"Lifting the Veil of Ignorance: Personalizing the Marriage Contract," (Eric Rasmusen and Jeffrey Stake) Indiana Law Journal (Spring 1998) 73: 454-502.

LIFTING THE VEIL OF IGNORANCE: PERSONALIZING THE MARRIAGE CONTRACT

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September 5, 1997

INTRODUCTION: FROM STATUS TO, uh, STATUS

Sir Henry Maine long ago identified a historical shift in the law: from status to contract.[3] In recent times we have seen the number of written agreements, warnings, and warranties increase vastly, a classic example being the movement in commercial leases from tenurial relationships to contractual agreements.[4] This change has freed parties from many constraints imposed in the past on the basis of status. Yet marriage remains an exception. The large majority of marrying couples have no written agreement beyond the

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Our thanks go to Michael Alexeev, Gregory Alexander, Margaret Brinig, F.H. Buckley, Robert Heidt, Kenneth Dau-Schmidt, Gene Shreve, Allan Farnsworth, Joseph Hoffmann, J. Mark Ramseyer, Larry Ribstein, Lauren Robel, Daniel Conkle, and the Econlaw discussion list for helpful comments. We also thank T. Lynn Fisher and Gretchen Lyn Grosick for research assistance. Although some readers might try to deduce the relative contributions from the order of author names, the authors wish to discourage it. Readers who know Stake will recognize that three quarters of the ideas are his, and readers who know Rasmusen will recognize that the other three quarters of the ideas are his.

3 HENRY MAINE, ANCIENT LAW (1861) at 141 (Dorset Press, 1986). C.f. Max Weber, 2 Economy and Society 671 (1978) ("the farther we go back in legal history, the less significant becomes contract as a device of economic acquisition in fields other than the law of the family and inheritance"). But see Roscoe Pound, The End of Law as Developed in Juristic Thought, 30 Harv. L. Rev. 219 (1917) ("the whole course of English And American law to-day is belying it unless, indeed, we are progressing backward"); Grant Gilmore, The Death of Contract, 3 (1978) ("Contract, like God, is Dead").

4 Comparing the degrees of freedom in medieval tenancies to the freedom allowed today (as evidenced by the sheer length of contracts) and the oaths of loyalty once binding tenants to lords, today's law would appear to be less a matter of status. The fact of tenancy told more about the relationship of yore. But see CARL SCHNEIDER AND MARGARET BRINIG, AN INVITATION TO FAMILY LAW: PROCESS, PROBLEMS, AND POSSIBILITIES (1995) at 348-349 (arguing current tenancies retain many elements of status).[[[ask peg if she wants this reference deleted]]]

marriage license, which binds them to state marriage laws.[5]

Even if a couple were to sign a contract setting out their terms of endearment, the courts might refuse to enforce it. This was consciously the attitude of courts in the days before no-fault divorce. As the United States Supreme Court said in 1888, "while marriage is often termed by text writers and in decisions of courts as a civil contract . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change."[6] The marriage contract remains as it has been for centuries, a contract of adhesion. Marriage remains largely a matter of status, although that status is today more ambiguous than in the past.

[[[The influence of marriage law has increased while changing direction

]]] This would not be surprising if the details of marriage law were unimportant because disputes rarely arise in marriages and formal law is rarely invoked. But we know this is not so. Disputes are inevitable and divorce is common, with the results being hammered out in courts.[7] Moreover, marriage law has become more important as control by social and religious norms has diminished.

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5 Numerous authors have, however, advocated marital contracts. See Marjorie M. Schultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 207 (1982) (this article includes an unusually comprehensive discussion of many of the points made in this article); Joan M. Krauskopf & Rhonda C. Thomas, Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support, 35 Ohio St. L.J. 558 (1974); Richard W. Bartke, Marital Sharing -- Why Not Do It by Contract?, 67 Geo. L.J. 1131 (1979); Theodore F. Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C.L.Rev. 879, 894 (1988). Elizabeth Scott, Rational Decisionmaking about Marriage and Divorce, 76 Va. L. Rev. 9, 17 (1990); Amy L. Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage? draft 8/97 at 91-92 ("the ability to negotiate a binding antenuptial agreement would still have salutary effects, because it would arrest the bargaining squeeze and eliminate the potential for opportunism that it presents").

6 Maynard v. Hill, 125 U.S. 190, 210-11 (1888). It is rare for the Court to engage in sarcasm, but the facts of this case make one wonder. The holding in this case appears to be that the law of marriage is up to the legislature, not the parties to the marriage. But the facts are that a man went to Oregon, broke his promise to his Ohio wife to return, and successfully lobbied the legislature for a customized, unilateral, no-fault divorce without notifying his wife.

7 Domestic relations cases made up a third of civil filings in state courts of general jurisdiction in 1992. BRIAN J. OSTRUM, ET AL, STATE COURT CASELOAD STATISTICS ANNUAL REPORT 1992 23 (Natl Ct for State Courts, 1994).

When non-legal rules were highly confining, legal rules had little room for influence. Since marital liberation, the law's pull on behavior has been felt more strongly. The surprise is that marital law has not been similarly liberated, to allow the parties the legal freedom to arrange their marriages as they wish within the much broader social boundaries.

Not only has the law become more important, but the direction of its influence has shifted importantly over the past forty years. Marriage law divides into three parts: the terms during marriage, the grounds for dissolution, and the terms of dissolution. The terms during marriage are few. The prohibition of adultery is notable, but the law leaves most issues of relationship, such as how financial resources are allocated,[8] which spouse decides where the couple are to live, and where the children shall go to school,[9] for determination outside the courts.[10] Anglo-Saxon courts have traditionally abstained from intervening in conduct during marriage, and this has not changed with the no-fault revolution.

The grounds for dissolution[11] specify conditions under which the marriage can be dissolved -- adultery and intemperance, for examples. The most dramatic change in marriage law has occurred here. In the past, if one spouse alone sought a divorce, the law required him or her to show faulty behavior by the other spouse.[12]

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8 See Lacks v. Lacks, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963)(contract to pay spouse during marriage void). See also McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953)(to maintain an action for maintenance, the couple must be separated). The requirement of minimal support is discussed below at note ???.

9 Even where the well-being of children is involved, courts resist intervening in disputes during marriage. "It would be anomalous to hold that a court of equity may sit in constant supervision over a household and see that either parent's will and determination in the upbringing of a child is obeyed, even though the parents' dispute might involve what is best for the child. Every difference of opinion between parents concerning their child's upbringing necessarily involves the question of the child's best interest." Kilgrow v. Kilgrow, 268 Ala. 475, 107 So.2d 885 (1958) rehearing denied (1959) (dening injunction restraining wife from taking child to certain school in violation of premarital agreement).

10 See Saul Levmore, Love It or Leave It, 58 Law & Contemporary Problems 221 (1995); Katherine Silbaugh, Turning Labor Into Love: Housework and the Law, 91 Nw U. L. Rev. 1, at 29.

11 "Grounds for dissolution" and "grounds for divorce" are used in this article interchangably.

12 Before 1967, several states did allow divorce without a showing of fault if the couple had been living "separate and apart" for a period of time. [[[North Dakota had allowed no-fault divorce based on separation since near the turn of the century.]]]Divorce on this ground required mutual agreement because separation without agreement could have been found to be desertion. No state allowed one spouse to divorce the other

Modern law dispenses with the fault prerequisite, eliminating the right of the innocent spouse to veto the divorce.[13] Under modern "unilateral,[14] no-fault"[15] divorce, one spouse may obtain a divorce against the wishes of the other without showing fault.[16] Just a few

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against his or her wishes without proving fault on the part of the spouse wishing to continue the marriage.

Separation for cause, without divorce, has been available for a long time. "Divorce *a mensa et thoro* is when the marriage is lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made." Blackstone, Commentaries, Vol. I, Chapter 15, section II.

13 According to Elizabeth Schoenfeld, "On September 5, 1969, with a stroke of his pen, California governor Ronald Reagan wiped out the moral basis for marriage in America." Elizabeth Schoenfeld, Drumbeats for Divorce Reform, THE JOURNAL OF AMERICAN CITIZENSHIP POLICY REVIEW, May, 1996 / June, 1996, p. 8. Within five years, Schoenfeld says, 44 other states had followed with laws allowing courts to grant divorces sought unilaterally on the ground of "irreconcileable differences" or "irretrievable breakdown". For a brief history of the development of no-fault, see CARL SCHNEIDER AND MARGARET BRINIG, AN INVITATION TO FAMILY LAW: PROCESS, PROBLEMS, AND POSSIBILITIES (1995) at xx.

14 Unilateral divorce includes four kinds of situation: (1) divorces against the wishes of one spouse based on the fault of that spouse, (2) divorces against the wishes of one spouse not based on any fault by that spouse, (3) (rarely) divorces requested by one spouse where the other spouse is unavailable and his or her preference is unknown, and (4) divorces sought by one party where the other party does not contest the divorce. Cases in the last catagory are similar to bilateral (or mutual) divorces, in that they are not contested. A huge number of cases are uncontested.[[[See Juergen Backhaus, if we can get the cite from Peg.]]]

15 "No-fault" divorce refers in this paper to divorce that may be obtained without a showing of fault. The reader should keep in mind, however, that fault still plays a role in the consequences of divorce in some states. A pure "no-fault divorce" state would neither require nor allow fault to be shown in any part of a divorce proceeding.

16 See Elizabeth Scott, Rational Decisionmaking about Marriage and Divorce, 76 Va. L. Rev. 9, 17 (1990) (only two states require consent of both spouses to a no-fault divorce); Marsha Garrison, How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decisionmaking, 74 N.C. L. Rev. 401, (1997) (only three states restrict no-fault divorce to cases involving spousal agreement, citing Miss Code Ann SS 93-5-2 (1) (1994), NY Dom. Rel. Law SS 170 (6), Tenn. Code Ann SS 36-4-101 (12) (1991) (if children)). MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 108 (1987); HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 339 (2d ed. 1986). Leora Friedberg, "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data", University of California at San Diego, Dept. of Econ., Discussion Paper 97-02, Jan 1997, at Table 1. See also CARL SCHNEIDER AND MARGARET BRINIG, AN INVITATION TO FAMILY LAW: PROCESS, PROBLEMS, AND POSSIBILITIES (1995).[[[eric, i think you wanted this added here, but it needs a cite to the page]]] Unfortunately, tables catagorizing divorce grounds sometimes fail to identify states such as Virginia that do not allow unilateral, no-fault divorce. See Linda D. Elrod and Robert G. Spector, A Review

years ago it seemed that the change to unilateral, no-fault divorce was an irreversible landslide.[17] But the earth might not have moved. Divorce law is swinging back in the other direction.[18] Between January and April 1996, legislators in 20 states introduced bills to make divorce more difficult.[19] The no-fault revolution is under counterattack.

The terms of dissolution[20] specify what happens after dissolution, including the custody of children and division of property and future income. Important and complicated changes have also occurred in this area. Maintenance has diminished and fault has less impact on the terms of divorce, in keeping with the revolution in divorce grounds. Women have been granted fewer privileges special to their sex such as child custody or alimony.

These were no small changes. Few legal changes in twentieth century America have generated such large wealth transfers between private individuals. Which spouse benefited from the change depended on the particular marriage. The new law gave new freedom to spouses wanting out of marriage. The law also made it possible for the poorer spouse to gain control of some existing financial assets by divorcing the richer spouse against the richer's wishes. And the new law reduced the obligations of the spouse with greater

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of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation, 30 Fam L Q 765, 807 (1996-7). It is stunning that the Family Law Quarterly summary table ignores the important difference between unilateral and mutual no-fault divorce.

17 In writing *Mandatory Planning for Divorce*, Stake presumed that the reform allowing unilateral divorce would not soon be reversed. See Mandatory Planning for Divorce, 45 Vanderbilt L. Rev. 397, 409-410 (1992). In writing their casebook, Schneider and Brinig said "Is no-fault divorce desireable? No one advocates returning to the old regime, . . ." Carl E. Schneider and Margaret F. Brinig, An Invitation to Family Law, at 94 (1996).

18 Some of the recent reforms in Britain have followed this pattern. In 1996, the first major change in marriage law since 1969 in England and Wales required mandatory "cooling off" periods, delaying most divorces 12 to 18 months instead of the earlier 7 month average. But in other ways, Britain is out of phase. As in earlier American reforms, the role of fault has been sharply diminished. Robin Knight, U.S. NEWS & WORLD REPORT, September 30, 1996, p. 60.

19 Hanna Rosin, Separation Anxiety: The movement to save marriage, THE NEW REPUBLIC, May 6, 1996, p. 14. In one state, Louisiana, the bill has been signed into law.

20 "Terms of dissolution" and "terms of divorce" are used in this article interchangeably.

earning potential after divorce.[21] Assuming that women and men had equal desire to be free of their spouses,[22] and assuming that, in dividing assets "equitably," courts paid substantial attention to the actual contribution of both spouses in amassing the assets,[23] the revolution in the grounds for divorce would, at first cut, have had equal impact on men and women as groups. Assuming that men had more market income potential,[24] the revolution in the terms of divorce advanced the interests of men.[25][[[do not include these next two sentences until the sources are checked--stories differ There is some empirical evidence that the legal shift did indeed benefit men more than women. After no-fault, divorce filings by males increased while filings by females decreased. fn[See Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. Rev. 79; Friedman and Percival at 69, 75, 86; B.G. Gunter and Doyle P. Johnson, Divorce Filing as Role Behavior: Effect of No-Fault on Divorce Filing Patterns, 40 J. Marr. & Family 571 (1978). Brinig, 26 Fam Law Quarterly 453, 466 (1993).] not done]]] Even more stunning than the potentially huge net gains in wealth for one sex at the expense of the other was the breadth of the impact. In every

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21 See Smith v. Smith (1989), Ind. App., 547 N.E.2d 297 (trial court may order spousal maintenance only after a showing of incapacitation). However, divorcing spouses crafting their own agreements may provide for maintenance without such a showing. Roberts v. Roberts, court of appeals of Indiana, fifth district 644 N.E.2d 173 at 175 (???), citing Smith. "While a divorce court is prohibited from fashioning an award of spousal maintenance containing a provision that the award is not subject to modification, divorcing couples are perfectly free to craft their own agreements --as did the parties in the present case-- for an award of maintenance that is not subject to modification." Id. Thus, divorcing spouses have more flexibility in crafting their property settlement by mutual agreement than do divorce courts by commands.[[[Thus, a court could not order maintenance without incapactitation, but the parties could by mutual agreement. A court could not say its decree could not be modified later, but the parties could agree to that.]]][[[eric, i could not tell which parts of this you wanted in the note and which parts were just an explanation to me]]][[[i am not sure why i asked you to explain that. the point is good, but we might find a better footnote for it]]]

22 This assumption is suspect. If men's filings for divorce increased more than women's, that would suggest that more men desired to leave a non-faulty wife than vice versa, and that the new law benefitted more men than women.

23 This assumption is also suspect in that some contributions by women were likely undervalued.

24 See Victor Fuchs, Women's Quest for Economic Equality, 44-45 (1988); Paula England and George Farkas, Household, Employment and Gender: A Social, Economic and Demographic View (Adeline Press, 1986); Milton Regan, Family Law and the Pursuit of Intimacy (NYU press 1992).

25 This proposition might be tested empirically if it could be determined whether men became more willing to marry after divorce reform. If they did become more willing to marry, that would support the claim that reform reduced the *ex ante* costs of marriage for them. Overall marriage rates have diminished, however. See Brinig and Crafton, 1994 JLS.

individual marriage, a change in the balance of power and wealth occurred one way or the other, probably from the more devoted and dependent to the less devoted and dependent.[26]

The destruction of existing marital rights by the shift to new default rules occurred at the same time as the Supreme Court was establishing that there exists a right to marriage. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[27] Although this seems odd, it perhaps became easier for the Court to establish a right to marriage when marriage did not, legally, mean much. The more rights that obtain upon marriage, the more interest the state might have in overseeing marriage. Interestingly enough, the Court also found a "right to divorce" of sorts, holding that the state cannot require indigents to pay court fees in order to obtain a divorce.[28]

In addition to changes wrought in the relative power and wealth of marital parties, the legal reforms radically changed the incentives confronted by married persons. With no assurance that a marriage would continue and no security for either party in the judicially determined terms of divorce, the parties to a marriage remained nearly as financially insecure after marriage as they had been when single.[29] Spreading of financial losses within the marital unit could no longer be relied upon when one spouse had the option to bail out of a household in difficulty. Devoting time and energy

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26 This legislative wealth transfer was challenged in litigation, without success. See In re the Marriage of Franks, 189 Colo 499, 506-07, 542 P.2d 845, 850 (1975) (en banc)(rejecting argument that the no-fault divorce grounds in the UNIFORM MARRIAGE AND DIVORCE ACT violated the contracts clause of the state constitution). See also In re Marriage of Walton, 104 Cal Rptr 472 (1972).[[[check these cases to see whether either deals with the takings issue. if so, the next sentences should be deleted]]] Given the current scope of the Takings Clause, perhaps that should have instead been the basis of the challenge. See First English, (a deprivation of land-use rights is no less a taking simply because it is temporary); Loretto, (no physical invasion is too small to be a taking); Hodel v. Irving, (it is a taking to stop a person from passing assets by will and by intestate succession even if person still has right to transfer assets at death by settling a trust); and Dolan, (burden is on government to make findings of fact showing rough proportionality in exactions cases).

27 Loving v. Virginia, 388 U.S. 1, 17 (1967). See also Zablocki v. Redhail, 434 U.S. 374 (1978), in which it was held that the state cannot prevent marriage by someone unable to meet his obligation to support his existing children.

28 Boddie v. Connecticut, 401 U.S. 371 (1971).

29 The new legal regime also creates an incentive to look more carefully for a spouse that will stay married, if that spouse's income is important.

to producing assets useful to the marriage became riskier.[30] A career became a safer bet for either party. People across the country responded to those new incentives, spending more time at the office and less at home.[31]

1. THE PROBLEM: MARITAL LAW DOES NOT FIT ALL MARRIAGES

Can it be that society had changed so radically and completely that the old rules were inappropriate for every couple? It seems doubtful that the change away from fault as a component of marriage law followed a wholesale shift in the public conception of marriage. Even if many or most couples preferred the new system, not every couple wanted the law to create incentives for them to devote less time to home and family. Indeed, it would be unusual in a democracy for the majority to wait until the minority agreed with it before enacting its view of the best law. As is usually the case, the legal change in marriage law followed a partial shift in values, with the result that the new rules (like the old) fit only a portion (even if a majority) of the population.[32] Predictably, the new rules fit some couples well but others poorly.[33]

[[[Reasons people have eschewed marital contracts married]]]

Why did this group of marital conservatives (if we may so term those persons for whom the old rules better fit their marital aspirations) not try to escape the consequences of the new default rules by individualized contracting? When the law first changed, many couples were unaware of how the changes in the law would change the allocation of power and wealth in their relationships. But even if they recognized the distributional consequences, they would not respond. The lawyerly response would be to draw up a new

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30 See generally, Lloyd's piece or Brinig/Crafton

31 The participation rate for females aged 25-34 rose from 45 per cent in 1970 to 75% in 1996???. STATISTICAL ABSTRACT OF THE UNITED STATES, 1996, Table 615.[[[See paper by Allen Parkman in upcoming IRLE, why are married women working so hard, confirms the last paragraph.]]]

32 Among the direct beneficiaries of the change in law were legislators who voted for it. The chairman of the California Senate Judiciary Committee, James Hayes, was divorced for fault in 1966 by his wife of 25 years and ordered to pay alimony and child support. He oversaw the drafting of the statute and its accompanying report in 1969, and used it himself in 1972 to end his child support and cut his alimony. In 1973, he managed to get alimony further reduced, and the judge told Mrs. Hayes to go out and get a job. If she had been the politician, perhaps history would be different. William Galston, Divorce American Style, 124 PUBLIC INTEREST 12 (1996).

33 The decrease in marriage rates after unilateral, no-fault divorce is adopted suggests that the new rules make marriage less attractive.[ask peg for a citation]

agreement for existing marriages, conforming more to the old legal default. But of course it was too late. Once the law had changed, its shadow had moved, and the bargains made in the shadow of the law would never be the same. Precisely because the legal change had taken away rights from the losing spouse, that spouse had no assets with which to buy them back.[34]

[[[singles]]]

Whatever the effects on married persons, the revolution in the law did not much change the existing power and assets of single parties. Unlike already married persons, singles could have tried to write contracts binding themselves together financially, either approximating the traditional marriage or inventing a new version of commitment to interdependence.[35] That this did not happen immediately presents no puzzle. Even when there are no signalling problems,[36] it takes time for individuals to understand and conform to new legal regimes.[37] But we have now had some thirty years of liberalized divorce rules, and although there are many calls for a public return to fault regimes for divorce,[38] private marriage contracts tailored to individual needs and desires remain uncommon among first time newlyweds.[39]

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34 peg says we should cite Elizabeth Peters, Elisabeth Landes and/or Manser/Brown for shifts in the marital bargain.

35 Of course, many cohabiting couples now have contracts, especially since Marvin v. Marvin.cite

36 See discussion below, at xxx.

37 In brinig's teacher;'s manual is a NJLJ article on our p. 5 assertion that people were unaware of the change in rules.

38 see note above

39 The law is making such private agreements easier. In 1983, the National Conference of Commissioners on Uniform State Laws approved the UNIFORM PREMARITAL AGREEMENT ACT (UPAA). Unif. Premarital Agreement Act, 9B U.L.A. 369 (1983). According to Rider v. Rider, 669 N.E.2d 160, 163 (Indiana, 1996),

> "the following states have adopted the UPAA: Ariz.Rev.Stat. SS25-201 to 25-205; Ark.Code Ann. SS9-11-401 to 9-11-413; Cal.Fam.Code SS1600 to 1617; Haw.Rev.Stat. SS572D-1 to 572D-11; Idaho Code SS32-921 to 32-929; Ill.Ann.Stat. ch. 750, para. 10/1 to 10/11; Iowa Code SS596.1 to 596.12; Kan. Stat. Ann. SS23-801 to 23-811; Me.Rev.Stat. Ann. tit. 19, SS141 to 151; Mont.Code Ann. SS40-2-601 to 40-2-610; Neb.Rev.Stat. SS42-1001 to 42-1011; Nev.Rev.Stat. SS123A.010 to 123A.100; N.J. Stat. Ann. SS37:2- 31 to 37:2-41; N.M. Stat. Ann. SS40-3A-1 to 40-3A-10; N.C. Gen.Stat. SS52B-1 to 52B-11; N.D. Cent.Code SS14-03.1-01 to 14-03.1-09; Or.Rev.Stat. SS108.700 to 108.740; S.D. Codified Laws SS25-2-16 to 25-2-25; Tex. Fam.Code Ann. SS5.41 to 5.56; Utah Code Ann. SS30-8-1 to 30-8-9; Va.Code Ann. SS20-147 to 20-155.

[[[why no contracting on terms for divorce]]]

There are a number of reasons we have seen little contracting. The courts do often uphold contracts relating to the division of assets on divorce,[40] as distinguished from the grounds for divorce,[41] but legal drafting is costly. Also, contracting on the terms of divorce has little attraction because most people think their marriage will not fail.[42] Perhaps more important, most people were and are unaware of the important behavioral incentives the terms of divorce create for behavior during marriage. Moreover, although some people understand the disadvantages of the law's new conception of marriage, few of them can circumvent the law because intitiating negotiations would send a pessimistic signal to a

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Rhode Island has also adopted a version of the UPAA, R.I. Gen. Laws SS15-17-1 to 15-17-11, but its specific wording compels a somewhat different view. Due to the substitution of an "and" for an "or," Rhode Island's version requires proof of unconscionability and involuntariness. SS15-17-6(a). See Penhallow v. Penhallow, 649 A.2d 1016 (R.I.1994).[[[we need to get the actual count for what states have adopted the upaa and the citations]]]

Other states' judges have adopted a view similar to the UPAA even in the absence of statutes. See (again quoting Rider, at 163): McHugh v. McHugh, 181 Conn. 482, 436 A.2d 8 (1980); Newman v. Newman, 653 P.2d 728 (Colo.1982); Burtoff v. Burtoff, 418 A.2d 1085 (D.C.1980); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981); McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn.1989); MacFarlane v. Rich, 132 N.H. 608, 567 A.2d 585 (1989); Gross v. Gross, 11 Ohio St.3d 99, 464 N.E.2d 500 (1984); Bassler v. Bassler, 156 Vt. 353, 593 A.2d 82 (1991); and Gant v. Gant, 174 W.Va. 740, 329 S.E.2d 106 (1985)."

40 See DeLorean v. DeLorean, 511 S.2d 1257 (N.J. 1986) (antenuptial contract calling for substantially uneven division of assets at divorce enforced by New Jersey court applying California law). Not in Britain, however. Antenuptial agreements there, even for the terms of dissolution, are not enforceable in court. English judges do take an agreement into account as one factor, but take it less seriously as the agreement ages. The Law Society has recently proposed that some agreements be made binding. See With This Contract I Thee Wed; Prenuptial Agreements in the United Kingdom, MANAGEMENT TODAY, August, 1996, p. 78.

41 A large literature discusses the extent to which antenuptial or postnuptial agreements are valid. See Gregg Temple, Freedom of Contract and Intimate Relationships, 8 HARV. J.L. & PUB. POL. 121 (1985); Judith T. Younger, Perspectives on Antenuptial Agreements, 40 RUTGERS L. REV. 1059 (1988). See also, Schultz and other sources cited in note 4 supra.

42 There appears to be a systematic bias in people's perceptions; fewer people expect to get divorced than do. For discussion of the psychology of planning for divorce see Lynn A. Baker, Promulgating the Marriage Contract, 23 U. MICH. J.L. REF. 217 (1990); Lynn A. Baker and Robert E. Emery, When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 L & HUMAN BEH. 439 (1993). One of us has suggested that a rational decision maker will enter marriage expecting to be disappointed. See Eric Rasmusen, Managerial Conservatism and Rational Information Acquisition, 1 JOURNAL OF ECONOMICS AND MANAGEMENT STRATEGY, 175 (1992).

fiancee or spouse. One of us has suggested that the law could reduce these costs of bargaining about the terms of divorce by requiring couples to choose, at the time of marriage, from a menu of rules governing the terms of dissolution. This would force the betrothed to confront the issue and remove the onus now on the person who brings up the topic.[43]

[[[why no contracting on grounds for divorce and terms of marriage]]]

Biases in perception and signalling problems might explain the absence of agreements regarding the terms of divorce, but not the absence of agreements regarding the grounds for divorce or the terms of wedlock. A person would not have to bring up divorce to say that he wanted to discuss the terms of the ongoing marriage, for those are most important to someone who intends to stay married. Even the touchy subject of grounds for divorce might be brought up without much fear of adverse signalling by the person who suggests *constricting* the grounds for divorce.[44]

[[[courts will not enforce]]]

An obvious reason why parties do not contract on the grounds for divorce and the terms of marriage is that they doubt courts would enforce the agreement.[45] Courts have long refused to enforce

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43 Jeffrey Evans Stake, Mandatory Planning for Divorce, 45 VAND L REV 397 (1992). Contracts regarding divorce are more common among the wealthy and people marrying for a second time. The fact that wealthy persons execute premarital contracts suggests that they are desirable, but that the costs of contracting outweigh the advantages unless someone has the means to overcome the costs. Society might improve the lives of those of lesser means by reducing the transaction costs.

44 This is one advantage of having no-fault be the default grounds for divorce. If the default were more restrictive, someone wishing to privately enlarge the default grounds for divorce would have a hard time doing so because of the signalling problem. With a no-fault default, someone wishing to constrict the grounds can do so without sending a message that he anticipates divorce.

45 See Towles v. Towles, 256 S.C. 307, 311, 182 S.E.2d 53, 55 (1971) (agreement violates public policy by precluding enforcement of a right granted by state).[[[There are cases of people losing in court on trying to restrict divorce grounds. See Clark's hornbook, Schneider and Brinig casebook.]]]

Courts have rarely ruled on the validity of agreements restricting the grounds of divorce. One exception is Massar v. Massar, 279 N.J. Super. 89; 652 A.2d 219 (N.J. App. 1995).

> "In an agreement signed April 30, 1993, Mr. Massar agreed to vacate the marital home, and Mrs. Massar agreed not to seek termination of the marriage for any reason other than eighteen months continuous separation. Pursuant to this agreement, Mr. Massar moved out of the marital home. However, contrary to the agreement, on October 1, 1993, Mrs. Massar filed a complaint for divorce on the grounds of extreme cruelty. Mr. Massar filed a motion to dismiss the complaint and to enforce the prenuptial agreement."

There was no duress, and Mrs. Massar had her own lawyer. The court therefore enforced the agreement, though with language making it clear that enforcement would be decided case-by-case, not just on the basis of written agreements.

agreements about the terms of marriage on the ground that the courts should not get involved in the ongoing marriage. The privacy necessary for a good relationship would be diminished by judicial intervention, and the costs of monitoring the couple's behavior would be too high. Now that parties can exit the marriage so easily, there is even less reason for courts to get involved in the marriage than in the days when the parties were stuck with each other 'til death did them part. Even where courts are not clearly hostile, uncertainty in the law reduces the appeal of such agreements. Few couples would wish their marriage to be the test case for a revolution in judge-made law.

What about enforcing agreements regarding the grounds for divorce? Here judicial reluctance may be a historical artifact. When the law greatly limited divorce, it did so for policy and religious reasons. It was the specific goal of the law to keep the parties together regardless of their desires, not necessarily for their own sake but for societal reasons. It did not make much sense to ask why the law did not enforce private agreements; they were almost of necessity contrary to public policy. When legal grounds for divorce were very narrow, the only conceivable purpose of private variation would be to expand them, which neither law nor society would approve. When unilateral no-fault divorce became the default rule, the purpose of private contracting flipped over to making divorce harder. The law seems not to have confronted the new possibility that parties would wish not to expand the grounds for divorce, but to narrow them. Private parties have not pressed the issue by making agreements, probably because there is no indication that courts would follow them and refuse to allow a divorce. Even the Uniform Premarital Agreement Act (UPAA),[46] which allows parties more freedom than some states, does not specifically allow the parties to control the grounds for their divorce.[47] Thus marriage law remains, in many respects, a set of limiting rules that the parties cannot change, rather than default rules which apply when they fail to express a choice. The right to divorce is inalienable.

[[[this footnote needs to be rewritten, and the later one with massar needs to be shortened and cross referenced]]]

46 citation

47 The UPAA does not specifically list the grounds of divorce as one of the things that can be regulated by contract. The UPAA allows agreements to regulate "(8) Any other matter, including the parties' personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." It seems likely, however, that a court would find a contract changing the grounds for divorce to be in conflict with the public policy expressed in the relevant statute setting out the grounds for divorce. But see Massar, note xxx, supra.

As a result of the change in background rules, the consequences of judicial reluctance to allow antenuptial contracting have reversed over the past thirty years. In an influential 1974 article, Professor Lenore Weitzman argued that state policy requiring all marriages to conform to a single set of legal rules was outdated because of the heterogeneity of desirable marriages. She said that the traditional marriage seemed to assume that all couples were young, white, middle-class adults, never married before, who desired a permanent marriage with traditional sex roles and with procreation as a major purpose.[48] Now the laws have changed, but they seem equally rigid, leaving Weitzman's young white middle class adults who desire a permanent marriage and traditional sex roles without a stable legal vehicle.[49] Perhaps more important, couples on the verge of poverty, for whom the greater financial security of a durable marriage is even more critical, are forced to rely on the government safety net instead.

A curious possibility is that this legal change may have driven otherwise irreligious individuals to organized religions that constrain individual freedom. Those desiring traditional relationships could not count on the law to support their expectations, but they could turn to institutions that could threaten eternal damnation (or at least, excommunication) to those who did not live up to traditional roles. A church can be seen as a private organization which enforces restrictive rules that the law refuses to enforce.[50] By finding a mate from within the church, the partners might obtain reasonable assurance that, at the least, faulty behavior would incur the disapproval of the congregation.

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48 Lenore J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 Cal. L. Rev. 1169 (1974). For a book-length treatment, see LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW (Free Press, 1981).

49 As Carol Weisbrod has noted, contracts may be particularly important in times of social uncertainty. Carol Weisbrod, The Way We Live Now: A Discussion of Contracts and Domestic Arrangements, 1994 Utah L. Rev. 777, 782-783.

50 One study found that marital dissolution among white males is three times more common for those who never attend church than those who attend at least twice a month. Protestants and Catholics as a group have higher divorce rates than Jews, but within each faith, the decisive issue is the degree of religious commitment. Part of the reason, researchers suggest, is that "those who actively participate in their church have a wide network of friends and associates to turn to for help in times of distress." Elizabeth Schoenfeld, Marriage Menders. THE JOURNAL OF AMERICAN CITIZENSHIP POLICY REVIEW March, 1996 / April, 1996, Pg. 12. By contrast, George Barna found in his sample of 3000 Americans that 27 percent of born-again Christians had been divorced, compared to 23 percent of non-Christians. (This result is not corrected for other variables such as age or income level.) Maja Beckstrom, Religion by the Numbers, The News and Observer (Raleigh, NC), April 23, 1996 at E1.

The partner at fault loses not only a spouse but much of the support network useful to cope with the trauma of divorce. Of course, the network might also try to keep the couple together.[51] Thus, liberalization of the law may have conservatized the social fabric of society. Indeed, we might have expected it to do so. The turn to restrictive religions can be seen as a plea for the enforceability of commitment; an attempt to fill the gaps in public law with private institutions.

Attempting to find a method for choosing a just system of principles, Rawls invented the "veil of ignorance" behind which all decision makers would sit in the original position.[52] Putting decision makers behind the veil would keep them from choosing rules that favor themselves.[53] This approach, compelling in its fairness, can lead to the misimpression that it is appropriate to try to devise a single set of rules to govern all marriages. Policy makers seem not to have recognized that they need not choose one set of rules to apply to all couples. Just as in business partnerships and in contracts for lawn care, justice would not be offended by allowing individuals the freedom to define their own relationships. When it tries to devise one marriage regime for all, society can do no better than to sit behind a veil of ignorance. But society can do better. The veil of ignorance can and should be lifted by asking thousands of individual decision makers, with full awareness of their position, to choose rules to fit their own goals and aspirations.

2. A PROPOSAL

At a minimum, each couple should be given the option to have their marriage governed by traditional rules of marriage and divorce, as enacted in Louisiana and proposed in Indiana and other states.[54] Legislative reforms should go further. Within limits, couples should be authorized to legally define their own marriages. Many arguments have been made, and have gained general acceptance,

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51 Id. Most churches in Modesto, California have voluntarily agreed to require couples wishing to marry in them to go through personality testing and as many as ten two-hour counseling sessions. About 10 percent of the couples break their engagements, but in ten years of the program the number of divorces fell 7 percent while the city population rose 40 percent. Hanna Rosin, Separation Anxiety: The movement to save marriage, THE NEW REPUBLIC, May 6, 1996, p. 14.

52 JOHN RAWLS, A THEORY OF JUSTICE (1971) page 136-138, and see generally section 24.

53 Unlike Mr. Hayes, discussed in footnote ??? above.

54 These laws are discussed at note , *infra*.

that courts should enforce agreements as to the terms of divorce, at least regarding the division of property.[55] Courts should be authorized to also enforce private agreements regarding grounds for divorce and terms of an ongoing marriage.[56] Finally, we also suggest that because of the Reno-divorce problem, limited federal legislation may be necessary to achieve the goal of freedom of choice in marriage.[57]

Professor Abrams claims in her comment on this article that we assume "legal enforcement is purely expressive of existing preferences, rather than a part of a pattern of social interactions that constitute and shape preferences."[58] Of course the law shapes preferences and reforming law will intitiate a change in preferences. Indeed, one of the important preferences law shapes is the taste for law itself. The Bill of Rights develops the American taste for freedom from governmental controls of expression and religion. American marriage law sends the opposite message: it is up to society to define important familial relationships. Our proposed legislation might foster preferences for extending private control and diminishing governmental control in marital matters.

3. SHOULD THE LAW ALLOW PRIVATE CONSTRICTION OF THE GROUNDS FOR DIVORCE?

Let us start at the end: divorce. The interaction between the spouses during marriage is heavily influenced by the grounds on which it can be terminated. As a first example, suppose that Nat and Dot agree, before marriage, that they want to commit themselves to each other in marriage to the same degree as traditionally expected by the law. They believe strongly that their lives will be better if they know that a court will grant them a divorce only if one of the traditional grounds for divorce can be proved. Should the law allow this?

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55 See note 4, supra.

56 The idea that couples should be allowed to make divorce more difficult is not new. Theodore Haas proposed in 1988 a "Model Agreement" that barred divorce except when traditional fault grounds could be shown and burdened divorce by provided that the spouse obtaining a no-fault divorce would suffer an unfavorable division of family property, income, and child custody. He argued that his model agreement should be enforceable as a matter of existing contract law. See Theodore F. Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C.L.Rev. 879, 894 (1988).

57 See discussion below at xx.

58 Abrams, this issue.

One ground for refusing to recognize a binding commitment is that no rational and informed person would choose to bind himself that way. If so, the law would needlessly open up possibilities for mistake and mischief by allowing that option. The first question, then, is whether making a binding commitment might be rational for both parties. Certainly there is popular support for marital bonds that are hard for one spouse to break.[59] Perhaps even a majority would applaud it.

3.1 Would any sensible person prefer traditional matrimonial bonds?[60]

Popularity does not assure prudence. Why might Nat and Dot sensibly desire a binding marriage? The commitment created by voluntary agreement has well-known advantages. Every contract reduces freedom. A purchaser (for example) limits his future options by committing himself to make payments in the future. He is willing to do so, however, because he knows that the promisee would otherwise not perform today. The same can be true in a marriage. If one spouse will be providing more benefit (such as bearing children), or forgoing more opportunities, earlier in the marriage, that spouse will wish to guard against divorce that might occur after those benefits are delivered and the opportunities are gone,

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59 "There has been a huge sea change [against no-fault] in the last six months." William Galston, quoted in NEWSWEEK, February 19, 1996, Pg. 72, Tightening the Knot. A recent poll conducted by the Family Research Council found that 55 percent of Americans favor making it harder to leave a marriage when one partner wants to stay together. NEWSWEEK, February 19, 1996, Pg. 72, Tightening the Knot. There is also support in foreign law for a fault requirement in unilateral divorce. In Japan, a contested divorce requires proof of fault and must be obtained in the district court rather than family court. Taimie Bryant, Marital Dissolution in Japan: Legal Obstacles and Their Impact, 17 Law in Japan 73 (1984). One ground for unilateral divorce is "grave cause making marital continuity difficult," but judges are very reluctant to find it. For example, a family court refused a husband's request for a divorce on this ground even though his wife had returned to her parents eight years previously. Id. at 75. However, physical abuse and criminal imprisonment should qualify. Id. at 75. By contrast, mutual divorce in Japan is easy, requiring, at its simplest, merely registration in a government office. Id. at 75.

60 While the discussion below assumes the context of traditional constraints, many of the points apply equally to more creative constraints on divorce. One such proposal that could be implemented through private agreement is Judith Younger's marriage for minor children. Another Proposal that might be implemented through private agreement rather than being forced on all couples is Irving Kristol's proposal that unilateral, no-fault divorce be made available only to women. See Irving Kristol, Sex Trumps Gender, Wall Street Journal March 6, 1996, at A20; Burggraf, at 136 (discussing Kristol's proposal). The constitutionality of such a regime, which has been questioned, see Anne Alstott, Tax Policy and Feminism, 96 Colum. L. Rev. 2001, 2042 (19??), would be less problematic if created by contract rather than statute. Imagine the response to a man's offering such terms.

but before the other spouse has compensated them.[61]

In addition to creating possibilities of trades with different performance times, commitment allows specialization within the marriage. First, it allows one partner to specialize in household production and the other in market production, an arrangement which can result in greater joint wealth than if both worked outside the home and hired someone else for household production. Traditionally, the husband specialized in paid employment and the wife specialized in unpaid homemaking.[62] This kind of specialization by its nature creates asymmetries, the most important of which is that the person specialized in marriage-specific work has more to lose from divorce. Learning how to cook Nat's favorite dishes is a lot less valuable when he is gone, but learning how to bring home more wages is just as useful after divorce.[63] Because expertise in production of marriage-specific assets is, by definition, less portable than expertise in monetary income production, neither spouse should be eager to specialize in traditional homemaking tasks under a liberal divorce regime.

Even when both spouses have decided to specialize in paid income, the rules of divorce influence how time will be spent on the job and at home. People have choices regarding what to spend time learning. A person can develop expertise discussing the books his spouse enjoys or can learn how to do his job better. If she divorces him, the time he spent learning how to do his job better will not lose its value, but the time he spent on her favorite books will. Family goodwill is not likely to survive breakup of the family, and financial assets can be divided by a court. By

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61 Lloyd Cohen notes that it is usually the wife who pays more early in marriage, and who is thus most vulnerable to non-performance. Lloyd Cohen, Marriage, Divorce, and Quasi Rents; Or,"I Gave Him the Best Years of My Life," 16 J. Legal Stud. 267 (1987). For another view of marriage in terms of contract law, see Margaret F. Brinig & June Carbone, The Reliance Interest In Marriage and Divorce, 62 Tul. L. Rev. 855 (1988). Lenore Weitzman uses a nice example of a female dancer marrying a medical student. L. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW; at 295-99. If she delays her career to put him through school, she sacrifices that career. For analogies to the Uniform Commercial Code, see Carol Weisbrod, The Way We Live Now: A Discussion of Contracts and Domestic Arrangements, 1994 Utah L Rev 777. For a view in terms of the economic idea of opportunism, see Margaret F. Brinig and Steven M. Crafton, Marriage and Opportunism, 23 J Legal Stud 869 (1994).

62 This difference is slow to dissappear. See Paula England and George Farkas, Households, Employment, and Gender, at 55 (1986) ("men typically make fewer relationship-specific investments than women, accumulating instead resources which are as useful outside as within their current relationship.").

63 Note that the same problem faces employers that want their employees to invest time in creating firm-specific talents.

contrast, career advancement will survive divorce and will not be divided. Traditional divorce rules told spouses they might have to share income after divorce. The modern, unilateral, no-fault, minimal alimony, divorce regime tells them they will get to keep most of the income they produce after divorce. As a result, the pursuit of career advancement has a higher expected benefit today. The modern rules press both spouses to devote their time away from family and cash income. Nat and Dot may, quite rationally, wish to avoid incentives for selfish career building at the expense of family, without wanting to bind themselves to predetermined roles.[64] They can do this if they are allowed to commit strongly to the marriage.

Second, commitment allows idiosyncratic specialization within household production.[65] Many household tasks, including those related to automobiles, clothing, home entertainment, food, children's schooling, travel, and medical care, can be done better and more efficiently if a person studies and develops personal contacts, but do not require both partners' detailed attention. The committed couple can divide up these tasks with less worry about whether the particular package of expertise chosen by each will be attractive to a future mate.

Third, commitment provides insurance. Two violinists might each feel that they have an 80% chance of making a decent living at the violin. They, like many others, might be sufficiently risk averse that a 20% chance of professional failure after many years of training would be unacceptable. However, if they band together, committed for life, their chances of having to give up the violin to make a living drop to a more acceptable 4%.[66] By marrying, and committing to a lifetime of joint income production, they can both pursue their love of the violin.[67]

Nat and Dot could plan to specialize emotionally in the marriage -- "forsaking all others,"[68] as the old marriage service puts it. There is some evidence that a marriage has a slightly

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64 It is, of course, equally selfish for men and women.

65 See Gary S. Becker, On the Allocation of Time, 75 Econo. J. 492, 512 (1991); Gary S. Becker, A Treatise of the Family (2d ed. 1991). one of these at page 30.

66 The probability that neither violinist succeeds is (.20)*(.20) = .04.

67 If the successful one wants a divorce, it would seem that an award to the other of the amount of lost career opportunities would not be adequate. But cf. ALI Tenative draft.

68 Book of Common Prayer, Section 20 or 120?, Solemnization of Matrimony.

better chance of survival under the traditional rules.[69] A couple making every effort to increase their odds could rationally opt out of the modern regime. Courts have apparently failed to see that their dissolution decisions have important incentive effects on other marriages.[70] In that blindness, they have gang aglee in approaching dissolution as a matter of determining how best to deal with a marriage once it has broken down or how to clean up a messy situation. A rational couple might see the incentive benefits to which courts have been blind.

Religion provides another dimension of reasons for commitment. If both spouses are Roman Catholic, for example, they may wish to bind themselves so that their legal constraints reinforce their religious convictions.[71] If just one is Roman Catholic, that one has all the more reason to include a clause restricting divorce since otherwise the non-Catholic spouse could use the threat of divorce as a bargaining chip.[72] Both parties might agree that such asymmetry in the marriage would be undesirable. If the law allowed a binding marriage, churches might require their members to select such a marriage. Parties could then signal their intentions and desires by membership in a church that required certain commitments for a religiously valid marriage.

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69 According to the data in an unpublished paper by Leora Friedberg, unilateral divorce raised the national divorce rate by 7% out of the 42% (approximately) total increase in divorce rate between 1970 and 1985. She used a panel of state-level divorce rates and controlled for year and state effects and state trends. Friedberg, Leora, "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data", University of California at San Diego, Dept. of Econ., Discussion Paper 97-02, Jan. 1997, *supra* note xxx. Note that divorce in foreign jurisdictions are ignored in this study. See section 6.2, *infra*. See also Margaret Brinig and F. H. Buckley, No-Fault Laws and at-Fault People, upcoming issue of IRLE, probably along with Parkman (finding that divorce rates from 1980 to 1991 were correlated with lower barriers to exit).

70 See, for example, Harrington v. Harrington, 22 N.C. App. 419, 422, 206 S.E.2d 742 (1974). "The preservation of a marriage which is only an empty shell can be of no benefit to the husband; it can be of no benefit to the wife; and it certainly can be of no benefit to society." This ignores the possibility of a benefit in influencing the behavior of other husbands and wives. See generally Margaret Brinig and F. H. Buckley, No-Fault Laws and at-Fault People, upcoming issue of IRLE, probably along with Parkman.

71 The Roman Catholic position is that marriage is status, not contract, because it is divinely ordained rather than decided by the parties. "[T]he nature of matrimony is entirely independent of the free will of man, so that if one has once contracted matrimony he is thereby subject to its divinely made laws and its essential properties." Pope Pius XI, Encyclical Casti Connubii (December 31, 1930), in OFFICIAL CATHOLIC TEACHINGS: LOVE AND SEXUALITY 23, 25 (O. Liebard ed. 1978).

72 See Ramon v. Ramon, 34 N.Y.S.2d 100 (Domestic Relations Court of City of New York, Family Court Division, Richmond County, 1942) for a court's discussion of the plight of a Catholic in a society that allows civil divorce.

Nat and Dot might also wish to bind themselves out of concern for the children they hope to have. There is enough credible evidence that divorce is harmful to children that a couple might wish to constrain each other for the benefit of their children.[73]

Thus, there are good reasons why some people might want to enter a traditionally binding marriage.[74] In arguing that some couples might choose restrictive divorce rules, we do not argue that a majority of couples would (or should) choose such a marriage.[75] A marriage allowing divorce only for fault is not always a better choice than a marriage allowing no-fault divorce. A fault requirement creates a disincentive for fault to someone who wants to stay married, but an incentive for fault to someone who desires divorce. Misbehavior might either increase or decrease. Which has the greater potential and which is the greater concern are both issues that depend on the parties' behavioral inclinations and values. These factors are so idiosyncratic that society should let the parties decide between the two, balancing the possibility of inducing fault against the benefits of increased commitment. One couple might have a less happy, and hence less likely to succeed, marriage if either felt trapped by the marriage, i.e., with substantial obstacles to exit.[76] Another couple might want to raise

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73 Professor Younger has advocated what she calls a "marriage for minor children", that could not be easily broken. Judith T. Younger, Marital Regimes: A story of Compromise and Demoralization, Tother with Criticism and Suggestions for Reform, 67 Cornell L. Rev. 45, 90 (1981); Symposium on Domestic Violence, 21 Hofstra L.Rev. 1367, 1380 (1993). See Elizabeth S. Scott, Ratinal Decisionmaking About Marriage and Divorce, 76 Virginia L. Rev. 9 (1990) (summarizing research on the effects of divorce on children). See also, J. Wallerstein and J. Kelly, Surviving the Breakup: How Children and Parents Cope with Divorce 10 (1980) (the majority of children preferred the unhappy marriage to divorce); Mavis Hetherington, Martha Cox, and Roger Cox, Effects of Divorce on Parents and Children, in Nontraditional Families: Parenting and Child Development 233 (M.E. Lamb, ed. 1982); Mavis Hetherington, Martha Cox and Roger Cox, Long-Term Effeects of Divorce and Remarriage on the Adjustment of Children, 24 J. Amer. Acad. Child Psych. 518 (1985); Judith Wallerstein, Second Chances: Men, Women and Children A decade After Divorce (1989); Judith S. Wallerstein, The Long-Term Effects of Divorce on Children: A Review, 30 J. Amer. Acad. Child & Adolescent Psychiatry 349 (1991). See also Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477 (1984)[[[check these out]]].

74 For a more detailed survey of the drawbacks of unilateral no-fault divorce, see Lynn Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L.Rev. 79. , supra.

75 In this article we do not argue that a traditional marriage should be mandatory. We have said many good things about it, but only to establish that some people could rationally choose it.

76 "The heart of man delights in liberty: The very image of constraint is grievous to it: When you would confine it by violence, to what would otherwise have been its choice, the inclination immediately changes, and desire is turned into aversion." David Hume, Of Polygamy and Divorces 1740, in Essays Moral, Political, and

the price of divorce to make it less likely.[77] In the interests of individual autonomy, self control, and self realization, in the interests of freedom of permanent association, in the interests of privacy and efficiency, they ought to be allowed to structure their lives as they wish.

3.2 Societal interests in free divorce

3.2.1 Externalities

Of course there are times when society rightly interferes in individual decision making. Substantial negative externalities, spillovers onto third parties, which can lead to both injustice and inefficiency, are reason enough for society to refuse to enforce private agreements. Do such externalities exist?

[[[judicial economy costs]]]

One obvious external cost is the cost of determining whether one party is indeed at fault. The divorcing parties would expend more judicial resources determining fault than are expended by no-fault couples. A court can grant a no-fault divorce with little fact finding. In addition to the costs it imposes on the parties, fault divorce imposes costs on the courts. Why should we pay this price?

It may be, of course, that the benefits to the parties are worth the increased judicial cost. This is true of enforcement of the vast majority of commercial contracts. Why single out marital

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Literary (edited by Eugene Miller (1987) at 187. But Hume counters his own argument. ". . . the heart of man naturally submits to necessity, and soon loses an inclination, whether there appears an absolute impossibility of gratifying it." Id at 189.

Brinig says employment of women outside the home reduces the chance of divorce.

77 "nothing is more dangerous than to unite two persons so closely in all their interests and concerns as man and wife, without rendering the union entire and total. The least possibility of a separate interest must be the source of endless quarrels and suspicions. The wife, not secure of her establishment, will still be driving some separate end or project; and the husband's selfishness, being accompanied with more power, may be still more dangerous." David Hume, Of Polygamy and Divorces, 1740.[[[peg page 63]]]

Elizabeth S. Scott poses an example of a premarital contract providing that divorce can only follow a two-year waiting period after notice by one spouse of intent to end the marriage. She says such a condition creates a barrier to exit, making divorce a more costly choice compared to continued marriage. This provides an opportunity, for example, for a wife to determine whether her long-term preference for a lasting marriage outweighs conflicting temporarily dominant short-term preferences. Elizabeth S. Scott, Rehabilitating Liberalism in Modern Divorce Law, 1994 Utah L. Rev. 687, 727-29 (1994). The "cost" imposed by this agreement is an interesting one. The same "cost" is paid by staying in the marriage. Perhaps the waiting period is more a reduction of the benefits of divorce than an increase to the costs of divorce. If I exchange my house for cash, my compensation is less if the buyer waits two years to pay. In physics terms, the waiting period is a dampening device that prevents quick action but does not prevent reaching an ultimate goal.

contracts for special non-enforcement? Society has long enforced other kinds of conditional agreements, many of which impose huge costs on courts, and the trend seems to be in favor of hearing disputes. In light of the trend toward willingness to intercede in other areas of life, is there a good reason to refuse enforcement of marital contracts as a class? The case has not been made that the ratio of costs to benefits for enforcing no-divorce-unless-fault marital contracts is substantially worse than for other contracts.[78]

The judicial costs will never be incurred if the couple never divorces, so fault-based divorce might actually reduce the costs to the court system. Requiring fault could reduce the likelihood of divorce,[79] so it is hard to tell which divorce regime requires more court time. Indeed, the quantity of divorces may be much more important than whether fault needs to be determined, since usually the most contentious and time-consuming issues will be the terms of divorce, not the grounds. This suggests a proxy principal. The parties are in many ways a proxy for societal interests. If the couple decides that those greater costs of divorce are outweighed by the lower likelihood of divorce, then the external costs of divorce might also be outweighed by the lower likelihood of divorce. If they think their marriage has a better chance if divorce is allowed only for fault, society ought to trust their judgment. The question then becomes whether there is any social interest not adequately proxied by private interest, so that following private choice would lead systematically to the wrong societal decision.

[[[letting unhappy couples go, and other effects on the contracting parties]]]

Requiring the traditional grounds for divorce would result in more unhappy couples staying together. The unhappiness of the couple, however, is not enough reason to prevent them from binding themselves, unless a case for paternalism can be made. We need societal harms beyond the unhappiness of the choosers to establish the case against private choice. The injustice of spousal abuse could be a cost to the rest of society of keeping couples together, for example, but the traditional grounds for divorce included mistreatment, and so this objection would not arise.

[[[effects on children]]]

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78 Martha Fineman, arguing for the abolition of the legal category of marriage takes the position that the ordinary rules of contract, tort, and criminal law should apply to couples. see new book and entry in this symposium. xxx

79 Divorce rates increased after no-fault was introduced. See Thomas Marvell, Divorce Rates and the Fault Requirement, 23 L. & Society Review 537 (1989).

Detrimental effects on children are an obvious justification for not enforcing a couple's agreement. Some experts take the position that children are better off if the couple divorces. Said Gary Sandefur, when asked about the anti-no-fault movement, "The worst thing for kids is to be around a constant state of warfare."[80] Not all experts agree, however. As noted above,[81] Judith Younger was so convinced that divorce (even by unhappy couples) is bad for children that she advocated the "marriage for minor children" that could not be dissolved during the minority of children.[[[we need to find this]]][82] One writer[[[add name here]]] claims that the consensus of recent findings is that divorce helps children if the marriage involves "physical abuse or extreme emotional cruelty," but hurts them otherwise, even adjusting for the income loss which commonly accompanies all divorces.[83] For the benefit of children, or for other reasons, it may be appropriate for a court in a given case to refuse to enforce an agreement limiting the grounds of divorce. The necessity of that discretion does not, however, justify a categorical rule against enforcement.[84]

3.2.2 Fairness

What if one party prefers the default regime? If the law honors agreements, it does two things. It creates the opportunity for gains from trades away from the default marital rights and the possibility that the gains from marriage will be divided unevenly.

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80 Hanna Rosin, Separation Anxiety, *supra*, note xxx.

81 See note ??? above.

82 Judith T. Younger, Marital Regimes: A story of Compromise and Demoralization, Tother with Criticism and Suggestions for Reform, 67 Cornell L. Rev. 45, 90 (1981); Symposium on Domestic Violence, 21 Hofstra L.Rev. 1367, 1380 (1993). Cf. Linda J. Lacey, Mandatory Marriage "For the Sake of the Children:" A Feminist Reply to Elizabeth Scott, 66 Tulane L Rev 1435 (1992).

83 See *Public Interest* article cited *supra* at note xxx (examining measures of child performance including school performance, high-school completion, college attendance and graduation, labor-force attachment and work patterns, depression and other psychological illnesses, crime, suicide, out-of-wedlock births, and the propensity for the children themselves to become divorced). See also, generally, Margaret Brinig and Doug Allen, forthcoming.

84 The New Jersey court has recognized that a blanket rule against agreements concerning grounds for divorce would be inappropriate even though some should not be honored. "Accordingly, we decline to adopt a per se rule. . . . we can envision many instances in which such an agreement may not be enforceable because it may serve to hide from the court actions of an abusive spouse or substance dependent spouse which may endanger the physical and emotional welfare of the other spouse and any children." Massar v. Massar, 279 N.J. Super. 89, 91; 652 A.2d 219 (1995). For more on Massar, see supra note xxx.

This is not necessarily a change for the worse; the gains from marriage are not equal under the current rules.[85] But it is troubling on fairness grounds that, even as it increases net welfare, the agreement could decrease the welfare of one spouse.[86] If the law allows bargaining over the marital contract, it gives an advantage to a party who is better at bargaining.[87] In addition to other reasons men can have an advantage in selfish bargaining,[88] bargaining favors the person who has "a more individuated sense of self,"[89] the person whose other-regarding preferences are weaker, the person whose utility curve is less intertwined.

One answer is that tremendous potential gains from trade are worth the distributional costs, which have not in any case been proved. In addition, bargaining occurs during the marriage and at divorce whether the law allows premarital contracts or not.[90] The question is *when* the bargaining will occur, not *whether* it will occur. Hence, the issue resolves into whether the weaker bargainer would be better off bargaining before marriage. After marriage and

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85 See Amy L. Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage? draft 8/97 at note 12 ("Studies of financial arrangements among married couples suggest patterns of unequal control over spending, with men having greater unilateral discretion and decision-making power.") citing among others Carole B. Burgoyne, Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power, 38 Soc. Rev. 634 at 648 (1990). See also text at note 133 infra, discussing division of marital workload.

86 For a detailed discussion of bargaining in marriage, see Amy Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage? University of Virginia School of Law, Spring 1997, 97-14.

87 "The result of contractual freedom, then, is in the first place the opening of the opportunity to use . . . resources without legal restraints as a means for the achievement of power over others." Max Weber, 2 Economy and Society 730 (U. Ca. Press 1978). Contract law serves "as an *intensifier* of economic advantage and disadvantage." Charles L. Black, Jr., Some Notes on Law Schools in the Present Day, 79 Yale L.J. 505, 508 (1970).

88 Kathryn Abrams worries that no real choice is allowed for women because of "predictable inequalities in bargaining power." See Kathryn Abrams, Paternalism, Choice and the Reinvigoration of the Traditional Family, in this issue. For a discussion of the disadvantages of mediation for women see, Tina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991); Joshua Rosenberg, In Defense of Mediation, 33 Ariz. L. Rev. 467 (1991); Margaret F. Brinig, Does Mediation Systematically Disadvantage Women? 2 Wm. & Mary L. Rev. 1 (1996); and Amy Wax, at notes 137 through 152.

89 See Milton Regan, at 149.

90 See Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).

as the marriage deepens, we would expect the more interdependent spouse's sense of self to become even less individuated, leading to even less bargaining power. If that is so, the earlier bargaining may be better for the weaker negotiator.[91]

Put another way, bargaining at divorce occurs in the shadow of background rights to alimony, children, and so forth.[92] Equally important, bargaining during marriage occurs in the shadow of the possibilities of divorce.[93] The key question is who establishes those background rights regarding divorce or alimony. It could be argued that the traditional rules of alimony and fault protected wives by establishing a decent initial position, a veto to divorce and a possibility of alimony, from which to bargain. Allowing them to bargain away that protective set of rights before marriage could have worsened the condition of women. Whatever its validity in the past, that argument has little force in most states today. Background rights accorded women by current law provide women with little protection. Women could hardly do worse bargaining for themselves, fixing their own background rights by premarital contract.[94]

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91 See Jeffrey Evans Stake, Mandatory Planning for Divorce, supra note at ???. In addition, if people are more idealistic when young, or more likely to realize that one is in a better position because of luck rather than deservingness, earlier bargaining might be more likely to result in equal bargains.

92 Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979).

93 Perhaps our article should have been titled "Bargaining in the Shadow of Divorce: The Case of Marriage and Bargaining in the Shadow of Marriage, the Case of Premarital Agreements." Amy Wax takes the metaphor the other direction, speaking of divorce law as a window on the market, leaving the parties to bargain in that shadow. See Amy Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage, supra, at note 96-97.

94 See generally Amy Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage, supra, (concluding, inter alia, that there is no solution to the problem that men have more bargaining power in marriage than women, at least no solution that is realistic and not worse than the problem).

It is important to note that this argument does not justify allowing parties to negotiate regarding the division of community property. The law in some states does protect women (and men), giving them half of the earnings during marriage. Allowing this division to be changed by premarital contract might result in a substantial reduction in the welfare of women. We cannot be certain that it would worsen women's plight because it would give them an ability to bargain which could result in an efficient trade. With that bargaining chip, more men might be induced to marry and the benefit of those marriages might (if enough of those marriages are good) be positive for women. Even if no more good men marry, the marriages made might be better matches for women, the women getting the husband they really want by bargaining and the net gains (considering what they threw into the bargain) for those women not being overcome by the losses to the women who lose those husbands.

Indeed, following the analysis of Amy Wax, one might expect women to do better for themselves than the law has done for them. How well women will fare in bargaining depends on their options available at the time of bargaining. Wax argues that, for a number of reasons, aging diminishes women's options faster than men's.[95] If she is right, women can strike the best bargains when they are young. Further, Wax shows that, given unequal initial positions, the gains from marriage can be split more evenly if there are more gains to be had;[96] "the more love, the more the possibility for equality."[97] If love is hottest early in the relationship, the gains from marriage are largest then and bargaining is most likely to yield a fair division at that time.

3.3 Who should initiate the reform?

Assuming the law should enforce agreements regards the grounds for divorce, should this reform be accomplished through the common law or by statute? Not all improvements ought to be made by judges. A change of the magnitude urged here should not be made lightly and there are reasons that it should not be made by courts alone.

First, the grounds for divorce have long resided in the legislative bailiwick. It is unlikely that many of the statutes specifying the grounds on which courts can grant divorces could fairly be read as allowing parties the contractual freedom of deleting "incompatibility," "irreconcilable differences," or "irretrievable breakdown" from the enumerated grounds. Had legislators thought private parties could pare back the list, they probably would have specified which grounds were optional. Second, even if courts might claim the authority to modify the legislative list by virtue of their inherent judicial authority not to grant a divorce, the issue deserves the kind of public debate that does not occur in the courtroom. Third, it will do little good for judges to enforce agreements. Although some decisions encourage private contracting,[98] a few scattered decisions are not enough to keep contracting from being risky. Some courts may recognize the utility of strict enforcement in long-term contracting,[99] but if the parties

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95 Wax, text at notes 87 through 98.

96 Wax text at note 116.

97 Wax at page 49.

98 See Massar v. Massar, supra note xxx.

99 See Simeone v. Simeone, 525 Pa 392, 581 A2d 162 (Pa. 1990) The court said, "Further, the reasonableness of a prenuptial bargain is not a proper subject for judicial review," and discussed why this is

cannot predict which kind of judicial temperament they will face twenty years down the road, the wisdom of a few particular courts is little help. For all of these reasons, legislative authorization of private agreements regarding the grounds for divorce is essential.

3.4 Busting up the judicial monopoly on divorce

As long as the issue of contracts on the grounds for divorce is being considered by the public and in the legislature, another question ought to be addressed: whether a couple should be able to avoid judicial involvement in their divorce. Legislatures have granted the authority to form a legal bond of marriage not only to judges, but also to clerics, with little investigation into the issue of who can join the clergy. Why should the same group not also have the power to decree a divorce? "I now pronounce you man and woman. You may no longer kiss the former bride."

Why should judges have a monopoly in the supply of this good -- divorce?[100] Most people today married on the assumption that they would not become divorced without a judge approving the request. We should not upset their reliance by simply extending the power to grant any divorce to additional groups. But it would not upset reliance to allow parties, by mutual agreement,[101] to provide that their marriage could be rent asunder by, for example, a Unitarian minister. Indeed, allowing couples to specify who could grant the divorce might serve as a reliable shorthand way of specifying the grounds for divorce at a low cost to the public. If the parties agree that they can be divorced only if a Unitarian minister agrees, it serves their interests and saves judicial time for judges to refuse to second-guess the decision of the Unitarian

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so in the context of long term contracts. The court upheld a prenuptial agreement signed the day before the wedding which gave the nurse bride only $25,000 in alimony from her brain surgeon husband.

100 "Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery. Boddie v. Connecticut, 401 US 371, 376 (1971). Without guarantees of due process, "the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable . . ." Id. at 375.

101 This contract could be executed before or after marriage.

church.[102]

There are some consequences of divorce, such as child custody where the child's interests must be protected, that do require judicial supervision. In addition, courts must have the power to grant divorces in some situations, regardless of any private agreement regarding the grounds or tribunal.[103] Within appropriate bounds, there is room for individual choice of divorce forum. Just as private parties are allowed by the use of trusts to break up the probate monopoly on disposition of assets on death, they ought to be allowed to break up the judicial monopoly on granting divorce.

3.5 Bilateral, no-fault divorce and renegotiation

Much of our focus has been on unilateral no-fault divorce and the problems this creates for long-term commitments. Traditional marriage law, however, also disallowed bilateral, no-fault divorce, in which both parties agree to terminate the marriage without allegations of fault. Should courts enforce a marital agreement that does not allow bilateral, no-fault divorce? A closely related question is whether the parties should be allowed to renegotiate their marriage contract. If they begin with a traditional marriage allowing divorce only for fault, should they be allowed, by mutual consent, to switch to a modern, unilateral, no-fault-divorce marriage? If so, it is clear that agreements to exclude bilateral, no-fault divorce are useless, since such provisions are easily evaded by renegotiation.

The authors of this article disagree with each other as to the answer. Some of the arguments are suggested in the following dialog between a Liberal and a Conservative.[104]

CONSERVATIVE: The law should enforce a couple's agreement not to allow divorce by mutual consent, and invalidate renegotiation of a marriage contract that tried to exclude that possibility. Credible pre-commitment allows both parties to rely completely on the enforceability of their contract. Through the contract, they can

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102 There is some case support for this already. See Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983), discussed below at xx (upholding agreement of Jewish couple to recognize authority of Beth Din regarding divorce). See also Aziz, discussed at xx.

103 At the time of authorizing agreements on the grounds for divorce, legislatures should specify minimal grounds for divorce that are beyond private variation.

104 “Liberal” is mostly Stake and “Conservative” is mostly Rasmusen, but we each have worked to improve the other's unpersuasive arguments.

set up the incentives as best fits their marriage and, having done so, can invest heavily without worry that the contract will be found unenforceable.

LIBERAL: Divorce reform has changed the legal treatment of two critically different types of situations. One involves a faultless couple mutually agreeing to terminate a marriage. The other involves a single party wanting out of the marriage in the absence of any fault by the other. In both situations, a divorce would not have been granted under traditional rules but could be granted today. The two situations should not be treated the same. A couple should be able to terminate their marriage by mutual consent without any finding of fault, regardless of the terms of their original marital understanding. Unilateral no-fault is another story. Courts should allow unilateral termination without a showing of fault only if that is consistent with the particular marriage contract.

CONSERVATIVE: In both situations the courts should honor the agreement of the parties. The parties are surely in a better position to determine whether the costs of commitment outweigh the benefits.

LIBERAL: The parties may be better at weighing costs and benefits *ex ante*, but the court has the advantage of viewing the matter *ex post*. Though enforcing the contract might create good incentives for parties not yet in miserable situations, it creates terrible consequences ("status effects") for parties already in those situations.[105] Some marriages are mistakes.[106] Your reasoning would justify enforcing Antonio's pound-of-flesh promise to Shylock. Courts would not enforce that promise, and this is an easier case because neither party wants the contract enforced. At some point the status-effect benefits of *ex post* decisions to terminate miserable marriages outweigh the incentive costs of doing so. The incentive benefits here are not large enough to justify enforcing a no-renegotiation provision.

CONSERVATIVE: Why, then, would they ever specify the no-renegotiation clause? You underestimate the benefits of this commitment. No matter what unfortunate events befall them, they know that they must make the best of it together. This should

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105 For further discussion of status and incentive efficiencies, see Jeffrey Evans Stake, Status and Incentive Effects in Judicial Decisions, 79 Geo. L.J. 1447 (1991).

106 See Gary Becker, Elisabeth Landes, and Robert Michael, An Economic Analysis of Marital Instability, 85 J. Pol. Econ. 1141 (1977).

create a large incentive for behaving with consideration, for misery of the other will surely reflect back.

LIBERAL: Even if the law allows renegotiation, there is an incentive to behave considerately, for a spouse cannot count on getting the other's agreement to a no-fault divorce. The marginal increase in incentives to behave well is not so large. And as for why a couple would choose it, they might make a mistake. Remember, most players in this game are not sophisticated, repeat players.

CONSERVATIVE: Under your rules, they might be.[107] We've already talked about some benefits in this article, but there are more, and probably some that professors or courts have not thought about.

Akrasia -- self control -- could be a motive. The couple might fear that in the future they would be tempted to divorce to avoid short-run difficulties but would later regret it, or they might believe that divorce is sinful and they might succumb to sin temporarily. It would be rational for them to bind themselves, just as a reformed alcoholic would prefer not to be offered free martinis.

Or, it could be that the couple would like to show third parties that they are committed to marriage. A bank would prefer to make loans to a committed couple, and relatives would be more willing to make marriage-specific investments in a marriage less easily dissolved. The couple may wish to encourage these third parties.

LIBERAL: Ruling out renegotiation is an extreme form of commitment. It may help to think about this another way. Consider the protection offered the party who does not want out of the marriage. Under current law, a married person has a right to stay married, but that right is protected with only a liability rule: the other spouse can get a divorce by paying a judicially agreed price.[108] I would change the law so that parties could choose to protect their right to stay married with a property rule. A divorce would not be granted unless the party wanting out agreed to buy the other's right to stay married for her price, no matter how unreasonable.

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107 Hold on there, Conservative. Paradoxically, your rules would increase the chances that the players are first-time players since there would be fewer repeat players, the very people who can benefit least from your rules.

108 This distinction between property and liability rules is a basic principle of law and economics. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

You would take yet another step, allowing parties to make their right to stay married inalienable.

Your position runs contrary to standard contract doctrine, which allows renegotiation by mutual consent.[109] If couples are allowed to prevent renegotiation, that would make marriage contracts much more binding than ordinary contracts and partnership agreements.[110]

CONSERVATIVE: You are right that I need to distinguish marriage contracts from ordinary contracts. Even in ordinary contracts, though, renegotiated terms are void if executed under duress, and might be void if there is no fresh consideration.[111] Sailors cannot get their employer to agree to higher wages by threatening to breach their contract and let the fish they caught spoil.[112] The law looks to whether the higher wages are justified by extra work and whether the sailors were relying on being judgement-proof or on the court being unable to detect their breach.

LIBERAL: I do not argue that the court should honor a modification

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109 See Farnsworth, Contracts 271-78 or 271-73 (1982), which also discusses the effect of duress and lack of consideration, and sections 278 and 279 of the Restatement of Contracts (Second). Recent scholarship argues that sophisticated parties should be allowed to bind themselves to contracts that cannot be renegotiated, Christine Jolls, Contracts as Bilateral Committments: A New Perspective on Contract Modification, 26 Journal of Legal Studies 203 (1997), but many fiancees do not qualify as sophisticated.

110 Partners have the power to dissolve the partnership unilaterally despite a partnership agreement to the contrary. See UNIF. PARTNERSHIP ACT @ 31(2), 6 U.L.A. 376 (1914). See also Hillman, The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations, 67 MINN. L. REV. 1, 11-14 (1982), The dissolving partner need make no showing of fault by the other partner, UNIF. PARTNERSHIP ACT @ 32(1)(e), (f), 6 U.L.A. 394 (1914). By contrast, English law prohibits unilateral termination if the agreement specifies it is to be terminated "by mutual agreement only". English Partnership Act of 1890. See Moss v. Elphick, 1 K.B. 846 (1910). See generally A. UNDERHILL, PRINCIPLES OF THE LAW OF PARTNERSHIP 30 (10th ed. 1975) (treatise on English partnership law). Because bigamy and adultery laws prevent persons from finding new marital "partners," partnership and divorce law are different in essential ways. Because of the fundamental differences, marriage law ought not follow the partnership too slavishly.

111 Section 5 of the UPAA, however, says that fresh consideration is unnecessary for modifying a premarital agreement.

112 For a classic case of renegotiation under duress see Alaska Packers' Assn v. Domenico, 117 F. 99 (9th Cir. 1902). A more recent case is Capps. v. Georgia Pac. Corp., 253 Or. 248, 43 P.2d 935 (1969). Both are discussed by Judge Posner in Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983).

executed involuntarily or lacking consideration,[113] but it would be a rare case when two parties both wanting a divorce did not both receive fresh consideration in the divorce.

CONSERVATIVE: Marriage is a relational contract and breach is often hard to detect and compensate. A husband might threaten to be unpleasant to his wife unless she agrees to a divorce, and the court could not detect his breach of marital expectations. To preclude that possibility, the wife might want to insist on a marriage that disallowed bilateral no-fault divorce and add a clause that renegotiation of this term would be void. The idea is like specifying liquidated damages; the parties do not trust the court to resolve a breach correctly without help. Moreover, if renegotiation is possible, the bargaining costs never end, and, in particular, issues that were supposed to be settled in the agreement can be reopened when the parties' tempers are hot and they know which parties benefit from the deal as a result of chance circumstances. The veil of ignorance is torn away; the violinists of our earlier example have discovered which one will be the star.[114]

LIBERAL: Your argument just brings up a bigger problem: the husband who cannot get his no-fault divorce will commit fault to get it. He will beat his wife or commit some other fault that the law should do its best to prevent.

CONSERVATIVE: This is your strongest argument, because now you have identified a spillover effect beyond just the two parties: the rest of us do not like wife-beating or adultery, even if the two parties have foreseen this and accepted the possibility.

But that is why we have criminal law. Assault is a crime, and many cities have special laws and enforcement mechanisms for domestic violence. Adultery too is a crime, and though rarely prosecuted (except in the military) states could step up their enforcement.[115] After all, if assault or adultery is ground for a

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113 The contract should be in writing under the UPAA.

114 [[[Peg says]]]cite to Lundberg and Pollack here. Ted Bergstrom has some pieces on this, including one in JEL[[[she thinks]]]

115 Two cases that reached appellate reporters are State v. Mangon, 603 So. 2d 1131 (Ala. App. 1992) (involving adultery prosecution) and Commonwealth v. Stowell, 389 Mass. 171, 449 N.E.2d 357 (1983) (upholding against constitutional attack the imposition of $50 fine for adultery). For a survey of state adultery laws, see chapter 8 of Richard Posner and Katharine Silbaugh, A Guide to America's Sex Laws (1996). Two articles that discuss the offense of adultery in ordinary and military contexts are Note: Constitutional Barriers

divorce, there must be evidence available for a criminal prosecution.

LIBERAL: Domestic violence is hard to prosecute, though. We must accept that criminal law is too blunt an instrument for dealing with these offenses. They are crimes today and yet most often go unpunished. Moreover, remember that when the issue is divorce the burden of proof for fault is much less than when the issue is incarceration. And even if we could count on punishment, do we really want him to answer, by his behavior, the question whether it is worth six months in jail to be free of his wife?

CONSERVATIVE: How about using the terms of divorce, then? If the marital contract specifies that someone divorced for adultery gets none of the marital assets, our reluctant husband will hesitate to use those grounds.

LIBERAL: If he wants out badly enough, he won't hesitate. But let me shift our attention to a milder externality, the undermining of honesty. In the old days, when two people wanted a divorce, they would manufacture evidence of fault.[116] The husband could pretend to be caught in a compromising situation in a motel somewhere, and the judge would agree to a divorce on grounds of adultery. Thus, courts did not prevent a bilateral no-fault divorce, resources were wasted and ethics were compromised manufacturing evidence, and the integrity of courts was undermined.[117]

CONSERVATIVE: If the couple wants a divorce badly enough, that is one method to evade their contract, I agree. But the public

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to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 Harv. L. Rev. 1660 (1991); and David Jonas, Fraternization: Time for a Rational Department of Defense Standard, 135 Mil. L. Rev. 37 (1992).

116 See Max Rheinstein, The Law of Divorce and the Problem of Marriage Stability, 9 Vanderbilt Law Reveiw 633, 643 (1956); Lawrence Friedman and Rovert Percival, Who Sues for Divorce?, 5 J. Leg. Stud. 61, 86, 65, n.11 (1976); Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in the United States, 33-36, 47-51 (1988). For an entertaining fictional account, see A.P. Herbert, Holy Deadlock (1934).

The common requirement of "irreconcileable differences" makes exaggeration necessary even today. See Lynn Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L. Rev. 79 (1991) , supra (also arguing collusive divorces are actually more prevalent now than ever[[[these two points need to be checked carefully to find a page]]]). Eliminating all such prerequisites would further reduce the incentives for mendacity.

117 [[[according to peg,]]]See Herbert Jacob's book on No-Fault.

declaration of fault is embarrassing, and this method not only requires certain transaction costs,[118] but also cooperation between two people who presumably are on bad terms. If the terms of divorce penalize the party at fault, the other party is unlikely to honor a side agreement to refund part of the court's award later. And a vengeful party would be tempted to turn state's evidence later to punish the other party for falsifying evidence.

LIBERAL: History undermines your argument. The law required fault, criminalized abuse, and considered fault in alimony awards, yet parties still fabricated fault. And judges winked at the fabrication. The fact remains that an exclusion of divorce by mutual consent increases the incentive for fault and pretended fault.[119] Because I see no compelling reason to enforce provisions barring renegotiation, I conclude that renegotiation should be allowed in order to reduce judicial acceptance of lying and to reduce incentives for conspiratorial faulty behavior. The corollary to this conclusion is that provisions stating the contract cannot be renegotiate should be void *ab initio*.

The reader may decide who wins the argument. The problem of renegotiation remains an active subject of study even in the context of commercial contracts,[120] and we have not been able to resolve it here.

4. ENFORCING CONTRACTS REGARDING MATRIMONY

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118 Jolls suggests that one way to hinder renegotiation is to bring in additional parties to the contract whose consent would be required. In a marriage contract, it would be natural to make the parents third-party beneficiaries with nominal consideration and to require their consent to modification. Jolls, supra note xxx, at 232.

119 It also causes some public embarrassment. "The statute[,] permitting divorce on the ground of a year's separation, was enacted in order to enable a husband and wife to terminate their marriage without the sensationalism and public airing of dirty linen which necessarily accompany a divorce based on fault." Harrington v. Harrington, 22 N.C. App. 419, 422, 206 S.E.2d 742 (1974). This embarrassment, however, may reduce the frequency of divorce by increasing its cost.

120 See Robert A. Hillman, Contract Modification Under the Restatement (Second) of Contracts, 67 Cornell L. Rev. 680, 685 (1982); Benjamin E. Hermalin and Michael L. Katz, Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach, 9 J.L. Econ. & Org. 230 (1993); Jason Scott Johnston, Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem, 3 S. Cal. Interdis. L.J. 337 (1993); Thomas Miceli, Contract Modification when Litigating for Damages is Costly, 15 INT. R. L. EC. 87 (1995). Christine Jolls, supra, note xxx. Aaron Edlin and Benjamin Hermalin, Contract Renegotiation in Agency Problems, May 1997, University of California at Berkeley Dept. of Economics.

4.1 A traditional division of labor with a sharing of income

We now turn to contractual terms regulating behavior during the course of marriage. Suppose Linda and Paul agree that they want to allow divorce for any reason, but wish to form a binding agreement as to certain terms of marriage. They intend that during wedlock Paul will provide the financial income and Linda will raise the children and take care of the household. They agree that half of Paul's income (enforceable by garnishment) will be deposited in an account belonging to Linda and that amount will be reduced by any income she receives from employment. In addition, they agree that they will remain sexually faithful to each other and that the price of infidelity will be the payment, from the unfaithful to the faithful partner, of half of Paul's previous year's taxable income, as declared to the Internal Revenue Service. Should and would courts enforce this deal?

First, could any sensible couple desire such an arrangement? Yes. In a traditional American marriage, the husband owed a duty of support to the wife and children. This duty arose only after a formal registration of marriage. Sexual fidelity was expected of both spouses, as was avoidance of excess in vices such as drinking and gambling. Divorce was granted for desertion or violation of these duties, and the party at fault was penalized in the terms of divorce. If divorce was avoided, inheritance laws guaranteed the surviving spouse some share of the deceased spouse's assets.[121] A couple might wish to reproduce a package of marital expectations similar to what was for a long time an attractive package to many couples.

There is at least a possibility that a traditional division of labor will produce "a larger marital pie than a comparable dual-earner arrangment."[122] Moreover, as to dividing those gains, there is some evidence that women with children do not fare well in marriages where both spouses work outside the home. At least as measured by equality of leisure time between husband and wife,

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121 Dower gave surviving wives a life estate in one-third of all freehold land of which the husband was seised during marriage and which was inheritable by the issue of the husband and wife. Curtesy gave a surviving husband a life estate in the wife's freeholds of which the wife was seised during marriage and which were inheritable by the issue born alive of the husband and wife. See Jeffrey Evans Stake, Inheritance, The New Palgrave Dictionary of Economics and the Law; Jesse Dukeminier and James E. Krier, Property, 3d ed 1993, at 400-401. Under the widely adopted Uniform Probate Code, the surviving spouse has a right to an elective share of the decedent's estate, no matter what the will of the decedent says. Under the most recent version of the UPC, this share varies with the length of the marriage.

122 Wax text at note 124.

wives working at home in traditional roles have a fairer division of the marital workload than their working counterparts.[123] A woman wanting to have children might sensibly prefer a single full-time job to a "double day".

With looser social norms and marriages between people of more heterogeneous beliefs, it may be more important than in the past to have legal enforcement of behavior within the marriage.[124] Contingent financial payments might be appropriate for couples committed to each other for the long-term. Both parties could feel that even after sexual unfaithfulness they wish to stay together. But they want to create a disincentive for unfaithfulness, a disincentive that does not penalize the faithful partner more than the unfaithful one. They also want to give the faithful partner some compensation for the behavior of the other. A contingent payment could serve to make the faithful partner feel that some justice has been done without terminating the commitment. This agreement avoids reliance on the legal process of divorce as the punishment for unfaithfulness.

Is such a contract legally viable? Relatively recent statutes lay the groundwork for increased judicial receptivity. Unlike the grounds for divorce, contracts on the terms of matrimony could be enforced by judges without any new legislative authorization. Section 3 of the Uniform Premarital Agreement Act lists the kinds of provisions allowed. These include anything with respect to property, control of property, disposition of property upon separation, death, or any other event; modification or elimination of spousal support; wills, trusts, etc as part of the agreement; life insurance; choice of law for governing construction of the agreement; and "(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Subsection 3(a)(8) is a catch-all, which the official comment says allows choice of

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123 See Amy Wax, 8/97 draft at 8, n17, and sources cited therein. On the other hand, it would make sense that wives earning wages outside the home would be able to exercise more control over spending within the marriage, see Wax at note 12, and would have a better position from which to bargain over other issues, see Wax at footnote 118. Wax also notes that greater financial wealth makes equality-enhancing side payments easier. Yet she concludes that "the future of egalitarian marriage is not bright and grows dimmer as married women engage in more and more paid work to generate much needed income for the family." Id. at note 169.

124 Carol Weisbrod has noted that contracts may be particularly important in times of social uncertainty. Carol Weisbrod, The Way We Live Now: A discussion of Contracts and Domestic Arrangements, 1994 Utah L. Rev. 777, 782-783. cited above a couple of times for the same proposition. Lloyd Cohen notes that the looser moral constraints of our time allow a party to gain many of the benefits of divorce without a formal decree. Cohen, *supra* note xxx. 16 J Legal Stud at 300.

residence, career plans, and children's religion.[125]

Notwithstanding this possible authorization under the UPAA, Paul and Linda cannot feel secure that courts would enforce their agreement. Courts might enforce the financial terms, but they do not enforce most terms of behavior during an ongoing marriage.[126] Given current judicial attitudes, a package of mutual obligations that was once popular, though enforced only by social norms, is of dubious legality.

Once again the question must be asked: have we changed so much that what once was commonplace is now unacceptable? Is the agreement itself contrary to public policy?[127] Certainly the goals are not illegal under the criminal law. As for other public policy, does society suffer if Paul and Linda realize, in addition to a lasting marriage, their wish of substantial behavior devoted to the family instead of the office? Having one spouse stay at home may generate positive externalities. The presence of one spouse in the home should reduce the costs of police protection paid for by others and may even reduce the need for police protection for all neighbors, since there would be more monitoring during workdays.

A single-earner marriage generates less taxable income than a dual-income marriage, but that does not, of course, mean that it creates less societal wealth. Indeed, the fact that the parties have chosen it suggests just the opposite.[128] If tax revenues are too low, the tax rules should be revised -- perhaps by increasing

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125 See Neilson v. Neilson, 780 P2d 1264 (Utah App. 1989) (noting that the traditional opposition to premarital agreements has been abandoned in most jurisdictions by judges or by adoption of the UPAA). Section 6 of the Act provides for exceptions such as unconscionability, especially because of lack of disclosure of assets, and provisions that leave a spouse a public charge.[[[

Richard Sax of London law firm Manches & Co advises that "frivolities are likely to get up English judges' noses." Management Today, August, 1996, Pg. 78.]]][[[eric wants this paragraph deleted, so it is out now]]]

126 "Under the status sonstruct now prevalent, the state superimposes the structure on the partners, but . . . requires the parties to work out their own problems within the context of the marriage." Howard O. Hunter, An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse, 64 Va. L. Rev. 1039, 1075-76 (1978). For more on courts' refusals to intrude into ongoing marriages, see note xxx above.

127 See discussion of public policy limitation at footnote xx, infra.

128 Of course it is possible that there are substantial positive externalities from women working in the market, including consumer surplus, that do not obtain when women work at home. It is also possible for a couple to choose household production in part because it is not taxed. The parties might choose to generate less total wealth because their net wealth is higher when part of the total is not taxed.

the rates on single-earner married households -- rather than discouraging the parties from generating the additional wealth just because society has difficulty taxing it. On the other hand, if the problem is that couples would choose single-earner marriages because of lower taxes, perhaps two-earner households should be given a deduction.

Are the spillover effects on children from the division of market and household labor harmful enough to prevent a traditional marriage? Surely not. Traditional roles allow parents to spend more time with their children. Beyond the issue of "quantity time," parents often do a better job educating and nurturing their children than temporary caretakers. In addition, other children benefit when a sick child stays at home with his or her parent rather than being sent to school or daycare.[[[There is also some evidence that preschools produce more combative kids.]]]

Although the contract between Paul and Linda does not itself contravene public policy, it still might not be worth enforcing. Judges have long been reluctant to enforce such terms because of the cost to the courts, the difficulty of enforcement without invading the sanctity of the marital home, and the possibility that enforcement would increase conflict within marriage. But although such problems might arise in the enforcement of many terms relating to the conduct of a marriage, they do not arise in the enforcement of Paul and Linda's agreement. Their agreement calls for the payment of money on certain contingencies that are no more difficult to prove than many contingencies in commercial contracts. Nor does the agreement call for judicial invasion of the marital home. Whatever courts may do with more problematic provisions, the agreement between Linda and Paul ought to be enforced.

4.2 More difficult cases

4.2.1 Judges in bedrooms (of others)

What about those more difficult marriage-contract cases? Consider the invasion contemplated by the court in *Favrot v. Barnes*. The husband tried to avoid paying alimony by claiming that his wife committed marital fault by seeking sexual intercourse three times daily when a premarital agreement said they would "limit sexual intercourse to about once a week."[129] Should courts be free to ignore such provisions?

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129 Favrot v. Barnes, 332 So. 2d 873, 875 (La. Ct. App. 1976). Graham (at 1046) notes that if the parties had tried to litigate this issue while the marriage was still intact, the court would probably have dismissed it, and the case would not be in any reporter. Finding examples of court refusals to enforce premarital agreements could be difficult for this reason.

Although merely hearing the evidence might in another era have caused substantial discomfort to finders of fact,[130] the imposition on their sensibilities no longer seems important. As for the married couple, it is they who bear the burden of the judicial intrusion into their affairs. It might not be wise for a couple to argue their bedroom in public, but it is not so clearly unwise that the law should always refuse to hear the matter. The primary costs of intrusion are, after all, borne by the husband and wife, and it is they who may best know whether the possibility of court intervention would increase conflict or reduce it. We cannot be confident they are wrong in concluding that the benefits of an agreement are worth the potential sacrifice in privacy needed to enforce it. The law's refusal to get involved leaves control in the hands of the more powerful spouse, a situation which the couple might sensibly wish to avoid. Given the increased importance of legal enforcement when social constraints are few, it is time for courts to stop refusing enforcement on the paternalistic ground that interference will be harmful to the marriage.

4.2.2 Marital discord

A similarly unacceptable reason for refusing to enforce a marriage contract is that it will lead to marital discord. Current legal default rules are as likely to cause trouble as many provisions denied enforcement by the courts. Consider the oral agreement in *Koch v. Koch* that the husband's mother would live with the couple in their home.[131] The court ruled that the agreement was invalid because it was oral and said that even if it were written it would be unenforceable, as tending to cause contention. But the parties should know better than the court what would lead to discord. Ordinarily, we expect that settling contentious issues in advance will lead to a more harmonious marriage. Moreover, it is not clear why the court should prize marriage over all other relationships. Mr. Koch might have felt that his relationship with his mother was more important than that with Mrs. Koch, and she might have been willing to accept him on those terms. Courts have no business deciding that the non-marital relationships given primacy by the parties are secondary to the marriage.

4.2.3 Verification

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130 Perhaps it offends the sensibilities of the courts to hear such evidence and the protection of sensitive judges is enough to justify not enforcing such a contractual provision. But judges already need iron stomachs,[[[how about jurors? do jurors ever hear divorce cases?]]] and any judges so offended should find work outside of family law courts.

131 Koch v. Koch, 232 A.2d 157 (N.J. Super. Ct. App. Div. 1967).

This is not to say that all provisions should be enforced. The cost of enforcement to the court is one legitimately considered by the court. Since we do not charge litigants the full costs to the public of operating the courts, the couple may too readily resort to law. Verification of terms such as those in *Favrot v. Barnes* may be expensive. Courts may rightly refuse to enforce agreements when society will have to pick up a substantial tab for monitoring.

This problem may, however, be overstated. The court may not end up having to pay much of those costs. It is up to the aggrieved party to provide evidence for his position, and if proof is too difficult and the plaintiff has no evidence, the court will dismiss the case. In addition, as can be seen from the Rodney King case,[132] video tapes are reducing the cost of monitoring and increasing the reliability of the evidence of misbehavior. Moreover, some kinds of contractual provisions would be simple to verify. Is Christmas spent with the set of parents that the wife chooses? Do the children attend the school the husband desires?[133] These conditions are simpler than many of those encountered in commercial law regarding the quality of a product or the timeliness of delivery. When judges confront provisions for which compliance is too difficult to monitor they can refuse enforcement on the ground that their involvement would be a waste of judicial resources. They need not, and should not, refuse to enforce all provisions governing the behavior of the parties during marriage.

4.3 Standard contract doctrines: vagueness and consideration

A number of standard doctrines of contract law would invalidate some marriage agreements even if they were granted the status of ordinary contracts. Vagueness is one. Are the duties of a husband or wife clear enough to be contractible? Vagueness is not special to marriage, however. Employment contracts are often just as vague, yet are commonly enforced.

One contract doctrine that has been used to limit the enforceability of marital agreements is consideration. Courts have said that a husband's promises to pay a wife for housework and other domestic services are void as against public policy and lack

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132 For a discussion of this case, see Harvey Levin, Trial By Fire, 66 S. Cal. L. Rev. 1619 (1993).

133 See Kilgrow v. Kilgrow, 268 Ala. 475, 107 So.2d 885 (1958) rehearing denied (1959) (denying injunction restraining wife from taking child to certain school in violation of premarital agreement); Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485, 492 (1916) (agreement regarding religious education unenforceable).[[[peg says There is an Indiana case]]]

consideration.[134] Modern marriage does not itself impose on the husband or wife a duty to clean the house or perform other domestic duties. Therefore, agreements to pay for such services do not lack consideration and should be enforced. The reasons and assumptions of marriage vary widely and the essential core of marital duties has shrunk to almost nothing. Because times have changed, courts should be loath to hold that any promised performance is not consideration.

Some people, those with "large hearts" have the capacity to bring a large emotional contribution of love and affection to a marital alliance. Suppose such a woman is interested in a man with a smaller heart who is willing to offer money to supplement his meager affection. If they marry, the law's refusal to recognize her contribution as consideration results in unfairness to the woman because she cannot enforce his promise after she has performed. If, knowing the promise is unenforceable, the woman refuses his offer, the result is unfairness to the man. Justifiable limitations contained in ordinary contract doctrine may be applied to marriage contracts as well, but these doctrines should be applied fairly.

4.4 Public Policy, externalities and illegalities

There will, of course, be provisions that should not be enforced for other reasons of public policy.[135] Suppose a couple agreed that the wife would raise the children, would not get a job or prepare herself for a paying job, would not get any of the husband's income during the marriage, would not be entitled to any other support during the marriage except at the whim of the husband, and would not get any property or alimony upon divorce, which would be allowed without showing of fault.[136] Although this

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134 See California case 1993, cited at footnote 98 of 91 NW U L Rev 1, 27; and other cases cited in note 99 of same.

135 The doctrine of voiding contracts against public policy applies only to agreements that violate "some explicit public policy" that is "well defined and dominant," W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983).[[[check this citation closely, this is a federal court on a state matter]]] Public policy "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Id. (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)). For a critical survey of the cases raising public policy claims, see G. Richard Shell, Contracts in the Modern Supreme Court, 81 Calif. L. Rev. 433 (1993).

136 See Towles v. Towles 256 S.C. 307, 182 S.E.2d 53 (1971) (a wife cannot sign away her right to sue for marital support, for that is against public policy).

arrangement is not all that far from the current legal regime,[137] the contract should not be enforceable. The problem is that this agreement sets up a substantial possibility that the wife would become destitute and a ward of the state.[138] Such an agreement casts enough negative spillovers on society for the law to refuse enforcement.[139]

Courts should remain free to exercise their discretion to refuse enforcement in a number of other situations. Some matrimonial agreements will be too costly for a court to monitor. An agreement requiring the wife to illegally smoke marijuana each day with her husband would no more be enforceable than an employment contract requiring that an employee smoke marijuana with her boss.[140] A provision allowing a man to beat his wife, even if they call it "boxing," is an easy example of a private agreement that courts should be free to ignore.[141]

4.5 Remedies
[[[when the contract is enforceable]]]

Supposing that agreements as to the conduct of the marital partners can create enforceable rights, what remedies might courts use to enforce the terms? The biggest problem is that many marital agreements are contracts for personal services, and courts do not generally enforce such contracts with specific performance. Money damages are available, but given the difficulty of measuring non-monetary benefits from marriage and the possibility of

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137 Our remark that this couple's agreement is not far from the status quo is meant seriously. Divorce is often a critical step toward public assistance, see F.H. Buckley and Margaret Brinig, The Bankruptcy Puzzle, forthcoming in J. Leg. Stud. (divorce seems to be a leading cause of bankruptcy), even though the result is not usually long-term welfare dependency. The existence of welfare allows husbands to dissolve the marital agreement with less concern over the fate of their wives and children.

138 Even states allowing agreements to control the consequences of divorce do not enforce such agreements when failure to award support would result in one spouse becoming a public charge. Osborne v. Osborne, 384 Mass. 591, 599, 428 N.E.2d 810, 816 (1981). The law does enforce very one-sided commercial contracts that might lead one contractor to become a ward of the state. But this contract is worse because it seems designed to make the wife a ward of the state by denying her the possibility of employment, which commercial contracts do not do.

139 The court might also question whether a rational person would sign such an agreement.

140 Courts will not enforce illegal contracts.

141 Indeed, it ought to be used as evidence in a criminal trial.

judgement-proofness, money damages would often be insufficient.[142] In the example of Paul and Linda above, however, the contract can be adequately enforced by monetary damages. Such debts could be enforced without enjoining the performance of personal services. The contingent payments have the important advantage that they can be set large enough to compensate for non-monetary losses to the parties and save the court the cost of having to estimate those losses.

[[[when the contract is unenforceable]]]

Consider again the example of the agreement that the husband will provide no support.[143] What should be done when the contract is unenforceable as against public policy?[144] Unfortunately, no one provision can be singled out as the faulty provision and refused enforcement. Any single term might be allowed in the context of other provisions designed to minimize the chances of negative externalities, but taken together they are not acceptable. What should a court do? One approach would be to apply a default marriage rule, but that requires setting up a legal rule that determines when a contract is so bad that the court should shift to the default rule instead of just refusing to enforce the bad provision. It may also take the parties a long way from what they originally agreed.

The better approach is to *cy-pres* the agreement, reforming it to something acceptable. The objective, of course, is to decide what allowable agreement is closest to the parties' intent. The possible modifications will depend on the posture of the suit. If the wife sues for support during marriage, the court could require the husband to support the wife. If the suit is the husband's request for divorce, the court could award property or alimony notwithstanding the agreement. The judge reviewing the contract and facing a claim of breach or request for divorce and finding an unenforceable term should ask what effect that has on the overall agreement. In some cases, it might be that the closest agreement is no agreement at all, and the court would declare an annulment. Or the judge might find that an unacceptable term is stricken and the rest of the contract stands. Or the judge might find that many of

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142 Harris, Teitelbaum, and Weisbrod have noted that the typical remedy in contract is damages, and that is not adequate remedy in many family law situations. Family Law 1996 at 691. That is, however, no reason not to honor family contracts when damages are adequate.

143 See text at note xxx above.

144 The discussion here is about unenforceable terms relating to the ongoing marriage. However, a similar analysis applies to cases in which the court finds an agreement regarding grounds for divorce or terms of divorce to be unenforceable.

the terms are stricken, in the extreme, leaving the parties in the default marriage. It might even be appropriate to find that the parties had created one of a number of standard-form contracts allowed by law.

4.6 Nontraditional marriage

We have focused on traditional marriage, but the questions raised will apply to other individualized marriage contracts. Homosexual partnerships, polygamy, kept mistresses, and other relationships might all be arranged by contract, except that provisions relating to crimes such as sodomy or prostitution would not be enforced.

Suppose that Ted and Alice wish to join their fortunes together forever, but because of the potential domination arising from a sexual relationship do not wish there to be any sex in the marriage.[145] They want a marriage for mutual aid and support: love without sex. They write a contract on this point, declaring their intent to avoid consummation of the marriage. This non-sexual relationship poses a good example of the limitations the law has forced upon couples. Because Ted and Alice fail to consummate the relationship, under current law a judge hearing a unilateral request could find their relationship never to have been a marriage. This annulment would leave the other partner without even the few protections still accorded by divorce courts to economically dependant partners.

The question is whether the net externalities from this relationship are negative enough to justify refusing to give it legal cognizance. What is the harm to society? Clearly society has no legitimate interest in promoting the sex act itself. It does not harm others for a married couple not to engage in sex.

Society also has an interest in some of the consequences of the couple's decision. Honoring this kind of marriage could lead to lower birth rates for the state or nation.[146] However, since Garrett

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145 Compare the view of the State of Hawaii that "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." Baehr. Miike, 74 Haw. 530, 594, 852 P.2d 44, 73 (199?). There are many cases involving marriage where no sex was intended. See citations in Brinig and Alexeev's Fraud in Courtship article.

146 This externality also falls on the parents of the couple, who could be disappointed not to have grandchildren. Not being grandparents, it is difficult for the authors to tell whether a rule forcing fertile couples to have children could generate enough happiness in the grandparents to compensate for its effects on the unwilling parents. Under current law, however, the decision whether to have children clearly belongs to the

Hardin published *The Tragedy of the Commons*,[147] and the zero-population-growth movement gained strength, it has been hard to argue that a couple's decision to limit their fertility would cause a net harm to society. Indeed, some would argue that Ted and Alice have taken a socially responsible position. Societal interests in partners having sex do not seem to be sufficient to justify refusing this couple a legal means for enforcing their relationship.

We do not contend that the annulment rule should be abandoned entirely. It might be retained as a useful default rule that many couples would include in their agreement if they thought about it, since it provides an escape when one party discovers that the other is unable to consummate the marriage and wants out. We do contend, however, that it should not be a limiting rule; the parties ought to be able to contract around the possibility of unilateral annulment for failure to consummate.

4.7 Third-party recognition of an agreement as a "marriage"

This last example suggests another issue not yet discussed: whether third parties should be forced to honor agreements the law holds binding on the couple. We do not suggest that the Catholic Church or the Internal Revenue Service must, or even should, recognize Ted and Alice's marriage. As a general matter, third parties can decide for themselves how they will treat individualized marital contracts. Some employers now treat a long-term homosexual (or other) relationships as equivalent to marriage for the purposes of spousal benefits.[148] But these matters ought, like the terms of the marital contract, to be left to the parties involved in the employment contract. Such third parties have made use of the legal default rule for marriage on purpose and it would be unfair to add new obligations to those originally

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couple and we do not suggest reform.[[[eric, you wanted this deleted, but i rewrote it and moved it to a footnote]]]

147 Garrett Hardin, The Tragedy of the Commons, 162 Science 1243-48 (1968).

148 University of Manitoba death benefits, for example, will be paid either to a legally married spouse or to a "common-law spouse," which includes "a person of the opposite sex who has been publicly represented by the plan member as the Spouse of the plan member (i) for a period of not less than 3 years, where either of the persons is prevented by law from marrying the other, or (ii) for period of not less than 1 year where neither of them is prevented by law from marrying the other . . ." PENSION BENEFITS, H450, University of Manitoba (1991). Clause (i) expressly ignores the legal definition of marriage by saying that the University will treat as married some couples who could not legally marry.

agreed by contract.[149]

A more difficult question is whether the government itself would be bound to recognize private marital agreements as marriages.[150] The answer depends on the government and the particular legal issue in question.[151] Clearly, the federal government is not bound by a state's decision to set couples free to define their marriages.[152] The federal government could, if it wished, decide that Ted and Alice's sexless marriage does not qualify as a marriage for social security purposes, although it might then ask itself how many other married persons have sex so rarely that they should be denied their spousal benefits.

But state and local governments are not so clearly above state law.[153] Would recognition of private marital contracts preclude prosecution for crimes against nature? Not necessarily. The law in some states today prohibits married and unmarried persons alike from certain acts. The issues of whether the acts are and should be illegal has been and will still be separable from the issue of whether the couple is married. What acts, consensual or not, should be crimes is beyond the scope of this article.

One crime, however, we cannot avoid discussing is the crime of sale of sexual services. Clearly some contracts could be read, as some marriages could be seen today, as mere sales of sexual services. Perhaps there is a way around this problem. One of the key concepts behind marriage, one of the only provisions that has

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149 If a couple has entered into the legal default marriage and subsequently added terms, third parties would presumably be bound to recognize them as married. A couple that opted out of no-fault divorce would be considered married unless the third party specifically excluded such marriages (as, indeed, it should be free to do).

150 A New York Surrogate's court ruled that it would not recognize a marriage that was valid under Rhode Island law, where it occurred. Two New Yorkers, an uncle and niece, married in Rhode Island which allowed Jews (but not others) to marry even if they did not meet the usual consanguinity requirements. The marriage would have been classified as incest in New York. When the niece died, her daughter and the uncle fought for letters of administration. The court held for the daughter. In re May's Estate, 110 N.Y.S.2d 430 (Surrogate's Court, Ulster County, 1952).[[[check this out???]]]

151 Sometimes these issues, such as the tax status of the couple, are called "incidents" of the marriage. See Baehr v. Lewin 74 Haw. 530, 852 P.2d 44 (1993). A couple might be married for some purposes and not for others.

152 Cf. Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 Law & Sexuality 97 (1991).

153 The usual rule is that the incidents of marriage follow the status. See Scoles and Hay, at .

remained stable during the sexual and divorce revolutions, is that marriage, however temporary it actually is, is not *intended* to be temporary. Hence, it would be consistent with the idea of marriage and all variations of past marital law for courts to refuse to enforce as marriages agreements intended to be temporary. Marriage is a relationship of open-ended commitment, and explicitly temporary arrangements are not marriages. Therefore, supposedly "marital" contracts for temporary arrangements need not be recognized as legal marriages. Similarly, temporary contracts for the sale of sexual services need not be recognized as marriages and, therefore, may be prosecuted under prostitution laws.

The most important third parties are the children. Clearly they have no opportunity to determine whether to recognize their parents' marriage. Therefore, their interests need not be subject to the control of their parents' agreement. A provision that the husband shall have no financial responsibility for the welfare of the children is not enforceable, because it is not in the best interests of the children and it might result in children being wards of the state.[154]

Our message is to let the parties decide what "marriage" means to them. If contracts restricting grounds for divorce are upheld, it may be all the more important that parties be able to agree also on what that enduring marriage will be like. That does not, however, mean that the parties can decide what marriage means for tax purposes, for spousal privilege purposes, for private pension or employment purposes, or for child support. Ours is a baby step away from the status quo.

5. DISSOLUTION TERMS

Premarital agreements often specify the terms of divorce, including provisions dealing with the distribution of property, custody of children,[155] and perhaps what behavior is permitted the parties after divorce.[156] If the parties have agreed on the division

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154 For one of many cases holding that parties cannot contract away such support, see Straub v. B.M.T. by Todd, 645 N.E.2d 597 (Ind. 1994).[[[See also ks v rs ind sup ct 1996 west law 420400.]]]

155 Child custody is a part of family law that affects more than the two spouses, and even more than the family, so it is outside the prescriptions of this article.

156 In Cowan v. Cowan, 247 Iowa 729, 75 N.W.2d 920 (1956), the parties entered into a "collateral agreement" just prior to divorce that provided that if either party should remarry before their youngest child reached the age of majority, he or she would pay $10,000 to the other. When the former husband remarried within the proscribed period, the former wife sued on the contract and won.

of property at divorce, courts will often uphold their agreement.[157] Hence, this dimension of divorce law does not cry out for reform. But a well-formed agreement on property division, however important and useful,[158] in many cases cannot provide enough security for the simple reason that the homemaker cannot count on there being enough property at the time of divorce to provide comfortable, lifelong income. Nor will courts help much, as substantial permanent alimony is not usually awarded.[159] For these reasons, a person wishing to specialize in risky or non-portable production needs an agreement that provides some portion of the other spouse's income.

Suppose Michael and Cheryl, both embarking on high risk sports careers, agree in writing that unilateral divorce will be allowed without showing of fault, and that after unilateral or bilateral divorce they will each give 35% of their income to the other until death or until the historically lower earning divorcee remarries. They also agree on two possible adjustments. First, a higher

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157 See Newman v. Newman, 653 P.2d 728, 734 (Colo. 1982) (en banc) ("There is no statutory proscription against contracting for maintenance in the antenuptial agreement."); Gant v. Gant, 329 S.E.2d 106, 116 (W.Va. 1985) (agreements that "establish property settlements and support obligations at the time of divorce are presumptively valid"). But see In re Marriage of Winegard, 278 N.W.2d 505, 512 (Iowa, 1979) cert. denied 444 us 951 (1979), (not allowing agreement to control support); Duncan v. Duncan, 652 S.W.2d 913, 915 (Tenn. Ct. App. 1983). Antenuptial agreements in contemplation of divorce are enforceable subject to three limits: there must have been full disclosure, the agreement must not be unconscionable at the time enforcement is sought, and the agreement may dispose of only property and maintenance. Edwardson v. Edwardson, 798 SW2d 941 (1990, Ky).

158 Contingent financial payments could be helpful in a large class of marriages in which commitment is important: those in which the husband has invested in outside employment and the wife in household production. If the wife's loss from divorce is greatest after a period of years of specialization in the marriage, then her loss is greatest after the household has had time to accumulate monetary wealth. Thus, contingent financial payments would be practicable exactly where they are most needed for incentive purposes.

159 There has been considerable research on the issue of alimony awards. See Brinig/Alexeev (finding about 30% of the Virginia cases had alimony); peg says use Richard Peterson in the American Sociological Review or Ross Finnie's Canadian study; Martha L. Fineman, The Illusion of Equality, 32, 40, 44 (1991) (suggesting that alimony no longer exists); Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 Va. L. Rev. 9, 18 (1990)(stating that "long-term alimony is virtually a thing of the past in many states"); Ira Mark Ellman, The Theory of Alimony, 77 Cal. L. Rev. 1, 22, n.51 (1989) (stating that most women receive no alimony at all); June Carbone, Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman, 43 Vand. L. Rev. 1463, 1492 (1990) (suggesting that spousal support is based on "need, a standard interpreted to provide relatively short-term awards designed to do little more than ease the transition from married life"); Lenore J. Weitzman & Ruth B. Dixon, The Alimony Myth: Does No Fault Divorce Make A Difference?, 14 Fam. L.Q. 141,143-44 (1980) (finding 15 to 17 percent of final California divorce decrees included alimony).[[[Weitzman was using California, always unusual. You should be reluctant to cite her article for the women lose on divorce/men win point. (She made a lot of empirical mistakes.)says peg]]]

earning spouse unilaterally dissolving the marriage without showing a listed type of fault would have to pay 15% more than if fault were shown, for a total of 50-50 income sharing. A lower earning spouse unilaterally dissolving the marriage without showing fault would receive 10% less than if fault were shown. Similarly, the post-divorce contribution from the higher earning spouse to the lower will be increased by 15% if the higher earning spouse committed infidelity during the marriage and will be decreased by 10% if the lower earning spouse committed infidelity during the marriage. One party could legally divorce the other, but if this agreement were enforced the higher earning former spouse would still have continuing obligations.[160]

Could this be an attractive contract? If enforceable, it would allow the parties to do for themselves what the public has not seen fit to do for all couples: create a disincentive for fault. Such a contract might be especially attractive in a jurisdiction not allowing constriction of the grounds for divorce. Imposing a cost on a party who dissolves the marriage without proving fault could be used as an imperfect substitute for restricting the grounds for divorce to fault-based grounds.[161]

Michael and Cheryl's agreement might be enforceable. Courts do allow antenuptial agreements some leeway.[162] The biggest obstacle to individualized tailoring of divorce consequences is uncertainty over whether courts will enforce agreements that base property

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160 Read literally, the lower-earning spouse would also have a financial obligation after divorce, but that obligation would be more than offset by the obligation of the higher-earing spouse.

161 Even if such disincentives to fault are enforceable, there are still reasons to allow parties to constrict the grounds for divorce. See Haas, supra note xxx, at n53-54.

162 Laura P. Graham, The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage, Wake Forest L.R., 28, 1037, 1043 (1993). One case in which such an agreement was upheld is Sanders v. Sanders, 40 Tenn. App. 20 S.W.2d 473 (1955or6)[[[we have discussed this elsewhere, and should not repeat it here]]]. A couple agreed to remarry, and that a party who sued for divorce would get none of the property in the settlement. "5. Should either party file a divorce against the other, then the party so filing shall by such filing forfeit to the other all right, title, and interest in all the property, real, personal or mixed, jointly held and owned by them. Id. at 24. It is interesting that the plaintiff's stated reason for his suit is that his wife "has conceived the idea that she can treat the complainant as she pleases and that he must endure it," including such atrocities as calling his grandson "a little bastard" and refusing to sign a joint income tax return. Id. at 25.
There is also a citation at the top of this section that has similar support.

division on fault.[163] A court might refuse enforcement for various reasons. A court in a jurisdiction disallowing private limitation of the grounds for divorce might say that it should not allow private agreements attempting to circumvent the law to achieve the same illegal goals by legal means. Parties should not, the court might say, make something that is legally a ground for divorce into a non-ground by penalizing someone who sues for divorce on the forbidden ground.[164] Another ground for refusing to enforce this agreement is that alimony or other payments might encourage divorce. The terms of the agreement, by providing security after divorce, reduce the price of divorce to one party, and thus could be found to contravene public policy.[165]

Need for agreement relating to consequences of divorce sometimes arises from religious conviction.[166] For example, Orthodox

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163 One case in which a court upheld such a payment is Akileh v. Elchahal, 666 So.2d 246, District Court of Appeal of Florida, Second District. Jan. 12, 1996. In that case, the wife's father granted the husband a sadaq consisting of $1 paid immediately and a deferred payment of $50,000. (A sadaq is a postponed dowry which protects the woman from divorce in Islam.) The wife left the husband, and the husband sued for the money and lost. Florida law supported the husband's right to the sadaq payment in general, but the court ruled that he had no right in this case because, under Islamic law, the wife would forfeit the payment to the husband only for fault such as adultery.

Another example of Islamic contracts of this kind, though a case in which fault was not relevant, is Aziz v. Aziz, 127 Misc.2d 1013, 488 N.Y.S.2d 123 (Sup.Ct.1985). In Aziz, the parties entered into a mahr, a type of antenuptial agreement which required a payment of $5,032, with $32 advanced, and $5,000 deferred until divorce. The court held that the mahr conformed to New York contract requirements and "its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony." Aziz, 488 N.Y.S.2d at 124.

164 Another legal concept besides contract that might be applied to marriage is partnership, already mentioned above in note xxx. Commercial partnerships are similar to individualized marriage contracts in that they have great freedom in specifying duties and privileges, but are closer to no-fault marriage in that dissolution is unilateral and the terms are restricted by state law. See Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault, 60 U Chi L Rev 67 (1993); Bea Ann Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 Tex L Rev 689 (1990); Saul Levmore, Love it or Leave it: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage, 58 L. and Cont. Probs. 221 (1995).

165 See Koch v. Koch, *supra* note xxx, or In re Marriage of Noghrey, 215 Cal. Rptr. 153 (Cal. Ct. App. 1985)(refusing to enforce wife's antenuptial contract claim to $500,000 on the ground that it created an incentive for her to seek divorce).

166 For cases refusing after divorce to enforce premarital agreements regarding religious education or upbringing see Zummo v. Zummo, 394 Pa.Super. 30, 574 A.2d 1130 (1990) (refusing to enforce after divorce an antenuptial agreement to raise chidren as Jews; the right to change one's religious convictions, protected by the Free Exercise and Establishment Clauses, is inalienable); Weiss v. Weiss, 59 [or 49?] Cal Rptr 2d 339

Jewish women who think they might wish to remarry following divorce must find a way to assure that they can get a religious divorce if they become civilly divorced. Without the religious divorce, she cannot remarry except in a civil ceremony. Once she is married, it is difficult for a former wife who wants a religious divorce from her husband to induce him to appear before the Beth Din, the rabbinical court if he can get a civil divorce unilaterally. Antenuptial contracts, "Ketuba"s, are used to compel such appearances.[167]

As mentioned above, courts sometimes refuse to enforce marital promises on the ground that they lack fresh consideration. In the context of promises by married persons relating to divorce, the judicial search for fresh consideration can be especially misguided. Suppose a husband is especially eager to maximize the opportunity for his wife to invest in the marriage. Knowing that she fears the loss of income that might accompany divorce, he executes a written promise to share his income with her even after divorce for as long as she is not married to anyone else. Under standard doctrine, she has provided no new consideration and his promise is unenforceable. But his promise was made to allow his wife to devote her time to the marriage, which certainly redounded to his benefit. To refuse to enforce the promise is both unfair to the wife who has made career choices in reliance upon it and is harmful to husbands wanting to provide their wives security for their own benefit. A single promise by one spouse may create consideration for both the promisor and promisee.

Similarly, courts should hesitate to invalidate agreements providing for security in the event of divorce on the ground that they tend to encourage divorce.[168] A provision that a spouse obtains

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(1996) cert. denied? (refusing to enforce pre-divorce agreement to rear children in the Jewish faith; mother sending children to Baptist Sunday school and church camp).

167 Such an agreement was enforced in Avitzur v. Avitzur, 58 N.Y.2d 108, 112, 446 N.E.2d 136, 459 N.Y.S.2d 572)(1983). After a civil divorce, the husband refused to honor the agreement. The court upheld the agreement, saying that it would also uphold similar agreements to appeal to secular tribunals of the parties' choice. The court limited itself to requiring the husband to show up at the tribunal, rather than ruling on whether the court would enforce its decrees, but one of the contract's terms did provide for damages: "We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision."

168 See In re the Marriage of Noghrey v. Noghrey, 169 Cal.App.3d 326, 329 (Court of Appeal, Sixth District, California (1985) (holding unenforceable a kethuba "created to provide economic security for the wife" that provided too much security thus: "I, Kambiz Noghrey, agree to settle on Farima Human the house in Sunnyvale and $500,000 or one-half my assets, whichever is greater, in the event of a divorce.").

substantial property on divorce has the possible effect of encouraging divorce, but it also has the effect of encouraging investment in the marriage. It ought to be up to the parties to weigh the costs and benefits of such a provision.[169]

On the other hand, a common precondition to the enforcement of ordinary contracts is that the parties have adequate time before execution for consultation and careful deliberation regarding the terms and legal effect of the contract. Such judicial oversight is especially appropriate for premarital agreements. If a man springs a premarital agreement on his fiancee while the extended families are assembling in the chapel, she does not have enough time for to think through her options and the agreement should not be upheld against her wishes.[170] Legislatures could minimize the unpredictability of an "adequate time" doctrine by providing a statutory safe harbor, that agreements executed more than one month before the wedding, for example, would not be unenforceable on this ground of procedural unconscionability.

6. IMPLEMENTATION

Now that we have discussed all three parts of the marriage contract -- terms of wedlock, grounds for divorce, and terms of dissolution -- we discuss some considerations that apply to all three.

6.1 Choice hurts

Making choices is painful.[171] Some restaurants have no menu, offering only one item for dinner and saving their customers the time and aggravation of deciding what to order. Increasing the marital options open to couples will increase the costs of determining what marriage is appropriate. Not only will individual decision-making be more costly, but negotiations with the marital prospect will also be more costly since there is more to negotiate. In addition to rising costs, and as a result of that price increase, some marriages that would have been happy will not occur. On the other hand, some marriages that were not allowed or facilitated under current rules will occur, so the direction of the

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169 It could be appropriate, however, to hold that one party had deceived the other into believing that he or she would give the marriage his or her best efforts and had not done so.

170 See Norris v. Norris, 624 P.2d 636 (Ore. 1981) (denying enforcement to lop-sided agreement presented to wife as they were preparing to go to the Reno courthouse for a marriage license).

171 In some extreme situations, such as Sophie's Choice, the word "painful" fails to capture the harm done by being forced to make a choice.

net change in the number of happy marriages is difficult to predict.

[[[menu]]]

One way to diminish the costs of negotiation is to offer a menu of legislatively approved alternative, standard-form contracts. Not only would this save drafting,[172] but the alternatives could be the focus of educational efforts that would help people learn about their alternatives. Proposals in various states including Indiana,[173] and a bill enacted in Louisiana in 1997,[174] add a new type of marriage license, a "covenant" license, dissolution of which being more difficult than a standard "contract" license. The law should offer more than those two choices.

If a state, in the course of offering a menu if options, changes the default marriage from the existing law, it should be made clear that the default does not apply to existing marriages. One of the great injustices of previous reforms was that couples entering marriages under a regime promising some security were deprived of that security when the law changed. That mistake ought

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172 See Jennifer G. Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage, 68 S. Cal. L. Rev. 745, 784-5 (1995) (pointing out marriage contract forms can save transaction costs); Jeffrey Evans Stake, Mandatory Planning for Divorce (suggesting a form with various divorce-consequence options). Private parties could also develop forms, but couples might be less sure the provisions would be considered valid by a court.

173 1997 IN H.B. 1049. The Indiana bill allowed divorce after two years' separation and when a court found "a pattern of physical or psychological abuse" or unconscionability. 1997 IN H.B. 1049 stated, "The clerk of the circuit court shall further inform the parties that a marriage based upon a covenant license may not be dissolved except as a result of a felony conviction, impotency, incurable insanity, adultery, or a court's finding that:

(1) a pattern of physical or psychological abuse exists;
(2) the parties have been separated for at least two (2) years; or
(3) denial of a dissolution of the marriage would be unconscionable."

174 1997 La House Bill 756 amending 9 Louisiana Revised Statutes sec 272-275 and 307-309. The Louisiana covenant marriage allows unilateral divorce only for adultery, imprisonment, desertion for over a year, or one year after a separation obtained on grounds of physical abuse of spouse or children. Divorce is not obtainable except on these fault grounds. Louisiana bill section 307, 1997 Louisiana House Bill 756. There is no provision in the Louisiana law allowing individual tailoring of the marital contract beyond the two choices offered.[[[check the law again; eric says this is correct he thinks]]]

The Louisiana law will undoubtedly lead to litigation when someone tries to dissolve a Louisiana covenant marriage by going to Texas. See our discussion of choice of law in Section 6.2.

not to be repeated.[175]

6.2 Forum shopping and the need for federal law

Suppose Indiana decides to allow agreements restricting divorce and an Indiana couple, Henry and Marian, state that their fault-only-divorce agreement shall be governed by the law of Indiana regardless of their future residence.[176] What happens if the couple relocates to Nevada? Will Nevada refuse to grant a unilateral, no-fault divorce to one of them?[177] If the agreement and others like it are to be useful, Nevada should refuse. And under ordinary conflicts rules, a Nevada court would honor the contract's specification of Indiana law, unless it were contrary to Nevada public policy.[178] But divorce law does not follow the rules for contracts. Courts have considered marriage to be status rather than contract. Historically, states have felt a powerful interest in marriage.[179] Because of that concern, states have applied local law rather than the law of the state in which the couple were

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175 Although there is much talk about returning to a fault-based system, there is little attention given to the problems of forcing such a system upon couples who married with different expectations. It would be just as unfair to change their marriage as it was to change the existing marriages at the time of the no-fault revolution. Those who clamor for a return to the past seem bound to repeat past mistakes.

176 The UPAA allows the parties to specify: "(7) The choice of law governing the construction of the agreement."

177 Contractual provisions dealing with the acquisition of property during the marriage may raise similarly knotty conflicts issues. Those issues are beyond the scope of this paper.

178 See Restatement (Second) of Conflicts SS 187 (allowing parties unfettered choice of governing law as to matters of interpretation and policy-limited choice as to validity). Moreover, the law of the state of celebration usually determines the validity of the marriage. See Restatement (Second) of Conflicts, SS283 (1971); Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965 (1997) (arguing that the full faith and credit clause requires states to recognize the status of marriages valid where entered); Eugene F. Scoles and Peter Hay, Conflict of Laws, 438-445 (2d ed 1992).

179 "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body, prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested . . ." Maynard v. Hill, 125 US 190 (1888).

married.[180] Although divorce reform shows that states no longer have a such strong interest in whether couples are married or not,[181] the courts have not ceased viewing the issue as one of status to be decided by local law. Nevada would feel as free to ignore Indiana divorce law today as it has in the past. If Nevada refuses to honor the Indiana agreement,[182] such agreements become less useful. Spouses can protect themselves by remaining in Indiana, but that protection comes at some cost.

A mutually agreed relocation is not the only contingency threatening the agreement. Suppose Henry takes a trip to Nevada. If he establishes domicile, his wife, Marian, has no power to stop him from getting a Nevada divorce that will be recognized in Indiana. In 1942, the Supreme Court held in *Williams v. North Carolina*[183]

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180 It does not help much to recharacterize the issue as one of marital-agreement law rather than divorce law. Although states usually recognize marriages valid where made, see previous footnote, states are not compelled to honor other states' marriages, much less the accompanying marital agreements. If young Virginians, say, were to go to Maryland, which might have a lower age limit to marry without parental consent, Virginia could choose whether to recognize the marriage. See Needam v. Needam, 33 SE2d 288 (Va. 1945) (deciding to honor a Maryland marriage).

181 When states made divorce difficult, they could plausibly argue that they had a strong interest in the marriage, in keeping the couple together. But states have shown through reforms allowing easy divorce that they have little interest in keeping couples together. Conversely, the ease of marriage shows that they have little interest in keeping couples apart. Hence, it is hard to see what strong interest a state can plausibly assert in a person's marital status today.

182 All it takes is one state that is willing to ignore the agreement to deprive the agreement of some of its beneficial incentive effects. For this reason, the UPAA, which allows contractual choice of law, Section 3 (a) (7) would have to be adopted by all states to make agreements reliable.

183 Williams v. North Carolina, 317 U.S. 287 (1942). One of two defendants being prosecuted in North Carolina for bigamy had obtained a Nevada divorce on grounds of "extreme mental cruelty," which under Nevada law was established by her unrebutted claim that her husband was moody, uncheerful, and untalkative. Her claim to domicile rested on having spent six weeks in an Alamo Auto Court in Nevada. *Williams* reversed Haddock v. Haddock, 201 U.S. 562 (1906), which held that an *ex parte* divorce could be obtained only where both spouses were last domiciled together.

Dissenting in *Williams*, Justice Jackson said "...settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Jackson J., dissenting at 50. Jackson also said, "I see no reason why the marriage contract, if such it be considered, should be discriminated against, nor why a party to a marriage contract should be more vulnerable to a foreign judgement without process than a party to any other contract." Jackson dissenting at 52. His dissatisfaction, like ours, lies in the treatment of marriage as status rather than contract.

On remand, the North Carolina court found that the divorce was not a valid divorce under *Nevada*

that other states must recognize a unilateral, fault-based divorce validly granted by a Nevada court despite Nevada's lack of personal jurisdiction over the unwilling spouse.[[[184]]] The Nevada court may assert jurisdiction over Henry and his status even though it has no jurisdiction over Marian back in Indiana. Not only does Nevada have the power to invalidate the Indiana restriction on divorce, it has an incentive to do so. By offering divorces not available elsewhere, Nevada promotes its tourism industry. Seeing a market opportunity and eager to supply to the demand, it might well follow its own law.[185]

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law because the Nevada court lacked jurisdiction since the defendant had not intended to reside indefinitely in Nevada. This determination was upheld in *Williams II*, Williams v. North Carolina, 325 U.S. 226, 238-239, and the defendants lost. Thus it appears, surprisingly enough, that Madame Butterfly was correct as to the possibilities under American law.

> Butterfly (very nervous, growing excited):
> Here, husbands are not queasy.
> "Had enough! Send her packing, it's so easy!"
> That's what they call divorce here.
> But in America
> things are very different. . . .
> There they have judges
> to deal with such scoundrels.
> One of them asks him:
> "You want to leave your wife? May I ask why?"
> "Married life bores me,
> so please divorce me!"
> What does the judge say?
> "Ah, that's what you think!
> Two years in prison!"

Giacomo Puccini, Madama Butterfly, English version by John Gutman, G. Schirmer ed. 2498, New York at 15. Current American law offers much less protection against divorce than in Butterfly's day, and current Japanese law, more (see above at xxx).

184 This point shows that the reform of divorce laws was in large part symbolic. Although the reforms reduced the cost of unilateral divorces, and travel costs were higher in the past, easy divorces have been available in Nevada since 1942. Since *Williams*, it has been a race to the bottom. eric, i think the result in this case shows that we are wrong in this footnote. the couple were found guilty. also, to make this statement, we need to know more about what nevada law allowed, ie what had to be shown to get a unilateral divorce in those days. Scoles and Hay discuss this point, at 452-3 and we should probably read that before making it here; in addition we need to worry about the desertion point i made above; it could have been desertion to establish residence in nevada

185 For the reasons in these last two paragraphs, a failure by Louisianans to choose the covenant marriage in that state's experiment, see note xxx supra, might not mean much. They might view a binding agreement as being worth its purchase price, but might decline on the ground that the agreement would not effectively restrict

Contractual restrictions on the grounds for divorce can be circumvented by one spouse as long as some state will ignore them.[186] To protect their marriage-law requirements, states have enacted anti-evasion statutes.[187] It is not equally easy, however, for states to protect their rules, or their citizens' private agreements, limiting divorce. The problem lies partly in the federal constitution's requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[188] Since a marriage is less clearly a "judicial proceeding" than a divorce decree,[189] states may be free to ignore marriage agreements binding in other states.[190]

To give Nevada sufficient interest in Henry's status for its decision to be binding on Indiana, Henry must be domiciled in Nevada. This requires that Nevada be his permanent place of residence and that he intend to reside there for the indefinite future. [[[Eric wants this sentence to be: This requires that he declare Nevada to be his permanent place of residence and that he intends to reside there for the indefinite future.]]] This domicile requirement provides Indiana with an opportunity to protect its divorce limitations. As part of its divorce reform law authorizing private agreements on the grounds for divorce, Indiana could make it a crime of desertion to move out of the marital home and take up residence in a new home with the intent to remain there

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divorce. On the other hand, choice of the covenant option by many Louisianans does not mean that they made the right choice, though it does suggest that they think the binding marriage better suits their needs.

186 Note the problem this creates for Conservative's position in the dialog above, and for empirical studies of the effect of changing divorce laws or changes in one state's laws. See generally, Larry Ribstein and Bruce Kobayashi, Federalism, Efficiency and Competition (available on the web) (independently coming to the same conclusion as this paper, that one state's covenant marriage has little future if it is not honored in other states); Eugene F. Scoles and Peter Hay, Conflict of Laws, 497 (2d ed 1992) (noting that the choice of law issue becomes a jurisdictional issue).

187 See, e.g., Va. Code Ann. 20-40. Find the indiana statute. And there are many cases on anti-evasion.

188 Article IV, Section 1.

189 The solemnization of the marriage could be viewed as a low-grade adjudication, but it sertainly lacks some of the characteristics of a disputed case.

190 An Indiana suit designed to obtain a court's imprimatur, which either party could later expose as collusive, might not qualify as a "judicial proceding" entitled to full faith and credit. So the parties cannot make their agreement bullet-proof by lawsuit.

in the indefinite future.[191]

Even a strong law against desertion might fail to give Indiana couples sufficient confidence in their divorce-limiting agreements to allow comfortable reliance. There always exists a possibility that the couple will later move to a state lacking a strong desertion statute. After such a move, it would be possible for one spouse to establish domicile in Nevada without fear of criminal prosecution.

If one state does not honor marital agreements and other states cannot protect their agreements, a national law forcing states to honor foreign agreements may be needed to make premarital contracts adequately reliable.[192] A national law *legalizing* agreements is not necessary. Nor do we advocate a national law requiring Illinois to honor a marital agreement by an Illinois couple that Indiana law would govern. What would be needed, however, is a national law that says agreements regarding the grounds for divorce that are effective in the couple's domicile at the time of execution must be honored by other states.[193] On the other hand, even without a national law, states might feel some pressure to recognize marital contracts because some spouses would refuse to move to states not willing to honor the agreements they are relying upon. At a minimum, however, it may be necessary to prevent states from offering divorces to one spouse without the consent of the other spouse.

This issue shows the importance of the distinction between contract and status. If marriage is status, and status is determined by the various states, then moving from one state to another changes the terms of marriage and divorce, changing with them the incentives for behavior, the fairness of the arrangement,

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191 Perhaps the law could also make any declaration of intent in a foreign tribunal irrebutable evidence of intent for desertion purposes. It might also provide that the foresaken spouse could get a prejudgment attachment of property.

192 The constitutional basis for such a law might be the spending power, or, better, the Full Faith and Credit clause, which says "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Article IV, Section 1. The purpose of the clause is to protect national unity, and it gives Congress a large role in deciding in what ways national unity is to be achieved. Such federal legislation would be contrary to the spirit of the Defense of Marriage Act, which allows states not to recognize the validity of same-sex marrital contracts that are valid in other states. cite

193 On the other end of the free-choice spectrum, such a law would also require the few remaining states in which unilateral, no-fault divorce is not available to honor no-fault-divorce agreements made in other states. Such a federal law need not interfere with the operation of anti-evasion statutes, however.

and the happiness of the couple. Indeed, even if the couple does not move, the mere possibility of moving undermines the incentive structure and their happiness. If it is contract, then the relationship remains the same, for the most part, regardless of the couple's migration.

The flip side of this forum-shopping point is that if states do honor marital agreements from other states, then it only takes one state allowing contracts to put pressure on others. If one state passes the law, and couples see the options as attractive, that state will become a magnet for marriage ceremonies. The tourism business alone might cause others to follow suit in a race to the top. Virginia says it is for lovers,[194] but other states with freedom of marital contract may claim greater hospitality.[195]

7. CONCLUSION

In the past, it was clear why few people in England and America executed a marital contract. Religious and social norms defined a "marriage" and the gender roles within a marriage. The law did not allow contractual variations out of keeping with the religious and social norms. As a matter of public policy, it was thought that the interests of society required the fostering of a certain type of marriage, in the interests of child rearing and stability, and the desires of the individual needed to be subordinated to social order.[196] Thus, social norms, religious rules, and legal doctrine prevented people from entering into a marriage agreement that might allow easy dissolution or unusual roles.

Some of the reasons why it was once difficult to contract out of a traditional marriage are clear. But many of those restraints on individual liberty have weakened or disappeared. Prevailing

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194 One might ask Loving about that (See note xxx, *supra*).

195 Recently, foreign state recognition of same-sex marriages has become a hot issue. That problem is outside the scope of this paper. We are just saying that if Hawaii allows same-sex marriages with reduced grounds for divorce, Indiana should not allow them to be easily dissolved. This is distinct, however, from the question of whether Indiana would have to recognize such marriages for, e.g., state income tax filing.

196 See Joan M. Krauskopf & Rhonda C. Thomas, Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support, 35 OHIO ST. L.J. 558 (1974), and Lenore J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 CAL. L. REV. 1169 (1974) for descriptions of the traditional requirements. One case is Ritchie v. White, 225 N.C.450, 35 S.E.2d 414, 453 (1945), where the North Carolina Supreme Courts said, "It is the public policy of the State that a husband shall provide support for himself and his family."

opinion has changed. Although still limited, a marriage today is considered much more a matter for the two parties concerned, not for society, to structure. Yet few people entering their first marriage memorialize their shared understandings, obligations, and aspirations by contract. The rarity of individualized contracts is partially explained by inertia and partly by lack of awareness that being bound by marital contracts can be a good thing for both parties. But another reason is that no one can be sure that courts will enforce the contracts. The law has not kept pace with societal sensibilities. The freedom valued by society and offered by expanded social norms is not enabled by the law.

No-fault divorce might seem to foster individual choice, in keeping with the spirit of the age, but it does not really favor individual choice. Some people would like to be able to choose to bind themselves in a permanent marriage, yet the law makes it difficult to personalize the contract. One legal size is presumed to fit all. The chief problem comes in being unable to specify the grounds for divorce, either directly or through using the terms of divorce to penalize a spouse who is at fault. The long-established rule against judicial interference in ongoing marriages further hinders the establishment of individually tailored marriages.

Moreover, social norms and families have become weaker. With non-legal constraints weakening, people need legal institutions to pick up the slack, allowing them to make credible commitments to each other. It is time for legislators and judges to clarify to what extent courts will enforce marital agreements.

We have argued that there is a rational basis for traditional marriage bonds constraining husband and wife. Some people rationally wish to bind themselves to a relationship with each other. They do so not just because of *akrasia*, the weakness of will anticipation of which motivated Ulysses to bind himself to the mast. They do so also for the same reason as business partners bind themselves: so that each party can make relationship-specific investments without fear of having them rendered useless by the other's perfidy.

We do not argue that traditional marriage should be the only form allowed. Such an argument [[[would require a quite different distinct critique of unilateral, no-fault marriage, which we have not attempted, and]]]would run counter to our claim that couples differ in their need for legally binding commitment. Our point is that no one has a choice and that some couples suffer for it. Marriage is still a matter of status,[197] and its failure to move to

197 The terms of divorce have shifted somewhat toward contract, but not the marital relationship.

contract is causing much harm.

The center of the divorce law discussion relates to what should be the best rules for custody of children and allocation of marital assets or future income. Many scholars raise the controversy up a level, arguing that one theory or another should be used in deciding how to reform the law of marriage.[198] At either level, the argument assumes that we as a society need to decide what is best for people. Our claim is that the debate regarding whether society or couples should decide what is best for couples has not been resolved satisfactorily.[199] The dispute often appears like an argument over whether states should build sedans or minivans for everyone to drive, or what criteria or theory we should use in deciding which car states should build.[200] The first point of attention should be whether the government ought to let people choose.[201]

The legal system should increase private choice in marriage and divorce law. We need not give as much freedom of contract as exists in the commercial context. Indeed, given the lack of sophistication of most people, that would help little. What is essential is that legal institutions understand that people need to be able to commit themselves to each other and to a relationship and that legislatures direct courts, with that understanding, to

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198 An example of this is the discussion of whether and when alimony should be awared upon divorce, and what theory ought to be applied in making that determination.

199 Of course, a number of important writings do address the issue of private verses public ordering of marriage law, see Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers and the Law (Free Press, 1981); Howard O. Hunter, An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse, 64 Va. L. Rev. 1039, 1075-76 (1978); Marjorie M. Schultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 207 (1982); Robert H. Mnookin, Divorce Bargaining: The Limits on Private Ordering, 18 U. Mich. J. L. Ref 1015, 1024-26 (1985); Marsh Garrison, Marriage: The Status of Contract, 131 U. Pa. L. Rev. 1039 (1983); Sally Burnett Sharp, Fairness Standards and Separation Agreements: A word of Caution on Contractual Freedom, 132 U. Pa. L. Rev. 1399 (1984); Judith T. Younger, Perspectives on Antenuptial Agreements, 40 Rutgers L. Rev. 1059 (1988); Ann L. Estin, Law and Obligation, 43 Wm & Mary L. Rev. (1995); Michael J. Trebilcock and Rosemin keshvani, The Role of Private Ordering in Family Law: A Law and Economics Perspective, 41 U. Toronto L. J. 533 (1991); Schneider and Brinig; Amy Wax, text at notes 278-188; though rarely does the discussion deal specifically with private ordering of the grounds for divorce.

200 See sources cited in Wax note 298.

201 This analogy makes it plain that our discussion assumes that there is no possibility the private sector can supply binding law. The argument is that the government is the only potential supplier and is failing to supply a valuable good it could supply at low cost.

enforce certain boilerplate agreements. Statutes could usefully provide forms with several enforceable and reliable options. In addition to modern no-fault exit without alimony, premised on both spouses developing careers, the traditional fault-limited divorce with alimony, premised on efficient division of labor, should be an option. The law does not need to provide enforcement for every possible kind of marriage, but it should provide clear and dependable enforcement for a few kinds, without any more of the judicial uncertainty created by fairness, unconscionability, and public policy limitations than is present in ordinary contract law. Much more than it does today, the law should lift the veil of ignorance shrouding marriage.

[[[we ought to cite amartya k sen, inequality reexamined 1992
allan h parkman, no-fault divorce: what went wrong 1992

what is the difference between bilateral and mutual?
]]]