¹³¹ 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

¹²⁹In 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.

¹³⁰The 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.

¹³¹Linda Waite(Cohabitation white paper) ; Steven Nock; Article on Cohabitation.

reforms is the power of the signal. Modern marital law offers individuals only a very modest opportunity to undertake commitment, and thus choosing marriage no longer signals intentions or triggers expectations as reliably as was once true.

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 an amplified and often unintended impact. 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 law makers can function effectively as norm managers to correct the problem, providing couples with effective means to legally enforce marital commitment. “Effectiveness” would be measured by the readiness of couples to utilize the legal mechanisms and their actual impact 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 the 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.

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 commonly understood to be a necessary incident of the law's deference to personal autonomy in intimate relationships. To be sure, advocates for a return to moralistic legal restrictions on intimate relationships are a distinct minority in the public debate. However, 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 sure, legal enforcement limits "ex post autonomy," or the freedom of individuals to renege on their promises.¹³² 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.¹³³

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 each other over time potentially reduces 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.¹³⁴ However, 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,

¹³² Scott & Scott, *Marriage as Relational Contract*, supra note – at 1246-47. Ex post autonomy receives maximum protection under current divorce law, which functionally prohibits the freedom to commit.

¹³³Id.

¹³⁴Thus, as spousal commitment norms weaken and are not enforced, the costs of exit decline, and the threshold of unhappiness which 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. Paul Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (1998)

and psychological well being. The unsettling headline is that unless the level of conflict between parents is intense, children would be better off if their unhappy parents stayed married.¹³⁵ This research finding put unconstrained parental choices in a more negative light. At a minimum, the data suggests that commitment mechanisms that promote marital stability in families 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.¹³⁶ 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. Although critics have targeted covenant marriage as a “the return to fault,” Louisiana, at least, specifies fault grounds under its alternative no-fault statute. Thus, statutory authority to bring divorce claims on fault grounds is not an innovation.

It is plausible that 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.¹³⁷ The restrictions on divorce provide concrete rules clarifying behavioral expectations for commitment. Although, as Robert Scott and I have argued,

¹³⁵ Id. Amato & Booth concluded that 20% of the children in their study were in high conflict families; Hetherington; Emery.

¹³⁶Legislatures in more than 20 states are considering covenant marriage bills. Divorce reform web site.

¹³⁷ It seems plausible that some couples might have revealing conversations with one another about whether they should undertake covenant marriage. Modern covenant marriage may be a more effective signal than traditional marriage because coercion and stigma will not affect the choice.

basing divorce on fault grounds is problematic,¹³⁸ the mandatory separation period usefully establishes the extent of spousal effort required before the relationship can be abandoned. 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.

a. 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 unduly burdening 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 the shallow types. 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 marriage. 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.¹³⁹

¹³⁸Marriage as Relational Contract, supra note __. 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 fact finder 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 which evades the separation period.

¹³⁹Another 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 will either have to differentiate among marriages in enforcing norms or will have limited behavioral expectations. This may dilute the

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. If covenant marriage is viewed as inconsistent with modern values and more specifically as an effort to revive the disfavored marital norms of earlier era, it likely will not be widely chosen and will have little impact. On the other hand, it may be seen as usefully offering the person who want commitment in marriage the means to find a partner who shares 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.¹⁴⁰ 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 covenant marriage statutes? Many of the objections are curious and don't withstand close inspection.¹⁴¹ Legal enforcement of marital commitment is apparently understood by critics as government coercion.¹⁴² Its choice-enhancing properties are ignored, even where 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

effectiveness of enforcement, although the problem may not be as serious as it seems, 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.

¹⁴⁰ The national media response to covenant marriage has been relatively hostile, particularly among liberal and feminist commenters. See note _ supra. A survey in Louisiana indicates that many respondents responded positively to the option, particularly to the pre-marital counseling provisions. It is difficult to predict whether attitudes in Louisiana are representative, since it is a southern state, with conservative social attitudes. Nock study.

¹⁴¹Some 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. Lynne Z. Gold-Bikin, Lets Eliminate the Idea of Covenant Marriage, Chicago Tribune, 9\7\97.

¹⁴² John McCarthy, ACLU Says Proposed Marriage Law Intrusive, Cleveland Plain Dealer, 9\3\97 WL 6611932

freedom to escape unhappy marriages.¹⁴³ 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.¹⁴⁴ 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. My hypothesis is that through the regime of coercive restrictions on marriage, law forged a bond between these two sets of norms, which interacted in apparent harmony, powerfully reinforcing each other to collectively shape marital behavior.¹⁴⁵ Over the last generation, it is widely understood that gender subordination was coercively imposed on women, most powerfully by the traditional legal 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.¹⁴⁶ Such policies, on this view, are tainted by their long association with legal enforcement of gender hierarchy.¹⁴⁷

The suspicion that legal enforcement of spousal commitment creates the threat of

¹⁴³Katha Pollitt

¹⁴⁴Linda Lacey, Tulane L.Rev (criticizing Scott's proposal that predated covenant marriage 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.

¹⁴⁵ Although privately, many women must have objected to their subordinated status, a strong public consensus favored gender hierarchy and silenced private objections.

¹⁴⁶ See Terry O'Niell, This Law Hurts Women, USA Today, 8\14\97. O'Niell, president of Louisiana chapter of NOW, argues that covenant marriage "supports] a fundamentalist, patriarchal vision of marriage." 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.

¹⁴⁷ 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.

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. 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.¹⁴⁸ For these scholars, the project is to promote equality in marriage, either through egalitarian family roles or through legal protection of women who undertake differentiated roles.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ Social conservatives advocate coercive legal intervention in service of the moral agenda

¹⁴⁸Joan Williams, Katharine Silbaugh, *Northwestern*; Bartlett, *Feminism and Family Law*, *Fam. L. Q.* (1999)

¹⁴⁹Joan Williams, *Unbending Gender*, Katharine Bartlett & Carol Stack, Jana Singer, *Georgetown* article;

¹⁵⁰ Feminist commentary on covenant marriage. Silbaugh, O'Niell, *supra*

¹⁵¹Pat Buchanan; Jerry Falwell

of revitalizing the traditional family, by opposing abortion¹⁵² and day care and reviving legal restrictions on divorce. Many conservatives have embraced covenant marriage statutes, albeit a little reluctantly, as a politically viable means of restricting divorce. In this context, the prospects for dis-aggregation 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 it may be useful in ex-post explanations. The experience with family law reform suggests norm bundling can play a role both in legal efforts to strengthen an existing norm and in efforts to promote norm change. Thus, legal efforts to reinforce a useful but threatened norm (spousal commitment norms) may be undermined by its strong historic association with other norms that were once powerful but are currently unpopular (norms 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.¹⁵³ 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

¹⁵²Kristen Luker (study showing that conservative women in traditional family roles oppose abortion in part because it threatens their life choices).

¹⁵³Lessig

known, it may affect attitudes about divorce.¹⁵⁴ 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. 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 periods 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.

3. 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.¹⁵⁵ 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,

¹⁵⁴Richard McAdams points out that one contributor to norm change is new information which casts doubt on the desirability of the old norm.

¹⁵⁵Much of the analysis of disguised preferences is drawn from the insightful model of social change developed by Timur Kuran. See Kuran, *supra* note --. 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.

even if they privately are neutral about the behavior.¹⁵⁶ The upshot is that social pressure to conform to norms may obscure variations in private preferences, and distort the apparent strength of the norm.

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.¹⁵⁷ Each side attempts to dominate public discourse and to impose costs on the expression of attitudes about family structure, roles, and behavior 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.

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.¹⁵⁸ 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 are plausible, and, ex ante, people may not be forthright about private

¹⁵⁶When a social norm is established in a community, a secondary enforcement norm often arises. Community members sanction violators to signal that they have the right values, and disapprove of the prohibited behavior. Otherwise, they anticipate that they may be subject to criticism. See Kuran, McAdams, Sunstein

¹⁵⁷James Hunter, *Culture Wars*

¹⁵⁸In Louisiana, for example, there is some evidence that private opinion about covenant marriage is more positive than the public debate would suggest. Nock survey

preferences.¹⁵⁹ 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 opponents of legislation.¹⁶⁰ 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 sub-group with which they identify.¹⁶¹ 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.

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,¹⁶² 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 which alter

¹⁵⁹Some 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.

¹⁶⁰ 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 t.a.n. _ to _ supra

¹⁶¹Cokie and Stephen 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. Roberts and Roberts, Louisiana’s New Covenant Marriage Law Makes Good Sense, Salt Lake Times, 8\31\97. In Oklahoma, a covenant marriage bill was supported many members of the state legislature, because they feared reprisals from the Christian Coalition. Brian Ford, I Really Do, Tulsa World, 2\ 22\ 99.

¹⁶² La. covenant Marriage Survey

reputational costs.¹⁶³ The framework developed in this essay may assist the project of (tentative) explanation and interpretation of the influence of legal reforms on 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 the following 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 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 appears 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,¹⁶⁴ 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 disapproval¹⁶⁵

Despite these impediments, legal change can influence both the pace and direction of

¹⁶³T. Kuran, 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 whose intrinsic preferences were intensely negative might continue to resist. Timur Kuran discusses the complex relationship between intensity of intrinsic preference, changes in reputational costs, and changes in expressed preferences.

¹⁶⁴The response to legal reforms favoring joint physical custody is an illustration of a legal reform that failed to influence behavior, because it was inconsistent with private preferences. These laws expressed support for equal sharing of child care responsibility, but the predicted role change has not occurred. Joint custody advocates in the 1980's (mostly fathers' groups) lobbied for the passage of statutes favoring joint custody. Women's groups opposed, arguing that joint custody was a windfall for fathers, since in most families mothers were primary caretakers before divorce. E. Scott, *Pluralism, Parental Preference*, supra note __. Robert Mnookin & 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 have primary child care responsibility. *Dividing the Child*

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normative change. Individuals vary in the extent to which they are ready to tolerate reputational costs by 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.¹⁶⁶ 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 may 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* (although information may emerge during the period of change).

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 about the mechanisms by which law influences norms in this context.

¹⁶⁶Timur Kuran,