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Jeffrey E. Stake

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Mandatory Planning for Divorce

*Jeffrey Evans Stake**

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I. INTRODUCTION

Rachel, if you'll not transport us,
I will take you for my wife,
And I'll split with you my money
Ev'ry pay-day of my life.¹

My daughter Laura will reach the median age of first marriage in about seventeen years.² Alison, her little sister, follows three years be-

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1. Reuhen and Rachel, an American folk song written, obviously, in another era. See THE NEW BLUE BOOK OF FAVORITE SONGS 99 (John W. Beattie et al. eds., 1941).

2. The median age of first marriage for women in the United States in 1986 was 23.3 years. STATISTICAL ABSTRACT OF THE UNITED STATES, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE 87 (110th ed. 1990) [hereinafter STATISTICAL ABSTRACT].

hind. There is a good chance they both will marry.³ What are the odds that those marriages will work out well? Less than I would like. The strong statistical possibility of divorce⁴ is hard to ignore and the prospects upon divorce are not rosy. The economic repercussions of divorce for Laura and Alison could be grim,⁵ likely worse than those for their brother Christopher if he were to divorce.⁶ What hope have I that this gloomy situation will brighten before they marry? Not much.

The American Association of Law Schools devoted an entire day's program at the 1991 annual meeting to the economic consequences of divorce, a topic of tremendous practical import to a large segment of society. Though the discussion informed and entertained the audience, it failed to respond adequately, as has much of the literature on divorce, to the fact that our melting pot may have melted us but it has not homogenized us. Deep differences abound. What different people want and expect out of marriage, and divorce, is not the same, probably

3. The odds that each of them will marry are somewhere between seven and nine out of ten. See Arthur J. Norton & Jeanne E. Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARRIAGE & FAM. 3, 5 (1987).

4. Based on the marriages within the last 15 years, the odds of divorce are about one out of two. THE AMERICAN WOMAN, 1988-89: A STATUS REPORT 29 (Sara E. Rix ed., 1988) [hereinafter THE AMERICAN WOMAN]. The marriage rate has hovered between 8.5% and 11.1% since 1950 and was about 9.7% in 1988. STATISTICAL ABSTRACT, *supra* note 2, at 62. The divorce rate almost doubled between 1965 (2.5%) and 1975 (4.8%), and then remained near 5.0% before slipping slightly to 4.8% in 1988. *Id.* The relative stability of the marriage rate suggests that the current divorce rate is not an artifact of baby boomers moving through the marriage and divorce years.

5. Stephen D. Sugarman, *Introduction to DIVORCE REFORM AT THE CROSSROADS* 1, 4 (Stephen D. Sugarman & Herma Hill Kay eds., 1991) [hereinafter Sugarman, *Introduction*] (noting that "all the authors here who address the issue agree that a large proportion of divorced women, especially those with young children, face very serious financial problems and a reduced standard of living"). In 1987, the median family income for families with no husband present was only \$14,600, whereas the median family income of married couples was \$34,700. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, No. 159, POPULATION PROFILE OF THE UNITED STATES 1989 32 (1989). In 1987, there were 986,000 divorced women between the ages of 55 and 65 of whom 21% lived below the poverty level. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES 1987 35, Table 8 (1987). Of the 755,000 divorced women over the age of 65, 23.9% lived below the poverty level. *Id.*

6. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 323 (1985) (stating that when income is compared to need, divorced men experience an average 42% rise in standard of living in the first year after divorce, while women experience a 73% decline); Stephen D. Sugarman, *Dividing Financial Interests on Divorce, in DIVORCE REFORM AT THE CROSSROADS* 130, 149 (Stephen D. Sugarman & Herma Hill Kay eds., 1991) [hereinafter *Dividing Financial Interests*] (suggesting a 30% decline in living standard for women); Joan M. Krauskopf, *Theories of Property/Division Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 271 n.65 (1989) (noting that Weitzman's critics differ on the amount, not the existence, of the disparity); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 352, 391-92 (1987) (noting that while the standard of living for men increases 17% and that for women declines 29% in Michigan, the men's increases 120% and the women's declines 33% in Vermont). *But cf.* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 1-35 (1991) (dissecting Weitzman).

ought not be the same, and in any case cannot be made the same.

Recognizing that one set of rules, no matter how complex, will not fit all marriages well, several scholars have suggested greater reliance upon, and enforcement of, antenuptial agreements. Allowing people to write their own enforceable marriage terms, with the legal rules serving as default rules, is an essential and important step in the right direction. I fear, however, that this step alone will have little practical impact. It is just too hard for most people to raise the subject of divorce. I propose another, and far more radical, step in the same direction: compelling marrying parties to determine the economic consequences of their own divorce.⁷ Perhaps it is time for scholars to stop debating what is best for couples and to start developing a legal and cultural framework in which couples can and will decide for themselves what is best.⁸ Perhaps it is time to abandon the impossible task of telling people what to expect out of marriage and instead make them choose for themselves. The possible use of law to reduce the costs of divorce bargaining provides a wonderful opportunity to empower people to structure their lives in ways they will find fulfilling and rewarding.

After making a case for private ordering, Professor Robert Mnookin asks, "how do we best design rules and procedures that respect personal autonomy by facilitating private ordering, and ensure fairness by establishing appropriate safeguards against the risks that

7. This Article does not suggest that premarital contracts can or should determine the obligations of parents to their children. Though premarital agreements could deal with other incidents of marriage and divorce, the proposal in this Article is limited to contracts relating to division of property and future income after the dissolution of the marriage. It is difficult to work out the many other incidents of a working marriage in advance because marriage is fluid and unpredictable. Additionally, such agreements would require courts to regulate ongoing marriages.

This Article does not consider the division of property at death. A complete treatment of custody is also beyond the scope of this Article, though a few comments about custody agreements will be offered. Indeed, even on the primary topic of spousal support, this Article offers no concrete proposal, only some ideas that might be worked into a proposal after considering many further practicalities.

The enthusiasm for the power of private agreements to work social improvement expressed in this Article may remind the reader of a similar belief in contract held by nineteenth century legal thinkers. See A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 327 (1989).

8. One scholar has stated:

For many years, a single behavioral model of acceptable marriage has been enshrined in domestic relations law. Underlying that legal policy are the beliefs that (1) there is a particular marital structure that, as a matter of policy, is best for the individuals involved, or for the society, or both, and (2) people will make unwise decisions if they are allowed to structure their intimate relationships.

Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 241 (1982). See also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 92-93 (1987) (noting that the law assumes uniformity of marriages).

incapacity or third party effects may lead to unjust results?"⁹ I suggest in this Article that no change in the law could do more to facilitate private ordering of property and income after divorce than a requirement that couples choose their own futures. I also argue that fairness and third parties need not be casualties of that mandate.¹⁰

While probing the suggestion of mandatory bargaining, this Article will explore several issues, including: whether it is possible for the law to fashion an efficient set of incentives for married couples; whether judges can determine the fair division of property and income at the time of divorce; what a divorce bargaining mandate does to freedom and autonomy; how bargaining in the shadow of a premarital agreement might differ from bargaining in the shadow of the law;¹¹ why people rarely execute antenuptial agreements; whether fault ought to be considered in dividing assets upon divorce; whether to allow parties to make illusory promises; what limitations the law ought to put on private ordering in the context of divorce; and who would win or lose if a state required an exchange of promises before marriage.

In order to highlight some of the competing considerations, I address these issues in the context of a proposal for reform. I present the proposal not because I am convinced its adoption is the right thing to do, but because I am confident that discussion of a marital mandate contributes to what Professor Robert Levy has called "a new public and legislative examination of the functions of maintenance."¹²

II. RECENT REFORMS

Many of the current problems surrounding divorce stem from legislative changes implemented to solve earlier problems.¹³ Anchored in notions of fault, the old divorce rules kept together people who would have been better off apart,¹⁴ chased unhappy couples to unrestrictive

9. Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1037 (1985).

10. I admit, however, that this notion of private ordering is slightly bent. Forcing couples to choose their future substitutes public ordering for private on the question of whether to choose. That is, however, the only way to assure meaningful choice on the more important question of what to choose.

11. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

12. Robert J. Levy, *A Reminiscence About The Uniform Marriage and Divorce Act—And Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43, 76.

13. For more, much more, history, see LAWRENCE STONE, *THE ROAD TO DIVORCE: ENGLAND 1530-1987* (1990); Levy, *supra* note 12; June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 5-6 (1989); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789.

14. See *Rankin v. Rankin*, 124 A.2d 639 (Pa. 1956) (divorce not granted to couple, each of

jurisdictions for easier divorces, and drove lawyers and clients to perjury as a means of fitting their cases into the narrow grounds available for divorce.¹⁵ In addition to creating undesirable incentives, the restrictive rules were considered by reformers to be an attempt to legislate an outmoded morality.¹⁶ That morality perceived "married" as a committed condition. "Married" has now largely become a convenient condition, lasting only until either party perceives a better alternative.¹⁷

The acceptance of unrestricted divorce, and hence temporary marriage, undermined the notion of alimony, which was founded on the idea that marriage was irrevocable. The ethos of increased independence for persons wanting to be free of their spouse, the elimination of fault as a legally relevant consideration in divorce, the excision of permanence from the concept of marriage, the granting of freedom to remarry, and the replacement of assumed female dependency with assumptions of equality¹⁸ and autonomy may have discouraged already reluctant judges from granting alimony.¹⁹ Coincidentally, the unilateral no-fault rule has further eroded the negotiating position of innocent, economically dependent spouses. When the breadwinner wanted to leave in the old days, the innocent breadmaker, whose consent was essential, could trade divorce for maintenance. The innocent spouse in a unilateral, no-fault, minimal-maintenance jurisdiction lacks that leverage.²⁰

whom had physically attacked the other, because both at fault). For the absurdity of keeping such couples together, see Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 38-39 (1966) (likening recrimination to the Sartre play *No Exit*).

15. See Sugarman, *Dividing Financial Interests*, *supra* note 6, at 130 (stating that "no-fault divorce primarily sought to rid domestic relations law of the bad features of the old system—bitter recriminations, private detectives, co-operative lying about adultery, the stigma of being divorced, and so on").

16. For a discussion of the diminution of moral discourse in family law, see Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 434 (1985).

17. GLENDON, *supra* note 8, at 108. In most states, either party may terminate the relationship. HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 339 (2d ed. 1986) (noting that reform has made divorce available on unilateral demand); JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 272 (2d ed. 1985) (suggesting that the breakdown of a marriage is irreparable if one spouse says it is). Homer H. Clark, Jr., *The Role of Court and Legislature in the Growth of Family Law*, 22 U.C. DAVIS L. REV. 699, 702 (1989) (noting that trial courts grant divorce on demand of either party, regardless of the other's objection that the marriage has not broken down).

18. Fineman, *supra* note 13, at 826 (noting that law is changing from status model to equality model).

19. See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75, 84, 91 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). *But cf.* Sugarman, *Dividing Financial Interests*, *supra* note 6, at 130, 132, 134 (concluding from Weitzman's data that the percentage of alimony awards in California dropped only from 19 in 1968 to 13 in 1972 and 17 in 1977; but the percentage of permanent awards was cut in half).

20. See WERTZMAN, *supra* note 6, at 13-14, 371-77; H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 452 (1986)

Not surprisingly, lowering the price of divorce has increased its frequency. Indeed, with modern divorce laws have come high divorce rates.²¹ Are the current problems merely transitional? Will they pass once couples have a chance to plan their lives according to the new scheme? I think not. Christopher, Laura, and Alison face serious difficulties in their future marriages.

A. *Problematic Incentives Created by Modern Divorce Law*

Time limitations pull into tension the goals of building a career and building a family. Suppose that Laura invests her time and efforts in household production. She tries hard to help her husband in his career,²² organizing and enduring business-related social events that help him to form a network of associations that lead to advancement. Listening to the inner voices of connectedness,²³ she stays at home to take care of her children. She puts off her own career until they are out of the house. Her husband supports her in her choice; after all, the more she depends on him, the less he needs to worry about her deserting him.²⁴ Suppose then, despite her best efforts, Laura's marriage breaks up.

Indeed, her best efforts on behalf of the family may, in a perverse way, contribute to the breakup of the marriage. By specializing in household production, Laura makes herself less attractive as a financial teammate after the children leave home. For each day she spends at home, the market withdraws some of the opportunities it offered the day before. Her husband, having built a career of solid financial potential with her help, may now see Laura as the lesser partner. It appears, from his new vantage, that there are lots of women who would like to

(stating that empirical results show higher divorce settlement payments in unilateral divorce states); McLindon, *supra* note 6, at 386 (noting that women in New Haven, like those in Vermont and California, have seen their divorce awards decrease in the no-fault era); Fineman, *supra* note 13, at 801-02.

21. See THE AMERICAN WOMAN, *supra* note 4, at 29; June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1493 (1990); J. Thomas Oldham, *Premarital Contracts Are now Enforceable, Unless . . .*, 21 Hous. L. REV. 757, 757-58 (1984).

22. She might also help with the performance of his job duties, reading his drafts as her mother read this.

23. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1984) (suggesting that outlooks on life are formed by early maturation in which men recognize their separateness from their mothers and women grow while remaining connected).

24. In this example and others that follow, I do not mean to pass moral judgement. Nor do I suggest that men and women are cold and calculating or even conscious of their own best interests. Indeed, I presume the opposite is usually the case. That does not mean, however, that their best interests do not exert a pull on their behavior. Incentives can and do influence actors without their being aware of the influence.

join forces with him. With a new wife he could start another family; knowing how much fun it is to raise children when someone else does the work, he might wish to raise some more. Or he could find a career-oriented wife with a lot more earning power, one who has not spent precious early years on childbearing and nurturing. His perceptions are not heartless, cold, and calculating; the world just looks different from his position of strength and security. Because his alternatives appear so attractive, the possibility of divorce poses only a small threat.²⁵ He invests little time and effort in their marriage and in trying to make Laura happy.²⁶ Laura puts up with the steadily diminishing returns because her choices outside the home diminish at the same rate.²⁷ Finally, the benefits of an extramarital fling for him outweigh the apparent costs. Laura, being proud and headstrong, puts up with none of this. Household specialization, which serves the couple so well for a time, thus eventually and necessarily creates a disparity in alternatives which pulls the couple apart.²⁸

This leaves Laura, like so many women since the divorce revolution, in desperate straits.²⁹ An equal division of Laura and her hus-

25. *But see* KRAUSE, *supra* note 17, at 79 (stating that "if people knew in advance the all too often ruinous financial consequences of divorce, fewer divorces might occur"). For models of divorce decisionmaking drawing on social psychology and economics, see Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 45 n.99 (1990). The once powerful social stigma of divorce has all but disappeared. See Carbone, *supra* note 21, at 1493.

26. It is true that the easy exit from marriage exposes the relationship to market competition, with the result that each spouse must try hard to please to avoid being replaced by some competitor. But Laura's husband's desire to avoid being replaced diminishes as his market alternatives improve. Moreover, even if his alternatives are not increasing, he may know that Laura's are decreasing faster than his.

27. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 71 (1988) (stating that "[t]he stronger the individual's situation outside marriage, the stronger his or her bargaining position within marriage").

28. A similar situation occurs in the labor market. Employees invest heavily in skills especially useful to that employer and the employer terminates the relationship before employees can collect their retirement designed to compensate them for the firm-specific investment. See Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining*, 136 U. PA. L. REV. 1349 (1988). For a discussion of the problems of relationship-specific production in the context of long-term contracts, see OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 32-34 (1985).

By this hypothetical I do not mean to suggest that there are not other factors, such as the persistent attitude that men age more gracefully than women, that contribute heavily to the frequency of divorce. Nor do I suggest that monetary concerns predominate. That love, status and public opprobrium, sex, friendship, and many other values are usually most important does not, however, prevent financial aspects from having an important marginal effect.

29. Courts have failed to recognize that the traditional division of labor *invests* marital assets of the couple in the future market earning power of the husband, which he carries with him away from the divorce. Take the following example:

Where both spouses perform the usual and incidental activities of the marital relationship, upon dissolution there can be no restitution for performance of these activities. . . . In each marriage . . . the couple decides on a certain division of labor, and while there is a value to

band's property provides shaky security because they have not saved very much. The judge presiding over their divorce is unlikely to order Laura's husband to pay long-term maintenance.³⁰ She must, therefore, find another source of security for herself. She can start a career, but it is a little late. Her wages will lag substantially behind what she would have made if she had entered the market with her cohort. It is unlikely that she will ever achieve the financial security her husband will enjoy. If she instead opts to continue in her previous trade of household production, she fights an uphill battle in trying to find another husband, presuming she wants one. In addition to lacking the financial potential of those who have pursued careers with single-minded purpose, she lacks the will, and possibly the physical capacity to bear more children.³¹ She may have to settle for some crusty old geezer who has few options himself.³² Having invested long in her husband and family and short in divorce-proof assets, Laura is left after divorce in relative poverty.

Women who cannot turn to relatives for financial support after divorce can be in a terrifying position. If these women lack the skills and training to support themselves, they may have to endure a physically abusive relationship in order to avoid welfare. The change to unilateral no-fault divorce was supposed to allow incompatible couples a way out of bad marriages, but the unavailability of maintenance from wrongdoers may lock women into horrible marriages.³³

what each spouse is doing, whether it be labor for monetary compensation or homemaking, *that value is consumed* by the [marital] community in the on-going relationship and forms no basis for a claim of unjust enrichment upon dissolution.

Pyeatte v. Pyeatte, 661 P.2d 196, 203-04 (Ariz. Ct. App. 1983) (emphasis added) (refusing to enforce a contract because it was indefinite, but giving restitution).

30. Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 143-44 (1980) (noting that about 15 to 17% of final decrees in their sample included alimony); see MARTHA L. FINEMAN, *THE ILLUSION OF EQUALITY* 32, 40, 44 (1991) (suggesting that alimony no longer exists); Scott, *supra* note 25, at 18 (stating that "long-term alimony is virtually a thing of the past in many states"); Fineman, *supra* note 13, at 795 (noting that alimony awards are extremely rare); Ellman, *supra* note 13, at 22 n.51 (stating that most women receive no alimony at all); Carbone, *supra* note 21, at 1492 (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").

31. Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 293 (1987) (stating that "[i]t is this more rapid using up of the woman's capital asset that creates incentives for the husband to terminate the marriage and causes difficulty for women in replacing their husbands following divorce").

32. There is some inconsistency in the data regarding the frequency of remarriage. Compare Scott, *supra* note 25, at 35 n.77 (noting that women remarry often) with Fineman, *supra* note 13, at 831 n.146 (noting that remarriage possibilities are slim and divorces high for divorced women). Data showing that women remarry often, however, do not imply that they remarry well.

33. When my wife was a high school teacher in a poor neighborhood outside of Washington, D.C., one of her students told a story of an impoverished mother who went on a ten-year plan of

The old alimony rules, based on notions of permanence and dependency, provided a check on some of the incentives that lead couples toward divorce.³⁴ Because his financial obligations to Laura would continue after a divorce, Laura's husband could raise his standard of living only by finding a new partner with that much greater earning potential. Because his alternatives under a strong alimony law would be less attractive, Laura's husband would try harder to make their marriage work.³⁵ Furthermore, the centrality of fault in the traditional divorce law created a disincentive for faulty behavior.³⁶ Laura's husband would be less inclined toward unfaithfulness if that behavior might occasion a subsequent reduction in his wealth in addition to the loss of Laura and the rest of his family.³⁷ Thus, the old rules of alimony, grounded in the assumption that marital responsibilities last forever, made it more likely that marriages indeed would last forever.

Suppose that Alison, being cautious by nature, invests little in her marriage. Seeing that there is no job security in the modern kitchen, she completes her education rather than cutting academics short for the needs of her family.³⁸ After graduation, Alison moves directly into the job market, taking advantage of child-care and other alternatives that allow her more time to pursue a career. After exhausting herself in career and household chores, she has little energy for her husband. And who needs him anyway? From day to day experience she knows that she can raise the children and hold down her job without much help from her husband. There is, therefore, little reason for her to respond magnanimously to his meager efforts at supporting the family's emo-

educating herself and getting a job so that she could divorce her abusive husband. If alimony has become less available under no-fault, cf. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110-11 (1989) (showing that alimony was rare even before the advent of no-fault divorce), the situation may be worse now for the wife of an abusive husband because severable legal bonds have been replaced by greater economic dependency.

34. To some degree, the trend toward equal division of property at divorce has counterbalanced the trend away from alimony. A community property or deferred community property scheme does increase the incentives for maximizing joint production as compared to a separate property regime.

35. For an in-depth look at the use of precommitment mechanisms to structure incentives during marriage, see Scott, *supra* note 25, at 9.

36. For a short history of the term "no-fault", see GLENDON, *supra* note 8, at 79-80 (saying that proposed legal changes were designed to eliminate litigation over issues of fault, but were not meant to suggest that no one was at fault when a marriage breakdown occurred).

37. A change in attitudes about adultery has also contributed to its increase. It is unclear how much the change in attitudes has itself resulted from the increase in adulterous behavior.

38. See Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35, 63 (1978) (suggesting that prohibition of alimony reduces marital fertility). *But cf.* Peters, *supra* note 20, at 452 (stating that there is no difference in fertility between unilateral and mutual consent states). Of course there are many other reasons for women to decide against household production and bearing children. Nevertheless, the law might tip the balance in close cases.

tional needs. The marriage cannot survive the half-hearted attention of Alison and her husband, and they, too, spiral into divorce.

Even Christopher cannot escape the nasty incentives created under the current legal regime. He must compete with insincere males in the search for a spouse. But the loyalty and faithfulness he has to offer come with no legal guarantee. The qualities that will make him a good husband over the long haul are worth little to prospective spouses because they know there is only a fifty-fifty chance that the marriage will last. Because he cannot assure potential spouses of his commitment,³⁹ he will have to search longer or settle for less expected happiness than he would if they knew his true value as a spouse. After marriage, the law will continue to work against him. The incentives confronting his wife, if she protects her own interests, may cause her to devote more energy to divorce-proof assets, such as her career, than they would otherwise deserve.⁴⁰ This diversion of her energies jeopardizes Christopher's marriage just as it did Alison's.⁴¹

I have painted these scenarios in the tones of traditional gender roles partly because they better illustrate the changes in legal regime⁴² and partly because differences in biology make the trade-off between career and family more difficult for women than for men.⁴³ However, the incentives are not confined to the traditional couple. Any person seriously involved with another is subject to the tension illustrated here. So long as parties cannot depend on legal enforcement of marital promises, self-serving interests will conflict with other-regarding interests; furthering the welfare of the family will diminish the time available for adding to assets that can survive divorce. If a couple's fortunes are not forever bound together by law, it is dangerous for either spouse not to treat their fortunes as partially separate already.

For all three, Laura, Alison, and Christopher, divorce could spell emotional disaster. The divorce reformers knew that. The no-fault, unilateral divorce regime presumes that the costs of barriers to exit from

39. He has no good way to collateralize his promise.

40. The insincere and fickle husband whose wife invests too much in the marriage, representing the fourth corner of the matrix, is the child my wife and I decided not to have.

41. I do not mean to suggest by these examples that there are not many other reasons that marriages end in divorce. Some spouses do such horrible things to the other that love is wholly inadequate as a reason to stay together. Other people just find out that they came from different planets.

42. To illustrate the dependency-assuming law of the past with examples of independent women would be confusing. To change the facts illustrating the independence-assuming law of today to a less traditional pattern would make it more difficult to focus on the legal changes here under scrutiny.

43. Apart from biological differences, our culture has put women under pressure to trade career for family by telling them how much they should value children. Some would attribute most behavioral differences to male hegemony.

marriage outweigh the divorcees' emotional losses from legal dissolution.⁴⁴ The emotional costs borne by the parties, however, constitute only one part of the losses occasioned by divorce. Financial losses follow as well. The magnitude of these losses is directly related to the standards applied by courts in the allocation of financial assets, via property division and spousal support, upon divorce. These rules are indeterminate.⁴⁵ They have to be flexible if a single law is to fit any more than a few situations.⁴⁶ But their necessary plasticity provides ample room for rent-seeking.⁴⁷ Depending on the advice of the lawyers, whose self-interest may well color the presentation, it may appear to the divorcing parties that it behooves them to fight vigorously for their "fair" share of the marital assets.⁴⁸ In the words of Professor Harry Krause, "the problem with divorce is that no one can afford it."⁴⁹

44. An alternative presumption that would justify the reform is that there are no significant transaction costs that would prevent the parties from reaching the efficient result regardless of the initial allocation of rights to terminate the relationship. Even with low transaction costs, however, divorce is one situation in which the initial allocation of rights may determine the ultimate outcome because of endowment effects. Once one spouse thinks he or she would be better off to divorce, the other lacks sufficient assets to be able to make an offer that would preserve the marriage.

45. See Krauskopf, *supra* note 6, at 255 (stating that "[m]ost statutes authorize courts to divide property as deemed just and to order reasonable support as needed. . . . [giving] little guidance to the decision maker"); see also Doris Jonas Freed & Henry H. Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 Fam. L. Rep. (BNA) 4043, 4051 Table IV-C (1980). But cf. Ellman, *supra* note 13, at 79 n.188 (noting that some judges use charts to determine the amount of alimony).

46. See Martha L. Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 A.B.F. Res. J. 781, 786-87 (noting that discretion allows judges to tailor results to fit various situations).

47. Some of this rent-seeking happens in front of judges. Old estimates put the percentage of divorces contested in court at about 5 to 10%. See Mnookin & Kornhauser, *supra* note 11, at 951 n.3. That is a small percentage but still a lot of cases, since divorce cases make up a large part of the docket. See *id.* at 951 n.2. (stating that family law cases, primarily those involving divorce and annulment, made up more than half of the civil caseloads in two California counties.) In Monroe County, Indiana, marital dissolutions (including subsequent requests for modifications of custody, visitation, and child support) absorb about 65% of some judges' time, although they constitute a far smaller percentage of total cases. Estimate given to author by Judge Phyllis Kenworthy, Monroe County, Indiana. Moreover, rent-seeking also occurs out of court in the form of negotiations over settlement.

48. In some circumstances it is rational from the self-interested standpoints of the two parties for them to spend more in the fight over the assets than the assets are worth. See Gordon Tullock, *Efficient Rent Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97, 102 Table 6.2 (James M. Buchanan et al. eds., 1980). Moreover, in some cases the lawyers may recommend contentiousness that goes beyond what is rational. See MONTE VANTON, MARRIAGE—GROUNDS FOR DIVORCE 99-100 (1977) (suggesting that divorce lawyers inflame antagonisms and prolong negotiations in order to obtain large fees); RIANE TENNENHAUS EISLER, DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE AND THE FUTURE OF WOMEN 40 (1977) (stating that the "legal system of battle where two adversaries try to get the 'best possible deal' for their clients only tends to exaggerate, rather than resolve, the emotional tensions of a divorce").

49. Comment to author at 1991 AALS annual meeting in Washington, D.C. (Jan. 5, 1991).

The costs of divorce fall on others too. Children may bear a large emotional burden. Though researchers have argued about it, there is substantial evidence that marital breakup causes psychological injury to children.⁵⁰ To add insult to injury, prolonged divorce fighting wastes assets that could go toward the children's needs after the divorce.

Even if their parents do not split up, children may suffer from the incentives created by the current law with its emphasis on equality and independence. Under the old law, with its ethic of permanence, both parents foresaw a long and close relationship with their children. Because of the strong presumption in favor of maternal custody during the tender years, mothers were doubly certain of a long-term relationship with their children. Investments of time and emotional energy, therefore, would later pay returns. Because modern marriage is more temporary and children do not qualify as divorce-proof assets, investments in children now have a lower payoff.⁵¹ By this I do not suggest that modern parents do not invest emotionally and financially in their children. Of course they do, and deeply. The point is only that current law encourages parents to go to the office instead of the park.⁵²

The rest of us bear costs of divorce as well. We suffer empathetically the emotional pain of our friends and their children. We also pay for the judicial arenas where they sometimes fight their final battles. Divorce cases constitute a large portion of the cases in state courts,⁵³ eating up court budgets and contributing to delays which can bear heavily on other litigants.

The counterproductive incentives generated by the impermanence of marriage go beyond divorce. Even if they do not break up the family, they may cause parties to divide their labor inefficiently. Having my own prejudices, I assume that Laura and Alison would make better lawyers than whomever they will marry. I also assume that they would

See also MARCIA MILLMAN, *WARM HEARTS & COLD CASH: THE INTIMATE DYNAMICS OF FAMILIES AND MONEY* 143 (1991) (stating that "[p]renuptial and nuptial contracts are financially advantageous because the legal costs of disputed divorces have become so immense they can eat up all the marital assets").

50. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1989) (stating that "we are allowing our children to bear the psychological, economic and moral brunt of divorce"); Scott, *supra* note 25, at 29-33; Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 *CORNELL L. REV.* 45, 86-87 (1981) (citing evidence that children of divorce are at risk).

51. Some children have contributed to the problem by moving away and not returning.

52. This can feed back into dissatisfaction with the family and spouse, increasing the chances of divorce. There is a countervailing incentive created by current child custody law. Current custody rules favor the parent that invested most heavily in the children. For parents that want custody, that creates some incentive to invest.

53. See *supra* note 47.

make much better nurturers and homemakers than whomever they will marry. The principle of comparative advantage teaches that because Laura is so much better at nurturing, she and her husband (not to mention her children) may be collectively better off if she stays home even though she could earn more than he could on the market. It is, therefore, not only from a sexist viewpoint that I might wish for her to stay home with her children until they are grown, and maybe beyond. Even if Laura and her husband believe, and believe rightly, that such a division of labor and responsibility would work out best for the family unit, however, I would feel compelled to advise her of the high individual risk she bears alone. Similar warnings, thoughts, hunches, or subconscious intuitions may well have dissuaded many currently working wives from household production.⁵⁴

As long as the law allows unilateral, no-fault divorce and refuses for the most part to bind couples financially after divorce, parties cannot safely assume their marriages are permanent. The law openly acknowledges that marriage may be temporary. The parties, therefore, knowingly or unknowingly may treat it as impermanent. As a result, marriage may turn out to be transitory or less rich, intertwined, and fulfilling than it could have been had it been treated as permanent. Powerful forces tug at the fabric of each marriage, forces influenced heavily by the rules of divorce.

B. Prospects for Solving the Incentive Problems Through Further Reform of the Law

Despite occasional suggestions that the fault-based system of divorce had some advantages and despite some popular sentiment to reverse the reforms, there is little scholarship urging that we return to the restrictive rules of the past under which fault was required for divorce. Today's problems will not be traded back for yesterday's.⁵⁵ Will future law reforms cure the incentive problems inhering in the current divorce law? It is doubtful.

54. The entry of women into the labor market has often been cited as a reason to change the rules of divorce. Some of the reasons for increased female participation in market production are unrelated to the divorce law. For example, many families feel they need two market incomes. Higher wages (even if not approaching those of men) increase the costs of staying home and thus may reduce demand for that activity. Moreover, women's aspirations certainly have changed. Divorce reform itself, however, may have also caused greater market participation by reducing the security associated with household production. See Peters, *supra* note 20, at 451 (noting that unilateral, no-fault divorce jurisdictions have slightly greater female participation in the work force).

55. See Sugarman, *Introduction*, *supra* note 5, at 2 (stating that "talk of reregulating divorce is virtually absent from the current discourse about reform"); Annamay T. Sheppard, *Women, Families & Equality: Was Divorce Reform A Mistake?*, 12 WOMEN'S RTS. L. REP. 143, 148 (1990) (suggesting that divorce reform was not a mistake).

There is substantial interest in further reforms, ones that build on the assumption that divorces will be granted on the unilateral request of one spouse and without any showing of fault. Some scholars have called for divorce law to place additional financial responsibility on husbands after divorce.⁵⁶ And a proposal by Professor Ira Ellman deals more directly with the problem that current law creates incentives to underinvest in familial assets.⁵⁷

Without a doubt, proposals to increase the frequency and size of maintenance awards would diminish some bad incentives created by treating marriage and its obligations as temporary. These reforms, however, may face substantial political opposition. First, radical increases in support for divorced women might not receive a sympathetic ear from male legislators, who may have a personal interest in the issue. Second, and more problematic, equal rights advocates could oppose these reforms on the ground that they smack of paternalism. Though a reformed law would be worded in gender-neutral terms, even those words could be seen as carrying the hidden message that women are inferior to men and need male support to survive comfortably. People who believe that statutes should define our aspirations might object to the notion that anyone is statutorily entitled to continued support from another. Moreover, people opposed to traditional gender roles might object that, regardless of the wording, the message is the same: alimony is tied to the performance of traditional female tasks. Third, people might oppose long-term spousal support on the clean-break ground, implicit in the minimal-alimony scheme, that it is best for the mental health of both divorcees to be completely free of each other after divorce. Fourth, applying stronger maintenance laws to couples who married under the current regime might be an unfair retroactive imposition of liabilities and responsibilities onto persons whose marriage vows carried no such understanding of legal responsibility.⁵⁸

The final, and perhaps most persuasive, criticism of proposals for more extensive use of maintenance is that they err in the opposite direction.⁵⁹ Given today's climate of independence, spouses may wish to maintain their autonomy and self-sufficiency during their marriage. Some spouses might even wish to use the terms of their marriage as an opportunity to assert and reinforce their independence. They may un-

56. See *infra* notes 145-47.

57. Ellman, *supra* note 13.

58. To solve this transitional problem, the longer term alimony could be applied only to those marrying after the legislative or judicial change. It should be noted that the converse transitional problem, that of depriving women of rights they had assumed attached at marriage, did not stop reform in that direction.

59. This criticism also applies to the common-law rules of alimony.

derstand that a marriage of independent entrepreneurs takes extra effort to work, but nonetheless be willing to put forth that effort to avoid the claustrophobia of dependency.

There are also financial reasons spouses might wish to remain fiscally independent. Given the competitiveness of the current job market and the importance of material wealth,⁶⁰ spouses might wish to impose upon themselves the greatest possible incentives to work hard at their jobs. The possibility of free-riding, whether still married or divorced and receiving substantial support, would reduce the impetus to provide for one's own future. Additionally, the possibility that one's spouse will be a free-rider, during marriage or divorce, also reduces the incentives to work by reducing the personal gains reaped by the worker.

For spouses wishing to maximize their pre- and post-dissolution financial income, rules tying their financial fates together thus create the wrong incentives. The model of interdependence and permanence embodied in rules imposing substantial maintenance, like the model of independence embodied in the modern divorce law, fails to provide legal space for couples not wishing to conform to the norm.⁶¹ The point is simple. There is no best law for all couples because there is no best set of incentives; it all depends upon what the parties want.⁶²

More formal support for this point may be found in the economic literature on damages for breach of contract. Economists conclude that no single damages rule will be efficient in all situations.⁶³ Which rule is more efficient depends on what sorts of concerns predominate. If it is most important to deter inefficient breach, expectation damages should be awarded. If it is most important to deter overreliance by the non-breaching party, restitution is preferred.⁶⁴ Hence, if one considers alimony to be damages for breach of the promise to remain together until death, no single rule for alimony will be efficient in all situations. If the parties are more concerned with deterring a breakup of the marriage, they might choose expectation damages—large and long maintenance. If they are more concerned with deterring overreliance on the marital

60. The modern fascination with material wealth is captured by the slogan: "The person who dies with the most toys wins."

61. The problem created by too much alimony is less severe than that created by too little alimony if these couples, being more independent, are more able and likely to contract around the law. If there is such an asymmetry in abilities to circumvent default rules, to err on the side of interdependence would seem preferable. See *infra* part VII.

62. It is possible that societal interests favoring a particular law would outweigh the interests of all couples ill-fitted by that law. But such externalities of the marital relationship, some of which are discussed below, do not seem that powerful, either on the grounds of economics or justice.

63. For this conclusion in the marriage context, see Cohen, *supra* note 31, at 268.

64. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 36 (1983); see also Carbone, *supra* note 21, at 1493.

vows and encouraging preservation of the market options for themselves, restitution, in the form of a shorter and lower level of maintenance, would be preferred.

One lesson we might learn from the problems created by the divorce reforms to date is that in a diverse society a single set of rules, no matter how complex, is bound not to fit some situations well. When a law is applied to millions of couples, even if it fits a large majority, it will fail to serve the needs of a huge number of persons. And when the law does not fit the aspirations of many, it is likely to cause much misdirected behavior.⁶⁵

Professor Ellman has crafted a reform to reduce, perhaps eliminate, the incentives to underinvest in relationship-specific household production.⁶⁶ He suggests, essentially, that upon divorce each spouse should be compensated by the other for the career sacrifices he or she has made on behalf of the family unit.⁶⁷ His scheme nicely alleviates some of the troublesome incentives of today's anti-alimony regime. But it is no solution.

The Ellman proposal will not suit all couples. While it is true that any multidimensional proposal like Ellman's calls for different alimony awards depending on which path a couple took during marriage, the financial outcomes at the ends of the various paths are fixed by law.⁶⁸ The law determines the prices and rewards associated with various behaviors. By contrast, a contractual approach lets the couples choose, in advance, the financial rewards lying at the end of each of the behavioral paths.

In Ellman's example 2(a),⁶⁹ a school teacher wife is entitled to alimony for having sacrificed her career to further her professor husband's. Though the result seems fair, it does not create disincentive for such sacrifices. The result ordained by Ellman's legal regime encourages the spouses to think of themselves communally rather than individually.⁷⁰ Perceiving that career opportunities will usually favor the husband, a couple might wish not to be encouraged to think communally where doing so would result in a reduction of income equality between them or the economic self-sacrificing of one. Even setting aside that point, however, Ellman's proposal has problems.

65. Misdirection here is gauged by reference to what the actors would have chosen for themselves if the default rules had been tuned to their concept of marriage.

66. Ellman, *supra* note 13.

67. *Id.* at 49.

68. If the outcomes are not fixed by the facts of the case, the law creates a tremendous incentive for rent-seeking.

69. Ellman, *supra* note 13, at 58.

70. *Id.* at 59.

First, as Ellman recognized,⁷¹ it is often very difficult to prove the value of market options not pursued.⁷² As a result, there is a substantial possibility of systematic undercompensation.⁷³ And if people recognize or predict a pattern of undercompensation, they will return to, or continue, their excessive efforts directed toward market production. A second and related point is that any spouse at all concerned about the possibility of divorce, as any sensible spouse invested heavily in the marriage ought to be, should spend a fair amount of time seeking demonstrable options only to turn them down. This posturing wastes time and effort and could lead to marital discord.⁷⁴

Ellman's proposal also may meet substantial opposition on the ground that it is unfair.⁷⁵ Further elaboration of Laura's hypothetical marriage shows the inequity. When Laura and her husband take their unenforceable vows, they take a chance on each other. In addition to the compatibility gamble and other risks, they each take a chance that the other will be productive in the marriage. Then they divide up the tasks and set about doing their best for the family. But under Professor Ellman's alimony rules, as he acknowledges,⁷⁶ Laura takes a lopsided bet. If her husband falls short of expectations, his opportunities for exit will appear less appealing and he will be more likely to stay married. Laura is stuck with her gamble because she has invested in him. If, on the other hand, his career turns out to exceed expectations, he can get out of their marriage, and Ellman's law requires only that he return her investment. Ellman's proposal thus allows him to convert Laura from an equity shareholder to a creditor just as the firm's profits loom

71. *Id.* at 78.

72. This alone would lead to a substantial amount of litigation.

73. The possibility of systematic undercompensation is larger than the possibility of systematic overcompensation because of the nature of the issue being proved. A spouse will be compensated only for opportunities that can be proved to have been foregone. But the spouse can never show or even know what additional career opportunities would have opened up during one of the foregone opportunities. Defending spouses will, on the other hand, have difficulty proving how much the opportunity should be discounted for the chance of job loss.

74. Universities face a similar dilemma in deciding whether to meet outside offers attempting to attract away their faculty. Responsiveness encourages faculty to divert attention from scholarship to offer-fishing, though the former is certainly helpful in the latter.

75. Many scholars have decried the lamentable situation of women after divorce. See sources cited *supra* note 6. The impoverished condition of divorced women is itself worthy of concern. But the exact nature of the unfairness is rarely explained. To many the unfairness needs no explanation or elaboration. There is no justice where some starve while others live in luxury. This position, however, seems more a critique of the overall distribution of wealth than a critique of divorce and alimony law. For the charge to impugn the rules governing marital dissolution, there must be some reason that distributional inequality is especially unfair when persons whose fortunes were tied together in the past wind up in different economic circumstances.

76. Ellman, *supra* note 13, at 68 n.168.

large.⁷⁷

By contrast, Laura's husband's gamble looks better. If Laura exceeds expectations, her successful relationship-specific investment in the family will further bind her to him. If she falls short of expectations, he can escape the marriage without losing much.⁷⁸ One can view the relative poverty of wives after divorce, therefore, as an ex post manifestation of the ex ante unfair gambles taken by men and women going into marriage.⁷⁹ This problem under current law would remain a problem under Ellman's proposal.

In sum, the proposed reforms suffer from the prevailing presumption that we can structure one law to fit all marriages. Universal solutions, however tempting, create troubling incentives and raise questions of fairness. Additionally, because any single solution will seem inappropriate for many couples, it will be hard to gain the political support necessary to make a legislative change. The conflicting proposals each carry some popular and scholarly support, and in their competition prevent the others from gaining enough backing to overcome the current law. Judicial change seems even less likely. Because the legislatures have acted to impose the modern regime, it would take a highly activist court to displace that structure with one of its own. Moreover, scholars and courts have had a hard time coming up with a satisfactory theory on which to impose spousal support.⁸⁰ For these and other reasons,⁸¹ any reform implicating a substantial shift in approach on the question

77. Efficiency might suffer too. If Alison and others see how Laura's investment was turned from equity to debt at the option of the other investor, they might choose not to invest in such firms and opt instead for otherwise poorer investments that have a more equitable return.

78. Because she has not done well at homemaking, leaving the home she has made is no big loss. Because she has devoted her efforts to the home and family, she will have a difficult time showing she has given up valuable opportunities. Moreover, he only has to compensate her for her losses, which may be quite small compared to his income if he has done well.

79. For an analogy to the unfairness, suppose that you and I own stock in two automobile manufacturers. Your company has just come out with a great new car and sales are tremendous. My company has no current products, but has much promise because the key management and design personnel have just quit your company to join mine. To stabilize our incomes over time, you and I agree to pool and share income from our two stocks. After about five years, just when the income from your stock trickles off and mine starts to flow, I pull out of the pooling arrangement, leaving you with only the income from your company with its obsolete products.

80. See Margaret F. Brinig & June Carbone, *The Reliance Interest In Marriage and Divorce*, 62 TUL. L. REV. 855, 894 n.152 (1988) (suggesting that "[w]hen marital misconduct is not at issue, however, the basis for spousal support remains to be fully articulated"); Ellman, *supra* note 13, at 4-5, 9 (noting that "there is no theory explaining why either spouse should have a financial obligation to the other that survives their marriage" and that "[i]n short, no one can explain convincingly who should be eligible to receive alimony, even though it remains in almost every jurisdiction" and further suggesting that "there is still no general understanding of why we have alimony at all"). See generally Sugarman, *Dividing Financial Interests*, *supra* note 6, at 130.

81. These other reasons relate to the political and psychological difficulties of suggesting that an earlier reform was wrong.

of spousal support likely is doomed.

III. A SELF-HELP ALTERNATIVE: PREMARITAL AGREEMENTS⁸²

Perhaps couples can do what the law will not. By designing antenuptial contracts to fit their own situations, men and women can determine the consequences of future contingencies and structure their pre- and post-divorce lives. By its very nature, a premarital agreement substitutes private determinations for a public determination of how best to divide assets and income. Private ordering of divorce serves utilitarian ends if we assume, with John Stuart Mill, that each spouse "is the person most interested in his own well-being . . . with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else."⁸³

The advantages of antenuptial contracting go far beyond those of allowing couples to decide who gets what, a decision they could also make at the time of divorce. By empowering couples to commit themselves reliably,⁸⁴ judicial enforcement of premarital agreements allows

82. The terms "agreement" and "contract" do not here mean what they mean in the U.C.C. or in the modern law of contracts. By premarital contract or antenuptial agreement, I mean a set of promises between the two parties that would be enforced according to the sui generis law of such agreements. It is worth noting that the law of contracts and family law seem to be headed in opposite directions in one respect. Contract law is finding more ways to refuse to enforce agreements between parties, see MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 69-77 (1990), while family law is inventing new ways to enforce private agreements, see Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 *RUTGERS L. REV.* 1959, 1069-70 (1988).

Although antenuptial agreements bear a facial resemblance to long-term or relational commercial contracts, there are enough peculiarities to suggest that the law of commercial contracts ought not be imported wholesale. For example, there is no course of dealing during the marriage because no obligations arise until divorce. Moreover, the bargaining positions of a couple will shift over time in ways that may be predicted by their relative investments in market production. Whereas two commercial parties may wish to accommodate future maturation, spouses may wish to fix rights that will survive such contingencies. If any analogy to the agreements contemplated here seems apt, it is of pensions and annuities. Another way to think of these agreements is as spousal unemployment insurance contracts.

To some scholars, these promises may sound more like property arrangements than contracts. Certainly these agreements could be seen as creating or denying present rights in future income streams. Nevertheless, I am not eager to classify the agreements as either property or contractual agreements because doing so might imply that the law of premarital agreements should follow the law of one of those categories. The rules governing premarital agreements ought to be determined by reference to policy rather than existing property or contract doctrine.

83. J.S. MILL, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 68 (R.B. McCallum ed., 1946) (1st ed., 1859). For a libertarian and utilitarian defense of private ordering at the time of divorce, see Mnookin, *supra* note 9, at 1017-19.

84. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 7 (tent. ed. 1958). Professors Hart and Sacks stated:

Every society necessarily assigns many kinds of questions to private decision, and then backs

the parties to structure the economic consequences of future behaviors and, by doing so, to manipulate the incentives they will face in the future. If Alison and her spouse wish to push themselves to maximal market production or financial independence during the marriage, they can do so by agreeing that neither will be allowed to rely, via alimony, on the other's future efforts after divorce. If Laura and her husband wish to create incentives for household production, they can do so by agreeing that such production will be rewarded by permanent financial security whether or not they stay together.⁸⁵ A premarital agreement thus can provide a basis for jointly optimal division of duties by eliminating the fear of the consequences of differential investment in market and household skills if the parties later separate.⁸⁶

Premarital agreements can also take some of the conflict out of decisionmaking during marriage. All sorts of issues arise during marriage: whose interests govern when choosing a city to live in; whose job duties prevail in deciding when to take a vacation; who supports whom first through school; and so on. An antenuptial contract could establish procedures for deciding those issues. Those possible contractual terms are beyond the scope of this paper, which treats only the consequences of divorce. However, even antenuptial contracts about division of property and post-dissolution income can diminish decisionmaking anxiety. For example, a contract assuring both spouses financial security via complete income sharing after divorce reduces the conflict between his financial interest and hers during the marriage. Because each individual's interests thus would coincide more with the family's, a career advance entailing a change in location could be considered in light of its prospects for the whole family.⁸⁷

Considering only the interests the parties have in the incentives

up the private decision, if it has been duly made, when and if it is challenged before officials. Thus, *private persons are empowered*, by observance of a prescribed procedure, to oblige themselves to carry out certain contractual undertakings, and, if dispute arises, to settle their differences for themselves.

Id. (emphasis added). This empowerment allows Christopher to give a meaningful bond for the performance of his promises, and thus helps to overcome the disadvantage faced by sincere partners in the marital marketplace today. See *supra* text accompanying note 39.

85. One cost of reducing the disincentives to household production via income sharing after divorce is that such income sharing reduces the incentives for each to work.

86. Landes, *supra* note 38, at 45, 49 (suggesting that courts' enforcement of alimony payments encourages optimal resource allocation within marriage, increases the gain from marriage, and encourages the formation, productivity, and stability of marriage).

87. The overlap between family and individual interests is never complete. No sharing agreement can solve the problems created by indivisible income, such as the psychic benefits from changing jobs. In some cases, an agreement to share income can create or exacerbate marital tension. If one earner wishes to switch to a more pleasant but less lucrative occupation, the other may oppose the change because he or she pays the price but obtains few of the benefits.

they will face, the premarital allocation of property and income approach necessarily is superior to a one-fits-all law applied by judges. Suppose there were one set of rules that would generate the best incentives in the largest number of cases. If that set of rules would be best for any given couple, they could adopt it as their agreement.⁸⁸ Couples for whom the set of rules would fit would not suffer substantially from having to choose those rules for themselves.⁸⁹ Couples for whom the set of rules would not fit could choose something more appropriate to their needs. A promissory regime thus can answer the call for multiple flexible alternatives better than any fixed set of rules.

Even assuming judges can do a better job of determining which incentives are best for each couple than can the intending spouses themselves, judges cannot do so early enough. For the parties to be positively influenced by the incentives, the incentives have to be present during the marriage.⁹⁰ The judge has no way of telling the parties in advance of marital strife how their assets will be divided.⁹¹

Additionally, the planning process itself may yield benefits for the couple. Planning can promote confidence by revealing, and thus securing, the common needs and hopes of the couple.⁹² Contracting processes have even been used as a tool in psychotherapy and marriage counseling.⁹³ Premarital negotiations may help some couples to avoid unhappy marriages by exposing their incompatibilities before they exchange

88. If any scholar can write acceptable instructions for the courts to follow in all cases, the couple also can do so, even if it means parroting the scholarly proposal in their contract.

89. There would, of course, be the transaction costs of composing the agreement, which a fixed law avoids. Those costs, however, are not too great if someone already has proposed a universal rule and a number of other couples have adopted it as their agreement. This surely would be the case if the proposal were appropriate for many couples. The couple would, in addition, bear the costs of learning that the popular rule is the right one for them.

90. The best possibility is that the parties would determine which set of incentives would serve their interests and act as if they were sure the judge would later concur. It stretches credulity, however, to think that spouses would rely upon judges to discern from their behavior during the marriage which division of assets they were assuming would apply at divorce. Even in the unlikely event that judges actually manage to figure out what the couples thought were the best sets of incentives, subsequent parties would never find out what a good job judges do. Given that divorced parties often feel cheated and relate that feeling to others, the public would not likely learn that judges are really characterizing marriages correctly. For example, Christopher's wife would rightly be skeptical if a lawyer told her, as one never would, not to worry about sacrificing her career to build a family, if that is her preference, because the judge will properly assess the extent and value of her reliance.

91. Because they cannot rely on sharing after marriage, spouses will protect themselves during marriage. Leaving the decision to judges thus leaves a set of incentives biased towards investment in divorce-proof assets. Only by creating enforceable promises can differing couples create the incentives they wish to face during marriage.

92. Even for couples who reach an understanding before marriage, making the terms explicit may reduce subsequent strategic behavior. See ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* 11 (1984).

93. Shultz, *supra* note 8, at 257.

VOWS.

Setting aside beneficial effects on behavioral incentives during the marriage and enhanced marital harmony, the reduced costs at breakup alone might justify mandating premarital agreements. The current standards allow a wide range of outcomes on the questions of property division and spousal support, though possibly not wide enough to suit all situations. The difference between the lowest and highest outcome for each party is the amount up for grabs at divorce. The larger that difference, the more likely it is to exceed the costs of dickering, bickering, and litigation. Reducing the disparity in outcomes by making the rules of allocation at divorce more determinate should, therefore, lower the frequency of haggling and litigation.⁹⁴ Using an antenuptial agreement, the parties can narrow the range of possible results. Laura might negotiate an agreement that she and her husband will share all of their post-divorce income evenly. Alison and her husband might agree that their incomes will be entirely separate after dissolution, leaving little room for argument about spousal support at the time of divorce. Couples thus might prevent a battle at the time of divorce, saving themselves and the public many of the financial costs of allocating their assets. Moreover, successful planning may spare the parties the emotional pain of an adversarial proceeding against a former loved one. Additionally, with antenuptial planning the dissolution can be carried out quickly, allowing the parties to get on with their separate lives. Finally, an agreement benefits risk-averse persons by diminishing the uncertainties inherent in a flexible one-fits-all law.

Evidence from mediation suggests that premarital contracts may be easier to enforce than judicial decrees. People feel more bound by their own promises than by obligations thrust upon them by the government. They comply more frequently and fully. They may even fulfill their own obligations more happily. If this is so, premarital contracts should reduce the current problem that many former spouses never see the monetary benefits of court-declared judgments and simultaneously lower the emotional price paid by the supporting spouse. On the other hand, the opposite might be true. It is entirely possible that people will be much more irritated by post-marital losses and obligations if they have only themselves to blame. If so, harm would result by requiring people to choose their financial fate, even if they make their choices well. Empirical research might help to resolve this question for or

94. "[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address to the Association of the Bar of the City of New York (Nov. 17, 1921), *excerpted in* DAVID W. LOUISELL & GEOFFREY C. HAZARD, JR., *PLEADING AND PROCEDURE* 1295 (3d ed. 1973).

against mandating premarital agreements.

Some, but not all, of the benefits stemming from premarital contracts assume that negotiation is easier at the time of marriage than at the time of divorce. There is reason to believe that early planning is much less stressful. Premarital negotiation can be carried out while heads are cooperative and hearts are caring. At that time, it is in the interests of each future spouse to appear reasonable and willing to compromise. At the end of the relationship, antagonism drives out the spirit of conciliation. Divorce signals the end of the need to compromise for the good of the unit. The dissolution process often becomes the avenue for revenge.⁹⁵ Because the parties are breaking apart rather than getting together, there is no long-term, relational check on strategic behavior. Nearly one out of two current marriages will end in divorce.⁹⁶ Therefore, if on the average the emotional and financial costs of ex ante planning are less than half of those saved at the angry time of divorce, planning looks like a good bet for Laura and her husband.

These arguments depend, of course, on the enforceability of antenuptial agreements. If courts ignore them frequently, they can give neither the assurances upon which incentives can be built nor the predictability necessary to avoid rent-seeking in the courts or at the bargaining table. There does appear, from the promulgation and adoption of two Uniform Acts,⁹⁷ to be a welcome recognition that the parties need to be able to rely on their agreement if it is to do any good. Time will bring dramatic changes in the marital relationship, some of which are quite predictable. It is these very changes against which the parties need the means to protect themselves. The parties need to know, as they are assured by the Uniform Acts, that twists of fate will not unravel an initially binding agreement.⁹⁸

This premarital agreement approach reconceptualizes maintenance as a promise to pay money upon divorce or afterwards or as an exchange of rights to future income rather than as damages for breaking a promise to remain married. It is similar to those models that would im-

95. "Even the most conciliatory and mediating of attorneys find it difficult to convince out-of-control clients that the legal process is not the appropriate arena for their intense feelings of fear, spite, or anger." ISOLINA RICCI, *MOM'S HOUSE/DAD'S HOUSE: MAKING SHARED CUSTODY WORK* 75 (1980).

96. See *supra* note 4.

97. Both the Uniform Premarital Agreements Act (UPAA), § 6(a)(2), 9B U.L.A. 376 (1987) and the Uniform Marital Property Act (UMPA), § 10(f)(1), 9A U.L.A. 121 (1987), limit determinations of unconscionability to ex ante factors. See KRAUSE, *supra* note 17, at 86; Oldham, *supra* note 21, at 776. The UPAA has been adopted in sixteen states. See 9B U.L.A. 25 (Supp. 1991). The UMPA has been adopted in Wisconsin. See 9A U.L.A. 97 (1987). See also Scott, *supra* note 25, at 80.

98. The degree to which the law ought to limit private ordering with the doctrine of unconscionability is discussed *infra* at notes 182-92 and accompanying text.

pose spousal support as a legal obligation triggered by marriage, but has the added advantage of letting the parties set the size of the obligation. The premarital agreement approach also avoids the intractable theoretical debate over which interest—expectation, restitution, reliance, or something else—is or ought to be protected by alimony.⁹⁹ In premarital agreements, the spousal support promises are made for reasons good and sufficient to the parties and need not be debated by the courts or commentators.

This shift in perspective carries a huge practical benefit. If maintenance is supposed to be compensation for the foregone chance to marry better,¹⁰⁰ or to pursue college and a better career, or to live in a healthier city, or to pursue some other opportunity, how can a judge possibly quantify the loss? What was the true value of that loss to the wife or husband? Or if the alimony is to be measured by the gains unfairly retained by the breaching party, how are those to be determined in a particular case? This reconceptualization avoids those impossible questions by leaving the matter to the parties. The values of the opportunities foregone and the benefits received in return are set by the parties in their agreement. Those values are measured by the parties' willingness to pay and to be paid after divorce.¹⁰¹

Enforcement of premarital agreements would serve the ends of fairness as well as efficiency. One aim of the law of marriage and divorce is to distribute fairly the benefits and burdens of marriage.¹⁰² But what is fair? It is generally fair to hold people to freely made promises, and fair to refuse to impose duties and obligations beyond those promises.¹⁰³ The more important question may be: To whom should it seem fair? It is vital that the couple thinks that obligations and entitlements are divided fairly. Because notions of fairness vary, we will probably come closest to that goal by honoring the parties' *ex ante*

99. See Carbone, *supra* note 21, at 1466 (noting the attractions of restitution); Brinig & Carbone, *supra* note 80; Ellman, *supra* note 13; Fineman, *supra* note 13, at 797 (stating that "[t]he problem of property division upon divorce is still a controversial area of family law, and one to which no satisfactory solution has yet been found"). One of the reasons it is so difficult to use contractual concepts for divorce resolution is that the spouses usually had quite different expectations at the time of marriage. The proposal here reduces that problem by requiring the couple to express their expectations.

100. See Cohen, *supra* note 31.

101. It is possible, of course, that the form provided by the state would include a choice allowing the parties to defer to judicial determination. For couples choosing that option, the valuation problem would remain. The resulting costs would be an important consideration in deciding whether to include such an option on the form. For further discussion of the issue, see *infra* text accompanying notes 159-60.

102. See Krauskopf, *supra* note 6, at 256-57.

103. I do not imply that determining what was promised is always easy. There may be much interpretation and gap filling to be done.

indications of what they consider to be fair. To determine fair property division and spousal support without knowing what the parties thought is to navigate without a destination.¹⁰⁴ Many current attempts to determine a theoretically fair outcome fail to recognize the importance of the reasonable expectations of the parties.

Could a judge look at the behavior of Laura, Alison, and their husbands during their marriages to determine what they had in mind for a fair division of assets at divorce? It seems possible but unlikely. The problem is that behavior during marriage is usually ambiguous as to the expectations about income sharing after divorce. Spouses typically do not talk about what they will do for each other after divorce. Other actions, such as using only one joint bank account and taking title to the house in both names, give little clue as to how the parties felt about maintenance. Finally, the search for a common expectation on the issue of support is often hopeless because the spouses did not share one.

Under the current system, judges more likely will get property division right because the behavior of the parties does, in some cases, indicate who they thought owned particular items. Property, however, is usually the minor issue.¹⁰⁵ Suppose Laura and her husband manage to accumulate \$40,000 in financial assets before divorce. At divorce, she is 55 years old and her husband earns \$35,000 per year. If she gets half of the property, \$20,000, she can expect it to purchase an inflation-proof annuity of about \$1120 income per year after inflation.¹⁰⁶ Even a meager ten percent of her husband's income each year after divorce, \$3500, is three times more valuable than one half of the property. Because division of income is the important question and it is unanswerable by reference to the spouses' behavior, judges cannot read the fair outcome from the tea leaves of a marriage.

In addition to fairness, a contractual approach could serve well the

104. Suppose, for example, it were observed that Jeff handed Mark a belt sander and Mark handed Jeff ten dollars. Later they appear in court fighting over the money and the sander. The fair result—who gets the money, the sander, or both—depends on what they thought (subjectively), or what they then indicated they thought (objectively), they were doing at the time.

105. See Sugarman, *Dividing Financial Interests*, *supra* note 6, at 132 (noting that more than half of divorcing couples do not have a significant amount of conventional property to divide up; most of the other half have only one important piece of property, a home).

106. At 55, she can expect to live about 26 more years. AM. JUR. 2D DESK BOOK 281 (Supp. 1991). With one dollar, she could purchase an annuity of \$.056 assuming an inflation-adjusted interest rate of 3%. DAVID THORNDIKE, THORNDIKE ENCYCLOPEDIA OF BANKING AND FINANCIAL TABLES 8-428 (3d ed. 1987). Spending \$20,000 on her annuity would yield \$1120 per year. (To be more accurate, the annuity should be calculated on the nominal interest rate, and the returns should be discounted by the inflation rate, which should probably be about 2.5% less than the interest rate.) The comparison here does not, however, account for the fact that the husband may die or stop working and an annuity would not. To cover that possibility, the wife could buy an insurance policy on her former husband's life.

goal of equality. By requiring freely expressed consent of both husband and wife for enforceability, it places them in a position of legal equality. As put by Professor Mary Ann Glendon, the contractual approach emphasizes "individual liberty and the relative independence and equality of family members."¹⁰⁷ The respect of the law for individual choices on issues of marriage might even translate into greater societal respect for, and diminished denigration of, those private choices, whether they be traditional, modern, or countercultural.

The message of equality and independence may be reinforced by the terms of divorce. An agreement by Alison and her spouse that they will each be responsible for themselves upon divorce carries the obvious connotation that they considered themselves independent and self-sufficient. Alison intends to pursue her own career and does not want or need the help of her husband. If Laura and her husband consent to a premarital agreement that he will pay her half of his income after divorce, she is entitled to that support as a matter of contract rather than beneficence. The contractual approach thus should reduce the stigma of enforcement and collection. Laura required assurances of security in order to embark on a career of limited marketability.¹⁰⁸ She has a right to his future pay not because she was victimized and is unable to care adequately for herself, but because she offered to him promises worthy of that high price. It is because she was worth so much that she gets maintenance, not because she is worth so little.¹⁰⁹ A rationale sounding in equality and autonomy displaces a rationale sounding in inferiority, subservience, and victimization.¹¹⁰

This approach harmonizes with the current view that the failure of a marriage is not an event calling for placement of blame. Because this new model reconceptualizes maintenance as a promise to pay money upon divorce or afterwards rather than as damages, the payment of contractual alimony does not reflect guilt or any breach of obligation.

107. MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 41 (1981).

108. Elisabeth Landes identified the economic role of alimony as (1) to compensate the wife for the opportunity costs she incurs by entering and investing in the marriage, and (2) to compensate satisfied partners for the loss in expected gain from marriage imposed on them by the dissolution. Landes, *supra* note 38, at 62. Professor Joan Krauskopf has urged that foregone earnings be protected upon divorce. Krauskopf, *supra* note 6, at 264 (giving credit to Professor Robert Levy and others for presenting and developing the theme).

109. "Place the work of a wife and mother on the same footing as other work: that is, on the footing of labor worthy of its hire; and provide for unemployment in it exactly as for unemployment in shipbuilding or any other recognized bread-winning trade." G.B. SHAW, *GETTING MARRIED*, in *THE DOCTOR'S DILEMMA, GETTING MARRIED, AND THE SHEWING-UP OF BLANCO POSNET* 204 (1911).

110. For comments on the view of divorced women as victims, see Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 *NEW ENG. L. REV.* 437, 498-500 (1988); Fineman, *supra* note 13.

The payment is the fulfillment of the promise after the contingency materializes.

Private ordering comports well with liberty.¹¹¹ All promises people make limit their future options; that is the nature of obligations. For courts to hold people to their promises restricts their liberty. Only by doing so, however, can courts create a liberty to make binding promises. The liberty to bind oneself outweighs the liberty to be free of one's promises. Would it have enhanced Ulysses's liberty for his crew to refuse to lash him to the mast?¹¹²

Honoring premarital agreements sends a message that the legal system places high priority on what people think about marriage and divorce. It reflects an assumption that people are competent to determine what is best for themselves on these matters of great importance.¹¹³ It manifests an attitude that marriage is a public expression of private values and preferences and that those private values count mightily.

Does private ordering sacrifice justice to achieve apparent fairness, equality and liberty? I am not going to attempt here a full discussion of justice, but I will suggest a couple of points of comparison. The first can be made to current divorce law. Some might say justice was a casualty of divorce reform.¹¹⁴ Many would say that the record of legislatures and judges, evaluated on the criterion of justice, is a poor one. Few applaud the results. That is not proof that public ordering of the consequences of divorce has failed to serve justice, but it suggests that a switch to private ordering might not serve justice worse.

The second comparison is to short-term contracts. Unless honoring private ordering is the same as justice, the two sometimes will conflict. We honor private agreements and exchanges, in spite of their potential for injustice, for various reasons, some of which have been mentioned above.¹¹⁵ It is possible, however, that the gains in efficiency, liberty, and sense of fairness are less pronounced over relatively permanent premarital agreements than temporary contracts and trades. If so, then the losses in justice occasioned by honoring antenuptial agreements are more likely to outweigh those gains. In what ways do long-term agree-

111. Professor Charles Fried, championing freedom to bind oneself to new obligations, has stated that law that "respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights." CHARLES FRIED, *CONTRACT AS PROMISE* 2 (1981). See also *id.* at 1, 78.

112. HOMER, *THE ODYSSEY*, Book XII, lines 39-54, 177-79 (Richmond Lattimore trans. 1967).

113. There is a virtue in making decisions for oneself. It teaches autonomy.

114. In terms of maximizing the welfare of those least well off, the current law does little justice. On that view of justice, the present proposal could improve matters. It is certainly not clear that the proposal work against those at the bottom of the economic scale.

115. See text accompanying notes 83-113.

ments differ from short-term contracts on those criteria?

It cannot be gainsaid that increasing the span of an agreement increases the time over which a person's attitudes can mature into a new notion of fairness. It would seem to be a difficult empirical question whether the fair result chosen by the parties several years earlier will better approximate their notions of fairness at the time of divorce than would the result chosen by the law. The gains in perceived fairness of premarital agreements thus are probably smaller than they are for shorter contracts. The perception of fairness could be enhanced, however, if the bargain were cast in property terms. A premarital exchange of contingent rights to future income might then be treated like an exchange of two parcels of land. One owner may later discover oil and the other may be wiped out by an earthquake, but we do not deem it unfair for the law to reject the latter owner's attempt to undo the trade.¹¹⁶

Lengthening the potential term of enforceable agreements does not have any obvious detrimental effect on efficiency. The law does not prohibit twenty-year leases on the ground that they are less likely to conform to the future needs of the parties than would 20 one-year leases.¹¹⁷ There are risks in long-term obligations, but there are risks associated with short ones too. Just as a short-term tenant will invest little in maintaining the leasehold, Alison will invest little in her marriage. The efficient level of investment is best left to the landlord and tenant, or to Alison and her husband.

Lengthening the term of the contract does not change the liberty tradeoff. Refusing to enforce Christopher's promise to support his wife until death limits his autonomy and liberty. He is prevented from making a legally enforceable promise he may very much want to make. In return, he receives more freedom after his divorce to spend his money as he pleases, unless the judge then decides otherwise. Assuming a legal regime that mandates alimony in some circumstances, Alison loses the freedom to pursue a marriage of independent careers but, if it pleases the law, she gains the freedom to spend more of her husband's earnings after her divorce. In neither situation does the fact that the agreement is enforceable over a long period of time diminish the liberty gained by allowing them to bind themselves.

Judges have long kept the hands of justice out of the nuptial household, and for good reasons. What may have been underestimated is the degree to which the law's insistence, in the name of justice, on a

116. Even where the parties have only signed a contract for the exchange, the law of equitable conversion may be employed to force an exchange of deeds.

117. At one time, the law said marriage was a life estate; now it is a month-to-month tenancy.

particular result at the time of divorce also injects notions of justice into ongoing marriages.

IV. BUT REALLY, MAKE PREMARITAL CONTRACTS MANDATORY?

Good arguments in favor of premarital contracts have been around for some time.¹¹⁸ I have taken the preceding pages to add a few points to those arguments, but my primary goal is to shift the debate to a new frontier, beyond the issue of validity to the question of imperative.¹¹⁹ Should we make premarital contracting prerequisite to legal marriage?

Maybe the experts and I are wrong about antenuptial agreements. The market would seem to say so. If they are so useful, why are they so little used?¹²⁰ If people are best able to decide what is best for themselves, perhaps we should assume that they have decided correctly that it is best not to plan for the future or discuss the question of divorce. Put another way, a mandate presents a paradox: people that are insufficiently rational to negotiate a premarital agreement when that is in their best interest may also be insufficiently rational to make a good agreement if they are forced to do so. In this sense, mandate cannot do any good for the only people for whom it might do some good.

There are several explanations, some of which offer a way out of the paradox, for the fact that most couples do not hammer out a deal before getting married.¹²¹ One possibility is that it just is not done.

118. See LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* (1981); Younger, *supra* note 82; Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 *LA. L. REV.* 1553, 1565-70 (1984); Oldham, *supra* note 21, at 787; Shultz, *supra* note 8, at 256-60; Richard W. Bartke, *Marital Sharing—Why Not Do It by Contract?*, 67 *GEO. L.J.* 1131 (1979); Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 *CAL. L. REV.* 1169 (1974); According to one matrimonial lawyer, "people can't afford to marry without an agreement—they're the wave of the future. Everybody should have one." MILLMAN, *supra* note 49, at 143. Similar views have been expressed by divorcees. "This time, when I marry, there will be a business contract. Marriage is a business—being in love only lasts a short time. It upsets my girlfriend when I say this, but she should understand; she has money of her own." *Id.* at 116.

119. This does not mean, unfortunately, that the issue of validity is dead. See *In re Hig-gason's Marriage*, 526 P.2d 289 (Cal. 1983) (holding a premarital contract unenforceable because it relieved one party of support obligation upon divorce). See KRAUSE, *supra* note 17, at 85 (noting that "[s]urprisingly few states have passed legislation firmly establishing a reasonable, modern framework for the validity of antenuptial contracts," and that while a growing number of courts do enforce antenuptial agreements as to the division of property at divorce, fewer enforce agreements as to support, *id.* at 80); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 8 (2d ed. 1988) (suggesting that the law is developing in the direction of permitting spouses to control alimony on dissolution by premarital contract, subject to a fairness requirement); Oldham, *supra* note 21; Younger, *supra* note 82, at 1069-70.

120. It is possible that the ordinary costs of bargaining outweigh the benefits. If so, a mandate, even though it reduces some transaction costs, would be very inefficient.

121. See Ellman, *supra* note 13, at 14 n.32 (stating "[t]his data suggests that marriages involving express premarital agreements are far from typical"). In a way, the data Ellman cited suggest that the wiser segment of the market does use premarital agreements. Specifically, older

Many couples hesitate to change the important traditions associated with marriage. Social custom or religious belief keeps them from treating marriage as a bargain to be struck. Or maybe personal superstition and denial prevent the dubious betrothed from explicitly recognizing subconscious doubts. People might feel, rightly or wrongly, that to voluntarily voice doubts would jinx their relationship or corrupt their devotion. Psychologists might offer the explanation that people fail to plan for divorce because they tend to believe that it will not happen to them. Each of us is immune to, and hence need not plan for, the hazards afflicting our neighbors.¹²²

It is also possible that the process of planning for divorce generates hidden, collateral benefits that couples fail to recognize. Christopher and his fiancée would be more likely to plan for divorce if they thought that such efforts would bring them closer together through a deeper understanding of each other. They might also view planning with more favor if they thought that marital planning would help them develop a sense of autonomy and the maturity to deal with important matters requiring compromise and agreement.

Another possibility is that premarital agreements were not worth making in the past because divorce rates were low. People still enter marriage under the erroneous assumption that the relationship will endure.¹²³ As the reality of high divorce rates sinks in and as people cast about for ways to cut the costs of divorce, they might discover the benefits of premarital planning and start finding enforceable ways of doing it.

A related explanation focuses on the fact that the rules governing alimony, divorce, and the enforceability of antenuptial agreements have changed recently.¹²⁴ It will take a couple of generations for people to optimize their behavior to the new regime. Once they learn about the troublesome incentives created by the new rules, they may embrace premarital planning as a solution.

I am less inclined to believe that people are slow to discover what is good for them and lean more to the view that for most couples today making a marital contract is indeed irrational. Notwithstanding the im-

persons who have been married before tend to use them. *Id.*

122. See Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REF. 217, 245 (1990) (citing psychological studies on perception of risk of harm from automobiles and other products).

123. See Ellman, *supra* note 13, at 15; Shultz, *supra* note 8, at 249 (suggesting that people still think marriage ought to be lifelong).

124. Twenty years ago, most states refused to honor antenuptial agreements. Indeed, the enforceability of contracts cannot be taken for granted even today. See *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).

portance of the factors just listed, it seems likely that the main reason couples do not bargain before marriage is that the cost of raising the divorce issue exceeds the benefit to each of the intending spouses.

Suppose that Alison has lingering doubts about her fiancée. She would like to write an agreement, but she thinks he has misgivings too. If she brings up the topic of divorce in any serious way, she could well undermine his confidence in her to the point that his faith caves in and he calls off the wedding. That risk alone might convince Alison to forego the premarital agreement.¹²⁵ Furthermore, that is not the only risk created by mentioning the subject of divorce. Her husband may carry lingering doubts through the wedding and into the marriage.

Alison may undercut her own confidence too. Cognitive dissonance theory suggests how she may sabotage her own feelings about the marriage.¹²⁶ As the marriage begins, Alison might think the chances of failure are small. She cannot deny, however, that she initiated, at some emotional cost, a plan for divorce. There is a logical dissonance between confidence in the relationship and the undeniable time and emotional energy expended in planning for divorce. This dissonance may erode her initial belief in the marriage. In short, her earlier behavior may influence her later perceptions. In addition to reducing their happiness, heightened apprehensions may undermine the confidence and faith necessary to get through the rough times, resulting in a failure of the marriage long after the wedding. At the very least, broaching the topic during the delicate stage just before marriage is certain to generate a lot of anxiety; Alison might rationally sacrifice contingent future benefits to prevent a certain loss of happiness in the present.

A major component, then, of the costs Alison faces in a premarital transaction about divorce arises out of the negative inferences she and her partner will make about her devotion. The very fact that she chooses to treat the subject seriously implies that her faith is shallow. By requiring Alison and her husband to come to an agreement about divorce, the law would eliminate her choice. By taking away that choice the state eliminates the basis for negative inferences. The law thus can greatly reduce the costs of bargaining by forcing marrying couples to come to an agreement.¹²⁷

125. See Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). Parties sometimes fail to negotiate efficient terms because certain terms signal that the other party is a less valuable trading partner.

126. See generally Hazel Markus & R. B. Zajonc, *The Cognitive Perspective in Social Psychology*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 137, 202 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985); LEON FESTINGER, *CONFLICT, DECISION, AND DISSONANCE* (1964); LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

127. In some cases, parents are able to, and do, perform this function. Cf. Judith Martin (Miss Manners), *Pre-nuptial money matters best left to lawyers?*, SUNDAY HERALD-TIMES, July 8,

On the other side of the cost-benefit balance, one reason the costs of making premarital contracts appear to most current couples to outweigh the benefits is that the couples bear the costs of bargaining but do not enjoy all of the benefits. Many of the savings are external to the couple. Premarital agreements can reduce the pain third parties bear during the divorce. Laura's children are saved the pain of seeing their parents squabble because the negotiations were completed before the children were born. The rest of us save by not having to pay judges to hear and decide their dispute.¹²⁸

Imposing a premarital contract prerequisite could also reduce the external costs of divorce by reducing the frequency of divorce. Some ways in which appropriate agreements about divorce might lead to better marriages were illustrated above.¹²⁹ In addition, compelling the parties to agree assures, at the least, that they will recognize what they will and will not share.¹³⁰

Beyond that, the planning process serves a sorting function. Many couples with incompatible aspirations and expectations about both marriage and divorce would discover the vast differences in their assumptions. Laura, prepared to give her all in relationship-specific-production, would find out that her husband was unwilling to let her hitch on to his financial star for the long run. Upon learning that, she would call off the wedding which, of course, would obviate the divorce.¹³¹ Mandating contracts dramatically reduces a couple's costs of gathering information about each other's long-term plans. The improved information should result in greater compatibility of those who do get married.

On the other hand, reducing the price paid for divorce might increase the demand for divorce. If the premarital agreement reduces attorney fees, emotional distress, and other costs of exit as much as one would hope, it encourages divorce. Courts have refused to uphold antenuptial agreements in the past on exactly this rationale.¹³² To the ex-

1990, at F6. As for Laura, I cannot imagine her paying any attention to me.

128. We would also be spared the emotional difficulties of taking sides, or trying to avoid taking sides, in their dispute.

129. See *supra* notes 83-93 and accompanying text.

130. This same function is served in Louisiana by the requirement that the couple be informed before marriage of the economic consequences of their union. See Baker, *supra* note 122.

131. For society, this is a clear gain. For the children, however, it is a close call. It depends on whether the children would prefer to have their parents be divorced or to have themselves not be born.

132. See *Noghrey*, 215 Cal. Rptr. 153. See also CLARK, *supra* note 119, at 6 (noting that traditional common-law courts usually struck down antenuptial agreements providing for divorce on the ground that they may encourage divorce or conduce or incite divorce); Oldham, *supra* note 21, at 764; Younger *supra* note 82, at 1068. Stated in its broadest form, this is truly the exception that swallows the rule. Almost any contract that clearly delineates the parties' rights after divorce

tent that easy exit is a problem for society and we can identify third parties harmed by the dissolution, we might impose a divorce tax to internalize the costs to the decisionmakers.¹³³ If the tax is imposed to reduce divorces because they harm children,¹³⁴ for example, the exit tax might be restricted to couples with children. The proceeds of such a tax could be earmarked for those harmed by divorce and failure to marry, the children of divorced and unwed parents.

It is possible that this Article, by providing an excuse for bringing up the topic of divorce, undermines the need for the state to mandate planning. Anyone wishing to raise the issue can say that they are not really trying to plan for divorce, but rather trying to construct incentives that will solidify the marriage.¹³⁵ However, it seems unlikely that many fiancées will learn the excuse and be able to convince their partner of their good intention. The need for a mandate will survive this Article.

V. IMPLEMENTATION

A legislature could simply pass a law declaring that no certificate of marriage shall issue nor shall any common-law marriage be recognized¹³⁶ until an agreement contemplating the terms of divorce is executed and filed.¹³⁷ But more ought to be done than that. The legislative

could encourage divorce because there is usually the possibility, however remote, that life in the marriage is worse than that specified in the agreement. Indeed, why else would at least one of the parties have chosen divorce over continued marriage? The rule could be read to mean that the agreement cannot encourage divorce by either spouse any more than the common-law rules. But that is still too broad. If the agreement were not any different from and more attractive than the common-law rules in the eyes of at least one party, then it would not have been adopted by the parties, unless they were trying to keep themselves in the marriage by imposing onerous divorce terms. The exception does make sense, however, if it is invoked only when a faulty spouse receives a better deal and an innocent spouse receives a worse deal under the agreement than they would have gotten without an agreement. This interpretation is plausible only if courts are willing to determine who is at fault.

133. *But cf.* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (criticizing Pigouvian taxes aimed at internalizing social costs).

134. *See supra* note 50.

135. Parties wishing to raise the issue could even show this Article to their prospective spouses, but I am not sure that would help.

136. The common-law marriage provision would be necessary only in the jurisdictions recognizing common-law marriages.

137. It bears repeating that I do not propose to require couples to agree on how they will conduct their marriage. There are far too many contingencies in life to attempt to plan for them all. The development of complex relationships cannot be anticipated well enough to allow useful specification in advance. I propose only that the couple decide two basic issues, how their property and income will be divided after their relationship terminates. It is mostly a question of monetary payments in the future, not a matter of deciding marital behavior.

Because a marriage license would not issue, the default rules applying to unmarried couples would take on special importance under this law.

package should include provisions for a standardized form on which the parties would choose the terms of their premarital agreement.¹³⁸ The form would include a few different options, one or more of which would be selected by the parties.¹³⁹ The form would also allow the parties to substitute their own agreement. A similar form, or even the same one, could be used to allow a married couple to change the terms of their agreement.¹⁴⁰ The lawmakers could themselves specify the terms of the options or instruct administrators to draft the form. The forms would provide various choices in each of two or more categories, resolving at least the issues of how to divide property held at divorce and how to divide income of both divorcees after divorce.

What should those options be? For starters, one option in each category ought to spell out the current law of the state. For other options, the legislature could look to the rules applied in sister states. Both community and separate property alternatives might appear as options under the heading of property division.¹⁴¹ Any important variations on those schemes could also be incorporated. With regard to the question of rights to post-dissolution income, the two limiting positions would be complete independence and permanent sharing of incomes. One of the choices might be the common rule of judicial discretion based on need and ability to pay. Another option might be the approach of maintaining the pre-divorce standard of living.¹⁴² The drafters might choose to include the classic formulation of wife support "at the level to which she is accustomed."¹⁴³

138. A sample form dealing with income after divorce appears as an appendix for heuristic purposes. A similarly simple form could be created to deal with the division of property at divorce. If this approach were adopted, much thought would be needed during the drafting of the forms. There would be many policy issues, from the substance of the proposals to the trade-off between simplicity and completeness, to be resolved in the development of the forms. Some of these policies are discussed *infra* at text accompanying notes 141-67.

139. Professor Elizabeth Scott saw the possibility of requiring spouses to choose from a menu of terms, but her article does not indicate that she considered the possibility of offering options other than the precommitment sort she favored. See Scott, *supra* note 25, at 86.

140. A couple that originally had elected independence might choose to change to a more traditional relationship upon deciding to start a family.

141. See KRAUSE, *supra* note 17, at 110 (suggesting couples could be forced to choose one system or the other for marital property); Bartke, *supra* note 118, at 1165 (suggesting legislation could allow couples in common-law states to opt for community property treatment by checking a box on the marriage license). Mexico requires couples to choose community or separate property at the time of marriage. MARTINDALE-HUBBELL LAW DIGEST, CANADIAN & INTERNATIONAL MEX-12 (1991).

142. See *Stiff v. Stiff*, 395 So. 2d 573, 574 (Fla. Dist. Ct. App. 1981); *Lash v. Lash*, 307 So. 2d 241, 243 (Fla. Dist. Ct. App. 1975); *In re Marriage of Yantis*, 629 P.2d 883 (Or. App. 1981); *In re Marriage of Grove*, 571 P.2d 477, 485, *modified*, 572 P.2d 1320 (Or. 1977). This choice should be further elaborated so as to provide guidance to courts when it is not possible for their combined incomes to provide that standard of living.

143. See Ellman, *supra* note 13, at 22 n.51.

Additional alternatives could be derived from proposals made by experts. One of the benefits of the contractual approach is that any scholarly proposal for a legal rule, whether a default or limiting rule,¹⁴⁴ can be made into a contractual option. Reformers have argued for various forms of equal incomes for a period subsequent to the divorce,¹⁴⁵ that each spouse should receive an amount sufficient to compensate for income foregone by financially rational accommodations made for the benefit of the family during marriage,¹⁴⁶ and for collective income to be divided among all family members.¹⁴⁷ Another option might be a division of future income that varies depending on the years of marriage or the birth of children.¹⁴⁸ Any or all of these could be choices on the form. In general, these sorts of choices should be worded in terms of percentages of income rather than dollar amounts, so as to avoid problems of inflation.

Practitioners too would contribute. The legislature might set up a committee to monitor use of customized alternatives. If parties aided by lawyers frequently adopt a particular set of terms, the legislature should consider adding that package to the listed options. By making it unnecessary for most parties to draft their own terms, a good legislative list of options would reduce greatly the parties' transaction costs.

One of the more important questions regarding form options relates to fault. Without changing the current unilateral no-fault rules regarding grounds for divorce, the law might allow parties to specify different consequences at divorce depending on the fault of the parties.¹⁴⁹ As suggested above, provisions that make consequences worse

144. Limiting rules are sometimes called immutable rules, though common-law immutable rules certainly do mutate.

145. See, e.g., Sugarman, *Dividing Financial Interests*, *supra* note 6, at 130-65; Singer, *supra* note 33, at 1117-21 (arguing in favor of an equal sharing of income between the spouses after divorce); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 353 (1988-89) (urging equal standards of living after divorce); McLindon, *supra* note 6 at 396 (adopting an equal standards of living approach); Herma H. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 318-19 & n.19 (1987) (advocating more precise legislative guidance for courts in spousal support laws).

146. For a discussion of compensation for the lost earning capacity of each spouse, see Ellman, *supra* note 13, at 54-65. That Ellman would allow parties to contract around his model, *id.* at 64-65, indicates that he does not consider the public welfare to justify imposing his model upon everyone. Although his proposal has merit, I am troubled by his emphasis on financial rationality. See *id.* at 63.

147. Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 578 (1990) (incomes of the former couple are added and then divided by the number of people to be supported).

148. See Sugarman, *Dividing Financial Interests*, *supra* note 6, at 160 (suggesting that percentage sharing should increase with the duration of marriage).

149. See Susan W. Prager, *Shifting Perspective on Marital Property Law*, in RETHINKING THE FAMILY 111, 125-126 (Barrie Thorne & Marilyn Yalom eds., 1982). A number of states consider fault in the award. See KRAUSE, *supra* note 17, at 381 (noting that many states exclude marital

for the partner at fault should create an incentive for good behavior.¹⁵⁰ Couples might wish that neither would physically abuse the other. An election could provide that beatings would change the division of assets or the provision of maintenance upon divorce.

Many couples would wish to require marital fidelity and to back up that requirement with financial consequences.¹⁵¹ Christopher, knowing his own loyalty and devotion but not his fiancée's, can reduce the chances of her betrayal by entering an agreement that deprives her of all but the barest support if she cheats or leaves. Not only would such an agreement create incentives for faithfulness and possibly improve the odds that his marriage will survive, it would ease his mind somewhat during the marriage. And if the worst happens, and she leaves, the huge reduction in his financial obligation should cool his burning sense of injustice.

These penalties, obviously, would not apply unless the couple divorced. Nevertheless, they could well have an impact on the behavior of the couple during the marriage. Penalizing the more culpable party decreases the possibilities of shirking without having to monitor and enforce the agreement of the parties during the marriage.¹⁵² Though the costs of determining fault are high, the parties bear a substantial portion of the burden.¹⁵³ Given the possible benefits of fault as a factor, the law ought at least to offer that option to the couples.¹⁵⁴

Any fault-dependent option also should include, however, planning for a fault-free divorce. The reformers of the traditional law saw correctly both that marriages may fail without fault and that fault is often impossible to judge.¹⁵⁵ The reformed law fails to acknowledge, however, that marriages may also fail due to the fault, in a meaningful sense, of one party. To avoid a legal battle at divorce, couples should plan for

fault as a basis for division of assets); Brinig & Carbone, *supra* note 80, at 886 n.129 (citing statutes and court decisions allowing fault to be considered in awarding alimony); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 72-74 (1987).

150. Landes, *supra* note 38, at 48-49 (1978). See *supra* notes 36-37 and accompanying text.

151. It was more scholarly than public dissatisfaction with fault-based divorce rules that led to reform. Scott, *supra* note 25, at 17. For the constitutional implications of considering adultery in divorce proceedings, see Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre and Extramarital Sex*, 104 HARV L. REV. 1660, 1671-80 (1991).

152. See Landes, *supra* note 38, at 48-49 (analyzing fault as a species of shirking).

153. Although it is not done in other areas of law, the statute could provide that parties choosing options particularly likely to require judicial resolution, such as fault-based options, would have to pay extra fees to the court for its help in the resolution. The fees would be set to approximate the marginal increase in externalities associated with that choice.

154. There are many types of fault. Some of the traditional grounds would have to be changed to make them gender neutral.

155. Ellman, *supra* note 13, at 24.

both possibilities. Adding a fault-based option would almost certainly increase rentseeking, even if fault is very clearly defined and easily proved. At least for the courts, however, that increase might be mitigated by a decrease in the number of divorces.

Another critical issue is whether the parties are allowed to change their agreement at a later date.¹⁵⁶ In the idealism of youth, the couple may choose the apparent equality of total independence, only to find later that equality is elusive and independence creates destructive incentives. If Alison were pregnant and contemplating whether to quit her job, she and her husband might realize that their aspirations have changed. Whether it is viewed as a reordering of property rights or a renegotiation of promissory obligations, they should be able, by mutual consent, to make a new election more in keeping with their current vision of family life. Indeed, the state probably should encourage couples to reassess their divorce needs while deciding whether to change from market to household production or whether one spouse will forego further schooling in order to support the other through an advanced degree.¹⁵⁷

There is danger in allowing changes. Laura's abusive husband might threaten her with divorce unless she agrees to rewrite their agreement to her detriment. She probably would realize, however, that if he is trying to change the agreement to give her less, he is ready for divorce. She would also recognize that if divorce is likely, she has nothing to gain by allowing him out of his promise. She might even realize that such a change would allow him easier exit from their marriage. Undoubtedly, some spouses will be deceived into making changes. These instances should be handled by reviewing the changes for fraud and threats of illegal behavior rather than outlawing changes entirely.¹⁵⁸

Perhaps the trickiest issue is how to handle mutual promises that do not define the rights of the parties. One of the arguments made

156. For some game theory and bargain theory perspectives on the problems of renegotiating relational contracts, see Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987) (describing research that demonstrates that conditional cooperation is the best strategy in a long-term strategic game relationship); Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 523-24 (1985) (arguing against a duty to adjust when an intervening event greatly changes the benefit of the contract for one party).

157. Shifts in the other direction are also possible. Many women learned in the 1960s to appreciate more independence from their husbands. They too should be able, if they and their husbands agree, to rewrite their agreements to reflect new aspirations. Although it could be argued that mandating antenuptial contracts will prevent couples from negotiating additional agreements as the need arises during marriage, it seems equally likely that it will foster bargaining when it is needed.

158. A related issue, handled in various ways by courts today, is whether the parties should be able to agree never to make changes.

above in favor of a contractual approach was that if one law is best for the parties, they can elect that law in their contract.¹⁵⁹ It is possible that the best law for a couple is a completely indeterminate rule. For example, a couple may wish to promise to do whatever the judge thinks is appropriate considering the circumstances. This possibility raises two questions: whether to allow parties to satisfy their statutory premarital obligation with such pointless promises and, if so, whether to put such an option on the forms.

To outlaw indeterminate promises would raise a number of problems. First, it could create huge administrative difficulties. Who would decide which agreements are and are not allowed? Once that is decided, how much effort should be spent in reviewing the agreement? Any substantial inquiry into the issue would be too burdensome and a perfunctory inquiry would be too haphazard in result. Moreover, a well considered decision to promise only to heed the judge could be exactly what the parties prefer. Their circumstances may call for a legal package that includes incentives that pull against investment in the family, leaves great latitude for rentseeking at divorce, and provides enough flexibility to accommodate any ex post judicial determination of fairness. The point of the mandate is to make them choose for themselves, not to limit their choices to those perceived by policymakers to be the best choices.

However, putting the "no-choice" option on the form probably goes too far. Couples might make such a promise to escape from the immediate emotional costs of discussing divorce and coming to grips with the issue. In other words, the easy availability of an indeterminate option requiring no shared conception of marriage or divorce might reinstate the current regime. Couples could perceive the choice of judicial discretion to be an option that allows the parties not to take the issue seriously. If so, then people might fear that their discussion of other options on the form would be interpreted as a lack of faith in the relationship.

Even if the option is not on the form, the majority of couples might elect to write promises leaving total discretion to judges. It is not necessarily bad, however, for couples to make the choice not to choose the consequences of divorce. If people choose that option after careful deliberation, the result is acceptable. That result merely confirms that the present law, with its incentives toward independence and its indeterminacy, is indeed what people want. Additionally, even if a large majority plan relative independence, the law may have helped the remainder to

159. See *supra* notes 88-89 and accompanying text.

plan connectedness.¹⁶⁰

Maybe the most difficult question is whether to allow parties to decide in premarital contracts who will get physical custody of minor children, if any exist at the time of divorce.¹⁶¹ A few comments can be made on this issue without getting into the general merits of private versus public decisionmaking on custody. The biggest advantage of private choice at the time of marriage is that it eliminates a major bone of contention during divorce. Deleting that topic from the agenda of dispute carries a couple of benefits. First, because there is one less thing to fight over, there should be less fighting. Second, it helps to preserve the integrity of the financial agreement.

In many cases, one party will place a higher price on keeping the children.¹⁶² Under the current indeterminate custody rules, if Laura's husband knows she puts a higher value than he does on physical custody, he can use that knowledge and the threat of a custody battle to renegotiate his way out of his premarital promise to support her in divorce.¹⁶³ Besides being unfair, Laura's husband's successful escape from his premarital agreement obligations would undermine the confidence Alison and other spouses have in their premarital contracts, thus upsetting the incentive structures those contracts put in place.¹⁶⁴ If Laura's

160. Not including the option on the form but making it available to those with the assets to hire lawyers and advisors raises the familiar problem that wealthier people have more options. One response is that those who expend the resources to find the alternative also generally may be more aware of the costs of exercising that option. Another response is that the dependents-to-be of wealthier persons are generally more able to fend for themselves and less in need of a legal imperative that their spouse make a choice. Yet another response is that the option could be put on the form if the unfairness to the poor and unaware is that troublesome.

161. I presume that children of a certain age or maturity could decide for themselves with whom they will live.

162. FUCHS, *supra* note 27, at 71 (suggesting that women put a higher value on children than men do). See Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 47 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (arguing that mothers want physical custody more than fathers).

163. See RICHARD NEELY, *THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE* 63-64 (1984) (recounting a personal anecdote of a lawyer advising a client with no interest in keeping the children to bluff his wife into a low settlement); WEITZMAN, *supra* note 6, at 23 (suggesting that women scared of losing custody will trade away anything else to keep it from happening); Mnookin et al., *supra* note 162, at 52 (stating that out of 158 fathers wanting maternal custody, 31 requested joint or father custody in their petitions; out of 107 mothers wanting joint custody, 35 requested maternal; others might have concluded custody negotiations before filing). *But see* Sugarman, *Introduction*, *supra* note 5, at 4 (noting that Mnookin finds no large incidence of strategic bargaining using custody to reduce financial obligations). It is also possible for Laura's husband to use the knowledge of her preference to negotiate a better deal at the time of marriage, but negotiations before marriage are less problematic. The bilateral monopoly problems are not nearly as severe then, and it is in his interest not to take irritating negotiating positions before Laura says, "I do."

164. In rare cases, a parent might also fight for and win custody merely to consume, jointly

husband has agreed in advance to allow her custody, he cannot use custody as a lever to get a more favorable financial settlement. As for the children, some advocates have suggested that almost any automatic rule would be better than the current "best interests" standard.¹⁶⁵ If that is true, blind obedience to the initial choice of the parties would be an improvement. These considerations support the position that, regarding child custody, the parties' contract should control unless there is a showing of neglect or unfitness.¹⁶⁶ On the other hand, learning of their parents' contingent allocation might cause emotional injury to the children by making them think that one parent does not care about them.¹⁶⁷

The exact meaning of each statutory option would, over time, be litigated before judges. Through this process some of the choices would become better defined, improving the predictability of outcomes and clarifying the incentives created by those choices. If courts split on an interpretation of one option, the legislature could take that as signalling a need for the option to be divided, on the form, into two sub-options. Once options have been drafted and interpreted by courts, scholars could examine both the incentive and distributional effects and inform the public of the potential consequences of each choice.

In addition to creating the forms, the legislature should provide for their wide and free distribution. Specification and publication of the options would aid in educational efforts by concerned organizations. The legislature itself should give guidance to both judges and fiancées by incorporating illustrative examples as an appendix to the form. Lawyers might make presentations explaining the proposals and suggesting circumstances in which soon-to-be-married couples need a custom-tailored agreement. Consumer organizations and schools could focus educational programs on the statutory choices. Private dating services could pick up the options as a criterion on which people would be matched.¹⁶⁸ The state could do its part in the educational process by supporting marriage counseling centers staffed to give helpful and ap-

with the children, the child support payments. A premarital agreement on custody might prevent an allocation of custody on this inappropriate basis. Another conceivable benefit of allowing the parties to agree in advance on who gets custody of the children is that for one parent the children become divorce-proof assets in whom it is worthwhile to make large financial and emotional investments. The other parent, on the other hand, has even less incentive to make such investments.

165. GLENDON, *supra* note 8, at 100.

166. This is inconsistent with current doctrine, but not current practice. See Mnookin, *supra* note 9, at 1035.

167. In addition, if number, gender, and age influence the preferences of the couple regarding custody, it may not be a simple matter to draft options that would be acceptable.

168. I am sure that someone would even start silk-screening T-shirts announcing the option preference of the wearer. Bumper-stickers might also prove popular.

propriate advice to those who need it. For the private ordering scheme to work well, the state should supply free premarital counseling or legal advice to the uneducated poor.

The multiple option approach might lead to more fruitful efforts by interest groups. A women's group wanting to improve the financial security of divorced mothers could shift its focus from rarely productive attempts to get legislatures and courts to change the default law for the benefit of women to the more attainable goal of helping women to choose well for themselves. For example, they could teach young women to insist on fifty-fifty sharing forever, to assure their security,¹⁶⁹ and teach young men that post-divorce sharing agreements work to allow optimal specialization in community tasks. A feminist group wishing to improve the financial independence of women might take the opposite approach.¹⁷⁰ It could urge women to elect total separation of marital assets and post-marital income in order to steer themselves away from dependency. It might teach men that it is more efficient to hire specialists with comparative advantages in child care and housework than to have one person attempt to perform such disparate tasks. These educational efforts might yield other benefits, such as teaching young people to plan for their futures and fostering a mature and deliberative approach toward important decisionmaking. Such efforts also seem, in some fundamental way, more appropriate than trying to get legislators to manipulate incentives in a way comporting with the particular interest group's views of what couples should do in their marriages.¹⁷¹

Shifting the source of divorce allocations from public to private decisionmakers will not, of course, resolve all legal issues or solve all practical problems of marriage and divorce. Difficult questions remain for policy makers and, especially, for couples.

A. *Determining Limits on Private Ordering*

Private premarital ordering ought not be unbounded. Situations may arise in which it is appropriate for judges to refuse to honor a pri-

169. See generally GARY S. BECKER, *A TREATISE ON THE FAMILY* 14-37 (1981). Professor Becker stated:

Since married women have been specialized to childbearing and other domestic activities, they have demanded long-term "contracts" from their husbands to protect them against abandonment and other adversities. Virtually all societies have developed long-term protections for married women; one can even say that "marriage" is defined by a long-term commitment between a man and a woman.

Id. at 14-15.

170. See Kay, *supra* note 149, at 80, 85 (cautioning against expansion of divorce awards on the grounds that they will prevent women from becoming financially independent).

171. See Carbone & Brinig, *supra* note 13, at 956 (describing the various agendas of current advocates).

vate agreement. This topic, when to enforce and when not to enforce private choices, is obviously too vast to be explored in a paper of limited scope.¹⁷² This Article discusses only a few points specific to the divorce context without pretending to present a complete set of limiting rules for judicial application.

Regarding divorce settlements, Professor Mnookin has identified three situations calling for judges to intervene: lack of capacity, detrimental effects on third parties, and unequal bargaining power.¹⁷³ The same categories are useful in examining contracts made before marriage. Courts need not hold parties to deals made without capacity, deals made because of fraud,¹⁷⁴ deals particularly detrimental to third parties, and deals made under threat of illegal harm.¹⁷⁵

Applying Professor Melvin Eisenberg's concept of transactional incapacity to divorce settlements,¹⁷⁶ Mnookin suggests that courts might step in when "the terms of the agreement considered as a whole fall outside the range of what would have been acceptable to a competent person at the time of the settlement."¹⁷⁷ If this standard were transported to the context of premarital contracts, capacity would be judged by the acceptability of the terms *ex ante*, before the marriage. Though there is some debate over whether the fairness of premarital agreements should be judged only *ex ante* or also *ex post*,¹⁷⁸ at least as regards the

172. See generally Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

173. Mnookin, *supra* note 9, at 1019-35. An argument could be made that because the parties are in a better condition to assess their own interests and are more nearly equal in bargaining power, premarital determinations should be treated with at least as much respect as divorce settlements. Divorcing parties generally have the power to decide for themselves how to divide their assets and responsibilities. See *id.* at 1016 (stating that "absent a dispute, divorcing parents actually have the power to make their own deals. Typically, courts rubber-stamp separation agreements, even in cases involving children."). Premarital agreements, it could be argued, should be equally enforceable. This argument lacks real force, however, because divorce agreements can be modified if the circumstances change. See *id.* Applying the same standard to premarital agreements leaves them wide open to modification because circumstances usually will have changed between the time of marriage and divorce.

174. The current inclination to consider whether a spouse disclosed fully his or her assets as a factor relevant to the validity of a premarital agreement might be handled within the category of fraud.

175. A good part of the theoretical justification for respecting the desires of the parties rests on the assumption that they have the means and opportunity to make decisions on their own behalf. When that assumption appears to be untrue, an informed judicial determination is more likely to serve the interests of that party than the party's own decision. Forms of duress other than illegal threats can also cast doubt on the key assumption. The most common kind of duress is surprise presentation of the agreement shortly before the wedding. See Oldham, *supra* note 21, at 772. That form of duress should disappear under a mandatory agreement regime.

176. Eisenberg, *supra* note 172, at 763.

177. Mnookin, *supra* note 9, at 1022.

178. See CLARK, *supra* note 119, at 8-9; Younger, *supra* note 82, at 1074-86; Oldham, *supra* note 21, at 775-76.

inferences to be drawn about capacity, the *ex ante* approach seems appropriate. Given the wide range of outcomes the law has seen fit to impose on people, it should be a rare agreement that goes so far outside those bounds that it would be deemed unacceptable to a competent person.

Negative third party effects provide another easy case for judicial intervention. An antenuptial agreement that provides inadequate support for children can and should be set aside. Intending spouses should have no more power to determine the children's financial consequences upon divorce than spouses have under current law. In the child support domain, one law should apply to all.¹⁷⁹ In some cases the interests of the children will conflict with a property or maintenance term of the contract. Suppose Alison negotiates an agreement of complete financial independence but later quits her schooling to care for the children. Shortly thereafter, her husband leaves the family. Because Alison and her children engage in joint consumption, some of his child support payments will go to Alison in violation of the terms of the contract. In such cases, the needs of the children should override conflicting provisions of the agreement.¹⁸⁰

Taxpayers also have an interest in divorce outcomes. If Alison's husband waits until after the children have gone to college before he takes off, she could be left in poverty. The legislative package should direct courts to impose a support obligation to prevent her from being a public charge, as courts have done in the past.¹⁸¹ Other cases likely will arise as well in which the courts must step in to protect third parties from the outcome specified in the agreement.

Unfairness arising from inequality of bargaining power poses a harder question.¹⁸² Though this theoretical basis for overriding the mutual consent of the parties is yet to be fully developed,¹⁸³ prevailing notions of fairness reflected in current contract law call for judicial intervention in some cases.¹⁸⁴ Without opening the entire topic, the

179. See GLENDON, *supra* note 8, at 98 (arguing for one set of principles to apply to all child support cases).

180. See *id.* at 94-95; Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553 (1984) (arguing "children-first" should be the principle of priority). Younger, *supra* note 50, at 91 (suggesting that parents should not be allowed to contract out of responsibilities to children).

181. See Younger, *supra* note 82, at 1083; Oldham, *supra* note 21, at 768 n.38. The Uniform Premarital Agreement Act (UMPA) also empowers courts to modify agreements so as to avoid eligibility for public assistance. UMPA § 6(h), 9B U.L.A. 376 (1987). See also *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981) (dictum); *Unanader v. Unanader*, 506 P.2d 719 (Or. 1973) (dictum).

182. See Mnookin, *supra* note 9, at 1024-31.

183. See *id.* at 1031. To cast these cases as lacking consent is to misapply that concept. See John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 267 (1947) (stating, "the more unpleasant the alternative, the more real the consent").

184. The doctrines of duress and unconscionability allow judges to ignore an agreement to

question here is how forcing parties to bargain before marriage changes the likelihood of unequal bargaining power. To a degree correlating to the specificity of the contract and the strictness of judicial enforcement, mandatory antenuptial agreements will shift bargaining from the time of divorce to the time of marriage. That shift is generally favorable because the potential for unfairness is greater at divorce than at marriage. Some problems of unequal bargaining power at the time of divorce arise because the parties are in a bilateral monopoly;¹⁸⁵ they must deal with each other. Though premarital contracting also contains some element of bilateral monopoly, it is far smaller. Before marriage, the parties have many alternatives. Laura's world may seem to revolve around that one special person, but the more unreasonable and onerous his terms become, the more likely she will realize that there are better deals around. Other bargaining unfairnesses arise when parties know well each other's preferences.¹⁸⁶ Although fiancées may know each other better than most contracting parties, they almost certainly will know each other better by the time of divorce.

Unfair agreements at the time of divorce may also arise because one party is in a position of immediate financial need and the other party has the time and money to wait for a judicial division of assets.¹⁸⁷ Setting aside the "shotgun" marriage situation, it seems that financially independent, unmarried persons are less likely to face an immediate financial crisis than persons nearing divorce. More generally, these cases of immediate financial need fall within the category of unequal endowments at the time of bargaining. Often the party with a greater endowment will be able to get the lion's share of the gains from trade. Because of asymmetric social attitudes toward the aging of men and women, biological changes, and career opportunities foregone for the family, the endowments of women usually decline more rapidly during marriage than those of men. Hence, women are generally in a far weaker bargaining position at the end of the marriage than at its start. Therefore, holding constant the constraints put on bargaining, women and men should have more equal endowments if they bargain before marriage than at the time of divorce.

Even with a premarital agreement, the parties may, of course, still bargain at the time of divorce. Instead of bargaining in the shadow of the law,¹⁸⁸ they bargain in the shadow of their earlier agreement. Courts might review those divorce settlements in two steps. First, is the di-

which both parties have consented.

185. Mnookin, *supra* note 9, at 1027.

186. *Id.* at 1025-27.

187. *Id.* at 1029-30.

188. See generally Mnookin & Kornhauser, *supra* note 11.

orce settlement fair in light of the premarital agreement and subsequent events? Second, was the initial agreement fair when it was made? If the agreement fails on either step, it may be set aside.

As to ex ante unfairness, both the Uniform Premarital Agreement Act and the Uniform Marital Property Act provide that unconscionable agreements can be set aside.¹⁸⁹ Applying this standard as a substantive limitation on premarital agreements for spousal support is problematic. The law over the years has been of two minds on income sharing after divorce. Long ago, but not only in ancient history, the law tied the couple together forever with strong financial cords.¹⁹⁰ More recently the law has taken the opposite tack, cutting all financial ties in most cases and leaving only a slender connection in the others.¹⁹¹ Was the law so wrong then, or is it now, that it can be unconscionable for couples, even if presumed to be in a state of romantic intoxication,¹⁹² to choose for themselves a position once, or now, forced upon spouses by the law? To declare either total sharing or total independence unconscionable is to say those choices would be right for no couple. That would be an odd thing for the law to say considering it has treated those choices, at different times, as right for almost everyone. Even assuming the parties lacked both will and knowledge, the law's past imprimatur puts the substantive fairness of any option between no sharing at all and fifty-fifty sharing nearly beyond judicial reproach. Hence, substantive unconscionability should be given a limited compass when applied to divisions of future income.

To those exceptions we can add the also difficult category of mistake. There is good reason to doubt the ability of fiancées to make good agreements.¹⁹³ Antenuptial agreements are made long before they become effective. It is hard for anyone to predict what they will need and

189. See *supra* note 97.

190. See *supra* notes 13-21

191. See *supra* notes 17-21.

192. "When two people are under the influence of the most violent, most insane, most delusive, and most transient of passions, they are required to swear that they will remain in that excited, abnormal, and exhausting condition continuously until death do them part." SHAW, *supra* note 109, at 139. Though Shaw favored no-fault divorce, he also recognized a need for alimony. *Id.* at 203-04.

193. Psychologists, economists, and others are developing models of human decisionmaking that include systematic error. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991); Detlof von Winterfeldt & Ward Edwards, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 227 (1986). Their work could shed light on the types of options that should or should not be presented on the premarital agreement forms and what sorts of agreements call for judicial intervention.

want far in the future. What might have been a good agreement once can become inappropriate after time changes the parties. Mistakes seem especially likely for the many fiancées who will be young or romantically intoxicated when they write their contracts. Moreover, in marriage there are few opportunities to learn from experience.¹⁹⁴ Unlike repeat players in other markets,¹⁹⁵ people make few marital agreements during their lives.

Unilateral mistake should not be allowed as an excuse. Laura's husband may find that he did not really know himself when he made his marital promises of income sharing, but Laura has relied on his former self. He has sold her an annuity and she has paid the price; his mistake is no excuse. Likewise for Alison. She has not bought any insurance against future discrepancies in their incomes and should not be allowed to claim later that not doing so was a mistake.

Setting aside these cases of unilateral mistake, however, a judge sometimes may know that both parties have made a mistake and would be much better off if the contract were rewritten.¹⁹⁶ This raises two issues: whether to force agreements on parties at all, and what judges should do about mutual mistakes. A mandate could increase dramatically the number of bad choices by forcing unwilling participants to choose. Those who now voluntarily make agreements have the inclination to do a good job of it, giving courts little reason to second guess their efforts. Conversely, those who do not now make them may be ill-suited to the task. This is a serious objection to the imposition of a mandate.

Judges faced with these issues of mistake and unfairness¹⁹⁷ should attempt to balance the incentive effects against the status effects of recognizing exceptions to the general rule that the parties' agreement should be enforced.¹⁹⁸ The parties can create their own incentives and

194. This problem is mitigated by the fact that people can learn from the mistakes of their parents and other relatives. More so than for many financial transactions, the fact and consequences of divorce are partially open to public scrutiny. As divorce becomes more common, the opportunities to learn from the experiences of others increases.

195. See Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925 (discussing mistakes made by inexperienced players in real estate markets).

196. See Douglas G. Baird, *Self-Interest and Cooperation in Long-Term Contracts*, 19 J. LEG. STUD. 583, 586 (1990) (suggesting that we face a dilemma between a rule of rigid adherence to terms, which may result in allocations of rights and responsibilities that stop making sense as conditions change, and a rule of more flexible interpretation, which allows one party to exploit the uncertainty of the contract).

197. I do not include here the two other grounds for ignoring contracts discussed above, incapacity and externalities. See notes 173-81 and accompanying text.

198. See generally Jeffrey E. Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447 (1991). If legislatures write standards for judges to apply on the issues of mistake and unfairness, they, too, should consider the status and incentive effects.

do their own justice only if the courts hew closely to terms they have agreed upon. The incentive benefits of private contracting are diluted if the parties cannot rely on judges to enforce their agreements. On the other hand, the agreements may turn out to be unfair or inefficient. In such cases, rigid adherence to contractual terms carries those costs. Judges and legislatures should also be keenly aware that liberal intervention will draw divorcing parties into courts in large numbers. If antenuptial contracts do not bind the parties, they will do nothing to abate the current problem of rentseeking at divorce. A state's adoption of mandatory antenuptial contracting presumes that the agreements would be enforced at least most of the time.

Maybe the general principle of shifting decisions from public to private decisionmakers should be taken one step further and applied even on these questions of mistake and unfairness. The form could have three or more boxes for the parties to check. One option would say that the contract will be enforced on its terms without regard to unfairness, injustice, or mistakes of the parties. Other options would allow judges to intervene in the events of mistake or manifest injustice. These choices would allow the parties to decide how much potential injustice to trade away for beneficial incentives. This approach recognizes the asymmetry built into the issue: If judges incorporate justice on their own, the parties have no way to choose other values for themselves; but if judges enforce contracts on their terms, the parties can tell the judge to do justice in exceptional circumstances. Any safety-net exception judges or scholars articulate can also serve as a contractual option.¹⁹⁹ Given that the balance between predictability and flexibility affects fairness, incentives, and rentseeking, perhaps we should let the parties strike that balance.²⁰⁰

A further problem is what to do when a provision or contract is unenforceable. The parties cannot be returned to their youth and cannot be given back the opportunity to choose a different spouse.²⁰¹ Judges could apply the default rules that govern the many couples married before agreements became mandatory. Alternatively, the legislature or courts could establish a special default rule to which the courts would turn when the contract failed. If, however, the judge simply throws the contract out and applies a default rule, an innocent party might be left in a worse position than under the unenforceable agree-

199. This approach to interpretation could also be applied to other sorts of contracts.

200. See Barbara Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397, 411 (1977) (stating that the goal is to achieve a proper balance between predictability and fairness).

201. Given the current patterns of males marrying younger females and females marrying older males, this fact carries a disproportionately greater impact on women.

ment. Judges might be allowed, in those cases, to do justice as they see fit. A more bureaucratic step would be to establish a special administration to review agreements for fairness *ex ante*, allowing the parties to know before marriage whether their terms are enforceable.²⁰² By restricting the choices listed on the forms to those presumed to satisfy the appropriate limiting rules and offering a set of choices broad enough to satisfy most customers, the legislature could reduce substantially the need for judicial findings on the issue of *ex ante* validity.

B. Other Possible Problems Created by Mandating Antenuptial Agreements

The marital couple might be troubled by the possibility that the smooth skids laid for divorce will increase their chances of taking the easy way out. To the extent that the lower price of divorce is a problem for the parties, they might structure the agreement so as to discourage divorce by increasing the price. They could agree, for example, that the person broaching the subject of divorce pays more or is entitled to less than the other party.²⁰³ To increase the joint price paid for divorce rather than the price paid by the initiator, they could agree that if they get divorced they will donate a specified sum to charity before dividing the remaining familial assets.²⁰⁴ Alternatively, the couple could provide that the judge will do justice as she sees fit considering the financial needs and resources of the parties. This indeterminate standard should evoke a healthy fear of an agonizing divorce.

A conceptual migration from status to contract may change attitudes about marriage in undesirable ways, or may give undesirable voice to an unwelcome change in attitudes.²⁰⁵ Religiously inclined persons might find an explicit contractual approach to be simply unholy. Mandatory contracting may strike some people as taking the joy and spontaneity out of the unpredictable unfolding of marriage.²⁰⁶ The promises contemplated here, however, should not reduce spontaneity because they deal mostly with future payments.

Still other people might find disturbing the explicit shift from law

202. Such an administration would not have the benefit of hindsight available to a court viewing the matter *ex post*.

203. Unless other fault provisions were coupled to it, such an "initiating" provision would create some nasty incentives for behaviors designed to cause the other spouse to raise the topic.

204. It might take legislation to make those promises enforceable by the charity. For a discussion of ways couples can commit themselves to each other, including promises to pay charities, *see* Scott, *supra* note 25.

205. Mandatory divorce planning might also foster bad attitudes about the law in general. People might lose respect for the law because it requires needless planning for contingencies that never happen.

206. *See* Shultz, *supra* note 8, at 242.

as a set of normative aspirations—established by society for individuals to meet—to law as a set of instrumental rules for achieving individual goals.²⁰⁷ This idea of letting the couple define the financial consequences of their relationship, sounding in utilitarianism, fits poorly with dearly held notions of what families are about. By treating the couple as two independent actors, it ignores the essential functions of a family and the relationships that constitute a family.²⁰⁸ By defining marriage in terms of legal rights instead of moral relationships, it creates a crass concept of marriage mired in self-centered pursuit of individual goals. This proposal thus could contribute to a crabbed and narrow concept of human relationships. By contractualizing marriage the law might indeed undermine communitarian attitudes of family sharing and responsibility.²⁰⁹ On the whole, however, my guess is that forcing couples to contract about divorce would strengthen marriages and the communal institution of marriage.

Would a statutory mandate set a dangerous precedent? It all depends on how you look at it. In one view, the rationale for changing from a default rule with contractual options to forced contractual options rests on the ominous notion that government should force parties to do what is good for them. From another perspective a statutory mandate would, in effect, say simply that parties wishing to take advantage of the legal status of marriage can do so only if they take certain steps to plan their relationship. From the state's standpoint, requiring the parties to make certain practical elections is much like requiring articles and bylaws for corporations. As long as it is no crime not to incorporate or marry, and no crime to perform religious services without a state certificate,²¹⁰ the obligations are assumed voluntarily. The state requires testing for venereal diseases;²¹¹ how different is required planning for terminal sickness of the marriage?

The liberty gained by enforcing agreements is, to some degree, lost by forcing them. A mandate diminishes the former right of couples not

207. If the goal of law is to structure normative aspirations, does the present law shape preferences to our liking? It would seem that we gave up on using divorce law to tell people what is right and wrong when we deemphasized fault as a ground for divorce. See Schneider, *supra* note 16, at 1832, 1859.

208. See Teitelbaum, *supra* note 16, at 439.

209. It is not clear, however, how strong these attitudes are. William G. Sumner described the family as "antagonistic cooperation" in which individual, not familial, values are sought. WILLIAM G. SUMNER, *FOLKWAYS* 346 (1906). See also Martin Daly & Margo Wilson, *The Darwinian Psychology of Discriminative Parental Solicitude*, 35 *NEB. SYMP. ON MOTIVATION* 91 (1987) (describing evolutionary basis for conflict between parents and offspring).

210. It is possible that the act of choosing an option for division of property and income at divorce would violate someone's religious tenets. The statute could provide an exemption for such people.

211. See Scott, *supra* note 25, at 12.

to choose their divorce consequences.²¹² Freedoms ought not be measured, however, by a simple count of legal liberties or compulsions. A rich notion of liberty must include the practicality of exercising freedoms. A mandate may be the only effective way to remove the state from the role of deciding what is best for couples and to provide intending spouses a meaningful opportunity to make these important choices for themselves. Considering only freedoms that we have a practical chance to exercise, the proposal here is a wash. The choice is between a useful freedom to choose the consequences of divorce and a freedom not to choose; we cannot have both. Moreover, between the right to choose the incentives pervading our marriages and the freedom to choose whether we can choose, the former is the more important.

Maybe people have too many choices. Adding another big decision during the difficult time just before marriage when location, jobs, education, and other important decisions must be made might cause too much stress. It is entirely possible that people are happier if they never have to confront such choices about divorce, even if the choices are made badly for them. For almost half of married couples, though, the decision must be confronted sometime, leaving only the issue of when. Some of the advantages of addressing divorce issues early were discussed above.

Implicit in some of this Article's arguments in favor of mandatory premarital contracting lies the assumption that people would lead happier lives if they would take a few moments to determine whether they and their prospective spouse share a common conception of what their marriage is all about. At least in some cases, the process of negotiating will sort out and prevent bad marriages. Additionally, the agreements reached will make some marriages and divorces go more smoothly. But the overexamined life, like the unexamined life, is not worth living.²¹³ The process that yields information about a partner's attitudes also produces awareness of one's own attitudes. The amount of harm that might flow from the awareness generated by a mandate is open to debate. Overexamination, if it occurs, certainly mitigates the benefits of a mandate.²¹⁴

212. Though the state is depriving individuals of the option not to plan for divorce, the state is not imposing any particular plan. It is more like a requirement that automobile drivers buy insurance than a requirement to wear seat-belts.

213. Statement of Robert Stake to the author.

214. At a more practical level, there would be many details to work out before making agreement a prerequisite to marriage. Numerous issues must be addressed, including: how to integrate income sharing options with remarriage; whether to adopt a system of notaries for authentication, as in civil law countries, see Glendon, *supra* note 180, at 1569; what to do upon findings of fraud or nondisclosure; whether and which creditors need special protections; to what extent the statutory choices bind the IRS; how to apply a divorce tax to the poor; how to enforce divorce agreements

VI. DISTRIBUTIONAL EFFECTS

Mandating and enforcing premarital agreements would have a number of distributional consequences. Spouses that promise support but feel no moral obligation to provide it at divorce would be disadvantaged under the new law. They would have to either refrain from the promise, which would presumably reduce their attractiveness to some partners, or fulfill the promise, which would deplete their bank accounts. Divorce lawyers might also suffer a loss from the diminished rentseeking, although those losses would be mitigated by increased need for counseling on the statutory choices and drafting of antenuptial contracts.²¹⁵ A more troublesome effect of premarital negotiating would be the break up of some marriages that would otherwise have been successful. It probably would be unusual, however, for a marriage of persons so unable to work out their differences to survive.

Another bothersome prospect of mandating premarital contracts is that being forced by the state to bargain about divorce may be extremely distasteful to some people. The mere mention or thought of divorce may cause some people pain. And that discomfort would be imposed at an inopportune time. Just in the rare and fleeting moment of giddy, feet-off-the-ground, reckless abandon, the state steps in and bursts the balloon with a dose of practicality. For those whose marriage survives only because the law forced them to choose appropriate incentives, the loss is probably worth it. For those headed into future divorces, it may or may not be fair to diminish this earlier moment of happiness in return for a later reduction of strife at divorce. Those never to divorce, with or without the mandate, suffer the clearest loss. This last group constitutes about one-half of all marriages. How large that loss would be for each of them depends on how much they hate to

against the poor; how to get nonmandatory jurisdictions to honor the contracts and other conflicts problems; how to handle cohabitation and what would be common-law marriages; what limits to impose because of cognitive defects; how much more binding the agreement should be if both parties had counsel; whether to allow agreements to control the incidents of an ongoing marriage; what procedures to require for making changes to the contract; how to administer the forms; how to handle pension plans; whether and how to integrate asset division at death; at what age to require young, intending spouses to get the consent of a parent or guardian; and how to deal with religious objections to making choices.

In addition, there would be transitional problems. For example, fiancées might adopt a 'sign now, litigate later' attitude and divorcing couples might continue to ask courts to settle their financial affairs until it becomes clear that judges would enforce the contracts by their terms. It might take a while, therefore, for the courts to kill off the practice of rent-seeking and to convince parties to elect with prudence.

215. Overall, lawyers' losses could be huge; we should hope so. I do not expect their support for this proposal. Although divorce lawyers would probably suffer financially, their reputation and that of lawyers generally might improve because fewer people would have as their only experience with a lawyer a situation where everyone but the lawyers comes out a loser.

talk about divorce and how much they bridle at state control of their lives. Although the magnitude of their loss is hard to gauge, it is plain that a mandate shifts time, energy, and other forms of wealth from those who do not divorce to those who do.²¹⁶

No matter how easy we make it for couples to choose their marital options, it still will take some time and effort on their part. That time and effort raises the cost of entering marriage. With increasing price, the demand should fall. What happens to those people? Some of them will find new partners. Some will stick together, unmarried. As unmarrieds, they will have fewer legal obligations to each other than under current law. Whether, as a general matter, that is better or worse for them remains unclear. It is likely that at least some men and women will end up in a worse condition. At the least, however, the law will not have helped to create false expectations of security and commitment.

If either effect—the redistribution of time, energy, and money from those who divorce to those who stay married or the diminished happiness of those who do not marry because of the increased price of marriage—is particularly troublesome, a tax and subsidy program could be used to reduce the problem. The state could pay couples to get married. The amount of the payment could approximate the costs of planning for divorce. The funds for this payment could come from a tax on divorce. If half of marriages fail, the divorce tax would have to be about twice as high as the subsidy. For divorcing couples with children, the divorce tax might include an additional amount earmarked to help children of divorced parents. Since it is, in part, the costs of divorce that drive the state to require planning, it would be appropriate to lay these costs on those who actually do get divorced. The combination tax-subsidy would reduce the frequency of divorce and increase the frequency of marriage while appropriately allocating the costs of divorce to divorcees.

One of the most disturbing possibilities is that bargaining and enforcement of premarital contracts will work to the detriment of women. Professor Carol Gilligan has suggested that women speak and think in a different mode, one of connectedness.²¹⁷ If Alison thinks more of others and less about herself than does her fiancée, she will operate at a disadvantage in negotiations predicated on the assumption that each party will look out for his or her own needs. In that case, she would be better

216. Viewed in *ex ante* terms, a requirement that all couples plan for divorce shifts wealth from those who are unlikely to divorce to those who are likely to divorce. Another group harmed are persons made uncomfortable by the fact that marriage creates legal rights. This discomfort should be mitigated by the realization that a system of indeterminate legal rights has as much influence on the structure of a marriage as a system of determinate rights.

217. GILLIGAN, *supra* note 23.

off if society negotiated a good bargain for her.²¹⁸ It is unlikely, however, that the law will write a good contract on her behalf. Since women control few state legislatures or supreme courts, they must rely on men to assert their interests. Additionally, if advocates persuade judges and money persuades advocates, litigation at the time of divorce favors those with greater financial assets. The plight of many women today testifies to the poor degree to which their interests are being protected by lawmakers and judges. Alison and her friends, with the help of education from school and special interest groups, could do better negotiating premarital contracts than relying on protection of the law.

Another important issue is the mandate's effects on the poor and uneducated. How can courts bind people to an agreement they cannot even read? My answer is that the agreements should be binding, but that it hardly matters in many instances. For two reasons the poor and uneducated woman who signs away her rights to future income is likely to be no worse off than she is today. First, the law offers little protection now. Second, even if it did, frequently her poor husband will not have enough income to share. The uneducated man who signs away half of his income forever should be held to his bargain. When his purse is empty, however, the bargain will not be worth enforcing. In other words, this proposal does nothing to solve the problems of truly poor couples. They do not have enough to live on no matter how we or they split it up. Nevertheless, one segment of the poor would lose under the mandate—those who unwittingly or imprudently sign away rights to future income from a spouse who breaks out of poverty and subsequently leaves the family.

The criticism might cut deeper, though. Might a mandate affirmatively harm the poor?²¹⁹ Many problems of the poor stem from failures to marry. There are, for example, many impoverished single parent homes. A requirement that intending spouses must check off an option on a bureaucratic form could scare young poor men away from marriage.²²⁰ Free counseling will not help when counselors are a part of the

218. Taken to the limit, this argument would imply that we should not allow women to settle their divorce cases without the help of a (male?) lawyer or judge. But maybe women are better negotiators at the time of divorce than at the time of marriage.

219. One argument is that some people are unable to properly balance present and future costs and benefits because of their environment during the first three years of life. If the poor are disproportionately debilitated by early environments and if they make bad choices as a result, then the poor may be especially harmed by being forced to bargain. That effect would be mitigated, however, to the extent that the decisions before marriage simply substitute for decisions at divorce since the debilitated will still be so at that later date.

220. Any added obligations imposed on poor men, as any proposal must do if it is to help poor women, will decrease their demand for marriage. The point here is that the form itself would raise the price even further.

very bureaucracy young indigent men fear and loath. As a result, rather than get married, they may cohabit for a while and then leave the poor young women to support their children alone.

There are three possible responses to this criticism. First, this group of poor persons deterred by a bureaucratic form might be especially responsive to a marriage subsidy. Additionally, many of the marriages of these hesitant and uncommitted husbands likely would have failed anyway. People unwilling to circle two options on a form to get into marriage are not likely to stick with it through thick and thin. Third, many poor women simply may see little benefit to getting married. Since current law does little to impose support obligations after divorce,²²¹ there is not much practical difference to the young mother between marriage and cohabitation, except perhaps an unwarranted sense of security. If poor women do not now insist on marriage because they know it gives them no security, the proposal might increase the frequency of marriage by giving them something to bargain for, some tiny bit of security and commitment not available under current law. It is, nonetheless, possible that mandatory premarital contracting would effect a redistribution of happiness from the poor to the middle class by providing a tool of self-protection and empowerment to the "haves" while placing more bureaucratic obstacles in front of the "have-nots."

The proposal might help, however, some people to avoid the ranks of the destitute. There is a large group of families with enough combined income to keep them hovering above the poverty level. For some of these families, the reduction of economies of scale accompanying divorce will push at least one spouse into poverty. For many others, the combined income is enough to keep all afloat, provided that it is divided evenly. As the law now works, after divorce the husband's income is often not shared at all. The result is that many wives and children sink into poverty when the husband leaves.²²² After seeing their mothers slide into destitution, some young women might insist on more protection if they are given a meaningful opportunity to do so. Furthermore, presuming that poorer couples would pay a smaller divorce tax, designating part of the divorce tax revenues for children of single parents would redistribute some assets to poor children.

In the end, the attractiveness of mandatory premarital agreements may turn on one's faith in the ability of men and women to look out for

221. The law is, however, changing with the efforts to collect child support from poor men. See HARRY KRAUSE, *CHILD SUPPORT IN AMERICA*, 307-11 (1981); Walter J. Wadlington, *Paying for Children's Medical Care: Interaction Between Family Law and Cost Containment*, 36 *CASE W. RES. L. REV.* 1190, 1201-02 (1986).

222. See FUCHS, *supra* note 27, at 107-08 (noting that children have swelled the ranks of the poor in the last two decades).

their own interests. Assessments of the proposal's merit also will depend upon the law to which it is compared, and one's perspective on law. I believe that if people are given a reasonable opportunity to talk and think about the effects of divorce, a few basic choices, and some information about the consequences of those choices, they will do better for themselves than the law can do in its almost futile attempt to provide for all.

VII. A FALLBACK POSITION

It seems unlikely that any state will move soon to mandatory divorce planning. Is there any more realistic way to achieve the benefits of private ordering? This Article has suggested that the division of assets at divorce that will be fair and create good incentives for one spouse, for example Laura, will be inappropriate for another, like Alison. They need different allocations, and those allocations must be decided long before divorce.

One possibility is to find some way other than compulsion to get intending spouses to determine and express their preferences. For example, the state could pay couples to plan for divorce. Upon receiving a properly executed allocation form, from either a marrying couple or a married couple that had not executed a previous agreement, and after checking for signs of abuse, such as multiple marriage, the state could pay the couple. The funds could come from a tax on divorce, as suggested above.²²³ A less aggressive approach would be to develop a program for educating pregnant women and others possibly leaving the work force regarding the need for an agreement to provide some security in case of divorce.

Another way to get more people to plan is to focus planning incentives on those more likely to respond. The current spousal support rules focus planning incentives on couples, like Laura and her husband, that want both income sharing after divorce and the marital cooperation and specialization it encourages. Changing the law to require substantial sharing after divorce, either always or when one spouse has made career sacrifices, would shift the incentives to plan and the burden of planning to persons who wished to join and promote independent careers. It would be up to those couples to worry about how to avoid the opportunities such a law creates for taking time to raise children. If couples that want incentives for independence tend to be wealthier and psychologically more capable of divorce planning, if they are more likely to recognize that the law does not create the right incentives, if they are better able to predict their needs after divorce and foresee the necessity

223. See *supra* text between notes 216 and 217.

of an antenuptial agreement, if they are more likely to recognize that the law does not comport with their sense of justice, then the default rule should be one of sharing rather than independence. In short, we should determine which couples are least capable and least likely to plan for divorce and write the default rules to favor them.

Another way to achieve the benefits of private ordering is to choose the default rule more couples would select. It is not clear today whether rules of substantial income sharing or fault would be popular. It is possible, however, that careful empirical study would yield data that would provide a solid foundation upon which to build a system of default rules that would fit the maximum number of couples.

VIII. CONCLUSION

The examples used in this article to illustrate the incentives and distributional consequences of the current law only hint at the magnitude of the problems at which my proposal is aimed. Many questions remain unanswered. How much avoidable post-divorce litigation and other rentseeking outside the courtroom revolve around alimony and property division? How much do the current rules contribute to the impression of unfairness? How much misdirected marital behavior is caused by the present set of incentives? This paper only raises those issues for subsequent research.

There are two key questions: (1) What incentives should surround a couple during marriage? and (2) What is a fair and functional division of the couple's assets and responsibilities upon divorce? To these questions there are no easy answers. That is obvious. After a little reflection, it is also plain that there is no set of right answers that can be applied to everyone. The consequences lying ahead at divorce may influence the marital lifestyle. Those consequences, therefore, should be a matter for the parties to contemplate and determine. The fairness of any division of assets and future income at divorce turns on the spouses' reasonable expectations at and after marriage.

To be sure, society has an interest in the incentives and outcomes. But the vast bulk of that interest is the welfare of the family members going through the divorce. We must protect the children of dividing families, assuming their well-being, the interests of the divorcing couple and the interests of society largely coincide. For that reason, and within the limits suggested in this Article, I believe the questions should be answered by those who stand to gain or lose most from the answers, the marital partners. Haltingly, states have moved toward allowing couples to make those decisions in premarital agreements. The legal option, however, is not yet a practical one. The costs of raising the issue usually outweigh the benefits to the parties. Only the rare person can say, on

the eve of marriage, "Honey, let's plan for our divorce." The state is in a position to help. The law could make it much easier for couples to plan by forcing them to do so. It is time to think about giving Laura and Alison, and Christopher too, a realistic opportunity to structure their marriages so as to meet their own needs and aspirations.

APPENDIX

SAMPLE FORM REGARDING INCOME SHARING AFTER DIVORCE

It is possible that you will get divorced. In that unfortunate event, the state wants to divide your property and order alimony in accordance with what you think is fair. So that we can do what you think is fair, you must choose one option below before the state will issue you a marriage license. The option you choose is legally binding. You both must choose the same option. Choose carefully.

In the event of our divorce,

1: I promise that I will not ask for support even if I earn much less than my spouse does.

2: I promise that I will support my spouse by giving her or him 25% of my income. I understand that she or he will also share 25% with me. This sharing of incomes will continue while we both are alive and whoever earns less has not remarried or started cohabitation with someone else.

3: I promise that I will support my spouse to the extent that she or he has made career sacrifices during the marriage. This sharing of incomes will continue while we both are alive and whoever earns less has not remarried or started cohabitation with someone else.

4: If I earn less than my spouse and I am at fault, I promise that I will not seek alimony. If I earn more and I am at fault, I promise to support my spouse by giving her or him 50% of my income. I understand that she or he will also share 50% with me. If neither of us is at fault or both of us are at fault, I promise that I will support my spouse by giving her or him 25% of my income. I understand that she or he will also share 25% with me. This sharing of incomes will continue while we both are alive and whoever earns less has not remarried or started cohabitation with someone else. Fault includes: abandonment, physical abuse, infidelity, drug and alcohol addiction, and petitioning a court for divorce when the other party has not committed fault.

5: If I earn less than my spouse and I am at fault, I promise that I will

not seek alimony. If I earn more and I am at fault, I promise to support my spouse to the level of our standard of living during the marriage. If neither of us is at fault or both of us are at fault, I promise that I will support my spouse by giving her or him 25% of my income. I understand that she or he will also share 25% with me. This sharing of incomes will continue while we both are alive and whoever earns less has not remarried or started cohabitation with someone else. Fault includes: abandonment, physical abuse, infidelity, drug and alcohol addiction, and petitioning a court for divorce when the other party has not committed fault.

6: As long as we have no children and are both healthy, option number 1 above shall apply. Once we have children or one of us becomes unable to work, option number 4 above shall apply.

7: I promise that I will support my spouse by giving her or him 1% of my income for each year we are married. I understand that she or he will also share the same percentage with me. This sharing of incomes will continue while we both are alive and whoever earns less has not remarried or started cohabitation with someone else.

8: We have written our own complementary promises, which are attached.

[The following option might be included on the form:]

9: I promise to do whatever the judge thinks is appropriate considering our circumstances.

Notice! No matter which option you have chosen, the judge will have the power to award alimony from the higher-earning spouse to the lower to keep the lower earning spouse off welfare. The judge will also have the power to order you to pay child support.

If your religion prohibits you from making a choice among the options above, you may be excused from the requirement.