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## Contractual Ordering of Marriage: A New Model for State Policy

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# Contractual Ordering of Marriage: A New Model for State Policy

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Marriage has undergone tremendous change in recent decades. Even if reality has always been diffuse, contradictory, and complex, until a generation ago there was a social consensus as to what marriage meant. Marriage was permanent and monogamous; children were automatic, essential, and central; husbands earned money and made decisions; wives stayed home taking care of house, children, and husband. The legal system reinforced the social norms for marriage.

Now the clarity and unity of the domestic picture is gone. Only a small percentage of American families still have all the characteristics associated with the traditional nuclear family ideal. In place of a single socially approved ideal we have compelling demands for autonomy and privacy, and multiple models of intimacy: single parents, working wives, house husbands, homosexual couples, living-together arrangements without marriage, serial marriage, stepchildren. The changes are legion, and their message is clear: the destruction of traditional marriage as the sole model for adult intimacy is irreversible.

The obsolescence of the old marriage model moved public sentiment toward a drastically different view of appropriate marriage law. Where before, society and the law had institutionalized a single mold for marriage, demands are increasingly heard for the law and the state to "get out" of marriage and intimacy. However, urging the state and the law to disappear from the whole arena of marriage and intimate relations offers no better solution than the law's outdated model. The demand for tolerance of diversity and for private control over intimate

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relationships is compelling, but needs for social support, recognition, and legitimacy remain.

Whatever the preferences of intimate partners, society and the law retain a stake in intimate relationships. This is true because despite major changes, marriage remains a midlevel institution, balancing between the individual and society. Marriage intersects areas of law and social policy from the rearing of children to taxation to inheritance of property. Then, too, marriage contributes to the stability of the overall social and political fabric. Moreover, although intimate partners want privacy and freedom in their relationships, they often also want the recognition, legitimacy, and support of social processes and institutions. Furthermore, as lawsuits stemming from living-together arrangements demonstrate, the fact that two people reject the structure of marriage, sometimes precisely in order to avoid state and law entanglements, does not mean that the law can be removed from intimate relationships.

In short, the rigidity of the old model of marriage is no longer acceptable, but proposals to remove law from intimacy altogether are also inadequate as a basis for policy. Some new synthesis of private needs and public concerns, of freedom and structure, of flexibility and formality, must emerge to lend dignity and legitimacy to today's diverse forms of intimate commitment.<sup>1</sup> This Article argues that contractual tools and processes can make important contributions to the achievement of those goals.

For many years, the idea of marriage contracting<sup>2</sup> has been a minor theme in American legal and popular discussion. The topic routinely appears in journalistic pieces; an occasional feminist advocates its legalization; student notes comment on cases or particular jurisdictions' treatment of marriage contracts; guides for practitioners surface intermittently.<sup>3</sup> Legislatures consider proposals; courts give limited

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1. Marriage will be used in this Article as the primary and central example of intimate relationships between adults that have some degree of public affirmation, commitment, and longevity. Marriage is culturally and numerically the most significant, though of course not the only type of intimacy which fits that description. The focus of the Article is on the legally married, but much of what it says has implications for other types of intimate relationships as well.

2. The term is used throughout this Article in the modern sense of design of the relationship's expectations and obligations by prospective intimate partners rather than in the older sense of marriages arranged between families of prospective marriage partners.

3. For examples of journalistic pieces, see Neely, *Marriage Contracts for Better or Worse*, JURIS DR., Sept. 1977, at 38; *Top U.S. Arbitrators in Labor Strife Turn to Marriage Wars*, N.Y. Times, Mar. 3, 1977, at 39, col. 5-6 (divorce agreements); *What to Include When Drawing Up a Marriage Contract*, S.F. Chron., Feb. 16, 1979, at 29, col. 1. For examples of feminist commentary, see L. WEITZMAN, *THE MARRIAGE CONTRACT* (1981); Edmiston, *How to Write Your Own Marriage Contract*, MS. MAG., Spring 1972, at 66. For examples of student comments, see Coinment, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROB. 607 (1973); Comment, *Pennsylvania Marital Agreements*, 12 DUQ. L. REV. 286

treatment to the issue.<sup>4</sup> Small, contract-like accretions develop on the body of law regulating marriage and intimacy.<sup>5</sup>

Despite this plentiful discussion, we have not, in any fundamental sense, taken marriage contracting seriously. We have flirted with, edged around, played at the topic. Clearly it has continuing attraction, yet a sense of unreality, of intellectual or polemical gameplaying remains. Why this ambivalence, this sense of validity coupled with continuing resistance? The answer lies deeply embedded in basic values, assumptions, traditions—in a word, ideologies<sup>6</sup>—which have led us to assume that whatever the idea's attractions, the merger of contract and marriage is inappropriate, untenable. It seems a proposal to mix love and law, intimacy and economics, feeling and rationality, soft and hard. The whole notion is counterintuitive, even disturbing.

This Article examines both the ideological ambivalence, and the realities on which it was based. It tests their continuing validity and ultimately rejects them as no longer controlling. The Article recommends instead a bridging of dichotomies that fragment our thought and

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(1973); Comment, *Marital Contracts Which May be Put Asunder*, 13 J. FAM. L. 23 (1973-74); Comment, *An Analysis of the Enforceability of Marital Contracts*, 47 N.C.L. REV. 815 (1969); Comment, *Interspousal Contracts: The Potential for Validation in Massachusetts*, 9 SUFFOLK U.L. REV. 185 (1974). For examples of practitioner guides, see Cathey, *Antenuptial Agreements in Arkansas: A Drafter's Problem*, 24 ARK. L. REV. 275 (1970); Emmanuel, *Property Settlements: Antenuptial, During Marriage, at Termination*, 24 INST. ON FED. TAX'N 281 (1966).

4. For example, in Wisconsin a far-reaching reform of marital property laws has been introduced by a group of legislators under the leadership of Representative Mary Lou Munts. The proposed legislation provides for individual marital agreements which may "alter the economic incidents of the marriage agreement" otherwise imposed by the state, except in certain specified ways. A.B. 1090, § 766.63 (1979). In Connecticut, the Task Force on Revision of Family Law, Permanent Commission on the Status of Women, received an extensive report from the Yale Legislative Service on marital contracts in October 1976. See R. Ihne, *Marital Contract* (Oct. 1976) (Yale Legislative Service publication). A proposal was introduced in the Maryland Legislature to allow three-year term marriages. H.B. No. 633 (1971), quoted in Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 662-63 (1972). The proposal died in committee. In Massachusetts the legislature considered a bill in 1974 to legalize interspousal contracts. H.R. 2200 (1974), quoted in Comment, *Interspousal Contracts: The Potential for Validation in Massachusetts*, 9 SUFFOLK U.L. REV. 185, 186 (1974).

For examples of judicial treatment, see *infra* text accompanying notes 300-04.

5. See *infra* text accompanying notes 279-313.

6. At least one major body of literature about the values and traditions of marriage is not analyzed in this Article: the one represented by various religious sources. Religious traditions have played a central role in the evolution of marriage institutions. Religious understandings of marital obligation have directly contributed to contractual models of marriage as illustrated by the traditional vows of Christian ceremonies, see, e.g., THE BOOK OF COMMON PRAYER AND THE ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH (1979) (Episcopal Church), and the contracts and procedures for marital dispute resolution under Jewish law, see, e.g., 11 ENCYLOPAEDIA JUDAICA 1026-51 (1971). Nevertheless, while fully acknowledging the importance of religious history and concept in marriage, this Article also had to acknowledge limits of scope and expertise. A choice was made to attempt the interrelation of a broad spectrum of social science materials with the central legal materials; thus, religious materials were regrettably omitted.

our lives. In our private, as in our public lives, the fact that not everything can be known, understood, arranged, chosen, does not deny the importance of intention or fairness. Love does not exclude accountability or consequences. Obligation is inextricably interwoven with voluntariness. Intimacy can coexist with planning and choice; indeed today it must.

To be sure, marriage involves deep, often irrational feeling, profound inchoate yearnings. Particularly in its modern form, marriage expresses basic human needs: for community, stability, and connectedness; for intimacy, acceptance, and love. Yet in spite of, and even more profoundly because of, its role in meeting those needs, marriage, both for itself and as a surrogate for varied forms of committed intimacy between adults, must renew its resilience and its potential. It is the conclusion of this Article that legal and social institutions of marriage, as well as contractual tools and processes, have now evolved in ways that make marriage contracting uniquely appropriate to reforming and revitalizing the state's policies of marriage governance.

Part One presents an analytical framework of options available to the state in governing any arena of human interaction, including marriage. It establishes that the state roles appropriate to arenas governed by private contract are nearly opposite to the roles adopted by the state in its traditional regulation of marriage. Part Two then examines a wide range of factual, legal, and theoretical developments that have changed our concept of contractual relations, of the role and processes of the law, and most important, of the social and legal institutions of marriage and intimacy. The discussion documents changes in the factual patterns of marriage and of relationships generally governed by contract and analyzes changes in both marriage law and contract doctrine. The discussion suggests that the way we perceive or theorize about facts or legal doctrines in these fields has markedly altered. Part Two extrapolates from these changes the desirability of a new pattern of intimate relations law in which contractual tools and processes would play a critical role. In part, such a pattern is a matter of recognizing and embracing what exists; in part, it is a matter of making connections between developments not previously perceived to be related; in part, it means moving forward to innovate and problem-solve. And, too, it would mean consciously deciding where to apply contract principles with enthusiasm, where to discard them as inappropriate, and where to tailor them to the special context of marriage.

To assert the potential value of marriage contract is not to claim that the tools of contractual ordering are appropriate to all aspects of marriage or to all marriages. The utility of contractual processes will vary with the personalities and predispositions of the parties to a rela-

tionship. Likewise, for most couples, certain issues will and should elude the rational management suggested by a contract or even a contractual metaphor. The presence of children may create complicating factors, raising issues that lie beyond the scope of this Article.<sup>7</sup> Some agreements will fall outside the competence of legal institutions. Then, too, public policy will sometimes override private preferences, as it does in other domains of contractual ordering. The argument, then, is not that marriage contracting can be all things to all marriages, but only that it should be allowed to be some things to some important dimensions of some relationships.

### *PART ONE*

#### *ALTERNATIVE STRATEGIES OF GOVERNANCE AND THE TRADITIONS OF MARRIAGE REGULATION*

Section I of this Part presents a matrix of options available to the state in governing marriage. It then examines the characteristics of the contractual governance option. Finally, it presents illustrative marriage contracts that are used throughout the Article to evaluate the desirability and feasibility of contractual governance of marriage. Section II uses the analytical framework established in Section I to evaluate the state's traditional scheme of marital governance and analyzes why contract traditionally has been deemed an inappropriate governing tool for marriage.

### *I*

#### *ANALYTICAL FRAMEWORK AND ILLUSTRATIONS*

##### *A. Potential State Roles in Marriage*

In relation to marriage, as to any other arena of human interaction, the state must choose appropriate roles for itself. It must select postures of legal involvement and strategies of governance that are likely to yield desirable results. Broadly speaking, the state may under-

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7. The analytic framework of this Article is developed and applied only to adult spousal relationships. Once plans and decisions about marriage were virtually synonymous with plans about children. Today more marriages never involve children, either because none are wanted, because the marriage terminates before any are born, or because it takes place between parents of children now matured. Although these facts somewhat reduce the centrality and the coextensiveness of issues about children in the analysis of marriage policy, children remain an undeniably central factor in most marriages. However, because the issues and concerns about children are significantly divergent from those affecting spouses alone, those issues are excluded from this discussion. State policy toward adult relationships is complex and confused enough to warrant separate investigation. Furthermore, it is prior in concept and fact even if no more important in the formulation of policy. Although no separation of the two issues is permanently tenable, discussion of the adult relationship is the only one this Article undertakes.



take two functions: channeling of behavior and resolution of disputes.<sup>8</sup> If the state chooses a channeling role, the law may, through judicial or legislative institutions, regulate conduct in substantive ways. As to marriage, for example, it may define the rights and obligations of spouses within marriage. If it adopts the dispute resolving role, legal institutions would authoritatively interpret and enforce obligations, evaluate claims, and select remedies. Adopting such a role toward marriage would mean making legal institutions available for authoritative resolution of disputes between spouses.

Thus, in relation to marriage, as to other arenas of conduct, the state must decide whether to undertake substantive behavior guidance and whether to undertake enforcement and dispute resolution. Four combinations of the two role choices are possible:

*Option One:* The state might prescribe the substance of the relationship and also act as an adjudicator of disputes arising out of those substantive directives.

*Option Two:* The state might establish the substantive rules of marriage, but refuse any enforcement or dispute resolution between spouses in regard to those rules.

*Option Three:* The state could leave most substantive marital rights and obligations to be defined privately, but make the legal system available to resolve disputes arising under the privately created "legislation."

*Option Four:* The state might minimize both roles, refusing to prescribe conduct within marriage or to resolve marital disputes.

Of course, a conceptually pure choice among the options is neither possible nor desirable. For one thing, each of the roles offers a continuum of options for state involvement, rather than a simple yes or no choice, so that far more than four combinations of the two roles are possible. Then, too, marriage itself may be analyzed either as a unit or as a series of discrete stages. An otherwise confusing array of state policies toward marriage may be better understood if the entry, duration, and exit stages of marriage are viewed separately, for the state can choose different combinations of roles for each marital stage.<sup>9</sup> While this Article concentrates on the duration stage, discussion of state policies toward entry and exit are sometimes used to illumine the duration stage choices. Finally, although segregation of the rulemaking and dispute resolution roles is analytically useful, it should not obscure the fact that the roles are entwined in both their definitions and applications. Nevertheless, analysis of state policy as involving selection

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8. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 637 (1976).

9. For example, state policies governing divorce are discussed *infra* text accompanying notes 238-51.

among the four options in the matrix can reveal pivotal policy preferences in the governance of marriage.

The matrix of options provides a general framework for analyzing state marital policy. The principal concern of this Article, however, is more specific: Should the state allow private contract to govern marriage? Contract is a legal device for ordering particular arenas of conduct, a tool of governance. It comprises a set of answers to the question: What roles ought the state to adopt? As we shall see, allowing contractual governance of an arena of interaction amounts to a choice of Option Three from the matrix.<sup>10</sup> Thus, when this Article asks whether contractual ordering of marriage would be desirable, it is asking whether it would be desirable for the state to choose Option Three in regulating marriage. More specifically, would it be desirable for the state to decline to prescribe marital conduct and values, leaving those matters to private choice, while at the same time accepting the role of enforcer and dispute resolver regarding obligations privately chosen? To complete our analytical framework for that question, we must more fully examine the characteristics of contractual ordering as a system of governance.

### B. *Implications of Contractual Ordering*

The first part of this Section assesses the allocation of public and private roles in conduct governance and dispute resolution that contractual ordering implies. The following part discusses the mechanisms that implement contractual ordering and the values that justify it.

#### 1. *Choices About State Roles Implied by Contractual Ordering*

The essence of classic contract is a paradox: the use of public resources and legal force to effect voluntary private choices about value and risk. Contract law is a duality—a permanent tension between volition, autonomy, choice, and consent on the one hand, and control, bindingness, obligation, and force on the other.<sup>11</sup> As one early theorist of contract observed, contract is the “meeting place of the ideas of agreement and obligation.”<sup>12</sup> The Second Restatement’s definition of a contract reflects this mixture of freedom and obligation, of public and private roles: “A contract is a promise or a set of promises for the

10. See *infra* text accompanying notes 11-24.

11. See W. MILLER, LECTURES ON THE PHILOSOPHY OF THE LAW 216 (1884); Fuller, *Human Interaction and the Law*, in THE RULE OF LAW 171, 205 (R. Wolff ed. 1971) [hereinafter cited as THE RULE OF LAW]; Kessler & Sharp, *Contract as a Principle of Order*, in SOCIETY AND THE LEGAL ORDER 155 (R. Schwartz & J. Skolnick eds. 1970) [hereinafter cited as SOCIETY AND THE LEGAL ORDER]; Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 809-10 (1974).

12. W. WATT, THE THEORY OF CONTRACT IN ITS SOCIAL LIGHT 2 (1897), quoted in Kessler & Sharp, *supra* note 11, at 156.

breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."<sup>13</sup> Private parties make promises to which the state grants the status of legal duties.

Thus, through the mechanism of contract the freedom to pursue individualization and diversity that characterizes private ordering is joined with at least two coercive elements arising from the potential for enforcement. One is the binding nature of obligations over time: yesterday's legally binding private choice may override today's contrary private choice. The other is the element of intrusiveness: the private agreement is enforced by an outsider. The court can become the arbiter of the meaning, adequacy, and legitimacy of earlier private choices now in dispute. Here, a further paradox arises. Bindingness and public intrusion clearly narrow private freedom, but they also expand it by reinforcing the importance of the privately made decisions that are the subject of enforcement.<sup>14</sup>

When social interaction is to be governed by contract, then, the state adopts Option Three from our matrix: substantive decisions about the conduct of the relationship are made by the parties involved, but the law will recognize and enforce the obligations so incurred or adjudicate disputes between the parties concerning them.

Even classical contract theory, however, was not a pure Option Three model. Two qualifications must be noted. First, although classical contract theory paid much lip service to "freedom of contract,"<sup>15</sup> substantive limits on private ordering have always existed. For example, the law never enforced agreements that contravened legality<sup>16</sup> or offended general public policy.<sup>17</sup> As we shall see, public policy limitations on contractual freedom have expanded dramatically in recent decades,<sup>18</sup> but the seeds of those limitations were present even in the

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13. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

14. I. MACNEIL, *CONTRACTS, EXCHANGE TRANSACTIONS AND RELATIONS* 367-69 (2d ed. 1978).

15. *E.g.*, Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 373 (1921) ("If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice.") (quoting *Printing and Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875)).

16. *See, e.g.*, *Pearson v. Duncan & Son*, 198 Ala. 25, 73 So. 406 (1916) (restraint of trade); *Armstrong v. Gresham*, 73 Colo. 13, 213 P. 114 (1923) (agreement to defraud a mine purchaser); *Gilbert v. Berkheiser*, 157 Minn. 491, 196 N.W. 653 (1924) (wagering); *Salvin v. Myles Realty Co.*, 227 N.Y. 51, 124 N.E. 94 (1919) (usurious loan) (dictum). For a general discussion of illegality and contracts, see 6A A. CORBIN, *CONTRACTS* §§ 1373-1375 (1962).

17. *E.g.*, *Harris v. Watson*, 170 Eng. Rep. 94 (K.B. 1791) ("If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost. This rule was founded on a principle of policy . . . ."); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); RESTATEMENT (SECOND) OF CONTRACTS §§ 178-96 (1981).

18. *See infra* text accompanying notes 371-76.

heyday of freedom of contract.

Second, judicial remedies for broken contracts often yield less than complete enforcement of contractual promises. For one thing, many injured parties will never seek legal redress even when it is available. When they do, the general remedial rule protects the "expectations" of disappointed parties by trying to place them where they would have been had their contracts been performed.<sup>19</sup> Nonetheless, judicial protection of that expectation interest has never been identical to actual performance of the promise. The interests usually protected by contract law are economic,<sup>20</sup> and the normal contract remedy is money damages.<sup>21</sup> Various subjective or nonmonetary injuries, such as sentimental value, time, and trouble will not be recognized by a court<sup>22</sup> except indirectly in situations where the criteria for specific performance are met.<sup>23</sup> Moreover, in both the rare case where specific performance is granted and the more typical situation where monetary damages are awarded, the remedy comes late, after the monetary and psychic costs of enforcement have been paid. Finally, even those damages that are theoretically compensable in monetary terms may be curtailed by dam-

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19. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981). See generally Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-1937).

20. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 14-4 (2d ed. 1977); 5 A. CORBIN, *supra* note 16, § 1076, at 426.

21. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to §§ 357-369, Topic 3 at 162 (1981). This assertion rests on the long tradition that equitable relief such as specific performance is available only if the legal remedy (normally damages) is inadequate. D. DOBBS, *LAW OF REMEDIES* § 2.5, at 57 (1973).

22. 5 A. CORBIN, *supra* note 16, § 1004, at 49 ("Sentimental value is something that cannot be considered in the law of contracts . . . [N]o price will be put upon mere feelings of pleasure or affection or feelings of sorrow and distress."); *id.* § 1076, at 426 ("intervening vexation is disregarded"). In part these exclusions result from rules requiring a reasonable degree of certainty, RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981), or foreseeability, *id.* § 351, in order to recover damages. In part they reflect the desire to restrict contract damages to those that will compensate but not punish. *Id.* §§ 355-366, and Introductory Note to Chapter 16. In part, they reflect concerns about institutional competence. They may also reveal value judgments about triviality of harm or administrability of remedy in the settings in which contract law has developed, *i.e.*, commercial/economic transactions. See Fuller & Perdue (pt. 1), *supra* note 19, at 63-66, for their view of the relative need for differing degrees of enforcement in different types of transactions, and *id.* (pt. 2) at 396-401, for their view of the types of damages appropriate to bargains that are noncommercial in nature or setting.

23. Specific performance may be granted when money damages are determined to be an inadequate remedy. The factors to be considered include: the difficulty of proving damages with reasonable certainty; the insufficiency of money damages to obtain a duplicate or equivalent of the promised performance either because the subject of the contract is unique or because of difficulty, delay or inconvenience; the likelihood that an award of damages could not be collected; the fact that injury might be recurring; the probability that full compensation cannot be had without multiple litigation. See RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981); 5A A. CORBIN, *supra* note 16, § 1142. For recent discussions of the rationale for specific performance, see Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

age limiting rules.<sup>24</sup> The overall result is that public enforcement of private bargains—even concrete and monetizable ones—is partial at best. The more diffuse and nonmonetizable the injury, the less complete the remedy a court will provide.

Even given the qualifications just described, however, the choice of contractual ordering embodies a preference for private control of conduct and obligation, with access to legal recognition and public enforcement available to parties who desire it.

## 2. *Rational Management: The Mechanisms and Values of Contract*

A choice of contractual ordering means that the state has decided to defer to and enforce private choices about relationships. More subtly, but just as importantly, an adoption of contractual ordering implies that the relationships in question are compatible with the rational management assumed by contractual processes. This subsection discusses the mechanisms by which contractual private ordering is implemented and by which public enforcement of privately created obligations is justified.<sup>25</sup>

First, it should be acknowledged that the contract definitions examined in this subsection developed largely in the economic and commercial context, the archetypal arena of private contract. However, while economic activity is the core subject matter of classic contract law, the field of contract has never been confined to economic exchange, other than as such limits inhere in the remedies and institutional competence of courts. The utility of contractual ordering as a strategy of governance extends to other areas of behavior that, like commercial life, have come to be organized by principles of private, consensual, rational “exchange rather than [by] tradition or command.”<sup>26</sup> Thus, although economic relationships have formed the basis for contractual definitions of rational management, this fact should not be allowed to obscure the potentially broader utility of contract’s

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24. The principal damage limiting devices in contract law involve: (a) foreseeability, *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1845); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981); (b) certainty, *id.* § 352; and (c) avoidable consequences, *id.* § 350.

25. The use of the words “implement” and “justify” suggests the dual role that these concerns about rational management have in contract law. In one important sense they are intellectual antecedents of the decision to use contractual ordering. They express value preferences as to what kind of behavior *deserves* to be governed by publicly enforceable private choice. In another sense these rational management concerns are merely expressions of practical necessity. They express preferences about what kind of conduct is most *easily* subjected to governance through publicly enforceable private ordering. These two sources of the rational management concern are so entwined it seems fruitless to attempt to unravel them; thus, the frequent conjunction of “justify and implement” or “mechanism and value” in this discussion.

26. Miller, *The Constitution and the Voluntary Association: Some Notes Toward a Theory*, in NOMOS XI VOLUNTARY ASSOCIATIONS 233, 238 (J. Peumock & J. Chapman eds. 1969).

traditions, tools, and policy choices. Defined broadly, the rational management assumed in contractual processes involves an exchange of promises or performances by parties who have planned and consented to a relationship they perceive to be mutually beneficial.

The concept of bargain or exchange is the hub of the contract wheel, the transaction type that most clearly justifies a state choice to defer to private ordering while giving access to public enforcement.<sup>27</sup> As contract law evolved, bargain promises were judged most likely to have both sufficient deliberateness to evidence the parties' reasoned autonomy, thereby justifying private control, and also sufficient social utility to justify expending social resources in enforcement or settlement of disputes.<sup>28</sup> Therefore, courts look to whether a bargain genuinely does exist—that promises or acts are bargained for as the price of reciprocal promises or acts—to assure that these criteria are satisfied.

The concept of bargain assumes the existence of two parties having certain characteristics which flow from their role in the bargain. They must have the capacity to plan and make decisions in their own interest.<sup>29</sup> They must approach one another on a plane of equality—if not in any literal sense, then at least in the generic sense of their equal right to accept or reject the bargain. At the beginning at least, these parties must see each other as potential allies, reciprocal rather than adversarial in relation to one another. Opposed interests are always inchoate in the relationship. Not only may disputes arise, there is also some sense in which one's loss is the other's gain. Nonetheless, the potential alliance of interest is most important, for the basis for ex-

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27. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) states: "Except as stated in Subsection (2) (encompassing formal contracts, relied on promises and other special cases covered in § 82-94) the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Section 71(1) states: "(1) To constitute consideration, a performance or a return promise must be bargained for." In their classic article, *The Reliance Interest in Contract Damages* (pt. 2), *supra* note 19, at 373, Fuller and Perdue state, in summarizing the first installment of their article, that "the complex of policies which dictates a judicial protection of the expectation interest is strongest in the case of a promise which forms part of a bargain or 'deal'. . . ."

Certain types of promises other than bargain promises are also enforced in contract-type actions. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (relied upon donative promises). For discussion of the problem of donative promises, see Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979). But bargain is the core transaction type governed by contract law. RESTATEMENT (SECOND) OF CONTRACTS § 17 comment b (1981). This Article is mainly concerned with bargain promises and will thus focus on that type of promise.

28. *See* Fuller & Perdue, *supra* note 19, at 61-71 (discussing differing types and degrees of social utility in differing contract enforcement settings). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 72 comment b (1981); Eisenberg, *supra* note 27, at 3-4.

29. RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16 (1981). Thus, children or the mentally infirm are normally excluded as lacking capacity to contract. J. CALAMARI & J. PERILLO, *supra* note 20, § 8-1, at 230. *See Orlere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969), for a relatively thorough effort by the court to update the standard for contractual competence in the context of mental illness.

change or bargain—which is exchange projected into the future—is the hope for what might be called a “win-win” transaction rather than a “win-lose” one.<sup>30</sup>

Once contract law had developed a willingness to enforce not only half-completed exchanges,<sup>31</sup> but also wholly executory promiscs whose future performance had been bargained for, another dimension of bargain emerged: bargain institutionalizes present planning about future needs.<sup>32</sup> Bargain is an effort by individuals to make satisfying present decisions about projected risks and benefits. The benefits of efforts to structure an uncertain future, while perhaps most obvious in modern day credit economics, are not confined to impersonal commercial transactions. Contract planning in any arena of interaction allows the “adaption of means to ends [for those who do] not want to adhere passively to the compulsory uniformity of behavior imposed by tradition and custom. Thus [contract’s] emergence has greatly increased the area and the potentialities of rational conduct.”<sup>33</sup>

The quality of intentional decision appears not only in descriptions of party capacity and in acknowledgements of the planning function of bargain, but also in concepts of consent. The consent element of contractual relations highlights the theme of choice (with its implication of available alternatives) and the theme of voluntariness (since one is free to choose no relationship at all). Consent serves as a screening device to ensure that only qualified agreements gain access to contractual ordering. Courts examine the contractual process to ensure that consent is genuine before privately chosen obligations are legitimized through court enforcement. The process leading to consent must be fair, free of fraud, duress, and unconscionable elimination of meaningful choice. The basic factual assumptions on which the bargain rests must be as the parties understood them. Additionally, the obligations assumed must be sufficiently clear, explicit, and definite for the consent to have substance and for a remedy to be ascertainable in case of breach.

In sum, elements of bargain, reciprocity, party capacity, equality, opposition and alliance of interest, planning, intention, consent, explic-

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30. For discussion of game theory, see A. RAPPAPORT, *TWO PERSON GAME THEORY* (1966); McGinnies, *Social Behavior: A Functional Analysis*, in H. EDWARDS & J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS NEGOTIATOR* 28-34, 39-43 (1977); Morgenstern & Shubik, *Game Theory*, in 6 *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCE* 62 (1968).

31. See L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 40-47 (4th ed. 1981); Fuller & Perdue, *supra* note 19, at 56, 59-66, 67-69; Eisenberg, *supra* note 27, at 4-7. For a discussion of contract as a projection of exchange into the future, see Macneil, *supra* note 11, at 712-20.

32. For insightful discussions of the interaction of promissory behavior and the time dimension involved with present planning for future exchange, see Macneil, *supra* note 11, at 800-04; Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974).

33. Kessler & Sharp, *supra* note 11, at 156.

itness, and procedural fairness all are woven into the central pattern of legal regulation described in Option Three of our matrix. The core of Option Three is deference to private decision about substance, backed by the potential for public enforcement and dispute resolution. The themes just examined describe the safeguarding values and implementing mechanisms of the classical contract model.

Thus, the state should allow contractual ordering if, within boundaries established by public policy, it desires to yield to private decision-making the "legislative content" of the relationship. Value choices would then be subjectively made, risks and obligations voluntarily assumed, and rights and goals individually selected. Once those individual choices were made in ways that satisfied the safeguarding criteria described above, a state choice to allow contractual ordering would mean that public enforcement within traditional limits would be accessible to a party aggrieved by nonperformance of privately determined obligations.

### *C. Illustrations*

The preceding discussion established the analytical framework that will be used throughout this Article to evaluate whether contractual ordering would be appropriate or desirable in marriage. Before turning to that task, however, this section provides examples of issues about which married couples might wish to contract were the state willing to recognize and enforce their bargains. It also suggests one area in which the state might wish to encourage or require greater private contract-like choice instead of simply tolerating it. Discussion of these examples here and throughout the text should help to clarify the implications of the changes in law and attitude that this Article recommends.

In terms of the substantive content of the agreements, a number of the examples involve economic matters. Some establish agreements concerning relationship obligations; others establish decisionmaking procedures; still others might best be labeled "definitional" or "structural."<sup>34</sup>

The economic examples present the clearest case for contractual management. Those in other categories are more debatable. Why this is so may be more readily understood by reference to factors drawn from the analytical framework above.

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34. Another category of agreements might involve terms that affect third parties, notably children. Such agreements cover important matters about which spouses might well wish to contract. However, they also raise a different complex of policy considerations than matters whose effects fall mainly on adult parties to the agreement. As in the rest of this Article, these important but divergent matters concerning children will not be covered in this discussion.



As we have seen, contractual ordering assumes that obligations should be derived from consensual private agreement and be capable of legal enforcement. Further, the agreements and the conduct they govern should be capable of rational management and planning. Analyzed by reference to these criteria, marital contracts could theoretically fall into three rough categories. The first would include those examples where all the criteria are met, making legal obligations resting on private decisions about conduct both possible and desirable. The second category would include examples where full application of the contract paradigm may be doubtful, but where a contractual metaphor may be useful. Such a contractual metaphor would be appropriate where, although some obstacles remain, substantially greater degrees of private ordering, rational management, and legal reinforcement of norms and obligations seem both possible and desirable. The final category would encompass those examples where even an attenuated, partial, or metaphorical application of contractual ordering seems inappropriate.

Different individuals would categorize particular examples differently, and agreement on categorization may never be possible. However, only as we open the legal door to marriage contracting of the first category, and through it to the second category as well, will individual choices and institutional experience increase our understanding to the point where particular types of agreements might be assigned with confidence to appropriate categories.

### *1. Income Production and Support*

Instead of the state decreeing standard, but unenforceable obligations for all marriages, spouses might wish to negotiate enforceable plans to meet their own needs in the area of income production and support. Enforceability is critical, because serious plans and expectations may rest on such an agreement. Without enforceable contracts, such expectations could be defeated either by a clash with public policy or by one spouse's refusal to perform the agreement when it had no legal recognition.

For example, Mary has agreed to work two jobs to support herself and John and to pay his law school tuition in exchange for his agreement to pay her tuition and assume all earning responsibilities for the couple when she returns to school to earn a doctoral degree. Similar agreements might be undertaken by couples for a variety of reasons: to facilitate childrearing, to free time for avocational pursuits, or to allow startup time for a new business venture.

### *2. Domestic Services*

Because they believe running a home is worthwhile work and because, in their view, our culture attaches unique respect to work that is

monetarily rewarded, John and Mary have agreed that he will pay her a salary for her work in the home. As between the two dominant methods of valuing such work—replacement cost or opportunity cost—John and Mary have decided replacement cost best represents the value of Mary's work. Their agreement provides for a basic salary, a paid vacation (when a substitute housekeeper will be hired), social security coverage, and funds for an Individual Retirement Account for Mary. Both John and Mary believe that Mary should have the dignity and the security that such an arrangement confers. For example, she should have her own Social Security account rather than be relegated to the role of dependent spouse. Such arrangements recognize the value of her work and provide her a measure of independence, pride, and autonomy in allocating funds she has earned. John and Mary know that a wife's earnings help equalize power within a relationship, an outcome they both seek. Since they live in a common law property state, they also wish to use this arrangement to assure greater equity than the law might provide should their marriage be terminated by divorce or John's early death.<sup>35</sup>

### 3. *Marital Property*

In an exceptional area like marital property where private contracts are already tolerated, the state might move even further toward contractual ordering by actively encouraging or even requiring private agreement concerning property rights and obligations. Such a system might be implemented at the time the marriage license is sought. For example, John and Mary had not thought much about property until the booklet they received when they applied for a marriage license triggered a serious discussion between them. They also reviewed the issues with friends and with John's uncle, a lawyer. Finally, they chose a common law title system for their prospective holdings, feeling it would best implement their decision that John would be the earner and financial decisionmaker and that Mary would rely on him to take care of her. They filed a notice of their choice with the state's recorder of documents and received their marriage license.

### 4. *Open Marriage*

John and Mary believe that marriage should not mean exclusivity or ownership of the other person. Each wishes to retain full rights to

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35. If Mary received a salary of her own, she would be able to acquire property in her own name which would be hers by right at the time of divorce or at John's death. If she were a nonearning homemaker, her rights at the time of divorce or John's death would depend on legislative policy and on the way in which title to property purchased with "John's" earnings was recorded. See Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1082 (1972).

pursue friendships outside the marriage, including sexual relations. To give substance to their desire for an open marriage, John and Mary have specified several conditions to govern this aspect of their relationship. Their written agreement states that each is free to be away from home two evenings a week and one weekend a month without the other. Each agrees to inform the other when a sexual affair has begun. Both parties have promised not to greet such news with recriminations, anger, or jealousy. They agree that if they should ever seek a divorce, neither will file under the adultery ground that still exists in their state, because they reject the concept of adultery and the punitive divorce actions it makes possible.

### 5. *Domicile*

John and Mary are intensely committed to their careers. They recognize that one of the biggest problems for their relationship will be making mutually acceptable decisions about where they will live. Their hope is that both can be enthusiastic and collaborative in any decision to relocate. Realizing that this may not always be possible, they have agreed to a set of rules to govern residence for purposes of job changes. If mutual agreement is not possible, then during the first two years of marriage Mary may decide where they live, the next two years John may decide, and so forth. If one of the parties exercises the option to insist on a move, that person must give the other party six months notice. That other party must make immediate good faith efforts to locate an acceptable job in the new location. If the efforts fail, the party not choosing to move may stay in the old location and commute at least once a month to the new location for up to two years. During this period, the parties will be considered as having independent domiciles in their respective locations. If no job is found by the end of two years, the parties agree to search for new jobs in a location acceptable to both.

### 6. *Traditional Vows*

John and Mary decide they wish to embody the traditional religious vows in their private marital contract. They draw up an agreement specifying that each has the obligation "to love, honor, and obey" the other. They also wish to reinforce the marital obligations specified by the law of their state, California. Thus they add to their contract the obligations of "respect, fidelity and support."<sup>36</sup>

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36. See, e.g., CAL. CIV. CODE § 5100 (West 1970).

### 7. *Dispute Resolution*

Recognizing that marriage is complex, multifaceted, and long term, John and Mary feel that they should plan procedures rather than specify performance obligations. John and Mary know that they are very different people, with divergent goals and preferences. They also admit that both are competitive, strong willed, and argumentative. Yet each has considerable respect for fairness and principle. They recognize that with their personalities and career commitments, they are likely to confront decisions and disputes that they can only dimly foresee. Nonetheless, both are committed to making their relationship work. They have decided that their relationship should include a method of problem solving to which each is committed regardless of differences about particular issues. Their marriage contract therefore provides for binding arbitration of any major dispute that they are unable to resolve themselves. The agreement requires both to cooperate in a specified arbitration procedure, utilizing the rules of the American Arbitration Association and a respected friend as arbitrator, before either files for divorce. The arbitrator's decision would govern the terms of any divorce.

### 8. *Homosexual Marriage*

John and James wish to marry each other. Like many homosexuals they want the dignity, commitment, protected status, and benefits that they believe accrue to marriage. Thus, they enter an agreement to marry.

### 9. *Duration*

John and Mary wish to commit themselves to a two-year marriage as the first stage of what may become a long term relationship. Like many of their contemporaries, they both seek and fear commitment. They wish to make a commitment that to them is meaningful, public, and formal, but not one that stretches indefinitely into a future they cannot predict. They do not want the stigma of promising permanence and then divorcing if they "fail." Neither do they want simply to live together without marriage. They want family ties, but they are realistic about the constant bombardment of choices that makes it difficult to say anything is forever. Out of their conflicting needs has emerged an agreement to a two-year trial marriage, which they might extend or allow to expire when the time comes. John and Mary have agreed on the conditions that will govern the expiration of their marriage if they do not elect to extend their commitment beyond its original term. They have also agreed on liquidated damage remedies if either should seek a divorce before the end of the term specified by their contract.

## II

## TRADITIONAL LEGAL REGULATION OF MARRIAGE

Section I presented a matrix of four options available to the state for structuring its relationship to marriage. It also analyzed the implications for public and private control over conduct and dispute resolution that stem from a choice of Option Three, which is the option most like the state's role in classic contract models. The principal task of Section II is to determine whether marriage traditionally has been defined and regulated by the state in ways compatible with the core themes of the classic contract model.

At least semantically, marriage and contract share common ground. Contract terminology appears often in conjunction with marriage. A number of states have statutes similar to California's Civil Code section 4100: "Marriage is a personal relation arising out of a civil contract . . . ."<sup>37</sup> Case law, too, commonly refers to the marriage relation as a contract.<sup>38</sup> Blackstone speaks of marriage as a civil contract that "the law treats . . . as it does all other contracts."<sup>39</sup>

To some extent this contract terminology may be a carryover from the era when marriage was a major occasion for bargain and exchange between the families of the bride and groom.<sup>40</sup> Such language may also reflect certain bargaining practices concerning marriage that are represented in the legal system even today. Actions for breach of promise,<sup>41</sup> actions to enforce promises about whether and when a per-

37. CAL. CIV. CODE § 4100 (West Supp. 1981). Other states that have such language in their codes include GA. CODE ANN. § 53-101 (1974); N.Y. DOM. REL. LAW § 10 (McKinney 1977); S.D. CODIFIED LAWS ANN. § 25-1-1 (1977); WASH. REV. CODE § 26.04.010 (Supp. 1981). The "civil contract" language of these statutes was probably historically intended to emphasize the civil as opposed to the religious nature of the legal institution of marriage. H. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 2.2, at 35 (1968). Such an explanation bears on the use of the word "civil" but does little to illuminate the selection of the concept "contract" to describe the marriage relationship.

38. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888) ("[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract . . . , it is something more than a mere contract."); *Fearon v. Treanor*, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936) ("Marriage is more than a personal relation between a man and a woman. It is a status founded on contract and established by law."), *appeal dismissed*, 301 U.S. 667 (1937); *Williams v. Williams*, 543 P.2d 1401, 1403-04 (Okla. 1975), *appeal dismissed*, 426 U.S. 901 (1976). The court in *Bove v. Pinciotti*, 46 Pa. D. & C. 159, 161 (C.P. 1942), stated that "marriage is not only a contract but a status and a kind of fealty to the state as well." A number of cases used this kind of language, which Professors Foote, Levy and Sander describe as being an "apparently self-contradictory assertion that marriage is both a contract and a status." C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 563 (2d ed. 1976).

39. 1 W. BLACKSTONE, *COMMENTARIES* \* 433.

40. W. GOODE, *THE FAMILY* 32-37 (1964); M. SAHLINS, *TRIBESMAN* 56-63 (1968).

41. Although a number of states abolished these actions, many others have not. H. CLARK, *supra* note 37, § 1.5. For discussion of the entire topic, see *id.* §§ 1.1 to 1.7. For recent commentary, see Note, *Breach of Promise to Marry, Connecticut Heartbalm Statute—Piccininni v. Hajus*, 13 CONN. L. REV. 595 (1981).

son would marry,<sup>42</sup> and special requirements for a writing in the Statute of Frauds for contracts involving marriage as consideration<sup>43</sup> reveal a legal system willing to enforce certain private agreements about whom, when, and whether to marry.

Today, these uses of contract in marriage law are relatively rare,<sup>44</sup> and the contract expressions still appearing in opinions and statutes are little more than vestiges of an earlier day. Today's proposals for marriage contracting speak of quite a different phenomenon, one that would involve bargaining directly between spouses or prospective spouses about the nature of the relationship itself. When traditional legal marriage is examined in light of this more typical concept of contract, semantics yield to reality. As the following discussion illustrates, marriage has not been, in any usual sense of the word, a contract. Certainly the state has not adopted Option Three, the classic contract model, in its dealings with marriage. In fact, in its traditional regulation of marriage, the state has typically selected Option Two (high conduct control and low dispute resolution), the obverse of Option Three (low conduct control and high dispute resolution).

#### *A. Control Over Substantive Marital Terms*

A key characteristic of the Option Three contract model is that substantive decisions about the terms of the relationship are left to the parties involved. This section applies contract concepts to marriage to determine to what extent the state has been willing to defer to private decisionmaking in the marital relationship.

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42. See, e.g., *Winters v. Miller*, 23 Ohio Misc. 73, 261 N.E.2d 205 (1970); *Smith v. Nyburg*, 136 Kan. 572, 16 P.2d 493 (1932). See also RESTATEMENT (SECOND) OF CONTRACTS § 189 (1981); 6 A. CORBIN, *supra* note 16, § 1474.

43. RESTATEMENT (SECOND) OF CONTRACTS § 124 (1981); 2 A. CORBIN, *supra* note 16, §§ 460-66.

44. Today breach of promise actions have become "an anachronism," H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 13 (2d ed. 1974) [hereinafter cited as H. CLARK, CASES]. Actions on promises restraining marriage are also rather unusual, except perhaps in the context of promises of support until remarriage. RESTATEMENT (SECOND) OF CONTRACTS § 189 (1981); 6 A. CORBIN, *supra* note 16, § 1474 n.7. The Statute of Frauds requirement survives, RESTATEMENT (SECOND) OF CONTRACTS § 124 (1981), especially as applicable to antenuptial agreements governing property rights, *id.* § 124 comment b; 2 A. CORBIN, *supra* note 16, § 462. That the Statute of Frauds provision does not surface more frequently is attributable to the fact that courts have not applied it to simple promises between a man and woman to marry each other, but only to promises involving marriage settlements or economic exchanges. RESTATEMENT (SECOND) OF CONTRACTS § 124 comment a; 2 A. CORBIN, *supra* note 16, § 460. As marriage became less a matter of economic exchange between families and more a matter of romance, marriage settlements became less common. Now however, especially as remarriage becomes a more common phenomenon, antenuptial agreements may again bring the Statute of Frauds requirements into more common usage. H. CLARK, CASES, *supra*, at 23-24 un.1-2.

### 1. *Parties*

Decisions about whom, when, and whether to marry are largely deferred to private control in traditional marriage law. Indeed, it is consent regarding these matters on which the old use of the "contract" label seems to have been based.<sup>45</sup> Most couples experience no constraint in these choices; however, a number of public policy limitations exist. The state places constraints on the number, sex, age, and degree of blood or legal relationship of persons who may marry.<sup>46</sup> Not long ago, it also sometimes placed restraints on the race of parties to a marital contract.<sup>47</sup> Recently, the state of Wisconsin attempted, albeit unsuccessfully,<sup>48</sup> to forbid remarriage by a noncustodial parent who was unable to demonstrate compliance with court-ordered child support payments for children of a previous marriage.

As we have already seen, policy limits are not necessarily inconsistent with contractual structuring, for contract doctrine itself imposes policy limits on who may make binding contracts.<sup>49</sup> Nevertheless, policy constraints on capacity to marry are far more extensive than those governing general capacity to contract. They reach beyond procedural concerns about decisionmaking capacity, to implicate values about appropriate marital structure and behavior.<sup>50</sup> Traditional marriage regu-

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45. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888), where the Court observed: The consent of the parties is of course essential to [marriage's] existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change . . . . When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation. . . . It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law.

In *Williams v. Williams*, 543 P.2d 1401, 1403 (Okla. 1975), the court quoted OKLA. STAT. tit. 43, § 1 (1971) which states, "[m]arriage is a personal relation arising out of a civil contract to which the consent of parties legally competent of contracting and of entering into it is necessary . . . ." and went on to emphasize that the state has extensive power to "declare and maintain a policy in regard to marriage and divorce" for its domiciliaries.

46. See, e.g., N.Y. DOM. REL. LAW § 5 (McKinney 1964) (defines marriages void for consanguinity); TEX. FAM. CODE ANN. tit. 1, § 1.01 (Vernon 1975) (prohibits issuance of marriage license to persons of the same sex); WYO. STAT. § 20-1-102 (1977) (marriageable age requirement). See also H. CLARK, *supra* note 37, §§ 2.8 to 2.13.

47. See, e.g., VA. CODE § 20-57, -58, -59 (1960) (struck down as unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967)). See also M. PLOSCOWE, H. FOSTER & D. FREED, *FAMILY LAW* 214 nn.1-3 (2d ed. 1972).

48. WIS. STAT. § 245.10 (1973) (struck down as violative of equal protection in *Zablocki v. Redhail*, 434 U.S. 374 (1978)), which is discussed in text *infra* at notes 209-16.

49. See *supra* notes 16-17 and accompanying text; RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16 (1981).

50. Of course, the procedural-substantive line eventually breaks down. Even requirements of rationality and capability to consent are ultimately substantive value preferences about what kinds of decisions ought to be honored. Nevertheless, contract limits on capacity to contract are more in the nature of procedural rules than are mandates that marriage ought to be heterosexual or monogamous. Partly this results from the fact that general contract limits are generic, applying

lation consistently treated such matters as appropriately within the domain of public policy, while contractual traditions would call for private control. We will see in Section III that these are issues of conduct and value that are being socially redefined as appropriately subject to private control, and therefore increasingly pluralistic in outcome.<sup>51</sup> Exactly how far that process should go remains open to debate, but analysis along the lines suggested in this Article should help to focus the discussion of whether the state should yield to private control more of the decisions concerning who may marry.

Once issues concerning who may marry are settled, a further problem complicates efforts to apply a contractual model to marriage: it is unclear who the contracting parties are. Under one view, the bargain is made between the two spouses. This would likely be the understanding of most lay persons. However, significant portions of the bargain lie outside the spouses' control and in the hands of the state.<sup>52</sup> Although in a few heavily regulated commercial contract settings the state, through assertions of public policy, exercises heavy control of contract terms,<sup>53</sup> in few instances is state control of the legal terms of a relationship so thorough as in traditional marriage. Moreover, in those settings as well, questions exist about whether contractual theory is really an applicable framework.<sup>54</sup>

If defining the contracting parties as the spouses creates conceptual difficulties, perhaps an adjustment in the model can remove them. Under the adjusted model, the bargain takes place, not between the spouses, but between both spouses on the one hand and the state on the other.<sup>55</sup> Thus, the legal system traditionally conferred recognition and certain "benefits" on the marital unit. It extended, for example, inter-

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to all contractual decisionmaking, rather than being specific expressions of policy preferences about a particular arena of conduct such as marriage.

51. See *infra* text accompanying notes 117-49.

52. For examples of this attitude, see cases cited *infra* notes 67-74. For a classic statement of the parties' inability to change the marital contract, see the language from *Maynard v. Hill*, 125 U.S. 190, 211 (1888), cited *supra* note 45. Despite the age of this case, its language is still largely correct in describing the situation today. The just-published RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981) reaffirms the inability of spouses to alter any "essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship." Thus, although the content of public policy may have changed somewhat, the premise of public ordering remains embedded in the law.

53. See, e.g., discussion of insurance contracts in I. MACNEIL, *supra* note 14, at 371-74.

54. See Rehinder, *Status, Contract and the Welfare State*, 23 STAN. L. REV. 941, 941 *passim* (1971).

55. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970) ("Since marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses"); *Trammell v. Vaughan*, 158 Mo. 214, 222, 59 S.W. 79, 81 (1900) ("The state is the third party to every such contract, and has a direct interest therein."); *Fearon v. Treanor*, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936) ("There are, in effect, three parties to every marriage, the man, the woman and the



tate inheritance rights, the privilege to confer legitimacy on children, rights to legal sexual intercourse, rights to special tax treatment, automatic attainment of age of majority, and previously, the right to maintain a married status if none of the specified grounds for divorce existed. In return, the marital unit accepted certain obligations like support of spouse and children.<sup>56</sup> Even if this model is adopted, however, at least two conceptual difficulties remain.

## 2. Consideration

The first problem centers on the contract concept of consideration. The purported consideration offered by the state to the marital unit has been seriously diluted by legal changes that aim to eliminate sex discrimination<sup>57</sup> and discrimination against illegitimate children,<sup>58</sup> by the passage of no-fault divorce,<sup>59</sup> by decriminalization of consenting adult sexual behavior,<sup>60</sup> and by reduction in legal barriers to unmarried co-

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state."), *appeal dismissed*, 301 U.S. 667 (1937). See also *Maynard v. Hill*, 125 U.S. 190, 211 (1888), where the Court observed:

The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.

56. See *infra* notes 81-82 and accompanying text.

57. New legal rules that reduce gender discrimination in marriage may be viewed as diluting the consideration the state used to offer in its exchange with married couples insofar as they eliminate certain rights previously granted to each of the spouses. For example, husbands used to have the right to management and control of community property in community property states. See, e.g., CAL. CIV. CODE §§ 5125, 5127 (West 1970) (amended 1973). Wives had the right to be supported by husbands. See, e.g., CAL. CIV. CODE § 5130 (West 1970) (repealed 1974). Although these gender based obligations placed burdens, they also created reciprocal rights which gender neutral legislation has diluted.

58. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down Illinois law forbidding illegitimate children from inheriting from their intestate fathers); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 617 (1973) (holding that the denial of welfare benefits on the basis of illegitimacy violates equal protection); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (holding that for purposes of workmen's compensation benefits a distinction between legitimate and illegitimate children violates equal protection); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that children of an unmarried father may not be declared state wards without the same process as that afforded to children of married parents or of unmarried mothers).

59. For example, CAL. CIV. CODE § 92 (current version at CAL. CIV. CODE § 4506 (West 1970)) was amended in 1969 to allow divorce on grounds of irreconcilable differences. Because of similar changes in most state codes, as of Aug. 1, 1980, all but two states had adopted some form of no-fault divorce. Freed & Foster, *Divorce in the Fifty States*, 14 FAM. L.Q. 229, 241 (1981). Following the adoption of no-fault divorce laws, several suits unsuccessfully argued that the laws impaired the obligations of the marital contract, see, e.g., *In re Marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (4th Dist. 1972); or were unfair to wives, see, e.g., *Reilley v. Reilley*, 409 U.S. 1003 (1972) (dismissing appeal challenging constitutional validity of West Virginia's no-fault divorce law); or violated the parties' ecclesiastical vows regarding grounds for divorce, *Williams v. Williams*, 543 P.2d 1401 (Okla. 1975).

60. E.g., CAL. PENAL CODE §§ 286, 288 (West Supp. 1981) (crime only with a nonconsenting adult or a minor); FLA. STAT. ANN. § 800.01 (West 1976) (repealed 1975); UTAH CODE ANN. § 76-

habitation.<sup>61</sup> Thus, much of the consideration originally provided by one party to the bargain has been removed. In cases of existing marriages, this theoretically might mean breach of the state's obligations.<sup>62</sup> In new marriages, where people have consented to the reduced bargain, under contract norms the law should not review the adequacy of consideration, but should defer to the judgment of the parties.<sup>63</sup>

The declining consideration that the state, as bargaining partner, can offer goes far to explain the reluctance of many modern couples to marry. To many people, the marriage bargain no longer seems a very good one.<sup>64</sup> This is not to suggest, however, that the cure is to reinstate the old bargain; it has been abandoned for good reason. Rather, it makes clear that a new marriage construct must emerge that is an attractive institution given our modern circumstances and values.

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53-22 (1978) (repealed 1973). *Contra* ARIZ. REV. STAT. ANN. §§ 13-408, 13-1411, 13-1412 (1978); MASS. GEN. LAWS ANN. ch. 272, §§ 14, 18, 34 (West 1970).

61. Many states have decriminalized consenting adult sexual activity. *See, e.g.*, CAL. PENAL CODE § 269a (West 1970) (repealed 1975); FLA. STAT. ANN. § 798.02 (West 1976) (to convict for cohabitation, man and woman must also "lewdly and lasciviously associate"). Removal of the taint of illegality has allowed cohabiting couples to regulate their relationship by contract unless their agreement explicitly rests upon a consideration of meretricious sexual services. *Marvin v. Marvin*, 18 Cal. 3d 660, 671, 557 P.2d 106, 113, 134 Cal. Rptr. 815, 822 (1976). For a thoughtful discussion of the issues presented to the court in *Marvin*, see Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976) [hereinafter cited as Bruch, *Property Rights*]. For an equally thoughtful discussion of its consequences, see Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937 (1977). Courts have prevented public officials from withholding other types of benefits because of nonmarital cohabitation. *E.g.*, *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979) (police officer cannot be dismissed because of refusal to answer questions about nonmarital relationship); *Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 71 (1979) (admission to bar cannot be denied merely because of nonmarital cohabitation). Professor Glendon has asserted that the distinctions between marital and cohabitation status are rapidly declining both in American and in European law. *See* M. GLENDON, *STATE, LAW AND FAMILY* 78-105 (1977). For a recent survey of judicial and legislative developments governing nonmarital relations, see Bruch, *Nonmarital Cohabitation in the Common Law Countries*, 29 AM. J. COMP. L. 217 (1981) [hereinafter cited as Bruch, *Nonmarital Cohabitation*].

62. Any such "breach" could presumably be excused by supervening illegality. However, the absurdity of the state as party being excused by the action of government *qua* state makes clear the limited utility of the idea of state as contracting party.

63. *See, e.g.*, *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949); RESTATEMENT (SECOND) OF CONTRACTS §§ 79, 71 comment c (1981). *See generally* J. CALAMARI & J. PERILLO, *supra* note 20, § 4-3.

64. Stewart Macaulay makes the following observation concerning this issue:

Abram Chayes (1959) has suggested that important regulation takes place when the legal system offers desired facilities—the right to incorporate, a legally valid marriage, or the transfer of legal title—to individuals and groups if they comply with certain conditions . . . but we should expect people to be willing to satisfy such conditions only when the facility offered by the law is viewed as sufficiently valuable to be worth the cost.

Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 524 (1977). Professor Posner comments that "as the gains from marriage have declined, the pressure for divorce has risen." R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 107 (2d ed. 1977).

### 3. *Terms*

The second problem with the notion of the state as party to the marriage contract is that of party control of terms. For many years the state incorporated into law, by statute or judicial construction, a number of terms to be imposed on spouses. Marriage was to be heterosexual, monogamous, and permanent. Its purpose was procreation. Its roles and tasks were strictly assigned on the basis of gender, giving control to the husband.<sup>65</sup>

Given these mandates, it becomes difficult to say when the state was influencing the terms of the contract in its party capacity (albeit as a party with unlimited bargaining power) and when it was dictating terms in its role as public policymaker. In either case, the state's unlimited power means that the prospective spouses can hardly be said to have bargaining equality with the other party to the so-called marital contract. Thus, the hallmark of contractual relationships—bargaining by the parties over the terms of the relationship—is absent. Instead of having a right to participate in shaping the contract terms, the prospective spouses may choose only to accept the terms offered by the state or to decline to enter into marriage.<sup>66</sup>

Furthermore, if the state is viewed as a contracting party in marriage rather than as a formulator of public policy, another anomaly appears. The state can unilaterally change the terms after the contract is made, as when it changed support obligations to reflect nonsexist attitudes.

Reverting to the model that views the spouses themselves as the contracting parties in a marriage does not solve the conceptual problem of party control over terms, for the spouses have little legal power to change the rights and obligations of marriage. Frequently by statute,<sup>67</sup> and even more often by judicial precedent,<sup>68</sup> spouses are prohibited

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65. For a penetrating analysis and compelling sociological critique of the traditional marriage contract, see Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

66. Ironically, most spouses or about-to-be spouses probably have only a dim idea of the specific legal rights and obligations they will acquire upon solemnization of a marriage. Professor Weitzman, who has undertaken apparently the only empirical study regarding the types of contracts actual couples would draw up if given the impetus, discusses this lack of awareness in the Introduction to her comprehensive new book. L. WEITZMAN, *THE MARRIAGE CONTRACT*, at xv-xvii (1981). Even those states that mandate that spouses cannot vary the essential incidents of their marriage relationship, *see, e.g.*, statutes cited in note 67 *infra*, often fail to define those rights and obligations. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 1978). Alternatively, they may specify obligations like "respect" and "fidelity," *e.g.*, CAL. CIV. CODE § 5100 (West 1970), which seem unenforceable under present legal standards.

67. *See, e.g.*, CAL. CIV. CODE § 4802 (West 1970); MONT. CODE ANN. § 40-2-203 (1979); N.M. STAT. ANN. § 40-2-8 (1978); N.D. CENT. CODE § 14-07-07 (1971); N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 1978).

68. *See, e.g.*, *Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich. 1940) ("[E]ven if the

from varying the legal terms of the marriage "contract." This prohibition is grounded either directly on the bar against varying the incidents of marriage,<sup>69</sup> or indirectly on related theories of no consideration.<sup>70</sup> Based on these policy analyses, courts have refused to enforce such agreements between spouses as: payment by one spouse to another for domestic, child care, or other services in the home;<sup>71</sup> planned termination of the marriage after a given period of time;<sup>72</sup> alteration of statutory duties of support;<sup>73</sup> and provision in advance for the eventuality of divorce.<sup>74</sup> Each of these is a plausible subject for private contractual agreement, as illustrated in the examples in Section I.

There are two exceptions to the generalization that marital partners cannot bargain about the terms of their relationship. First, a number of legislatures allow spousal contracts concerning property rights.<sup>75</sup> Second, privately made agreements are increasingly allowed

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contract is otherwise within the contractual power of the parties it is void because it contravenes public policy. . . . The law is well settled that a private agreement between persons married or about to be married which attempts to change the essential obligations of the marriage contract as defined by the law is contrary to public policy and unenforceable."); *Brooks v. Brooks*, 48 Cal. App. 2d 347, 349-50, 119 P.2d 970, 972 (2d Dist. 1941) ("In the absence of statute it is the established rule that a married woman cannot contract with her husband with respect to domestic services which are incidental to her marital status, since such contracts are against public policy."); *Motley v. Motley*, 255 N.C. 190, 193, 120 S.E.2d 422, 424 (1961) ("The antenuptial agreement relied upon by the defendant herein is against public policy and is null and void in so far as it undertakes to relieve the defendant from the duty of supporting the plaintiff.") See also RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981).

69. RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981). See, e.g., CAL. CIV. CODE § 4802 (West 1970); OHIO REV. CODE ANN. § 3103.06 (Page 1980).

70. See, e.g., *Miller v. Miller*, 78 Iowa 177, 35 N.W. 464 (1887); *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E.2d 171 (1951); *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968); *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931).

71. See, e.g., *Youngberg v. Holstrum*, 252 Iowa 815, 823, 108 N.W.2d 498, 502 (1961); *Bolannan v. Maxwell*, 190 Iowa 1308, 181 N.W. 683 (1921); *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N.W. 334 (1895); *Coleman v. Burr*, 93 N.Y. 17 (1883). See also cases collected in C. FOOTE, R. LEVY & F. SANDER, *supra* note 38, at 896-99, and Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386 (1932). At least one state actually has a statute stating: "Husband and wife shall not contract with each other, so as to entitle the one to claim or receive any compensation from the other for work and labor, and any contract between them whereby one shall claim or shall receive compensation from the other for services rendered, shall be void." MISS. CODE ANN. § 93-3-7 (1972).

72. See sources cited *infra* note 244.

73. See cases collected in C. FOOTE, R. LEVY & F. SANDER, *supra* note 38, at 896-99.

74. Provision for property rights in case of divorce has long been accepted. H. CLARK, *supra* note 37, § 1.9, at 27-28. Other types of planning about post-divorce obligations have often been barred as contributing to the likelihood of divorce. See, e.g., *In re Gudenkauf*, 204 N.W.2d 586 (Iowa 1973); *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964). See discussion of this view in 2 A. LINDEY, *SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS* § 90, at 33-36 (1979); Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 159-63 (1979); Weitzman, *supra* note 65, at 1163-64.

75. E.g., CAL. CIV. CODE § 4802 (West 1970); MASS. GEN. LAWS ANN. ch. 209, § 3 (West Supp. 1981); S.D. CODIFIED LAWS ANN. § 25-2-10 (1977). *Contra* IOWA CODE ANN. § 597.2 (1978-79).

to control in matters of property division and spousal support when divorce or legal separation is imminent.<sup>76</sup> The implications for marital contracting of these two exceptions will be examined in Section IV.<sup>77</sup> For present purposes, however, the point is that despite these two exceptions, the law generally does not permit even most economic aspects of an ongoing marriage to be governed by a privately bargained agreement between spouses. As the Domestic Services and the Income Production and Support examples in Section I suggest, this is a prominent arena where modern ideas and economic realities combine to lead some couples to desire enforceable agreements tailored to their own priorities to be substituted for the state's general policies.

In sum, the limits on private choice about conduct are severe no matter how the parties to the marriage contract are defined. If the spouses are the contracting parties, they have little of the usual ability to design, modify, or dissolve the contract by mutual consent. If the state is a party, then the spouses' inability to influence the content of the bargain makes the relationship an adhesion contract,<sup>78</sup> where the state unilaterally controls the terms. In short, in traditional marriage law, the spouses' only role is to say "yes" to the prepackaged relationship.<sup>79</sup>

### *B. Availability of Public Enforcement and Dispute Resolution*

Access to public enforcement and dispute resolution is the second major element in classic contract theory and its availability is a key characteristic of a state choice to utilize Option Three from the analytic matrix. This section examines the extent to which marriage law traditionally has allowed public enforcement and dispute resolution regarding the terms of the marriage relationship.

#### *1. The General Rule*

We have already seen that couples are usually prohibited by statute or case law from creating, and therefore a fortiori from enforcing, private agreements that alter the terms of their marriage as defined by the state. This is simply a way of saying that one method by which the

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76. *E.g.*, CAL. CIV. CODE § 4802 (West 1970); ILL. ANN. STAT. ch. 40, § 502 (Smith-Hurd 1980); MONT. CODE ANN. § 40-2-303 (1979); N.D. CENT. CODE § 14-07-07 (1971); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1981).

77. See *infra* text accompanying notes 279-95.

78. For a discussion of the criteria that define adhesion contracts, see I. MACNEIL, *supra* note 14, at 445-47. For a more general discussion of the issues, see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

79. The irony is that while this situation (contractual choice of status-like packages of obligation) makes traditional legal marriage more akin to the developments in other fields of contract law today, neither marriage nor those other "contract-statuses" bear very extensive resemblance to the theoretical model of classic contract. See *infra* text accompanying notes 373-79.

state indirectly enforces its public policy about marriage is by preventing conflicting private policy choices from being enforced. As already noted, the scope of this barrier to private choice in marriage has been broad and diffuse, ranging from specific statutory mandates such as the support obligation, to vague statutory and judicial pronouncements on what is offensive to the "essential incidents" of marriage.<sup>80</sup> As a result, only private agreements of the types specifically excepted from the bar against spousal contracting are fairly certain to receive enforcement.

While it is not odd that an assertion of public policy will render conflicting private agreements unenforceable, it is more surprising that the state refuses direct enforcement of public policy by the parties most concerned—the spouses. For instance, support obligations traditionally have been among the most common publicly imposed marital obligations. Incorporated in civil codes, they specify who is to support and who is to be supported,<sup>81</sup> but often no remedy is indicated.<sup>82</sup> If the duty is to have meaning, its beneficiaries ought to have some private right of action that could be implied in the absence of an express provision.<sup>83</sup> Yet courts have typically refused to allow a spouse to enforce

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80. See *supra* text accompanying notes 67-74.

81. E.g., CAL. CIV. CODE § 5100 (West 1970); OHIO REV. CODE § 3103.01 (Page 1980).

82. See, e.g., CAL. CIV. CODE § 5100 (West 1970). This lack of remedy characterizes the older statutes that attempt to describe the mutual obligations of marriage. Much of the law of marriage involves no serious effort at enforcement; rather it constitutes "a model of correct behavior. . . (a body of) moral precepts." H. CLARK, *supra* note 37, at 181. More recently added statutes such as CAL. CIV. CODE § 242 (West Supp. 1981) (enacted as part of the Uniform Civil Liability for Support Act) do specify remedies, *id.* § 248, but their annotations make clear that their principal application is to circumstances of separation or divorce. Some degree of criminal enforcement is possible although it, too, is generally confined to circumstances of divorce or abandonment. See *infra* text accompanying notes 98-103.

83. Implied private rights of action are debated in a variety of contexts and present complex questions far beyond the scope of this paper. The willingness to imply such rights has recently eroded in some contexts, such as the protection of investment expectations. Compare *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (using expansive approach) with *TransAmerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (cutting back on doctrine), and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (same), and *National R.R. Passenger Corp. v. National Ass'n R.R. Passengers*, 414 U.S. 453 (1974) (same). Implied rights of action have remained strong in other contexts such as tort law, see *RESTATEMENT (SECOND) OF TORTS* § 874A (1977); W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS*, 231-32 (6th ed. 1976); and in damages actions for violations of constitutional rights, see, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Love, Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979).

In all contexts, the principal issues are prudential ones. Some of the concerns which plague other areas, such as the identifiability of the class of beneficiaries, do not present problems in the marital context. Apart from the policies underlying the hands-off doctrine, which are under discussion throughout this Article, the still-cited tests from *Cort v. Ash*, 422 U.S. 66 (1972) for implying a right of private action seem arguably to be met in the marital context. The issue of implied private rights of action is discussed here not to argue for such a right in the marital context but to assert that the legal vacuum created by the present pattern of marital regulation increases the need for enforceable private ordering.

the support obligation during marriage. In *McGuire v. McGuire*,<sup>84</sup> for example, the court refused to consider a wife's suit against her husband for inadequate support even though it appeared that the husband was well off, but parsimonious in providing for his wife. Reasoning that "[t]he living standards of a family are a matter of concern to the household and not for the courts to determine,"<sup>85</sup> the court ruled that "public policy" required that the court not give cognizance to claims to spousal support where the parties were continuing a marital relationship.<sup>86</sup> The result in *McGuire* is so common that commentators treat the unenforceability of support obligations during marriage as a given of marital law.<sup>87</sup> If the state is unwilling to allow a spouse to enforce a specific monetary obligation such as support, it is presumably even less willing to allow interspousal enforcement of intangible obligations such as "fidelity" or "respect."<sup>88</sup>

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84. 157 Neb. 226, 59 N.W.2d 336 (1953).

85. *Id.* at 238, 59 N.W.2d at 342.

86. *Id.*

87. This result is now so flatly assumed that a recent comprehensive book about state regulation of the family generalizes that in the United States, "[c]ourts will not order support so long as the couple is living together . . . ." M. GLENDON, *supra* note 61, at 140. The same conclusion was reached in 1971 by the Citizens Advisory Council on the Status of Women: "The rights to support of women and children are much more limited than is generally known and enforcement is very inadequate. A married woman living with her husband can in practice get only what he chooses to give her. The legal obligation to support can generally be enforced only through an action for separation or divorce." *Quoted in* H. KAY, *SEX BASED DISCRIMINATION* 190-91 (1981). Professor Clark characterizes cases of support enforcement during ongoing marriage as "extremely rare," H. CLARK, *supra* note 37, at 186 and cites but one: *Miller v. Miller*, 320 Mich. 43, 30 N.W.2d 509 (1948). The refusal to enforce support obligations while the couple is living together is rationalized in part by a legal conclusion such as in *McGuire* that "As long as . . . the parties are living as husband and wife it may be said that the husband is legally supporting his wife." 157 Neb. at 238, 59 N.W.2d at 342. Such a legal conclusion avoids the need to evaluate the particular facts and circumstances short of separation. For an interesting discussion of the phenomenon of "secondary poverty" which afflicts the families of men who make adequate money but do not provide sufficient funds to take care of their wives and children, see Young, *Distribution of Income Within the Family*, 111 BRITISH J. OF SOC. 305-21 (1952). For a comprehensive discussion of the parallel difficulty of enforcing marital property rights, see Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 28 U.C.L.A. L. REV. 1125 (1981).

88. See, e.g., CAL. CIV. CODE § 5100 (West 1970) and OHIO REV. CODE § 3103.01 (Page 1980), both of which specify marital obligations of "respect" and "fidelity."

The process of enforcing the interspousal obligation of fidelity used to parallel in many respects the process being described in the text with regard to support. Spouses could not sue one another directly, although they could get some retroactive vindication at the time of divorce. (See *infra* note 97 and accompanying text). The state did provide a certain indirect enforcement through criminal statutes concerning adultery (see, e.g., statutory examples cited *infra* note 109). Actions involving third parties, such as seduction, alienation of affection, criminal conversation and the like, provided another kind of indirect enforcement of the interspousal duty. See H. CLARK, *supra* note 37, §§ 10.1-10.3. Many of these actions have fallen into disuse; today's concerns about spouses in criminal and tort contexts tend to involve battery, rape, and negligent injury. In all of these circumstances the bar on direct interspousal dispute resolution and enforcement is substantially eroding. See *infra* text accompanying notes 252-77.

The rationale most often offered for this policy against interspousal enforcement of obligations, whether public or private in source, is a fear of disrupting domestic harmony, sometimes with a suggestion that such enforcement should not be necessary in a successful marriage.<sup>89</sup> Less often stated, but also of concern, are questions about the institutional competence of courts to deal with the issues that arise between spouses. These reasons have been widely repeated in support of the longstanding hands-off policy toward enforcement of marital duties;<sup>90</sup> however, their validity is more often assumed than proven. As we shall see in Part Two, the arguments do not always survive close analysis; they tend to have, as one commentator described it, "an

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89. Clearest expressions of this attitude are found in analyses by Professors Rheinstein, Glendon, and Karst:

It seems to be taken for granted that spouses have to make their decisions jointly and that in a case of irreconcilable differences, the courts are not to intervene to impose their own decisions on the parties. When neither spouse can prevail over the other, the marriage fails and the only court in which the parties will meet is the divorce court.

Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U.L. REV. 463, 467 (1973).

Keeping in mind that in an amicable functioning marriage, the economic relationship of the couple will be a *de facto* community . . . it is apparent that generally speaking most problems of marital property, new or old, will appear and be resolved in the context of the dissolution of the marriage by divorce or death.

M. GLENDON, *supra* note 61, at 171.

It is to be expected, except where divorce is not easily available or not considered acceptable by the couple, that couples who reach the point of seeking legal intervention to settle their disputes will also frequently have reached the point of marriage breakdown.

*Id.* at 127.

There are sound reasons for the state to leave the members of an ongoing intimate association alone, to let them carry on their relations with a minimum of state intervention. If they cannot work out their differences, the exits are clearly marked.

Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 640 (1980) (footnote omitted).

90. In *Doe v. Doe*, 314 N.E.2d 128, 132 (Mass. 1974) (declining to grant a husband power to participate in his wife's decision concerning abortion), the court stated that "Except in cases involving divorce or separation, our law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship." Another court observed that marital partners would have to be "judges, Courts, sheriff's officer and reporter" for themselves since the courts would not make themselves available to settle marital disputes. *Balfour v. Balfour*, [1919] 2 K.B. 571, 579 (opin. of Atkins, L.J.). In *Kilgrew v. Kilgrew*, 268 Ala. 475, 480, 107 So. 2d 885, 889 (1959), the court stated that "[t]he judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship . . . ."

Legal commentators have frequently shared these views. Professor Rheinstein cites with approval the "American attitude of non-interference." Rheinstein, *supra* note 89, at 467. Robert Drinan describes what he sees as an overwhelming consensus in this country that the state should intervene in marriage as little as possible. Drinan, *American Laws Regulating the Formation of the Marriage Contract*, 383 ANNALS 48, 53 (1969). In her writings, Professor Glendon documents and applauds the state's accelerating withdrawal from the marital relationship. M. GLENDON, *supra* note 61, at 126-28, 171-74. In a recent article Professor Karst observes, "There are sound reasons for the state to leave the members of an ongoing intimate association alone, to let them carry on their relations with a minimum of state intervention." Karst, *supra* note 89, at 640.

It is sometimes difficult in reading such statements to discern whether the interference exhorted against is that of substantive governance of marital conduct, or state participation in dispute resolution or both. This Article examines the dramatically changing trends in the meaning of desirable noninterference.



anachronistic ring."<sup>91</sup>

Nevertheless, the traditional model of state marriage governance makes clear that insofar as interspousal conflict is concerned, the public policy against legal enforcement and dispute resolution is stronger than substantive policies favoring support or respect. Even were a private agreement to incorporate the substance of public policy, as in the Traditional Vows example, such an agreement would then also be unenforceable in any interspousal dispute. Where private agreements conflict with substantive policy, the policy against interspousal dispute resolution adds a second reason for their invalidity.

## 2. *Exceptions to the General Rule*

Despite the strength of its policies against interspousal dispute resolution, the state has allowed interspousal litigation in two situations: property rights and divorce. These are the same areas in which exceptions have been created to allow private contracting between spouses. How these two exceptions illustrate the potential for enforceable private ordering between spouses is discussed in Section IV.<sup>92</sup> Of particular interest here is their relation to the enforcement of publicly imposed marital obligations under the traditional model of marriage regulation.

Although theoretically adjudicable during marriage,<sup>93</sup> property rights are usually litigated at the termination of a marriage by divorce or death.<sup>94</sup> The infrequency of property litigation during marriage might indicate that spouses never have disputes about property that they wish to bring to court; perhaps they are even more concerned about domestic harmony than are courts. Alternatively, it might well reflect a lack of awareness regarding substantive rights or rights to enforcement and dispute resolution.

The major exception to the general bar against interspousal dispute resolution occurs in the context of divorce. Under traditional fault statutes governing divorce, the state allowed spouses to use the dissolution process to achieve a degree of after-the-fact enforcement of marital

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91. M. GLENDON, *supra* note 61, at 169.

92. See *infra* text accompanying notes 279-99.

93. *Wilcox v. Wilcox*, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (4th Dist. 1971) presents an example of adjudication of property rights during marriage. The availability of adjudication is premised among other things on the specific exception allowing property rights to be governed by private interspousal contract.

94. M. GLENDON, *supra* note 61, at 127, 134-35, 170-71. Termination of a marriage through death of a spouse presents an occasion for retroactive vindication of marital property rights which has some similarities to termination by divorce. However, the issues and traditions governing this complex of issues differ enough from those governing marital and divorce dispute resolution to go unaddressed by this Article.

obligations.<sup>95</sup> Ironically, marital support obligations could be enforced, at least in theory, after divorce,<sup>96</sup> but not before. Other publicly imposed obligations like fidelity and respect, even given the problems of institutional competence they present, could at the time of divorce be vindicated through punitive divorce terms directed at a party who had violated these requirements.<sup>97</sup> This tolerance of interspousal litigation not only for the purpose of terminating the marriage, but also for the purpose of enforcing some marital obligations, reinforces the conclusion that fears about disrupting domestic harmony lay at the root of the traditional refusal to allow interspousal enforcement of private or public marital obligations. Seemingly, a court need have no concern for domestic harmony once a divorce action had been commenced.

### 3. *The Illusion of Freedom from State Control*

If the thrust of the analysis so far is that the state generally refuses spousal enforcement of either publicly or privately created obligations in marriage, does this force a reevaluation of spousal freedom within marriage? Is marriage sufficiently outside the legal arena that couples can actually do whatever they wish, free of interference by the state?

Any such supposed freedom is severely limited by its own premisses, for in the context where disputes are most likely to arise or obligations to require enforcement, judicial dispute resolution or enforcement is unavailable. Even if that problem is set aside, the suggestion that couples are free to do as they wish misses another important issue. Although in interspousal actions, the denial of legal enforcement takes priority over substantive policies about marriage, the same is not necessarily true in other types of disputes involving marital obligations. For example, although the state would not allow interspousal enforcement of the support obligation, that duty could be indirectly enforced through actions by third parties, including the state itself. One traditional enforcement mechanism was the creditor's right to sue for necessities provided.<sup>98</sup> Similarly, the state, faced with a prospective welfare

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95. Modern treatment of divorce alters this paradigm substantially, as we shall see in Section IV. See *infra* text accompanying notes 238-51.

96. The payment of spousal support (alimony) finds a major theoretical justification in its role as a substitute for the marital obligation of support. H. CLARK, *supra* note 37, § 14.1, at 420-22; H. KAY, *supra* note 87, at 272 (1981). In reality, however, even under traditional fault divorce, and especially under no-fault regimes, alimony is awarded far less often than might be thought. Weitzman & Dixon, *The Alimony Myth: Does No Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141 (1980).

97. H. CLARK, *supra* note 37, at 442; Weitzman & Dixon, *supra* note 96, at 146-47.

98. J. AREEN, CASES AND MATERIALS ON FAMILY LAW 73 n.3 (1978); H. CLARK, *supra* note 37, § 6.3. See *infra* text following note 436. Although the law allows such actions they are seldom used by creditors. The practical disutility of these actions further underscores the need for interspousal dispute resolution if the underlying obligations are to have real force. See *supra* note 83.

claimant, might initiate civil or criminal action against a husband who leaves his wife destitute.<sup>99</sup> In light of the rationale for barring interspousal dispute resolution, it is interesting that both these actions involve domestic disputes that have spilled over into the outside world. Apparently, however, the presence of third party interests, even though minimal compared to the spouses' duties to one another, has been viewed as sufficient to allow disruption of the domestic harmony that could not be disturbed for the sake of resolving the spouses' own problems.<sup>100</sup> Yet the enforcement resulting from these indirect actions, measured either by motive to initiate or extent of vindication of the duty, is likely to be inadequate.<sup>101</sup> The state confines its indirect enforcement of support obligations to the extreme situation of destitution and neglect,<sup>102</sup> but bars all private agreements about support.<sup>103</sup> Thus, there is a significant legal vacuum between supposed right and available remedy under either private or public ordering of interspousal support obligations.

Any asserted ability to act freely in some nonlegal private space is even more clearly defeated by the state's ability to enforce publicly imposed marital obligations against a couple who are united in an effort to arrange their lives in some fashion that conflicts with public policy.<sup>104</sup> For example, in many states a married woman's domicile is by

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99. For illustrations of typical criminal statutes, see, e.g., CAL. PENAL CODE § 270(a) (West 1970); 18 PA. CONS. STAT. ANN. § 4322 (Purdon 1973). CAL. CIV. CODE §§ 242, 248 (West Supp. 1981) illustrate civil enforcement actions that may be undertaken. Here, too, the state is likely to undertake enforcement only in the context of separation or divorce, or the kind of neglect which is likely to arise only in the context of abandonment. See *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948); *Commonwealth ex rel. Goldstein v. Goldstein*, 271 Pa. Super. 389, 413 A.2d 721 (1979); H. CLARK, *supra* note 37, §§ 6.4-6.5. Cases like *Goldstein* produce the same outcome for the enforceability of support during marriage as the *McGuire* case discussed *supra* in text accompanying notes 84-87. Cf. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972) (mother of illegitimate child seeking to compel prosecution of father for support lacks standing because private individual has no judicially cognizable interest in the prosecution of another), which suggests another sidelight on the problem of individuals seeking to enforce intrafamilial support obligations. Although the duty and the fact pattern differed from the circumstances under discussion here, the case suggests another limitation, based on the federal doctrine of standing, on an individual's right to influence state criminal enforcement of such duties.

100. See *supra* notes 89-91 and accompanying text.

101. The creditor has only specific purchased items at stake, while the state usually has only the amount involved in subsistence welfare. By contrast, the support duty between husband and wife during marriage arguably involves substantially more. The closest parallel is spousal support after divorce, which was traditionally grounded on the marital obligation of support. See *supra* note 96. Such awards were certainly not in theory limited to welfare or neglect avoidance levels, H. CLARK, *supra* note 37, § 6.1, at 183, although they sometimes in fact seem almost that low or lower. Weitzman & Dixon, *supra* note 96, at 172-79.

102. E.g., CAL. PENAL CODE § 270(a) (West 1970); 18 PA. CONS. STAT. ANN. § 4322 (Purdon 1973). See H. CLARK, *supra* note 37, § 6.5, at 202.

103. See cases cited *supra* note 73.

104. The number of these situations of clash between state models of marriage and private

law the same as her husband's.<sup>105</sup> In such states, a woman may suffer burdensome consequences in such diverse areas as tax liability<sup>106</sup> and tuition status at state universities.<sup>107</sup> Even if the spouses by behavior or private agreement seek to establish separate domiciles while continuing their marriage, such an agreement would not change the outcome if, as is likely, it were deemed to alter an essential incident of marriage. Again, a person who while single has received disability benefits under the Social Security Act will lose those benefits when married because of a rule resting on the spouse's marital support obligation.<sup>108</sup> Given the present situation regarding spouses' inability to contract with one another, even a good faith private agreement—for instance, a variant on the Income Production and Support example that specified that neither spouse was to be liable for the other's support—would presumably not change this outcome. Yet again, even if spouses had agreed, as in the Open Marriage example, that they did not view unconventional sexual relations as wrong, their private beliefs or agreements would not prevent state criminal punishment of adultery or sodomy where such laws still exist.<sup>109</sup>

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control of behavior is decreasing as the publicly-imposed legal content of marriage is diminishing. See *infra* text accompanying notes 199-317. Nevertheless, various conflicts may still arise.

105. E.g., DEL. CODE ANN. tit. 13, § 1702 (1975); GA. CODE ANN. § 79-403 (1973); RESTATEMENT (SECOND) OF CONFLICTS § 21 (1971); H. KAY, *supra* note 87, at 177-83.

106. Because state law presumes that a married woman takes her husband's domicile, a woman from a community property state may be unable to reap tax advantages from attribution of a part of her income to her spouse under community property rules that would likely grant such advantages to a married man were the genders reversed. See *Lane-Burslem v. Commissioner*, 72 T.C. 849 (1979); H. KAY, *supra* note 87, at 180.

107. H. KAY, *supra* note 87, at 178. University rules that deprived a resident woman of in-state tuition on the grounds that by law she took her nonresident husband's domicile after marriage have been found a denial of equal protection. *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), *decision to decertify class vacated*, 538 F.2d 991 (3d Cir. 1976). Cf. *Kirk v. Douglas*, 176 Colo. 104, 489 P.2d 201 (1971) (statute governing marital domicile and tuition domicile construed so as to allow married women the advantages of in-state resident tuition). Despite these cases, a recent survey of tuition practices at a number of colleges and universities reported that although states generally allow a resident woman to maintain her own domicile for tuition purposes, rather than forcing her to take her nonresident husband's domicile, they impose various conditions on her retention of domicile. Patrick, *Nonresident Student Practices*, 51 C. & U. 291, 293-94 (1976). Those conditions are more burdensome than they would be for a woman who is single.

108. See *Califano v. Jobst*, 434 U.S. 47 (1977). The result was particularly distressing in the fact pattern presented because the spouse of the individual receiving payments under the Social Security Act was also disabled, but was not a beneficiary under the Act. An exception to the general rule of termination of benefits at marriage had been made by Congress for cases where two disabled persons both receiving payments under the Act had married one another. *Id.* at 51. Although the opinion does not specifically mention marital duties of support, the inference is clear that such duties are behind the congressional scheme in this Act. The Court discusses the assumption that marriage brings important changes in economic status. *Id.* at 53. It also reports the congressional decision that a totally disabled child older than 18 is still likely to be financially dependent on parents. *Id.* at 57 n.16. It is marriage that changes that presumption.

109. See, e.g., CONN. GEN. STAT. ANN. § 53a-81 (West 1972); FLA. STAT. ANN. § 798.03

The state also enforces its policies about the definition of marriage in situations involving attempted homosexual marriage, incest, polygamy, underage parties, or marriage for a limited term or purpose.<sup>110</sup> It would enforce such substantive policies indirectly by disallowing private agreements to the contrary, such as those in the Duration or Homosexual Marriage examples above. It would also vindicate those policies directly by denying a license to any couple who fails to conform to the accepted definition.<sup>111</sup>

In short, viewed from the spouses' perspective, traditional marriage policy almost totally bars access to legal enforcement or dispute resolution concerning marital obligations, whether those obligations derive from private agreement or public policy. That barrier is extensive, given that spouses are the ones who will want enforcement and dispute resolution concerning marital obligations. But lack of enforcement does not even give the spouses the right to be let alone, to operate outside the realm of law, free of its intrusions. Spouses may find themselves the target of state or third party actions that impose state policy upon them, even when they unite in an effort to arrange their intimate affairs according to their private preferences. In the face of these facts a couple's freedom to arrange a relationship as they wish is illusory: their arrangement is not legally recognized, but may be challenged from the outside.

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(West 1976). Cf. *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.), *cert. denied* 429 U.S. 977 (1976) (conviction of married couples for sodomy upheld). Another indirect imposition of state norms about marriage was involved in the statute that was struck down in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (criminal prosecution of doctor and organization for providing birth control information to married couples held to violate a fundamental constitutional right of privacy).

Perhaps the most frequent and egregious examples of conflict between married couples' behavior and expectations on the one hand, and the law on the other hand, occur in yet a different context, that of marital property division after death or divorce. Although spouses do have the right to make whatever dispositions of property they wish, few couples actually draw up contracts or conveyances which reflect their individual or joint expectations about property. In the absence of evidence that crystallizes such expectations into a form the law will recognize, the marital property law of the state is imposed on the parties. Frequently, especially in common law property states, the law's rules drastically violate the assumptions of one or both parties. For examples of this, see WISCONSIN GOVERNOR'S COMMISSION ON THE STATUS OF WOMEN, *REAL WOMEN, REAL LIVES* 17-21 (1978). See discussion of expectations of sharing in regard to marital property in Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1 (1977) and L. WEITZMAN, *supra* note 66, at 427. These sharing norms are often not reflected in the law.

110. H. CLARK, *supra* note 37, §§ 2.8 to 2.15.

111. See, e.g., CAL. CIV. CODE § 4400 (West 1970) (incestuous marriages are void); *id.* § 4401 (bigamy and polygamy invalidate the marriage); *id.* § 4101 (West Supp. 1981) (age of consent to marry); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (homosexual marriage void).

*C. Why Contract Has Traditionally Been Deemed an Inappropriate Governing Tool for Marriage*

The preceding analysis makes clear that the state's traditional roles in marriage regulation diverge sharply from those it would adopt if it were to allow contractual ordering of marriage. In large part, contractual governance models assign to private parties the role of determining what conduct obligations should exist in a relationship. By contrast, the state traditionally has reserved to itself control of the legally recognized content of a marriage relationship. Similarly, while contractual models provide for public enforcement of obligation and state resolution of disputes, in marriage the state has, with few exceptions, refused to allow spouses to enforce either privately agreed obligations, such as those in the examples above, or those which the public law itself imposes. Thus, far from adopting the contractual Option Three from our matrix, the state in governing marriage, has chosen Option Two as its preferred strategy.

The state's traditional choice of roles in marriage was based on a wide range of assumptions and judgments. The reasons for selecting Option Two may be stated as objections to a choice of Option Three. These objections cluster around the same two issues we have examined: (1) whether private bargaining outcomes and processes will harm the quality and character of the marital relationship, and (2) whether legalization of marital obligation is needed and legal institutions will be adequate to address such obligations. The arguments typically raised in objection to contractual ordering of marriage are sketched in the following subsection; their validity will be examined in detail in Part Two of this Article.

*1. Concerns About Protecting the Quality of Marriage from Negative Impacts of Private Contractual Ordering*

Strong resistance to contractual private ordering derives from objections to diverse private choices in so crucial an institution as marriage. 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. Such notions are objections to the very idea of private ordering of the rules of conduct in marriage.

Resistance to private ordering also reflects fears that private ordering would lead to advantage-taking or a wholesale undermining of public policy. Such broad assumptions are, however, disingenuous.

Even in purely commercial transactions, the law has placed both substantive and procedural limits on freedom of contract.<sup>112</sup> There is never purely private ordering. To have merit, these objections to private ordering in marriage would have to be phrased in one of two ways: (1) the public ordering of marital relations is more desirable than is the public ordering of other contractual relations; or (2) the risks inherent in private ordering of marriage would be greater than those of the present marriage system and/or greater than those of other relationships presently regulated by the law of private contract.

Concerns about private ordering also derive from assessments that the mechanisms of rational management are incompatible with marriage. Contract involves calculation of self-interest; marriage is often seen as principally a matter of cooperative and altruistic behavior. Contract involves careful planning of future rights and obligations; many think of marriage as an unpredictable unfolding subject to the trial and complexity of constantly changing circumstances, and partaking of the joy of human spontaneity. Classic contract involves explicit specification of expectations and obligations; many think of marriage as an inevitably diffuse interaction, incapable of definitive analysis or prediction. Each of these counterpoints raises a serious objection to the compatibility of marriage and contractual bargaining.

## 2. *Doubts About the Need for and Feasibility of Legal Obligation*

Of equal if not greater force are objections to the very existence of legal obligation within marriage. When legal obligation involves intrusion by outside agencies of the state, it may disrupt domestic harmony. Couples can work out their problems, the argument goes, and if the dispute is irreconcilable, the marriage is destined for the divorce court anyway. There the state's intervention is mandatory.<sup>113</sup> According to this line of reasoning, the easy availability of divorce means there is little need for formal dispute resolution between spouses. Only where divorce is difficult to obtain or is an unusually repugnant alternative to individuals might there be need, under this view, for formal dispute resolution during marriage.<sup>114</sup>

Other than at divorce, when marital breakdown makes a clear determination of obligations essential, the restraints imposed by binding obligations offend notions of spontaneity and response to changing circumstances. They also conflict with the obvious truth that compromise

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112. See *supra* text accompanying notes 15-24.

113. See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("[w]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the State's judicial machinery.").

114. See *supra* note 89.

is a necessary tool of marital harmony. Compromise would be at odds with the win-or-lose enforcement of predetermined obligations that characterizes contractual enforcement, and indeed all adjudication. Here, the argument about predicted effects of enforcement shades into related issues of institutional competence.

The archetypal instrument of legal resolution in contractual disputes is a court. Courts are blunt and tradition-bound instruments. Courts are competent to weigh certain kinds of evidence, evaluate certain types of claims and wrongs, administer certain values, and construct certain types of remedies. Marital relationships, the objection is, involve subtle, delicate, diffuse, and highly emotional interactions that do not lend themselves to courtroom evidence and the adversarial context of litigation. Further, courts use impersonal act-oriented norms rather than person-centered norms in framing all-or-nothing solutions that are ill-suited to marital harmony.<sup>115</sup> There are also objections to any redirection that might add controversies to the backlogged calendars of our courts.

Then, too, while contract has never been confined to economic transactions, courts seem most effective at remedying injuries that can be comprehended in economic terms. As the marriage of convenience fell by the historic wayside, and as the family unit played fewer economically significant roles, ideals of romantic love and personal fulfillment came to dominate the marital landscape.<sup>116</sup> A threshold objection to marital contracting, then, arises from a profound reluctance to commit this most personal and intimate of relationships to a sphere designed principally for economic regulation, and a pronounced distrust of the adequacy of economically based legal tools to remedy problems of intimate relationships.

Even so brief a summary as the one just given suggests that the objections to use of contract as a device to structure marriage are many and weighty. They are not, however, dispositive, as we shall argue in Part Two.

## PART TWO

### *TOWARD A REALIGNMENT OF PUBLIC AND PRIVATE ROLES IN THE GOVERNANCE OF MARRIAGE*

Part One examined the choices about state roles that are implied by contractual ordering and determined that in its governance of marriage the state has traditionally selected roles that are nearly opposite to those it assumes when contractual ordering is deemed appropriate. The remainder of this Article will examine numerous recent changes in

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115. See Eisenberg, *supra* note 8, at 638-65.

116. See *infra* text accompanying notes 142-49.



marriage and in the law that regulates it. Together those changes suggest that the state's traditional governing posture toward marriage, and the assumptions on which it was based, have been seriously undermined. A host of developments in society and law, in marriage, and in the tools of contractual ordering, now point toward a reversal of the traditional state roles in marriage. In light of those developments, proposals for legal recognition of private agreements about marital behavior—in short, for marriage contracting—present important opportunities for the development of a coherent and tenable state policy for marriage, a goal far from present achievement and vital to attain. At the least, such proposals deserve serious and immediate consideration.

Section III examines societal changes that strongly favor private rather than public control of the substance of marriage. It also tests whether the social and psychological character of marriage is compatible with the mechanisms and values of contractual ordering. Section IV tracks evolutions in the law of marriage that reflect both a new acceptance of private ordering and a breakdown of the legal attitudes and assumptions on which denial of spousal dispute resolution has traditionally been grounded. Section V describes developments in contract law that make the tools of contractual ordering more compatible with governance of marriage. Finally, Section VI examines the need for legal obligation and conflict resolution in marriage and comments on problems of institutional competence, which have been thought to bar legal enforcement of marital obligations.

### III

#### THE PSYCHO-SOCIAL CHARACTER AND CONTENT OF MARRIAGE: IMPLICATIONS FOR PRIVATE ORDERING BY BARGAIN

As we saw in Section II, many doubts about contractual ordering of marriage arise from the feared negative impact of private ordering on the character of marriage. Section III addresses those concerns. The first part demonstrates that the character of marriage is changing from a single model toward diverse forms of intimacy. It argues that this trend has generated a growing need in marriage for the increased private control offered by contractual ordering. The second part evaluates the compatibility between marriage and the rational management mechanisms of contract. It concludes that the mechanisms of contract and the self-interest values they imply need not destroy the intimacy of marriage.

### A. *The Changing Character of Marriage*

A number of themes have been woven into the fabric of today's intimate relationships: diversity, tolerance, privacy, choice, impermanence, individualism. Each makes a distinct contribution to the emerging pattern while being entwined with the others. No one of these themes is novel in American family life, but the overall configuration and especially the emphasis placed on these values is both new and important. Together they produce compelling pressures toward private rather than public ordering of marital obligations.

#### 1. *Diversity and Increased Tolerance of Private Choices*

Marriage as an institution still enjoys wide popularity. The numbers of persons married at any given time and the numbers of persons who marry at some point in their lives still represent overwhelming proportions of the population.<sup>117</sup> Even though age at first marriage has been rising,<sup>118</sup> numbers of new marriages remain high, although falling from peak levels of the past.<sup>119</sup> Most divorced or widowed persons eventually remarry,<sup>120</sup> although since 1970 the rate of remarriage has declined somewhat after rising steadily for years.<sup>121</sup>

While marriage as an institution is still attractive, many people are nevertheless opting out of the traditional marriage. Divorce rates are high,<sup>122</sup> indicating that many people are abandoning a given relationship, if not the idea of marriage. Furthermore, a certain number of the previously married and the never-married are sufficiently dissatisfied with traditional marriage to have developed new lifestyles at variance with the traditional marital model. The variations include intentional singlehood,<sup>123</sup> living together without legal marriage,<sup>124</sup> homosexual

117. M. BANE, *HERE TO STAY: AMERICAN FAMILIES IN THE TWENTIETH CENTURY* 22-23 (1976); Kitagawa, *New Life-Styles: Marriage Patterns, Living Arrangements, and Fertility Outside of Marriage*, 453 ANNALS 1, 13, 18 (1981).

118. M. BANE, *supra* note 117, at 23; Glick, *Remarriage: Some Recent Changes and Variations*, 1 J. FAM. ISSUES 455, 459-60 (1980); Kitagawa, *supra* note 117, at 5.

119. M. BANE, *supra* note 117, at 22-23; Kitagawa, *supra* note 117, at 20.

120. Glick, *A Demographer Looks at American Families*, in FAMILY IN TRANSITION 90, 92, 104 (A. Skolnick & J. Skolnick 2d ed. 1977) [hereinafter cited as FAMILY IN TRANSITION]; Glick, *supra* note 118, at 466.

121. Glick, *supra* note 118, at 457; Kitagawa, *supra* note 117, at 20.

122. Divorce rates rose very rapidly through the 1960's and early 1970's. In the late 1970's there was some evidence of a leveling off, but in 1979 and 1980 the rate began to rise again. Spanier & Glick, *Marital Instability in the United States: Some Correlates and Recent Changes*, 30 FAM. REL. 329, 330 (1981).

123. Proponents of intentional singlehood oppose "the generally held view that single people are not single by right or by choice" and see singlehood "as a developmental phenomenon in response to the dissatisfaction with traditional marriage." Stein, *Singlehood: An Alternative to Marriage*, in FAMILY IN TRANSITION, *supra* note 120, at 517. It is not yet clear what the statistics will show about numbers of persons making such a choice nor can mere numbers reveal the degree of intentional motivation behind a statistic concerning "marital status." Yet there is evi-

unions,<sup>125</sup> and group and communal marriages.<sup>126</sup> A variation may simply be a temporary substitute for marriage, or, as in many unmarried cohabitation situations, an accepted stage in progress toward marriage. Others are viewed by those involved in them as permanent alternatives to traditional marriage. What is vital here is that all have achieved sufficient visibility to constitute a range of options for individuals in quest of happiness.<sup>127</sup>

Pressures toward diversity exist within traditional legal marriage as well as in the creation of alternatives to it. Second or serial marriage, clandestine affairs or consensual "swinging," decisions to remain childless, and abandonment of traditional breadwinner/homemaker roles occur within the formal legal structure of marriage, but they

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dence that young people are waiting longer to marry the first time, *see supra* note 118, and remarriage rates for widowed and divorced persons leveled off before divorce rates did. *See supra* notes 119-21 and accompanying text. These statistics reveal a pool of persons who might choose intentional singlehood as a lifestyle. *See* Kitagawa, *supra* note 117, at 3-4. Although statistical confirmation or disconfirmation will emerge only over the decades, the creation of an ideology of singleness establishes the availability of such a lifestyle alternative.

124. Nonmarital cohabitation is certainly increasing in the purely numerical sense. FAMILY IN TRANSITION, *supra* note 120, at 104; Kitagawa, *supra* note 117, at 4; Skolnick, *The Social Contexts of Cohabitation*, 29 AM. J. OF COMP. L. 339, 340-41 (1981). Even more important, it has become an accepted prelude or even alternative to marriage among economic classes and age groups to whom the idea would previously have been shocking. *Id.* at 341-42.

125. Homosexual relationships of a long term and committed nature have become increasingly visible. To what extent this results from a "coming out of the closet" of already-existing relationships, and to what extent it reflects growing numbers actually involved in such relationships, is less important for purposes of this Article than the fact of significant numbers of persons openly challenging the heterosexual status quo. Professor Rivera cites an estimate of 20 million homosexuals in the United States. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 800 (1979). The growing acceptance of homosexual behavior is revealed by the decriminalization of homosexual conduct in a number of states, *see infra* note 131, and by such events as the American Psychiatric Association's decision that homosexuality is not in and of itself a mental illness. Green, *Homosexuality*, in 2 R. KAPLAN, A. FREEDMAN & B. SADLOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1762 (1980).

126. Experiments with group or communal arrangements and with various types of families extended by choice rather than blood, although less visible than in their sixties heyday, are still present on the scene of intimate relationships. *See, e.g.,* *Hippies in the Backwoods: '60s Dream is Alive in Tennessee*, S.F. Chron. Sept. 21, 1981, at 1, col. 1-3. Communes have long been a part of American life, though their nature has varied from middle class youth rebellions to economic experiments to religious communities. *See generally* Kanter, *'Getting It All Together': Some Group Issues in Communes*, in FAMILY IN TRANSITION, *supra* note 120, at 564. Though not generally labeled communes, extended families of varying types are more prevalent among racial or ethnic minority groups and among the poor. *See* Karst, *supra* note 89, at 686-87; TenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status* (pt. 3), 17 STAN. L. REV. 614, 618-20 (1965). *Cf.* *Moore v. City of East Cleveland*, 431 U.S. 494, 508-10 (1977) (Brennan, J., concurring) (the "extended family" remains a vital institution among blacks).

127. *See* A. SKOLNICK, THE INTIMATE ENVIRONMENT 387 (2d ed. 1978); Giele, *Changing Sex Roles and the Future of Marriage*, in FAMILY IN TRANSITION, *supra* note 120, at 273; Keller, *Does the Family Have a Future?*, in *id.* at 591; Rausli, *Orientations to the Close Relationship*, in CLOSE RELATIONSHIPS: PERSPECTIVES ON THE MEANING OF INTIMACY 182 (G. Levinger & H. Rausli eds. 1977) [hereinafter cited as CLOSE RELATIONSHIPS].

sharply diverge from its traditional defining assumptions. A decade ago, the couples who wrote their own marriage vows or held nonconformist wedding ceremonies on mountaintops symbolized the pull toward variety and individualization within traditional legal marriage. Those few hardy souls who have negotiated "marriage contracts," even knowing the certainty of their rejection by the legal system, demonstrate the tenacity of many who wish to define and control their intimate obligations and relations.<sup>128</sup>

Each of these nontraditional forms of intimate lifestyle has unique features; their common characteristic is that they each represent increasingly plausible alternatives to traditional marriage.<sup>129</sup> However, this emergence of "pluralism in family forms"<sup>130</sup> reflects more than just an enlargement in the number of available lifestyles. It also reflects greater societal tolerance of diverse values. Our moral values no longer insist that there is only one "right" form of intimacy. This fluidity of values both within and outside marriage means that individuals may choose among a variety of intimate options for a while or for a lifetime.

Although state marriage policy has always paid lip service to privacy and autonomy, only as the state abandons a policy that mandates one correct form of intimacy can those values have practical meaning. Each major alternative to traditional marriage has forced some degree of adaptation to its preferences from a previously monolithic legal code about appropriate intimacy,<sup>131</sup> but most of the examples of diverse in-

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128. See, e.g., Shulman, *A Marriage Agreement*, in MARRIAGE AND THE FAMILY 296 (C. Peruci & D. Targ eds. 1974). For a discussion of marriage contracts negotiated by other couples, see Edmiston, *supra* note 3, at 66, and L. WEITZMAN, *supra* note 66, at 291-333. Jessie Bernard discusses the 1855 contract of Lucy Stone and Henry Blackwell in J. BERNARD, *THE FUTURE OF MARRIAGE* 87-88 (1972).

129. The concept of the plausibility of behavior is discussed in J. GAGNON & W. SIMON, *THE SEXUAL SCENE* 15-16 (1973).

130. Sussman, *Family Systems in the 1970's: Analysis, Policies, and Programs*, 396 ANNALS 40, 42 (1971). This pluralism of family forms involves more people than might be expected. Although exact percentages vary depending on the definition of terms being used, it is widely agreed that only a small minority of Americans live in families having all the characteristics of the traditional nuclear family ideal. G. MASNICK & M.J. BANE, *THE NATION'S FAMILIES: 1960-1990* at 95 (1980); S. LEVITAN & R. BELOUS, *WHAT'S HAPPENING TO THE AMERICAN FAMILY* at viii, 8 (1981).

131. For example, many states have decriminalized consenting adult homosexual behavior. *E.g.*, ILL. ANN. STAT. ch. 38, § 11-2 (Smith-Hurd 1979); N.M. STAT. ANN. § 30-9-11 (1978); VT. STAT. ANN. tit. 13, § 3251 (Supp. 1981). Likewise, various jurisdictions have ordinances prohibiting discrimination against homosexuals in private employment. *E.g.*, Detroit, Mich. Code ch. 10, §§ 7-1004 to 7-1005 (1976); Seattle, Wash. Ordinance 102,562 (Sept. 18, 1973) (cited in Rivera, *supra* note 125, at 810 n.61). Homosexual lifestyle has been held by some courts not to constitute an automatic bar, as a matter of law, against being granted custody of minor children. *Nadler v. Superior Ct.*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (3d Dist. 1967). See Rivera, *supra* note 125.

Similarly, many states have decriminalized other forms of adult consensual sexual activity. See *infra* note 226. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court struck down a law which differentiated between unmarried and single persons in regard to access to contraceptives.

dividual arrangements suggested in Section I would still be denied full legal recognition. For instance, despite growing social tolerance for flexible sex roles and sexual equality, the law still will not allow private decision to vary the "incidents of marriage," thereby rendering unenforceable agreements about matters like support, domestic services salary, and independent control over domicile. Similarly, despite increasing social tolerance of homosexual conduct, a contract of homosexual marriage is not permitted.<sup>132</sup> Although these refusals rest on several policy concerns, in part they reflect a hesitancy to pursue fully the implications of pluralism and privacy. Where diverse individual outcomes are valued and pluralism is necessary, some form of private ordering of conduct and values is the appropriate regulatory structure.

Contract offers a rich and developed tradition whose principal strength is precisely the accommodation of diverse relationships. It is designed to regulate those arenas of human interaction in which the state recognizes and defers to divergent values, needs, preferences, and resources. Indeed, the deference to individual choice is strengthened, the pluralistic choices themselves legitimized, by the state's readiness to enforce private expectations or resolve private disputes at the behest of one of the parties to the relationship.

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In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court on due process grounds invalidated a statute which irrebutably presumed unwed fathers (but not unwed mothers or married parents of either sex) to be unfit custodians of their minor children. State courts have removed much of the taint of illegality which barred contractual ordering of a nonmarital cohabitation relationship. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). See *Kay & Amyx*, *supra* note 61. Lower courts have prevented public officials from withholding benefits because of nonmarital cohabitation. *E.g.*, *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979) (police officer cannot be dismissed because he refused to answer questions about his nonmarital relationship). See generally M. GLENDON, *supra* note 61, at 78-105; Bruch, *Nonmarital Cohabitation*, *supra* note 61; Fineinan, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275.

Spouses in dual career marriages have convinced Congress that the marital tax penalty should be softened. See *infra* note 266. The increase in numbers of marriages where both spouses work, despite the presence of children, helped to produce more favorable tax treatment of child care expenses for working parents. See I.R.C. § 44A (Supp. III 1979).

Cases like *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980), and *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1979), have invalidated zoning laws which aim to "sustain a suitable environment for family life," 27 Cal. 3d at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543, by restricting the numbers of unrelated individuals who may live in a household. While not directly affecting the legality of group or communal marriage, such cases insulate unusual living arrangements from at least one form of legal attack. *Contra Belle Terre v. Borras*, 416 U.S. 1 (1974). Cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (striking down on substantive due process grounds an ordinance that "selects certain categories of relatives who may live together"). Justice Powell, speaking for the Court in an opinion joined by Justices Brennan, Marshall, and Blackmun, stated: "Ours is by no means a tradition limited to respect for . . . the nuclear family." *Id.* at 504. He went on, however, to discuss the tolerated pluralism in terms of aunts, uncles, cousins, and grandparents living together.

132. See *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

## 2. *The Temporary and Conditional Nature of Marriage*

The much-publicized prevalence of divorce not only reflects, but also produces alterations in marriage. Our grandparents, and to a significant extent our parents, expected marriage to be a permanent bond. Admittedly a lifetime marriage was easier to achieve early in this century when the average length of such a relationship was nearly a decade less than would be the case today.<sup>133</sup> Furthermore, today's expectation of marital longevity provides an added incentive to divorce in early or middle years when a relationship is less than optimal. The proportion of voluntary marriage terminations (divorces) has been steadily increasing, and recently the number of marriages dissolved in any given year by divorce surpassed the number dissolved by death.<sup>134</sup>

In light of statistical realities, today's spouses must enter marriage with some awareness that the relationship may well be only temporary. Indeed, one newspaper columnist complains that this is the era of "disposable relationships."<sup>135</sup> Sometimes the fact of potential temporariness may be chosen and desired. More often it is fatalistically acknowledged. Sometimes it may be nearly repressed. Despite the statistics, most people still seem to hold the value that marriage ought to be lifelong.<sup>136</sup> To do so, they must perform a psychic sleight-of-hand to convince themselves that divorce will happen only to other people. Or they tolerate some dissonance between the ideal of permanence and the reality of temporariness. Perhaps they aspire to permanence in the abstract, but are willing to sacrifice it to achieve other, more crucial goals like self-fulfillment. Whichever of these explanations of the gap between the continuing ideal of permanence and the growing possibility of temporariness is accepted, the statistics must have an impact on intimate relationships.

Some predict that intimate relationships will be increasingly impermanent;<sup>137</sup> people will have to develop ways to cope with transience. Temporary intimacy will make people more interchangeable, with less attention to the intrinsic qualities of the partner in intimacy and more on the rewards and functions of the relationship.<sup>138</sup> One monograph theorizes that coping with temporariness requires conscious development of the skills to "get love, love and lose love" with satisfaction and without undue stress.<sup>139</sup>

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133. Davis, *The American Family in Relation to Demographic Change*, in DEMOGRAPHIC AND SOCIAL ASPECTS OF POPULATION GROWTH, 239, 254-56 (C. Westoff & R. Parke Jr. eds. 1972).

134. M. BANE, *supra* note 117, at 35-36; Glick, *supra* note 118, at 456-57.

135. Will, *A Matter of Convenience*, S.F. Chron., Sept. 11, 1980, at 44, col. 5.

136. M. BANE, *supra* note 117, at 21; A. SKOLNICK, *supra* note 127, at 268.

137. See, e.g., W. BENNIS & P. SLATER, *THE TEMPORARY SOCIETY* 89-90 (1968).

138. *Id.* at 84-86.

139. *Id.* at 127.

Even if permanence remains a value, recognition of the fact of potential impermanence again underscores the need for diversity and autonomy. Not everyone can or will stay married to a first spouse, or even to any spouse. Furthermore, the temporary character of many relationships suggests the need for planning about both the goals of this relationship and the criteria and processes under which it might terminate. Planning and decisionmaking are far more relevant to temporary and conditional relationships than they were to the unconditional, unalterable, and presumably permanent marital bonds of the past.

Proposals for a legal structure for temporary marriage suggest one adaptation of public policy to facts of intimate impermanence.<sup>140</sup> Recognition of private preferences would seem more appropriate. The spouses in the Duration example seek to make one kind of peace with temporariness. Those in the Dispute Resolution example are responding to the potential for impermanence in quite a different fashion. Yet certainly the first agreement, and quite possibly the second, would not currently receive legal recognition as proper subjects for private control. To the extent this denial reflects doubts about the suitability of rational management or legal enforcement in marriage, those doubts will be addressed below.<sup>141</sup> To the extent it represents an effort to dictate an expectation of permanence or to create one indirectly by controlling criteria and processes for termination, it inappropriately ignores diverse attitudes about the value of permanence and the optimal methods for coping with impermanence.

### 3. *Individualism in Marriage*

It is not only the legitimation of alternatives and the consciousness of impermanence that have contributed to new emphasis on private choice in intimate relationships. The changing point of reference by which marital goals are defined and evaluated has also contributed to the change in the character of today's intimate relationships. The central purpose of modern marriage is increasingly recognized to be the

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140. Futurist Alvin Toffler predicts that "As conventional marriage proves itself less and less capable of delivering on its promise of lifelong love . . . we can anticipate open public acceptance of temporary marriages." A. TOFFLER, *FUTURE SHOCK* 223 (1970). A decade ago anthropologist Margaret Mead suggested formalizing and supporting temporary marriage by instituting trial marriage for couples not yet ready to have children. Mead, *Marriage in Two Steps*, REDBOOK MAGAZINE, July 1966, at 48, 84. Already America has moved toward a "permanent availability model" of marriage. B. FARBER, *FAMILY ORGANIZATION AND INTERACTION* 103-20 (1964). "Marriage [is] coming to be a voluntary association in which the partners continue as long as their commitments to each other exceed their attachments to others." Skolnick, *supra* note 124, at 350. Of course, divorce policies are a major form of state policy responding to the impermanence of many marriages. Divorce, however, is a retroactive coping with impermanence. Here we speak of prospective planning about potential time limits on marital commitments. See *infra* text accompanying notes 238-46.

141. See *infra* text accompanying notes 150-98, 391-464.

fulfillment of the individual.<sup>142</sup> This norm both reinforces and reflects the values already discussed. If individual happiness is the primary goal of intimacy, then individual preferences as to intimate arrangements should be honored. If alternatives multiply, specific prescriptions about right and wrong must be replaced by a new credo: tolerance of individual variations and values. In the same way, if individual fulfillment is the ultimate value, then pursuit of it justifies sacrificing such goals as permanence.

Although primacy of individual goals is most visible in recent changes, it is rooted in developments occurring throughout the past century.<sup>143</sup> As early as 1906, William G. Sumner described the family as "antagonistic cooperation in which individual, not familial, values are sought."<sup>144</sup> By the forties, a sociological analysis of eight "themes" of the American family included the following two: "The criterion of successful marriage is the personal happiness of the husband and wife," and "Individual, not familial, values are to be sought in family living . . . the family exists for the benefit of its members."<sup>145</sup> Around the same time, Burgess and Locke described a shift from families united by formal authority, tradition, and mores to families whose bonds rest on affection and companionship.<sup>146</sup>

Today the emphasis on individual happiness and fulfillment as the primary purpose of marriage is predominant. The hold of marriage mores originating in religion, community, family, economic necessity, and tradition has been substantially weakened. Each of these frames of reference used to justify ignoring conflicting individual needs or preferences. That time is passing. Geographic, social, and economic mobility of the nuclear family has further loosened the control of extended family and community over selection of marital partners and lifestyles. The new reality is reflected in the sharply decreased role of parents and relatives in marriage decisions and in "a shift in the social functions of marriage from being alliances for the economic or social or political benefit of parents and kin, to being a primarily personal relationship between two individuals (although with economic functions as

142. See FAMILY IN TRANSITION, *supra* note 120, at 9-10, 12-13, 96; M. GLENDON, *supra* note 61, at 115, 173-74; A. SKOLNICK, *supra* note 127, at 267; Gadlin, *Private Lives and Public Order: A Critical View of the History of Intimate Relations in the United States*, in CLOSE RELATIONSHIPS, *supra* note 127, at 57-58.

143. See FAMILY IN TRANSITION, *supra* note 120, at 9-10; Gadlin, *supra* note 142, at 57. For a far-reaching cross-cultural study of changing patterns of family life in interaction with changing patterns of economic organization, see W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* (1963).

144. W. SUMNER, *FOLKWAYS* 346 (1906).

145. Sirjamaki, *Culture Configurations in the American Family*, *AM. J. SOC.*, May 1948, at 464, 466-67, 470.

146. E. BURGESS, H. LOCKE & M. THOMES, *THE FAMILY* 335 *passim* (3d ed. 1963).



well)."<sup>147</sup> The increasing role of government in child and family education, health and welfare, together with the decline in the family's function as a unit of economic production, has also stripped the family of many roles that previously provided it with meaning and cohesion.

As marriage has lost many of its traditional economic, educational, kinship, and welfare functions, it has deepened and intensified its role in providing individual happiness and fulfillment. At the same time, other relationships that used to provide personal satisfaction, support, and meaning—for example, community, extended family, church, sometimes employment—no longer serve that function. Thus, today's intimate relationships almost singlehandedly bear the responsibility for providing personal happiness to individuals. Even the divorce rate attests to this emerging role of marriage. Precisely because they have such high expectations of marriage, people frequently are disappointed with a particular marriage. They terminate it, but continue to seek the "right" marriage.

Supplementing and accelerating these trends toward individualism is the renewal of the women's movement. Efforts to liberate women, demands to recognize and institutionalize their equality with men, emphasize that individualism is a goal of women as well as of men. Birth control, declining birth rates and family size, and the broad influx of women into the labor force are gradually producing social realities to match this ideology. Although much remains to be accomplished, changes in education, work roles, pay scales, childcare, and politics should facilitate individualism in marriage. Obligations and roles will no longer be assigned purely on the basis of gender. Furthermore, women will no longer be economically and socially dependent upon men. Increasingly they will exercise the individual power that derives from having choices—choices about marriage, work, children, as well as more indirect choices about health, geography, religion, relations with extended families, et cetera.<sup>148</sup> This is not to deny that many women (and men, too) still exercise few choices. Many women are not economically independent. Many are unwilling or unable to make choices about the relationships, children, and work that define their lives. The direction, however, is clear: toward sexual equality and freer choice in intimate relationships.

The new focus on individual fulfillment and equality in marriage reinforces the demand for a governing system that validates private choice. If both spouses are to be satisfied with their relationship, each

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147. Skolnick, *supra* note 124, at 348.

148. See generally C. BIRD, *THE TWO-PAYCHECK MARRIAGE* (1979). Ms. Bird, among others, has explored these issues of choice and power as they relate to women's increasing economic and personal independence. See *id.* at 60-83.

must be able to achieve personal goals. Since spouses have differing needs and preferences, some process of negotiation is needed that will permit spouses to shape their relationship to accommodate both partners' needs.<sup>149</sup>

Contractual ordering offers a set of tools and governance strategies that legitimate pursuit of individual satisfaction through planning and negotiation among equal parties. Yet in one important sense, the increased individualism in marriage cautions against contractual legalization and planning of at least some aspects of marriage. The legal system is ill-equipped to deal with issues such as emotional fulfillment. Thus, requirements like "no recrimination" for sexual infidelity in the Open Marriage example or "love, fidelity, and respect" in the Traditional Vows example are not appropriate for contractual management. Still, this need not rule out all private planning about self-fulfillment. The Income Production and Support hypothetical, for example, illustrates that private decisionmaking can enable couples to structure the economic aspects of their relationships in ways that permit each individual greater opportunity to seek fulfillment in nonincome-producing endeavors. Yet, the economic issues involved in such an agreement would not involve the same legal difficulties raised by the other two hypotheticals.

In sum, to the extent that individualism suggests values of pluralism and personal satisfaction, it supports state deference to private control of behavior. However, individualism may also implicate concerns about the effect of rational management or doubts about the feasibility or desirability of legal obligation in marriage. Those issues are explored further in the next section and in Section VI, respectively.

### *B. Processes and Values of Rational Management*

We have just seen that societal pressures toward diversity, privacy, autonomy, impermanence, and individualism present cogent arguments for private control over intimate conduct and obligations.<sup>150</sup>

149. Awareness of discrepant needs and views within the marriage relation has been particularly heightened since Jessie Bernard dramatized the issue in her thought-provoking analysis of "his" marriage as compared to "her" marriage. J. BERNARD, *supra* note 128, at 3-53.

150. The way in which individualism, diversity, and choice compel intentional planning in modern intimacy is well captured in the following observations:

In the future there may well be a differentiated marriage and family system that provides alternative models appropriate to the length and degree of commitment that each person feels capable of making. . . . At each voluntary separation (occurring in 60% of marriages) or at the death of the partner, it is possible to choose among single status, traditional monogamy, symmetrical marriage, or the intimate network.

. . . Perhaps most important of all is that the participants understand the strengths and limitations of each marital form and not confuse the rules of one with another. Then individuals can choose accordingly and measure the adequacy of the particular role bargain they enter against expectations appropriate to that form.

They also require individuals to choose. Contractual ordering is a system for implementing individual choice, but it assumes choices based on rational management.<sup>151</sup>

The presumption of rationality raises a threshold objection to contractual ordering in marriage, since intimacy involves emotion and irrationality. To be sure, couples confront choices that vary in the degree to which they could be made intentionally and rationally. Variation would also arise from differences in personalities. Many couples might wish to plan about economic matters, like the couples in the examples in Section I. A smaller number might wish to plan the less rational, more emotional aspects of their relationship, as did the couple in the Open Marriage example. But even where the underlying behavior, such as marital infidelity, might be heavily influenced by nonrational factors, it still might be possible to plan rationally for certain consequences of such behavior—for example, a choice not to use adultery as a ground for divorce. In any case, processes of rational management offer one relevant, if not exclusive, set of tools for exercising choice and seeking personal fulfillment.

Even if rational management of some aspects of marriage is possible, fears about its impact on marital intimacy provide a major basis for objections to marital contracting. An examination of social science materials about interpersonal relations can address many of these doubts.

Differences between the domains of intimacy and impersonal relationships seem obvious. Indeed, sociology has analyzed the distinctive traits of "primary" as opposed to "secondary" groups. The typology captures and systematizes the contrasts that we intuitively sense. The value placed on primary group relations, together with concern over the decreasing number of such relations in modern society, has led some social scientists to seek to import insights, attitudes, and values from the realm of primary group relations into arenas that are predominantly instrumental or secondary in nature. For example, organizational psychologists have sought to "humanize" large bureaucracies in business, education, health care, and government, increasing both satisfaction and efficiency by improving communication, encouraging awareness of feelings, strengthening interpersonal ties, clarifying

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Giele, *supra* note 127, at 273.

Each couple must decide for itself between marriage and just living together; it must shape its own rituals, its attitudes toward stability and change, its own stand toward exclusiveness and inclusiveness vis-à-vis other relationships. And whatever its "commitment," the current interpersonal relationship must include a commitment to continuing negotiation.

Rausli, *supra* note 127, at 182.

151. See *supra* text accompanying notes 25-33.

personal and organizational expectations, and making strategies of conflict management and evaluation less impersonal.<sup>152</sup>

Such efforts do not deny the differences between primary and secondary group relations; rather, they seek to improve the functioning of one by infusing strengths and insights from the other. In a similar fashion, certain of the conceptual models for secondary relations and certain of the practices that make secondary relations effective may be drawn upon to understand and strengthen aspects of primary group relations, such as marriage.

### 1. *Reciprocity and Exchange*

The principal mechanism of private ordering through contract is bargained-for exchange.<sup>153</sup> Marriage contracting is subject to the objection that exchange mechanisms like negotiation and bargain are appropriate to the marketplace, but have little place in intimate relations.<sup>154</sup> Lawyers, exposed to a particular segment of activity, tend to think of exchange primarily in the commercial context. It is, however, a form of behavior studied in varying contexts by many disciplines, including sociology, psychology, and anthropology.<sup>155</sup> Social exchange theorists describe and classify a very broad range of human behavior. They state their theories sweepingly:

All contacts among men rest on the schema of giving and returning the equivalence.<sup>156</sup>

[I]nteraction between persons is an exchange of goods, material and non-material.<sup>157</sup>

Social behavior is an exchange of rewards (and costs) between

152. See generally C. ARGYRIS, *INTEGRATING THE INDIVIDUAL AND THE ORGANIZATION* (1964); C. ARGYRIS, *PERSONALITY AND ORGANIZATION* (1957); D. MCGREGOR, *THE HUMAN SIDE OF ENTERPRISE* (1960).

153. See *supra* text accompanying notes 27-28.

154. See, e.g., Fuller, *supra* note 11, at 205, 207 ("It seems a safe guess that not many married couples have attempted to arrange their internal affairs by anything like an explicit contract . . . . All over the world the intimacies of the extended family . . . have proved an obstacle to the establishment of dealings on a straightforward commercial basis . . . ."); *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 45, 359 A.2d 719, 720 (1979) (describing the previous attitude of courts in barring even property agreements between spouses—"it being the opinion of the courts that those transactions would inject a disturbing influence of bargain and sale into the marriage relationship").

155. See, e.g., P. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* (1964); G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961); H. KELLEY & J. THIBAUT, *INTERPERSONAL RELATIONS: A THEORY OF INTERDEPENDENCE* (1978); J. THIBAUT & H. KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* (1959); M. MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (1967); Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161 (1960); Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597 (1958).

156. G. SIMMEL, *THE SOCIOLOGY OF GEORGE SIMMEL* 387 (K. Wolff ed. & trans. 1950).

157. Homans, *supra* note 155, at 597.

persons.<sup>158</sup>

In brief, social exchange may reflect any behavior oriented to socially mediated goals.<sup>159</sup>

Economic exchange, then, is merely a subset of a much larger phenomenon of exchange and reciprocity that encompasses virtually all rational human conduct.<sup>160</sup>

Social exchange theory recognizes that human exchange can use as its medium a vast array of tangibles and intangibles: economic goods and services, gifts, affection, power, desirable behavior, status, et cetera.<sup>161</sup> Consequently, social exchange models can be applied to intimate relations not only in their economic components, where the possibility of exchange is obvious, but in their social and interpersonal dimensions as well. Indeed, social exchange theorists have been increasingly interested in intimate relationships. Their theories and findings demonstrate that even intimate interaction can be predicted and explained by concepts such as reciprocity, cost/benefit analysis, outcome maximization, and interpersonal equity.<sup>162</sup>

Social exchange theorists also posit that even in highly collaborative, intimate relationships, individuals must receive a rewarding return on what they invest. Just as economic relationships disintegrate when one party no longer views the relationship as advantageous, so too will social relationships break down unless each party shows a "profit."<sup>163</sup>

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158. G. HOMANS, *supra* note 155, at 317.

159. P. BLAU, *supra* note 155, at 5.

160. P. EKEH, *SOCIAL EXCHANGE THEORY: THE TWO TRADITIONS* 172 (1974).

161. *Id.* at 85-86, 195; A. HEATH, *RATIONAL CHOICE AND SOCIAL EXCHANGE: A CRITIQUE OF EXCHANGE THEORY* 113 (1976); M. MAUSS, *supra* note 155, at 3, 12-13.

162. Exchange theory utilizes various models of behavioral exchange, types of interaction, and methods of individual outcome evaluation to analyze individual feelings and to describe the course of relationship development. As applied to marriage, such models illumine decisions like who marries whom as well as the intimate network of spousal interaction itself. See I. ALTMAN & D. TAYLOR, *SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONS* 6-7 (1973); W. GOODE, *THE FAMILY* 31-43 (1964); H. KELLEY, *PERSONAL RELATIONSHIPS* 42 (1979); H. KELLEY & J. THIBAUT, *supra* note 155, at 289-312; J. MOUTON & R. BLAKE, *THE MARRIAGE GRID* (1971); Z. RUBIN, *LIVING AND LOVING* 157-61, 206-07 (1973); Becker, *A Theory of Marriage* (pt. 1), 81 J. POL. ECON. 813 (1973); Goode, *World Revolution and Family Patterns*, in *FAMILY IN TRANSITION*, *supra* note 120, at 47-50; Goffinan, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 PSYCHIATRY 451, 456 (1952); Walster, Berscheid & Walster, *New Directions in Equity Research*, 25 J. OF PERSONALITY & SOC. PSYCHOLOGY 151, 170-74 (1973). But see P. BLAU, *supra* note 155, at 93-94, 112 (noting the diffuseness of social obligation and exchange).

163. This is a basic premise of social exchange theory. Peter Blau expresses it as follows: "Above all, the expectation that benefits rendered will yield returns characterizes not only economic transactions but also social ones in which gifts and services appear to be freely bestowed." Blau, *Interaction: Social Exchange*, in 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 452, 454 (D. Sills ed. 1968). Another prominent exchange theorist, George Homans, states "no exchange continues unless both parties are making a profit." G. HOMANS, *supra* note 155, at 161.

Thus, efforts by the couples in our examples to plan rewarding results for each partner are realistic and healthy for the relationship.

Even with social exchange models, some elements of intimate behavior remain unexplained or unpredictable. Nevertheless, sufficient work has been done to establish the premise that intimate behavior involves reciprocity and processes analogous to those for assessing personal gain and loss in economic exchange. Far from destroying intimacy, such concepts and processes can contribute to both its understanding and its effective functioning.

Following these theories, those whose work involves dealing with personal relationships—therapists, social workers, counselors, and educators—often apply insights drawn from economic relationships, formal structure, and goal-oriented behavior to improve intimate relations.<sup>164</sup> Interestingly, a body of literature has developed around “contracting” as a tool of social work, psychotherapy, and marriage and family counseling. These practitioners “contract” with clients not only about fees, but also about the goals and methods of therapy.<sup>165</sup> They also initiate contracting processes between spouses as part of marital counseling or reconciliation;<sup>166</sup> between social workers, courts, and parents where parents seek to regain custody of neglected children;<sup>167</sup> and between parents and delinquent children.<sup>168</sup>

Of course, these “contracts” deviate from the normal legal usage of the term in that they usually are not legally enforceable,<sup>169</sup> but the

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164. See *infra* notes 165-68. For discussion of contracting in education, see L. HOMME, A. CSANYI, M. GONZALES & J. RECHS, *HOW TO USE CONTINGENCY CONTRACTING IN THE CLASSROOM* (1969).

165. Croxton, *The Therapeutic Contract in Social Treatment*, in P. GLASSER, R. SARRI & R. VINTER, *INDIVIDUAL CHANGE THROUGH SMALL GROUPS* 169-83 (1974); Estes & Henry, *The Therapeutic Contract in Work with Groups: A Formal Analysis*, 50 *SOC. SERVICE REV.* 611-22 (1976); Maluccio & Marlow, *The Case or the Contract*, 19 *SOC. WORK* 28-36 (1974); Rhodes, *Contract, Negotiation in the Initial Stage of Casework Service*, 51 *SOC. SERVICE REV.* 125-40 (1977).

166. J. FISCHER & H. GOCHROF, *PLANNED BEHAVIOR CHANGE* 334-37 (1975); J. HALEY, *PROBLEM SOLVING THERAPY* 40 *passim* (1978); S. MINUCHIN, *FAMILIES AND FAMILY THERAPY* 132-37 (1974); B. OKUN & L. RAPPAPORT, *WORKING WITH FAMILIES* (1980); C. SAGER, *MARRIAGE CONTRACTS AND COUPLE THERAPY* *passim* (1976); R. STUART, *HELPING COUPLES CHANGE* 17, 164-70 (1980); Sager, Kaplan, Gundlach, Kreiner, Lenz & Royce, *The Marriage Contract*, 10 *FAM. PROCESS* 1311-26 (1971).

167. T. STEIN, E. GAMBRILL & K. WILTSE, *CHILDREN IN FOSTER HOMES: ACHIEVING CONTINUITY OF CARE* 114-16 (1978); T. STEIN & E. GAMBRILL, *DECISION MAKING IN FOSTER CARE: A TRAINING MANUAL* (1976); Stein & Gambrill, *Facilitating Decision Making in Foster Care: The Alameda Project*, 51 *SOC. SERVICE REV.* 502-13 (1977).

168. T. STEIN, E. GAMBRILL & K. WILTSE, *supra* note 167, at 114-16; T. STEIN & E. GAMBRILL, *supra* note 167, at 101. Blechman, *The Family Contract Game*, 23 *FAM. COORDINATOR* 269-81 (1974), describes parent-child and whole-family contract processes dealing with less serious kinds of behavior problems.

169. Some of them do, however, create direct legal consequences. For example, social workers contract with parents of neglected children about the conditions for removal or restoration of

therapist's use of contract terminology is intentional and significant. In part, the contract label dramatizes the preference for private ordering over the intrusion of outside norms as the basis for choices about lifestyles. Just as important, contract models reflect preferences about management and planning in the context of intimate relationships. Like typical legal contracts, these agreements utilize mechanisms of clarification, specification, negotiation, and consensual bargaining about rights and obligations as strategies for achieving personal goals. They have as their subject matter and context the intimate issues of feeling and behavior. Still, they are not unlike contracts that facilitate economic exchange, because in order to shape a mutually satisfying and profitable relationship, there must be specific communication about each party's goals and about the resources and performances that each party is willing to exchange to achieve those goals.

Similarly, behavior modification therapists have demonstrated that even subtle and complex human behavior can be broken into units that can be the subject of planning, negotiation, and action.<sup>170</sup> Precise and specific types of behavior can be manageable links in a chain leading from vague frustration to the attainment of clear goals. When individuals select goals, specify the type of behavior necessary to reach those goals, and identify the rewards for the undertaking, they achieve both motivation and a sense of potency.

Clarification of goals and givens, expectations and limits, hopes and resources, has the additional benefit of making those dimensions of a relationship clear to each individual. Otherwise, important information remains hidden, while influencing each person's behavior and his or her assumptions about the other's intentions and feelings.<sup>171</sup> Explicit communication provides a basis for negotiation and exchange about behavior, goals, obligations, plans, structures, and limits, which can be a vital tool for initial planning, for building satisfying relationships, and for resolving conflicts that inevitably arise as people grow and change.

In a relationship like marriage, which encompasses multiple decisions over many years, it is particularly vital that partners communicate. Frequently people inquire about their prospective spouse's goals

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those children to the home. Courts use the agreements as the basis for legal resolution of those cases. Stein & Gambrill, *supra* note 167, at 502; Stein, Gambrill & Wiltse, *Foster Care: The Use of Contracts*, 32 PUB. WELFARE 20 (1974).

170. See, e.g., E. GAMBRILL, BEHAVIOR MODIFICATION: HANDBOOK OF ASSESSMENT, INTERVENTION AND EVALUATION 358-437 (1977); D. O'BANNION & D. WHALEY, BEHAVIOR CONTRACTING: ARRANGING CONTINGENCIES OF REINFORCEMENT (1981); S. TURNER, K. CALHOUN & H. ADAMS, HANDBOOK OF CLINICAL BEHAVIOR THERAPY (1981).

171. For discussion of attribution theory, see H. KELLEY, *supra* note 162, at 93-120; Kelley, *An Application of Attribution Theory to Research Methodology for Close Relationships*, in CLOSE RELATIONSHIPS, *supra* note 127, at 87-114.

and expectations less than they would investigate which car to buy or which college to attend. In short, elements of communication, exchange, and planning are often suppressed in marriage when they should be explicit.<sup>172</sup>

The need for explicitness raises a problematical aspect of applying social exchange theory to intimate relations. It is possible that even if a model of reciprocal exchange applies, the parties themselves may not be conscious of the process. Some exchange theorists suggest that the element of explicitness differentiates social from economic exchange:

The most basic difference is that the obligations incurred in social transactions are not clearly specified in advance. In economic transactions the exact obligations of both parties are simultaneously agreed upon . . . . In social exchange, by contrast, one party supplied benefits to another, and although there is a general expectation of the reciprocation, the exact nature of the return is left unspecified.<sup>173</sup>

On this view, the obligations of social exchange tend to be diffuse, unspecified. The reciprocity of social obligation generates gratitude and rests on trust rather than coercion.<sup>174</sup> The returns of social exchange are clearly expected, but explicit bargaining might destroy their value.<sup>175</sup> On the other hand, where bargaining is indirect and nonspecific, the system of exchange may be fragile and inefficient. The vagueness of implicit exchange will survive only as long as the costs of specifying the desired return are greater than the losses incurred by the inefficiency of indirectness.<sup>176</sup>

Even if explicitness is not always possible, it would be helpful in marriage. Thibaut and Kelley postulate that "accurate knowledge of the pattern of outcomes . . . is essential if the interdependent members are to realize the full potentiality of their relationships."<sup>177</sup> Admittedly, such knowledge will be gained partly on the basis of nonverbal behavior and by attributions made regarding that behavior.<sup>178</sup> Most natu-

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172. When one marries he makes a number of different bargains. Everyone knows this and this knowledge affects the sentiment of love . . . .

. . . . [T]he current emphasis upon marriage for love causes the bargaining element to be concealed, and yet no thoughtful person will contend that it is not present; indeed it may be argued that the transition from the old arranged marriage has brought the bargaining attitude into the love relationship more explicitly, for previously the families bargained, but now everyone must haggle for himself.

W. WALLER, *THE FAMILY: A DYNAMIC INTERPRETATION* 239-40 (1939).

173. Blau, *supra* note 163, at 454.

174. *Id.*; P. BLAU, *supra* note 155, at 5-6, 8, 61, 93, 95-96. See P. EKEH, *supra* note 160, at 59; Gouldner, *supra* note 155, at 175.

175. P. BLAU, *supra* note 155, at 61; P. EKEH, *supra* note 160, at 58; M. MAUSS, *supra* note 155, at 63, 74.

176. A. HEATH, *supra* note 161, at 115.

177. H. KELLEY & J. THIBAUT, *supra* note 155, at 213.

178. *Id.*



rally, however, "frank and open discussion" will be the route to knowledge. Although discussion will not always be possible, it is most likely when the participants' outcomes in the relationship correspond—that is, when both are gaining from the interaction, thus obviating any need for deception or evasion.<sup>179</sup>

One would hope that a "correspondent outcome" situation is typical of a marriage. When it is not, honest discussion may be needed more than ever. People are uncomfortable in relationships that are inequitable.<sup>180</sup> Such inequity is most likely to be resented in an era when it seems possible to use rational management to replace the institutional inequality of marriage with individual equality. If destructive stereotyping and inequity are to be eradicated from marriage, planning will be crucial to overcoming the tendency to slide back to old behavior and norms.<sup>181</sup>

Furthermore, implicit social exchange requires a stable set of social expectations and meanings. In the preceding section we saw that the norms and social expectations of traditional marriage have eroded.<sup>182</sup> In an era of diverse intimate relationships rather than one socially acceptable relationship, the parties' expectations will have to be thought out and specified if they are going to be effective guides to conduct.<sup>183</sup>

Even if certain kinds of exchange remain diffuse and implicit, marriage relations would not be solely of that genre. Marriage is a mixture of types of interaction. Not all dimensions of the marital relationship could be subject to specification and explicitness, but certain aspects clearly would be. For example, the traditional religious or legal obligations of respect, honor, fidelity, and love would be difficult to subject to specification, even though they might be the subject of agreements as in the Traditional Vows example. Even if these obligations could be made explicit, most people may well prefer to leave them diffuse and implicit. By contrast, economic support, domestic services or

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179. *Id.*

180. See Walster, Berscheid & Walster, *supra* note 162, at 151-76.

181. See Komarovsky, *Cultural Contradictions and Sex Roles: The Masculine Case*, in *FAMILY IN TRANSITION*, *supra* note 120, at 229, 234-40, which documents the inconsistent attitudes of college men in regard to women's equality. S.M. Miller speaks eloquently of his own inexorable tendencies toward "lapsed egalitarianism" in Miller, *On Men: The Making of a Confused Middle-Class Husband*, in *id.* at 241. Furthermore, women may correctly recognize that in light of an ideological commitment to equality, explicit discussion and intentional planning may be necessary to solve problems of interspousal inequality. By the same token, men, as the "exploiters" in inequality patterns, naturally seek to avoid open discussion and explicit renegotiation of relationship patterns. H. KELLEY, *supra* note 162, at 159-60 & n.1.

182. See *supra* text accompanying notes 117-49.

183. See Raush, *supra* note 127, at 185 ("Today, the question [of who cooks in a marriage] is subject to conscious consideration, discussion and negotiation. The issue is externalized rather than seen as part of the internal female 'me'.").

methods of property ownership could be specified as illustrated in the Income Production and Support, the Domestic Services, and the Marital Property examples. Of course, people's preferences about such specification might well differ. It would thus seem unwise to make marital policy on any blanket assumption—either that marital obligations must be specified or that they could not be.

## 2. *The Self-Interest Component of Contractual Ordering*

Just as the application of concepts of exchange and reciprocity to intimate relations initially may seem troublesome, so do notions of self-interest and individual goal seeking raise certain problems. Intimate relations are often thought or hoped to be characterized by altruism, concern for the other, or at least by a merged "we-ness" of interest. The following discussion addresses the concern that self-interested behavior may destroy intimate relations and concludes that self-interest is not only essential to individual well-being, but also contributes to healthy relationships.

Applying the model of reciprocity, exchange theorists have stressed the lack of clear distinctions between altruism and self-interest, between gift-giving and discharge of obligations, between spontaneous expression and duty. Modern culture and theory have perhaps inappropriately attempted to isolate these strands. In particular, modern societies sometimes treat economic exchange as severable and impersonal. Much more fully than our own, primitive cultures understood the integration of persons and things, gift and exchange, altruism and self-interest.<sup>184</sup> For example, one of the principal students of the phenomenon of gift-giving, anthropologist Marcel Mauss, observed of the Trobriand Island culture that:

[p]restations which are in theory voluntary, disinterested and spontaneous . . . are in fact obligatory and interested. The form usually taken is that of the gift generously offered; but the accompanying behavior is formal pretence and social deception, while the transaction itself is based on obligation and economic self interest.<sup>185</sup>

Although Mauss was assessing rituals in a primitive society, his insight remains apt: even where interaction appears as gift-giving, self-interest may be a dominant motivation. Similarly, sociologist Peter Blau has asserted that even behavior like martyrdom, which appears to be extremely altruistic, involves self-interest.<sup>186</sup> These analyses caution against tidy explanations of behavior. Along with selfless motives,

184. G. HOMANS, *supra* note 155, at 318; M. MAUSS, *supra* note 155, at 22.

185. M. MAUSS, *supra* note 155, at 1.

186. P. BLAU, *supra* note 155, at 6. The reverse is also true. There may be "altruism in egoism," Gouldner, *supra* note 155, at 173, and disinterested or idealistic components in behavior may be passed off as purely selfish or economically beneficial.

most apparent altruism or love contains significant elements of self-interest and exchange. Both dimensions of behavior need to be understood and legitimized.

Like most interpersonal relations, marriage includes many entwined strands of self- and other-centered behavior.<sup>187</sup> Yet views of marriage and the family as a haven of love and selfless solidarity persist.<sup>188</sup> An inappropriately sentimental view of the family has often surfaced in the literature of family social science.<sup>189</sup> So too, lawyers, active in the domains of conflict, money, and power, may be particularly susceptible to a tendency to romanticize marriage as a separate world, an emotional, private, altruistic domain wholly apart from exchange, self-interest, conflict—and reality.<sup>190</sup> Such views overlook the blend of self- and other-interest, of cooperative and competitive behavior that characterizes even the most intimate of relations. Certainly differences exist between marriage and primarily economic realms, but they are matters of degree and emphasis, not of qualitative dichotomy.

Insisting on a rigid dichotomy between the motivations and characteristics of the public and private realms, and segregating self-interested and other-interested behavior, generates another conceptual difficulty. Not only do self-interested and other-interested behavior occur together, they are not conceptually antithetical, or perhaps even severable.<sup>191</sup>

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187. Kelley and Thibaut have, for example, developed matrices describing various combinations of cooperation and competition in two-person transactions. They argue that family relationships include the dilemmas, conflicts, mixed interests, and types of control reflected in these matrices. Intimacy therefore calls for individuals who are "flexibly and appropriately capable of both cooperative and competitive behavior." H. KELLEY & J. THIBAUT, *supra* note 155, at 180.

188. "The family becomes a kind of shrine for upholding and exemplifying all of the softer virtues—love, generosity, tenderness, altruism, harmony, repose. The world at large presents a much more sinister aspect. Impersonal, chaotic, unpredictable, often characterized by strife and sometimes by outright malignity . . . ." J. DEMOS, *A LITTLE COMMONWEALTH* 186 (1970), *quoted in* A. SKOLNICK, *supra* note 127, at 116; Z. RUBIN, *supra* note 162, at 204-07; Demos, *The American Family and Social Change*, in *FAMILY IN TRANSITION*, *supra* note 120, at 59, 67. *Cf.* C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977) (objecting to the ongoing process of deterioration of the family's role as "haven").

189. A. SKOLNICK, *supra* note 127, at 74-85.

190. Such an assertion is difficult to document and must be admitted to rest heavily on the author's impressions of attitudes within the legal profession. However, language like the following tends to reflect such views: "The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship." *Kilgrow v. Kilgrow*, 268 Ala. 475, 480, 107 So. 2d 885, 889 (1959). Furthermore, there is data that men are more romantic than women in their approach to love and marriage. Z. RUBIN, *supra* note 162, at 205; A. SKOLNICK, *supra* note 127, at 217; Hill, Rubin & Peplau, *Breakups Before Marriage: The End of 103 Affairs*, in *FAMILY IN TRANSITION*, *supra* note 120, at 313, 328. Since most lawyers are men, a carryover of such romanticized attitudes into professional life might not be wholly unexpected.

191. On a more theoretical level, segregation of self-oriented behavior from other-oriented behavior may even be a contradiction in terms. The sense of "self" was thought by Cooley, Mead, and others to develop by interaction with others, as a reflection of those others' perceptions, atti-

"Self-interest" or "self-centeredness" may connote narrow avariciousness or pettiness, but may also suggest healthy self-development. Indeed, many social psychologists conclude that a substantial amount of self-knowledge, self-development, and self-oriented behavior is necessary to satisfactory personal relations.<sup>192</sup> Erik Erikson, for example, posits that self-identity necessarily precedes both intimacy (closeness with another) and generativity (giving of oneself to others).<sup>193</sup> A separate, well-developed sense of one's needs is essential to the development of good relations. For example, psychologist Harold Raush concludes:

[I]ntimacy is often seen as a threat to individual autonomy, and autonomy and intimacy are often thought of as opposite ends of a continuum of self versus mutual involvement.

. . . Developmentally, personal autonomy and interpersonal intimacy are necessarily intertwined.<sup>194</sup>

Similarly, in summarizing theory and research relating to family therapy, Olson, Sprenkle, and Russell conclude that while family cohesion is crucial to family functioning, too much closeness is as destructive to good interpersonal relations as too much disengagement.<sup>195</sup> In short, intermediate degrees of autonomy and self-development, in balance with closeness, appear to be most conducive to satisfactory relations.<sup>196</sup>

Not only is a healthy incorporation of self-interest essential to the

tudes, and needs in interaction with the person in question. C. COOLEY, *SOCIAL ORGANIZATION 7 passim* (1909); G. MEAD, *MIND, SELF AND SOCIETY* 135-226 (1909).

192. It is perhaps worthy of note that when these psychologists speak of intimacy and good interpersonal relations, they are in some sense redefining "love." We could perhaps distinguish three models of "love" extant in our culture today. The "intimacy" or "good interpersonal relations" model, popularized and elaborated by psychotherapy, emphasizes clarity of communication together with awareness and fulfillment of both parties' deeper personal needs. Such a model is compatible with the exchange models and processes of rational management under discussion in this Article. By contrast, the "sentimental model" of love emphasizes irrationality in the form of romance. Finally, the "moralistic model" of love, with roots in religious or ethical systems of thought, tends to stress the importance of self-sacrifice or even martyrdom as the proper expression of love. As the first of these three models becomes more important in our culture, perhaps fewer people will see open discussion of and "bargaining" about needs and self-interests as the antithesis of the sentiment, warmth, and deeper understanding characteristic of "love."

193. E. ERIKSON, *CHILDHOOD AND SOCIETY* 227-31 (1950).

194. Raush, *supra* note 127, at 175. See also Karpel, *Individuation: From Fusion to Dialogue*, 15 *FAM. PROCESS* 65, 78 (1976), where the author observed:

Where difference and change are felt as threatening and responded to as betrayal, individuation is crippled . . . . [E]ach partner's increased individuation makes him/her more capable of accepting the otherness of the other. Partners in a dialogic relationship are more willing to accept individual responsibility for their own lives. . . . to act, over and over, as separate, self-directed individuals.

195. Olson, Sprenkle & Russell, *Circumplex Model of Marital and Family Systems: Cohesion and Adaptability Dimensions, Family Types and Clinical Applications*, 18 *FAM. PROCESS* 3-28 (1979).

196. Levinger, *Reviewing the Close Relationship*, in *CLOSE RELATIONSHIPS*, *supra* note 127, at 155; Olson, Sprenkle & Russell, *supra* note 195, at 3-28.

individual and the relationship, self-interest can actually contribute to the interest of others. One mechanism through which this is possible is, of course, exchange. As any economist or contract lawyer knows, exchange is a device by which two persons can simultaneously pursue their respective self-interest. "If value is subjective . . . the function of exchange is to maximize the conflicting and otherwise incommensurable desires of individuals."<sup>197</sup> The genius of exchange is that differing interests need not be adversarial. Pursuit of self-interest through exchange means adversarial relations only if the exchange involves a zero-sum game. In many cases exchange comes about precisely because it is possible for both parties to win, rather than one winning and one losing.

Lawyers have long been aware that exchange benefits individuals and promotes stable economic growth. Reciprocity can also strengthen personal relationships and foster intimacy, transcending dichotomies between self-interest and other-interest. The exchange process creates a web of relatedness. Reciprocity helps build trust and gratitude in relationships.<sup>198</sup>

In sum, failure to appreciate the importance of self-interest in the establishment of healthy personal relationships may cause serious errors in making policy about marriage. Where key social scientists stress the importance of individualism, self-development, and self-fulfillment in personal relations, the law should not base its policies upon a model of marriage as a relationship where self must be forgotten or merged with the other.

### C. Section Summary

The societal pressures away from a single model of marriage toward diverse, individually chosen and personally rewarding forms of intimacy have become compelling. Facing this reality, the state must not only change specific elements of its intimacy regulation policy, but must decide whether to cling to a diluted version of the single public policy model, withdraw from legal involvement in marriage, or design a regulatory structure that accepts, dignifies, and affirms the diverse forms of modern intimacy. Present legal policy juggles the first two approaches; it ought to adopt the third.

Even when it is conceded that intimate relations need the private, pluralistic choice made possible by contractual ordering, concerns remain about the impact that the mechanisms and values of rational management would have on marriage. Yet the existence of alternatives

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197. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 947 (1974).

198. P. BLAU, *supra* note 155, at 94; Gouldner, *supra* note 155, at 175.

and deference to individual values, the awareness of the potential impermanence of marriage, and the increased emphasis on personal fulfillment all suggest the need for far greater rational choice and planning in intimate relationships. Of course, irrationality will always remain in emotional and personal life. Nevertheless, increased rational management seems both possible and desirable.

Examined in the light of social science theory, the mechanisms and values of rational management seem less threatening. We have seen that exchange is a universal model of human interaction, encompassing most types of social as well as economic behavior. The reciprocity, explicitness, intentionality, consent, and even equality that characterize contractual ordering are substantially compatible with intimacy. Furthermore, self-interest can coexist with and contribute to healthy interpersonal relations. Just as society at large needs to find ways to incorporate the values of primary groups in an increasingly impersonal social order, so intimate relationships need the insights of more formal groupings for their health and stability. In the light of these analyses, the advantages of contractual ordering can be obtained without undue anxiety about their implementation through the rational management processes of contract.

#### IV

#### RECENT DEVELOPMENTS IN THE LEGAL REGULATION OF MARRIAGE

Section III documented rising societal pressures for diversity, planning, choice, privacy, and individual autonomy in intimate relationships. It also reviewed evolving social science theories indicating that concerns about the negative effects of bargaining processes on intimacy have been overstated. Both developments would be expected to produce a movement toward greater acceptance of private control of conduct in marriage. Indeed, recent decades have witnessed numerous such changes in the legal regulation of marriage.<sup>199</sup> Section IV surveys these changes, analyzing how they have altered state marriage policy and what significance they may have for contractual governance of marriage.

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199. Although this Article focuses mainly on the legal rules governing marriage obligations, it also gives some attention to rules which, although outside the direct context of domestic relations, influence the law of marriage by providing for special treatment of spouses. Such rules exist in a variety of areas like tax, criminal law, pensions, insurance, and government benefits. The Article also draws to some extent on areas of law which have indirect impact on the legal framework of marriage, as for example, policies governing abortion, or legal rules affecting women's options in the economic marketplace. References to the latter two types are not intended to be detailed or comprehensive but only suggestive of broad trends shaping the institution of marriage.

*A. Marriage and the Constitution*

The new and not yet fully charted constitutional right of privacy has ties to marriage. Even before the Court recognized a constitutional right of privacy in *Griswold v. Connecticut*,<sup>200</sup> Supreme Court decisions had hinted at a constitutional status for marriage, speaking of marriage as one of the "basic civil rights of man,"<sup>201</sup> a right that is "fundamental to our very existence and survival."<sup>202</sup> Then in *Griswold*, the Court struck down a state law that forbade the use of contraceptives by married persons, on the ground that it violated the right of privacy.<sup>203</sup> Although the Justices differed about the rationale for this holding, several Justices focused upon the fundamental importance of marriage as a reason for protecting it within a "zone of privacy."<sup>204</sup> Justice Douglas, for example, spoke of "notions of privacy surrounding the marriage relationship,"<sup>205</sup> while Justice Goldberg spoke of a constitutional "right of marital privacy"<sup>206</sup> and quoted the assertion in *Prince v. Massachusetts*<sup>207</sup> that there is a "private realm of family life which the state cannot enter" without substantial justification.<sup>208</sup>

Later cases have failed to define the precise contours of the constitutional rights embedded in the marriage relation. In *Zablocki v. Redhail*,<sup>209</sup> the Court found unconstitutional, under the fundamental rights branch of equal protection analysis, a Wisconsin statute that prohibited marriage by a noncustodial parent of minor children unless that parent could demonstrate compliance with any outstanding order for child support and demonstrate that the children were not likely to become public charges. The Court found that the interests offered to support this statute were insufficient to justify its serious interference with the fundamental right to marry.<sup>210</sup> In so holding, the Court reemphasized the language of earlier cases about the fundamental importance

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200. 381 U.S. 479 (1965).

201. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

202. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *Loving* preceded articulation of a constitutional right of privacy, but did strike down a state prohibition on interracial marriage. It has been categorized principally as a case about race rather than a case about marriage. Nevertheless, it included language about the importance of privacy and individual control within the institution of marriage, *id.* at 12, and, in the opinion of Professor Karst, "was not just an equal protection decision about racial discrimination; it rested on an alternative substantive due process ground that the Court in *Zablocki v. Redhail*, 434 U.S. 374 (1978) (a later case about the right to marry) properly cited with approval." Karst, *supra* note 89, at 667.

203. 381 U.S. at 485.

204. *Id.* at 484.

205. *Id.* at 484-85.

206. *Id.* at 486 (Goldberg, J., concurring).

207. 321 U.S. 158, 166 (1944).

208. 381 U.S. at 495.

209. 434 U.S. 374 (1978).

210. *Id.* at 388-91.

and constitutional protection of the marriage relation.<sup>211</sup> Yet the opinions in the case, including Justice Marshall's opinion for the Court, reiterated the belief that states could impose reasonable regulations on marriage.<sup>212</sup>

Precisely what the balance of interests or the standard of judgment might be in future cases involving marriage regulation remains unclear in the mix of six opinions.<sup>213</sup> To be sure, *Zablocki* is a case about the right to marry. Justice Stevens attempted to clarify the appropriate balance of constitutional protection and state regulation of marriage by suggesting that classification on the basis of marital status may be more acceptable than classification regarding who may enter into marriage.<sup>214</sup> Whether this distinction holds remains to be seen. It seems likely, however, that other concurring Justices were correct when they observed that *Zablocki* "actually erects substantive limitations on what States may do"<sup>215</sup> in regulating marriage and that "there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government."<sup>216</sup>

Extensions of the constitutional right of privacy to encompass certain decisions about abortion,<sup>217</sup> while not directly related to a notion of marital privacy, have implications for marital regulation. The traditional legal model of marriage treated procreation as a quintessential purpose of marriage.<sup>218</sup> To the extent that certain decisions to obtain an abortion are now constitutionally protected from state regulation, procreation is more a matter of private choice and less a matter of state mandate. One impact of the abortion opinion, then, is to legitimate a

211. *Id.* at 383-86. *Accord* *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down a zoning ordinance that narrowly defined permitted family living arrangements, in this case two grandsons, cousins to one another, living with their grandmother). Although *Moore* did not involve burdens on the right of marriage, it invoked extensive rhetoric on the protection of freedom and privacy in relation to marriage and family life. *Id.* at 502-06.

212. 434 U.S. at 386-87; *id.* at 392 (Stewart, J., concurring); *id.* at 396-99 (Powell, J., concurring).

213. Professor Karst has discussed the implications of *Zablocki* and attempted to point directions for the future of a fundamental right of intimate association. Karst, *supra* note 89, at 667-73.

214. 434 U.S. at 403-04 (Stevens, J., concurring). By using this distinction, Justice Stevens reconciles the holding in *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding a statutory classification which terminated Social Security benefits to a disabled child upon marriage as rational, given a legislative judgment that married persons are less likely to be dependent on parents for support than are single persons), with the holdings in *Zablocki* itself and in *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a state miscegenation statute as violating the fundamental right to marry).

215. 434 U.S. at 395 (Stewart, J., concurring).

216. *Id.* at 397 (Powell, J., concurring).

217. *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

218. *See, e.g.*, *Scheinberg v. Smith*, 659 F.2d 476, 486 (5th Cir. 1981) ("[h]aving children is a major purpose of the institution of marriage"). *See also* discussion and cases cited in Weitzman, *supra* note 65, at 1211-16.



wider range of privately chosen alternatives within marriage.<sup>219</sup>

To be sure, the articulations of the right of privacy in areas such as abortion and birth control for unmarried persons<sup>220</sup> suggest that the critical nexus of the right of privacy in *Griswold* may have been the life and death dimensions of procreation rather than marriage.<sup>221</sup> Nonetheless, *Griswold*'s suggestion that the fundamental importance of marriage proscribes certain state intrusions into its conduct<sup>222</sup> signals important changes in the law that should influence the state's attitude toward marital contracting. As we saw in Section II, courts formerly suggested that the uniquely private character of marriage prevented them from intervening in marital disputes other than those involved in divorce,<sup>223</sup> but asserted that the social importance of marriage provided a firm basis for state prescriptions about substantive rights and obligations involved in marriage.<sup>224</sup> By contrast, the recent assertion of a constitutional right of privacy emphasizes an emerging state abstention from substantive regulation of marriage behavior. It therefore represents an important reversal of traditions concerning the appropriate al-

219. Although the right of privacy suggests important backdrop considerations for this Article, whether there should be legally enforceable private ordering of decisions about birth control and procreation is not here addressed. Any detailed examination of this question implicates not only the problems of private ordering which are addressed here, but also those of procreation and child-rearing which are beyond the scope of the present effort.

220. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

221. As the title of his article (*Freedom of Intimate Association*) suggests, Professor Karst thinks that protection of intimate relationships should be a major organizing principle in analysis of right to privacy cases. He argues his thesis quite persuasively. See Karst, *supra* note 89.

222. Indeed, Professor Glendon asserts that "*Griswold* raises to a constitutional level the principle of non-interference in a functioning marriage." M. GLENDON, *supra* note 61, at 121. While *Griswold* seems to emphasize the need for private control of substantive conduct within marriage, Glendon's comment is more ambiguous. It is unclear whether the noninterference she posits refers to substantive matters of marital conduct, to the traditional refusal of dispute resolution, or to both. Furthermore, of course, the impermissible state intrusion in *Griswold* was undertaken through the state's criminal code, rather than through the domestic relations statutes which have typically been used to regulate the substantive terms of marriage. While this distinction might have some importance, the case seems to turn on the interference with marital conduct per se, rather than on the source of that interference.

223. See *supra* notes 84-111 and accompanying text.

224. See *supra* text accompanying notes 46-77. The classic statement of this view appears in *Maynard v. Hill*, 125 U.S. 190, 205 (1888), where in upholding state determination of criteria for and validity of divorce, the Court stated:

Marriage, as creating the most important relation in life . . . has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Other examples abound. See, e.g., *Fearon v. Treanor*, 272 N.Y. 268, 272-73, 5 N.E. 815, 816 (1936) ("From time immemorial the State has exercised the fullest control over the marriage relation, justly believing that happy, successful marriages constitute the fundamental basis of the general welfare of the people."), *appeal dismissed*, 301 U.S. 667 (1937); *Williams v. Williams*, 543 P.2d 1401, 1403 (Okla. 1975) ("The State has a constitutional right to declare and maintain a policy in regard to marriage and divorce.").

location of public and private roles in marriage.<sup>225</sup>

*B. Reduction of Sexism and Tolerance of Diverse Sexual Behavior*

Reflecting the societal pressures toward diversity and individualism discussed in Section III, the law has shown increasing tolerance of a broader range of sexual behavior and preferences. In a related trend, significant efforts have been made to reduce gender bias formerly institutionalized in the laws regulating or influencing marriage. Both developments suggest an emerging legal climate that is far more deferential toward private decisionmaking about conduct within intimate relationships.

Although the process is far from complete, changes have been made in the laws of most states to lessen or remove legal limitations on the sexual behavior of consenting adults.<sup>226</sup> Such changes make more possible the kind of relations intended in the Open Marriage or even the Homosexual Marriage examples.

However, despite a growing trend toward decriminalization of homosexual or adulterous conduct<sup>227</sup> and hesitant steps to reduce other burdensome consequences of unpopular choices about sexual conduct,<sup>228</sup> efforts to gain affirmative legal recognition for such relationships have been unsuccessful.<sup>229</sup> To some extent present legal policies result from decisions to delegatize the entire arena of sexual conduct. However, to some extent they represent an incomplete acceptance of divergent private behavior in such matters. In an institution like marriage, the benefits and burdens of legalization are inevitably entwined.

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225. Indeed, the rather striking change in state attitude can be discerned by juxtaposing two opinions. In *Maynard v. Hill*, the court stated that "It was of contract that the [marriage] relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law." 125 U.S. 190, 211 (1888). In *Baker v. Nelson*, 291 Minn. 310, 313, 191 N.W.2d 185, 186 (1971), *appeal dismissed*, 409 U.S. 810 (1972), the court speaks of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and states "The basic premise of that decision . . . was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship." The two views of state role in marriage are almost opposites. In 1888, the primary power of the parties was in establishing the marriage relation; then their power ended and the state took control of the relationship. By the time of *Griswold*, according to the *Baker* court, the state's principal role is the authorization of marriage; once the relationship's legitimacy is authorized, the state is without power to intrude into the privacy of the marriage.

226. See, e.g., CAL. PENAL CODE § 286 (West Supp. 1981); ILL. ANN. STAT. ch. 38, §§ 11-3, 11-4, 11-9 (Smith-Hurd 1979); MODEL PENAL CODE § 213.2 (1980). *Contra* ARK. STAT. ANN. § 41-1813 (1977); FLA. STAT. ANN. § 800.02 (West 1976).

227. See *supra* note 131.

228. See *id.*

229. See *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972). Although the author knows of no cases litigating private agreements such as the one in the Open Marriage example purporting to govern adulterous conduct, one would suspect that such agreements would not be enforced under current law.

Denial of homosexuals' right to marry, for example, is not a result of some beneficial withdrawal of public control over sexual conduct; it continues a policy burdening the private behavior by denying access to the benefit of legal recognition.

Somewhat further advanced but also far from complete is the process of dismantling the legal reinforcement of a system of roles, obligations, and rights assigned according to gender.<sup>230</sup> These developments give vastly greater plausibility and incentive to private efforts to contract for the types of marital obligations reflected in a number of the examples above.

Changes in economic aspects of marriage, in particular, have vital importance in the movement to reduce sexism in marriage. Apart from flippancies like "two can live as cheaply as one," popular conceptions about romantic love divert attention from the economic consequences of marriage. As the sophisticated have always known, however, those consequences can be major, ranging from support obligations, to state-imposed regimes of marital property, to special tax treatment, to special rules regulating treatment of spouses on death or divorce.

Until recently, the economic consequences of marriage have been far more visible for men than for women. In the traditional marriage, where husband is breadwinner and wife is homemaker, men have been seen as contributing the economic values and as shouldering the economic burdens. The bonbon-eating housewife watching soap operas or the alimony parasite squeezing her ex-husband's wallet dry are images ensconced in the popular imagination.

Only recently have the important contributions of women and the potentially negative consequences of traditional marriage economics for women been widely recognized. Actions for the wrongful death of a housewife have begun to include the dollar value of services performed in the home.<sup>231</sup> Similarly, divorce decrees have begun to count a wife's domestic work as a significant contribution to marital assets and to a husband's earning potential.<sup>232</sup> Once the issue surfaced, numerous other inequities became apparent in tax laws, pension rights,

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230. M. GLENDON, *supra* note 61, at 113-81; H. KAY, *supra* note 87.

231. *E.g.*, *Legare v. United States*, 195 F. Supp. 557, 560-61 (S.D. Fla. 1961); *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 484, 153 A.2d 490, 491-92 (1959). See Lambert, *How Much is a Good Wife Worth?*, 41 B.U.L. REV. 328, 328 *passim* (1961).

232. See, *e.g.*, *Rieger v. Christensen*, 529 P.2d 1362, 1364-65 (Colo. App. 1974); CAL. CIV. CODE § 4801(a)(1) (West Supp. 1981) (specifying that one factor the court is to consider in formulating the dissolution decree is "the earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties"). According to Freed & Foster, *supra* note 59, at 246, the number of statutes recognizing homemaker contributions to marital assets is increasing.

tort theories, social security provisions, marital property laws,<sup>233</sup> and in the segregation and undervaluation of women's work generally.<sup>234</sup> While the state has thus begun to remove certain economic inequities, the remaining economic consequences of marriage constitute a major incentive for couples to draw up private agreements such as the Domestic Services example. Through its traditional rules invalidating private agreements to pay a salary for domestic services, the state has long dictated the economic invisibility and dependence of housewives. Individual couples understandably may wish to make other arrangements. Not only traditional housewives, but also women who work outside the home may need or want enforceable private agreements that give monetary recognition to housework. Research has shown that even where both spouses work full-time, women still do the overwhelming majority of housework and child care.<sup>235</sup> Furthermore, women are far from equal in the pay they receive from outside employment<sup>236</sup> and are likely to remain unequal until comparable worth issues are addressed.<sup>237</sup> Private agreements recognizing the monetary value of domestic work would go far to equalize a wife's earning power with that of her husband. By the same token, women planning careers outside

233. Although her article is on property rights of unmarried cohabitators, Professor Bruch forcefully raises the issues surrounding the economic value of services in the home in her important article, *Property Rights*, *supra* note 61. See also Fethke & Hauserman, *Homemaking: The Invisible Occupation*, 71 J. HOME ECON. 20 (1979). As early as 1932, Professor Havighurst had focused attention on this problem in his article, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386 (1932), and as recently as 1981, Lenore Weitzman analyzed the pervasive legal and social inequities still arising from underrating women's economic contributions in the home. L. WEITZMAN, *supra* note 66, at 60-97. For other discussion of this and related problems see H. KAY, *supra* note 87, at 192-219; Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 4-76 (1980); Gann, *Abandoning Marital Status As A Factor in Allocating Tax Burdens*, 59 TEX. L. REV. 1 (1980); Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789, 828-40 (1978); F. Turnbull-Hall, *The Case of the Late Mrs. Smith, Homemaker: Preparing Testimony for the Court*, 67 J. HOME ECON. 30 (1975).

234. See, e.g., Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979). In *County of Washington v. Gunther*, 101 S. Ct. 2242, 2246 (1981), the Supreme Court emphasized "the narrowness of the question" before it, adding that the claim "is not based on the controversial concept of 'comparable worth.'" Nevertheless, it did decide that female prison guards could sue under Title VII of the Civil Rights Act despite the fact that they did "not perform work equal to that of male jail guards," *id.* at 2254, because "the County of Washington evaluated the worth of their jobs; . . . [and] determined that they should be paid approximately 95% as much as the male correctional officers . . . [but] paid them only about 70% as much . . ." *Id.* at 2253. But see Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980).

235. M. BANE, *supra* note 117, at 29 n.21; A. SKOLNICK, *supra* note 127, at 245; sources collected in Bruch, *Property Rights*, *supra* note 61, at 112 nn.43 & 44.

236. See *Kahn v. Shevin*, 416 U.S. 351, 353 (1974) ("[D]ata compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955.").

237. See Blumrosen, *supra* note 234, at 400.

the home may wish to make arrangements like those in the Income Production and Support and the Domicile examples to implement their rights to careers within the context of marriage.

To the extent that the state has begun to refuse to mandate or reinforce stereotyped economic, social, or sexual roles, the legal framework of marriage already has become more receptive to contractual governance. The accelerating acceptance of diverse lifestyles, and especially the dilution of a legally entrenched model of one correct relationship between sexes and between intimate partners, clears the way for a state posture toward intimacy that facilitates and defers to individual choice, consent, and equality.

### C. *No-Fault Divorce*

Divorce serves several functions. It certainly marks the exit from the legal status of marriage. In addition, as Section II illustrated, it has traditionally provided a forum wherein the state might enforce marital obligations after the fact.<sup>238</sup> Finally, divorce may also function as a rulemaking process that decrees the legally enforceable terms of a beginning "divorce relationship."<sup>239</sup> Recently the state has reduced its involvement in each of these areas, signaling a change in attitude that may significantly affect marital contracting. The following discussion examines the state's retreat from the substantive regulation of marriage termination and from its enforcement of marital obligations through the divorce decree. The state's changing role in divorce rulemaking will be considered later.<sup>240</sup>

Until recently, the state dictated the grounds on which divorce could be sought. Social pressures outlined in Section III undermined both the uniformity and substance of the state's policies and the legitimacy of their imposition. Under no-fault divorce, the decision to end marriage increasingly rests on unreviewed private judgment;<sup>241</sup> the state's role is diminishing to one of solemnization and recording, akin to its role in marital licensing.<sup>242</sup> Thus, the no-fault movement represents the state's abandonment of control over the substantive criteria

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238. See *supra* text accompanying notes 95-97.

239. While the first role is always present, the degree to which the latter two aspects of divorce are manifested depends on variables like the degree of contest between the parties and the presence of minor children.

240. See *infra* text accompanying notes 281-99.

241. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 953-54 (1979). Professor Rheinstein observed as long ago as 1972 that "[i]f a legislature were to enact a statute providing that the partners to a marriage be restored to the freedom of remarriage simply upon the expression of their mutual agreement, it would do no more than recognize the actual state of affairs." M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 251 (1972).

242. See M. GLENDON, *supra* note 61, at 229.

for marital termination and, by inference, the substantive criteria for marital continuation as well.

In light of this trend, it is surprising that one publicly imposed preference—for intended marital permanence—remains largely intact. No-fault gives legal recognition to the social fact of impermanence in a growing number of marriages. Moreover, as we shall see, even the longstanding judicial resistance to enforceable planning for the possibility of divorce has begun to crumble.<sup>243</sup> Yet, no public option for temporary marriage exists; nor are there valid private agreements specifying a limited term,<sup>244</sup> such as the Duration example.

The no-fault development also raises the issue whether private agreements about criteria and procedures governing marital termination, such as those in the Open Marriage or Dispute Resolution examples, ought to be recognized.<sup>245</sup> To grant such recognition would be akin to allowing contracting parties in other contexts to choose arbitration of disputes or to specify what kind of breach would terminate the relationship.<sup>246</sup>

The abandonment of fault as a necessary ground for divorce has diminished the state's role in determining the criteria for marital termination, and it also has had important implications for state efforts to regulate marital conduct. As shown in Section II, under fault divorce regimes, courts determined breaches of marital duties, such as support, fidelity, and respect, and used the findings for both granting divorce and determining post-divorce obligations such as property division, spousal support, or child custody.<sup>247</sup> By contrast, under no-fault divorce, breaches of marital obligations are largely irrelevant.<sup>248</sup> Thus, where a husband's infidelity may once have led a divorce court to inflate the wife's alimony check, the matter is now likely to be ignored.

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243. See *infra* notes 300-04 and accompanying text.

244. The most common example of prospective efforts to limit duration occurs where a marriage is agreed to solely for the purpose of legitimizing a child. Courts have held such marriages valid but ignored the existence of the agreement about duration. See, e.g., *Davis v. Davis*, 191 A.2d 138 (D.C. 1963) (parties' prenuptial agreement that marriage was to legitimize child and that either could obtain divorce at will did not invalidate marriage). See also *Schibi v. Schibi*, 136 Conn. 196, 69 A.2d 831 (1949) (husband's request for annulment on ground that marriage had been intended to last only six weeks denied on ground that marriage was valid). See generally H. CLARK, *supra* note 37, § 2.18.

245. One situation in which private values about the criteria for divorce have been held unenforceable occurs where a spouse claims that granting a divorce under no-fault criteria violates religious beliefs expressed through ceremonial vows. See, e.g., *Williams v. Williams*, 543 P.2d 1401 (Okla. 1975). Such vows may or may not be embraced by the parties with the seriousness, deliberateness, and intent that would characterize marital contracts.

246. Even if allowed, such agreements could, of course, be optional, operating against the backdrop of a state policy, probably no-fault, which would control in the absence of a private contract.

247. See *supra* text accompanying notes 95-97.

248. Freed & Foster, *supra* note 59, at 247.

Instead, support obligations increasingly are determined by divorce relationship policies such as the recipient's needs and the financial resources available to the other spouse.<sup>249</sup>

The state's retreat from substantive regulation of marriage termination and from the vindication of state marital policies in the divorce context is highly significant for the possibility of marital contracting. If the state no longer asserts that it is in a better position than the spouses to define the characteristics that mark the end of a marriage, then the state can hardly assert that it can best define the characteristics of an existing marriage.<sup>250</sup> Moreover, since the state already prohibits spouses from enforcing state imposed marital obligations during marriage and is now tending to the same posture at the time of divorce, marriage is becoming devoid of any enforcement of publicly imposed obligations. Basic questions of the need for and feasibility of legal obligation in marriage remain to be addressed in Section VI.<sup>251</sup> If such needs do exist, however, no-fault divorce's withdrawal of state substantive policy from marriage suggests the need for legal recognition of private control, unless marriage is to become a "lawless" institution.

#### D. *The Retreat from the Unit Theory of Marriage*

##### 1. *Marital Unit Theory and the Civil Law*

A woman's legal identity historically has been merged into that of her husband.<sup>252</sup> Until late in the last century, the doctrine of coverture gave legal substance to the view that a marital couple was a unit, a single entity controlled by the husband.<sup>253</sup> The formalities of coverture

249. H. KAY, *supra* note 87, at 271-78; Weitzman & Dixon, *supra* note 96, at 159-61, 183-85. The UNIFORM MARRIAGE AND DIVORCE ACT § 308(a), for example, suggests that spousal support be ordered only if the spouse requesting it is unable to rely on his own property or earnings for support.

250. While this increased acceptance of private control over substantive values in marriage creates a vital shift toward contractual ordering, the no-fault reform also moves marriage away from contractual ordering in one important respect: it allows a party unilaterally to terminate the relationship. See M. GLENDON, *supra* note 61, at 229. By contrast, normal contractual obligations continue unless there is mutual rescission. See RESTATEMENT (SECOND) OF CONTRACTS § 283(1) (1981); R. POSNER, *supra* note 64, at 107-08. Although this Article does not discuss the issue of whether divorce should be granted on unilateral demand it does address the resulting problem that marital obligations no longer have any avenue of enforcement. See *supra* text accompanying notes 84-111 and *infra* text accompanying notes 457-64.

251. See *infra* text accompanying notes 390-464.

252. Even as women began to emerge from other forms of dependency on men, a married woman's relations with her husband remained the exception: "The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract." H. MAINE, ANCIENT LAW 140 (1931 ed.) (1st ed. 1861).

253. Blackstone described the situation this way: "By marriage, the husband and wife are one person in law. . . . The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing,

disappeared by the end of the last century with the adoption of laws<sup>254</sup> that gave married women, like other individuals, rights to own, buy, and sell property, and to make contracts.<sup>255</sup> Yet, the single entity view of marriage remained, having permeated most areas of law that touched the family, and a host of legal provisions continued to emphasize the unified nature of marriage. Special rules for marital partners still include marital property rules;<sup>256</sup> inheritance laws;<sup>257</sup> and special tax rules.<sup>258</sup> Evidence privileges for spouses are broader than those for

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protection, and cover she performs everything . . . ." 1 W. BLACKSTONE, *supra* note 39, at \*442 (emphasis omitted). See generally, H. KAY, *supra* note 87, at 163-183; Johnston, *supra* note 35, at 1044-61.

254. *E.g.*, IOWA CODE ANN. §§ 597.1, .18 (West 1950); N.Y. GEN. OBLIG. LAW §§ 3-301, -315 (McKinney 1978); OKLA. STAT. ANN. tit. 32, § 15 (West 1976). See H. CLARK, *supra* note 37, at 222-23 & n.4; Johnston, *supra* note 35, at 1061-70. Once these laws were enacted the wife could even, in theory, make contracts with her husband, although as we have seen above, this right was usually sharply restricted by domestic relations statutes or precedents. See *supra* text accompanying notes 67-74.

255. Soon thereafter came a wife's right to manage and control her own earnings. *E.g.*, N.Y. GEN. OBLIG. LAW §§ 3-301, -315 (McKinney 1978); OKLA. STAT. ANN. tit. 32, § 15 (West 1976). Professor Johnston develops the point that although women theoretically controlled their own earnings by 1935, the failure to recognize in married women a property right, enforceable against their husbands, in the value of their own labor within the home, considerably restricted the importance of the supposed control over earnings. Johnston, *supra* note 35, at 1070-75. Later still, in community property states, married women were granted the right to equal management and control of all the community property. *E.g.*, CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1981); TEX. FAM. CODE ANN. tit. 1, § 5.22 (Vernon 1975). See discussion of the utility of this right in H. KAY, *supra* note 87, at 214-19. See also Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A. L. REV. 1 (1976). Some common law states have also attempted to improve their treatment of married women in regard to marital property. In 1980, New York passed an "equitable distribution" law, amending N.Y. DOM. REL. LAW § 236 (McKinney 1977) and N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 1973), although that law treats marriage as a partnership only after it is dissolved. See Foster, *An Explanation of the New York 1980 Equitable Distribution Law*, 6 FAM. L. REP. (BNA) 2651, 2651 (1980). Another common law state, Wisconsin, has been considering the adoption of a system of marital partnership property. Wis. A.B. 1090 (introduced by Rep. Munts in 1979).

256. *E.g.*, CAL. CIV. CODE §§ 4800-4813, 5104-5129 (West 1970 & Supp. 1981); OHIO REV. CODE ANN. § 3103.04 (Page 1980). See also M. GLENDON, *supra* note 61, at 140-81; H. KAY, *supra* note 87, at 204-19; Foster, *supra* note 255, at 2651; Johnston, *supra* note 35, at 1057-70. This Article does not suggest that background laws of the state regarding marital property or inheritance policies should ignore important needs for unity and sharing in marriage. Rather it addresses the presently inadequate degree of private control over such matters. For insightful and thoughtful discussion of the tension between equality and sharing principles in marital property law, see M. GLENDON, *supra* note 61, at 140-81; Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1 (1977).

257. *E.g.*, CAL. PROB. CODE §§ 201, 201.5 (West 1956); IOWA CODE ANN. §§ 633.211, 633.212 (West 1975); MO. ANN. STAT. § 474.010 (Vernon 1956). See M. GLENDON, *supra* note 61, at 279-80, 282-84.

258. *E.g.*, I.R.C. §§ 267(c)(2), 318(a)(1)(A)(i) (1976); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 301 (to be codified at I.R.C. §§ 2056, 2523). For a proposal to abandon marital unit notions and substitute a system of separate tax returns for all individuals, see Gann, *supra* note 233. See also J. CHOMMIE, *THE LAW OF FEDERAL INCOME TAXATION* 4-5, 440-42 (2d ed. 1973); M. GLENDON, *supra* note 61, at 178.



other special relationships.<sup>259</sup> In some states, spouses still cannot sue one another for tortious conduct.<sup>260</sup>

In line with new societal emphases, however, many of the old legal rules are now changing to treat spouses as separate and equal individuals within marriage. Examples abound: a husband's permission is not required for a wife's abortion decision;<sup>261</sup> credit opportunities must be extended to married women in their own names;<sup>262</sup> spouses may now in many states sue one another for tortious conduct;<sup>263</sup> marital testimonial privileges are being cut back.<sup>264</sup> Even the Supreme Court has given this trend visibility and approval, at least rhetorically: "Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals with a separate intellectual and emotional makeup."<sup>265</sup>

Where marriage-as-unit rules have been slow to change, they have been under heavy attack. For example, the system of joint marital tax returns had the effect of aiding traditional one-earner families and penalizing two-earner families by imposing higher taxes than if each spouse were single and earning the same income. The law recently was changed.<sup>266</sup> Although some inequity remains, continuing amelioration of the "marriage penalty" seems likely.

The choice between a single-entity or a two-individuals view of marriage has great conceptual and philosophical importance for contractual ordering of marriage. When a single-entity view of marriage

259. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 144-46 (2d ed. 1972). *But see* Trammel v. United States, 445 U.S. 40 (1980) (witness spouse alone has privilege to refuse to testify adversely and may neither be compelled to testify nor foreclosed from testifying). *Trammel* modifies the common law rule against adverse spousal testimony reaffirmed in *Hawkins v. United States*, 358 U.S. 74, 77 (1958). The *Trammel* Court does, however, characterize the *Hawkins* privilege as follows: "No other testimonial privilege sweeps so broadly." 445 U.S. at 51.

260. *See, e.g.*, *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); J. FLEMING, THE LAW OF TORTS 664-66 (5th ed. 1977). Indeed, in general, legal presumptions and outcomes in husband-wife litigation have differed from otherwise prevailing norms. Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1650 (1966).

261. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-71 (1976).

262. *See* Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (1976); 12 C.F.R. §§ 202.7(b)-7(d) (1979); *see generally* Burns, *Empirical Analysis of the Equal Credit Opportunity Act*, 13 U. MICH. J.L. REF. 102 (1979).

263. *See* W. PROSSER, THE LAW OF TORTS § 122 (4th ed. 1971); Casey, *The Trend of Interspousal and Parental Immunity—Cakewalk Liability*, 45 INS. COUNS. J. 321, 322 (1978); Comment, *Interspousal Tort Immunity*, 30 BAYLOR L. REV. 291, 300-01 (1978). *See also* Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) (holding one spouse may sue the other for outrageous and intentional personal tort); RESTATEMENT (SECOND) OF TORTS § 895-F (1977) (abolishes interspousal immunity). The dissent in *Raisen v. Raisen*, 379 So. 2d 352, 356 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980), indicates that 28 states have now abolished interspousal tort immunity.

264. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40, 53 (1980).

265. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

266. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 103, 95 Stat. 301 (to be codified at I.R.C. § 221).

prevailed, it was logical that only the unit could own property, create contracts, and decide domicile. More important, any notion of bargaining, exchange, or negotiation within a marriage-as-unit would be anomalous and perhaps even offensive as a matter of policy. If, however, a marriage is seen as consisting of two independent individuals, then bargain and exchange within the relationship becomes possible, just as it is already possible for married individuals to conduct separate legal relations with third parties. When it is acceptable for the two partners to bargain with one another, spousal contracts like those illustrated in the examples will not seem strange.

## 2. Marital Unit Theory and the Criminal Law

A salient example of the marriage-as-unit theory is found in the interaction of marriage law and the criminal law. For example, at common law, a married woman could not be convicted of most crimes "if she committed a prohibited act jointly with (her husband), or while he was present."<sup>267</sup> In these circumstances a wife was presumed to be acting under coercion of her husband.<sup>268</sup>

While little remains of the marital unit theory where spouses injure third parties,<sup>269</sup> the same cannot be said of crimes of physical abuse between spouses themselves. In most states it is still legally impossible, although certainly not physically so, for a husband to rape his wife.<sup>270</sup> Even in those states where this longstanding rule has been changed<sup>271</sup> few men have been prosecuted.<sup>272</sup> In contrast with rape, no

267. R. PERKINS, ON CRIMINAL LAW 914 (2d ed. 1969).

268. *Id.* at 910-18. One 14th century English case even extended this immunity far enough to presume a wife's coercion on the mere basis of her husband's command. *Id.* at 916 n.81.

Certainly reasons other than a concept of marriage-as-unit influenced the development of the husband-wife coercion rules in the criminal law. *See id.* at 910-18. Nevertheless these rules joined with parallel ones to reflect and reinforce the assumptions of marital unity. Separate choices, obligations, injuries, and intentions of spouses were given little legal recognition. Always, too, the merger was not one of equals; legal accountability for the unit, like its legal domination, rested mainly in the hands of the husband.

269. Married women's immunity to criminal prosecution because of presumed (as opposed to proven) coercion by the husband has largely vanished. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 380 (1972).

270. *See, e.g.*, ARIZ. REV. STAT. § 13-1406 (1978); ILL. REV. STAT. ch. 38, § 11-1(a) (1979); WASH. REV. CODE § 9A.44.040 (1981). For recent discussions of the problem of marital rape, see Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088 (1980); Freeman, *But If You Can't Rape Your Wife, Who(m) Can you Rape?: The Marital Rape Exemption Reexamined*, 15 FAM. L.Q. 1 (1981).

271. *See, e.g.*, CAL. PENAL CODE § 262 (West Supp. 1981); N.J. REV. STAT. § 2C: 14-5(b) (1980); OR. REV. STAT. § 163.305 (1979). Even where prosecution of marital rape is now possible, the factual parameters of the actionable conduct may be narrower and punishment more lenient than in other types of rape. Compare CAL. PENAL CODE §§ 261, 264 (West Supp. 1981) ("normal" rape) with § 262 (West Supp. 1981) (spousal rape). These differences may reflect a compromise born in part of evidentiary doubts, but they likely also reflect holdovers of the old substantive attitudes as well. *See* H. KAY, *supra* note 87, at 905-06; Freeman, *supra* note 270. It should also

statutory exceptions make criminal assault and battery definitionally impossible between spouses. However, recent public scrutiny of the problem of wife-beating (and occasionally husband-beating) reveals a reluctance among police, prosecutors, and courts to bring the criminal justice system to bear on those who physically abuse their spouses.<sup>273</sup>

Laws on spousal rape and practices concerning spousal abuse have been recently subjected to widespread criticism,<sup>274</sup> and they will likely continue to change. The pressures for change in these areas reflect the move to treat spouses as independent and responsible individuals. They also reveal the state's retreat from its traditional Option Two posture toward marriage (high control of behavior norms, low involvement in dispute resolution). The controversy over these policies makes this a natural area in which to trace the changes in state attitude toward both key questions addressed in this Article: public versus private control of marriage obligations and access or bar to spousal dispute resolution.

The legal and practical realities of crime within marriage illustrate the high degree of state control of the behavior appropriate in marriage. Indeed the state's control of marital behavior may even override some commands of the general criminal law. That rape cannot be prosecuted within marriage<sup>275</sup> means that the state has mandated that a wife must be constantly sexually available to her husband. Similarly, battery has seldom been prosecuted within marriage, in part because of an implicit assumption that "physical discipline" may be condoned or at least tolerated within marriage.

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be noted that some states have adopted an intermediary position between an absolute immunity for spousal rape and the elimination of such immunity: they provide for prosecution if there is legal or physical separation, or a pending action for divorce. See listing of various states' positions in *id.* at 24-25.

272. While it is difficult to estimate the number of marital rape charges brought, commentators note the dearth of convictions. See Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088, 1091 (1980) (noting that only one such case had been reported); Glasgow, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565, 582 (1980) ("To date there has been no successful prosecution of a husband for marital rape under these laws."). South Dakota eliminated the spousal exemption and then reinstated it a year later, there having been no prosecutions under the changed code. Freeman, *supra* note 270, at 24.

273. See, e.g., R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES* 207-22 (1979); Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1688-91 (1981); Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 L. & CONTEMP. PROBS. 539, 541-65 (1971); Trent, *Wife Beating: A Psycho-Legal Analysis*, 65 WOMEN LAW. J. 9, 12-15 (1979).

274. See, e.g., R. DOBASH & R. DOBASH, *supra* note 273; Freeman, *supra* note 270, at 1-29; Glasgow, *supra* note 272, at 585-86; Marcus, *supra* note 273; Sampson, *Spousal Abuse: A Novel Remedy for a Historic Problem*, 84 DICK. L. REV. 147, 147-70 (1979); Trent, *supra* note 273; Comment, *Wife Beating: Law and Society Confront the Castle Door*, 15 GONZ. L. REV. 171, 171-202 (1979).

275. See *supra* note 270.

The same arguments that are used to justify the state's traditional refusal to become involved in civil disputes between spouses—institutional incompetence and fears of disturbing domestic harmony—are raised in support of police and prosecutorial abstention in interspousal crime.<sup>276</sup> It is difficult, however, to assert the domestic harmony argument with convincing seriousness in the context of physical abuse. The rationale of institutional incompetence seems disingenuous in regard to institutions whose competence is precisely the controlling of physical violence. As in other special areas of criminal enforcement such as organized crime, principles and skills tailored to the family setting could be developed by responsible institutions. The fact that the familiar arguments of disrupting domestic harmony and exceeding institutional competence are less than satisfactory in the criminal context casts analogous doubt on their persuasiveness in civil settings.

If the state were to abandon special rules of marital conduct, normal criminal law rules would apply to marital relations. The harder question is whether private agreements concerning appropriate sexual and physical conduct in marriage ought to be introduced into the territory being abandoned by state marriage policy. If, in the Open Marriage example, instead of agreeing to open sexual relations outside the marriage, John and Mary had decided that she would agree in principle to sex on demand, should such an agreement prevent her from later filing a rape claim against John? Normally one cannot consent to serious criminal conduct.<sup>277</sup> This principle would prevent any private determinations about serious battery, for example, from overriding the general criminal law. Rape, however, is different. Consent bars a charge of rape,<sup>278</sup> and arguably a private agreement to consent in advance to a sex-on-demand obligation ought to remove the possibility of criminal prosecution. However, a strong argument can be made that consent is meaningful only if given at the time of the act, or more generally, that private contract ought not to override the general criminal law concerning rape even as one cannot legally contract to commit a

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276. Strictly speaking, of course, criminal prosecution of a spouse for rape or battery does not constitute interspousal dispute resolution but represents instead the sanctioning of proscribed behavior by the state itself. Nevertheless, as compared with other crimes, domestic violence may require greater effort by a spouse complainant to initiate state prosecution. In a real sense, criminal prosecutions are the public expression of an interspousal dispute. Furthermore, since the arguments against enforcement of criminal laws in the marital context closely parallel those justifying denial of interspousal dispute resolution in civil actions, it seems reasonable to treat the policies about domestic violence as relevant to the more general problem of interspousal dispute resolution.

277. W. LAFAYE & A. SCOTT, *supra* note 269, at 408.

278. See, e.g., *People v. Harris*, 93 Cal. App. 3d 103, 155 Cal. Rptr. 472 (1st Dist. 1979); CAL. PENAL CODE § 261 (West Supp. 1981) (defining rape as occurring "when person is incapable of giving legal consent"); W. LAFAYE & A. SCOTT, *supra* note 269, at 408.

murder. In any event, the idea of enforceable private agreements concerning violent sexual conduct is less offensive than a state declaration that violent sexual conduct is automatically acceptable in marriage.

### *E. Acceptance of Limited Contractual Arrangements Between Spouses*

The changes examined thus far in this Section prepare the ground for contractual ordering because they respond to pressures toward diversity, individualism, and equality by reducing public control of conduct in intimate relations, because they treat marital partners as individuals capable of separate interests, injuries, and remedies, and because they recognize that legal dispute resolution in marriage may sometimes be desirable. Other recent changes in the law of marriage take the next step, facilitating the partners' ability to make enforceable contracts about certain aspects of their relationship. While the general rule still discourages marital contracts, the number and breadth of exceptions to that policy is increasing. In these exceptional areas the state has moved away from Option Two, characterized by high control of marital obligations and refusal to adjudicate or enforce in marital disputes, toward Option Three, which allows private agreement to govern conduct in ways which the state stands willing to enforce. These exceptions demonstrate the likely direction of movement. Moreover, an examination of the exceptions provides an opportunity to reevaluate the justifications for the general rule itself, thereby sharpening the analysis of whether the new trend is desirable.

#### *1. Property Agreements*

Section II briefly described the exception that permits spouses to make binding contracts concerning property rights.<sup>279</sup> This exception seems to pivot on the subject matter of the contract. The state's view is apparently that marital property agreements and disputes are more appropriately indexed under policies governing property than under policies governing marriage. Courts have considerable experience and a sense of competence with the economic issues involved in property disputes, and adjudications can be relatively final and clear. Moreover, the general area of property rights is one typically committed to private ordering by ideological tradition if not always by policy.

While in practice, property rights based on spousal agreement are normally litigated at divorce or death, nothing in the terms of the exception itself would so restrict it.<sup>280</sup> If that conclusion is correct, then the exception must rest on the ideological legitimacy of private control over property, on the need for adjudication, or on the ease of adjudica-

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279. See *supra* text accompanying note 75.

280. See *supra* notes 93-94 and accompanying text.

tion. Apparently, in theory at least, it would be possible to intrude into domestic harmony to settle a property-related dispute. If so, some light is shed on the criteria for state willingness to settle other kinds of disputes as well.

Although spouses are already able to make enforceable contracts regarding property rights, a decision to support private decisionmaking might lead the state to encourage the making of such contracts rather than just to tolerate them. State regimes of marital property differ drastically, particularly as between common law and community property systems. Many people do not understand even the outlines of their state's system, nor do they know they have the right to opt out of it by private agreement. Yet they do have assumptions and expectations about property that, if not articulated in a contract, may well be frustrated in a later dispute. If the state were to decide that marital property ownership ought to be based on private choices it might require prospective marriage partners to choose among several optional forms of property ownership at the time of getting a marriage license, as in the marital property example. Such a plan would produce far greater private control of property rights than the present combination of a state-dictated regime of marital property supplemented by contracts drafted by the knowledgeable few.

## 2. *Divorce Contracting*

Section II also referred to a second exception to the prohibition on marital contracts, which permits couples to control certain divorce terms by private agreement.<sup>281</sup> The core of this exception is found in statutory enabling provisions,<sup>282</sup> but recent judicial practice has committed to private control a growing number of decisions regarding obligations after divorce.<sup>283</sup> Indeed, while marriage contracting as a general proposition has thus far been rejected by courts and legislatures, a certain amount of divorce by contract is now the norm.

Divorce contract may be too blunt a label, but it does suggest the direction of recent developments, especially under no-fault divorce.<sup>284</sup> As noted above, establishing rules of conduct for the new "divorce relationship" is one function of the divorce process.<sup>285</sup> Especially where

281. See *supra* text accompanying note 76.

282. E.g. CAL. CIV. CODE § 4802 (West 1970); MONT. CODE ANN. § 40-2-303 (1981); OHIO REV. CODE ANN. § 3103.06 (Page 1980).

283. See, e.g., *Hawgood v. Hawgood*, 33 Ohio Misc. 227, 294 N.E.2d 681 (1973). See also Mnookin & Kornhauser, *supra* note 241, at 954-56.

284. See the excellent presentation of this point by Mnookin & Kornhauser, *supra* note 241, at 953-56.

285. See *supra* text accompanying note 239. Professor Kay makes this point in her article, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1228 (1968).

children or spousal support obligations necessitate continuing contact between former spouses, private separation or settlement agreements have a planning and governing role akin to that of a rulemaking contract. Of course, unlike normal rulemaking contracts, divorce agreements also share the characteristics of dispute settlement agreements<sup>286</sup> in that they are negotiated in light of predictions about what a court would order if the parties failed to agree.<sup>287</sup> Moreover, while the bargains about divorce terms are enforceable by courts in case of breach, unlike normal contracts, the terms of divorce agreements are subject to subsequent modification by the courts under certain circumstances.<sup>288</sup>

The degree to which the obligations of the divorce relationship may be governed by private bargain differs according to the subject matter at issue. In most states, separating or divorcing spouses may make binding agreements concerning division of property and spousal support.<sup>289</sup> Depending on the jurisdiction, these private agreements may or may not be incorporated into the decree of divorce, and may or may not be modifiable at a later time.<sup>290</sup> By contrast, parties lack the power to make binding agreements about child custody or support.<sup>291</sup> They may, and often do, however, suggest to the court privately agreed terms concerning these matters.<sup>292</sup> In practice, courts will frequently defer to private agreement even on these matters.<sup>293</sup> Whether this is so because of a lack of institutional competence, a lack of judicial stan-

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286. For discussion of rule making as compared to dispute settlement negotiation, see Eisenberg, *supra* note 8.

287. See Mnookin & Kornhauser, *supra* note 241, at 968-69.

288. See H. CLARK, *supra* note 37, §§ 16.11-14; C. FOOTE, R. LEVY & F. SANDER, *supra* note 38, at 914-16; Mnookin & Kornhauser, *supra* note 241, at 954-56.

289. Mnookin & Kornhauser, *supra* note 241, at 954.

290. C. FOOTE, R. LEVY & F. SANDER, *supra* note 38, at 914-16.

291. Mnookin & Kornhauser, *supra* note 241, at 954-55.

292. See *id.* at 955. Indeed, under new joint custody statutes such as California's, the court may require the parents to submit a plan for custody to the court for its approval. CAL. CIV. CODE § 4600(b)(1) (West Supp. 1981).

293. Mnookin & Kornhauser, *supra* note 241, at 954-56. The degree of deference to private bargain will, of course, vary not only with the inclinations of the court but with remaining or revised public policy preferences about custody, as for example mother preference policies for children of tender years, see discussion of which states retain or reject this doctrine today in Freed & Foster, *supra* note 59, at 263-66; see also Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335 (1982); or the newer policies favoring joint custody, e.g. CAL. CIV. CODE § 4600.5 (West Supp. 1981). See discussion of the new trend toward joint custody in Foster & Freed, *supra* note 59, at 265-66. Even where a statute establishes a substantive policy preference, however, private planning may play an important role. The California statute, for example, requests a privately agreed plan for implementation of the statutory preference. This pattern of interaction between public and private ordering might well be used as a model for other areas of marital conduct where public policy preferences remain strong but where the need for private planning is clear. To some degree the explicit mix of public and private policy in the governance of child custody in California can be seen as an intelligent compromise between the state's need to protect the interests of children, who are outsiders to the marital bargain, while also deferring to the preferences of the responsible adults.

dards for decision, or lack of time, inclination, or attention is unclear; but the result is evident: more private determination of obligations enforceable by courts.<sup>294</sup>

What does the divorce contract exception reveal about the validity of the state's general refusal to enforce private marital agreements? Given acceptance of private control of some divorce terms but not others, the divorce agreement exception to spouses' inability to contract seems to rely on distinctions between types of substantive terms. However, this factor alone does not satisfactorily explain the divorce agreement exception, since certain of the terms that are open to contractual control at divorce are closed to private control during marriage. For example, although the Income Production and Support example could not be enforced during marriage, analogous terms of a divorce agreement would be enforceable as part of a divorce decree. Perhaps the state's public policy preferences about support responsibilities within marriage are stronger than its preferences concerning support after divorce. As we have seen, however, even state-enacted policies about marital support obligations go unenforced between spouses during marriage.<sup>295</sup> It thus seems likely that the difference in acceptance of contractual control of spousal support and similar issues does not arise from preferences about private as opposed to public control of the conduct, but rather from assumptions about the consequences of, and necessity for, public enforcement or dispute resolution at varying points along the marital timeline.

The anticipated negative consequences of formal dispute resolution are usually couched as fears of disrupting domestic harmony.<sup>296</sup> In one sense, this concern is irrelevant at divorce since, by hypothesis, domestic harmony has ended. Realistically, however, the need for harmony and consensual decisionmaking often continues, especially where

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294. Mnookin & Kornhauser, *supra* note 241, at 955-56. Some commentators have advocated even greater private bargaining at the time of divorce. Mnookin and Kornhauser, for example, have attacked the segregation of the money aspects of divorce from the child-related aspects and have recommended an even more complete and open deference to private decisionmaking in divorce matters generally. *Id.* at 956-58.

295. See *supra* notes 84-86 and accompanying text.

296. See, e.g., Fuller, *supra* note 11, at 205-06 (1971); Note, *supra* note 260, at 1650-54. The court in *Graham v. Graham*, 33 F. Supp. 936, 939 (E.D. Mich. 1940), expressed a common view when it refused to enforce a private agreement between husband and wife because it saw such agreements as "inviting controversy and litigation between them."

While concerns about domestic harmony underlie the refusal of legal dispute resolution during marriage, they cannot explain the failure to recognize and enforce privately agreed marital obligations in divorce or other post-marital dispute resolution. A full evaluation of the latter policy would require a more comprehensive review of divorce policy and practice than can be undertaken by the present discussion, but such post-marital enforcement seems, if anything, easier to justify than the enforcement during marriage which is under discussion here.



children are involved.<sup>297</sup> Indeed, the growing acceptance of private ordering of divorce may itself assume that if divorcing partners reach private agreements about obligations, they are more likely to achieve a harmonious relationship after divorce and are thus less likely to seek court enforcement of divorce terms. Old notions of divorce vastly underestimated the value of private, consensual determination of post-divorce obligations.<sup>298</sup> A similar error is made when the possibility of conflict and the potential need for authoritative dispute resolution within a functioning marriage is denied.<sup>299</sup> An oversimplified assumption of conflict in divorce, or of harmony in marriage, may result in inappropriate legal policies concerning both relationships.

Fears about formal dispute resolution are usually joined with the premise that legal institutions are incompetent to adjudicate the types of issues that would arise in marital contract disputes. That argument is substantially weakened by the fact that courts adjudicate the same types of issues during divorce relationships. During and after divorce, complex personal issues such as child custody and support, spousal support, and irreconcilability are routinely made the subject of court orders. Courts also undertake dispute resolution in other "messy" family situations, such as contested wills, paternity disputes, and marriage annulments. Courts apparently feel competent to adjudicate family issues in those contexts; at least they conclude they must do so. The critical issue, then, distinguishing willingness to adjudicate divorce as opposed to marital disputes must be the perception of how compelling is the need for enforcement and dispute resolution, rather than any absolute inability to deal with family issues themselves, difficult as they may be. Given this, the state should evaluate anew its refusal to undertake enforcement or dispute settlement during marriage. Instead of erecting barriers to dispute intervention during marriage, the better approach would be to balance the concerns about competence against the compellingness of the need for dispute resolution. Similarly, fears about disruption of domestic harmony need to be set against the evils of lawlessness, broken promises, betrayed expectations, and unresolved discord between marital partners.

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297. Particularly noteworthy in this regard are the emerging statutes giving preference to arrangements for joint custody of any children after a divorce. *See, e.g.*, CAL. CIV. CODE § 4600.5 (West Supp. 1981). For general discussion of an emerging trend toward joint custody, see Freed & Foster, *supra* note 59, at 265-66.

298. Indeed the desire to facilitate more constructive and harmonious private decisionmaking at the time of divorce was a key reason advocates of no-fault divorce pursued their goals. *See* Goldstein & Gitter, *On Abolition of Grounds of Divorce: A Model Statute and Commentary*, 3 FAM. L.Q. 75, 81, 90-93 (1969); Kay, *supra* note 285, at 1228.

299. *See infra* text accompanying notes 396-405.

### 3. Antenuptial Contracting

The most recent extension of the right to make enforceable agreements between marital partners has occurred in the area of antenuptial agreements. Agreements between prospective marital partners concerning property rights before, during, and after marriage have long been enforceable<sup>300</sup> and have frequently been used by the wealthy and sophisticated. Only recently, however, have a few courts indicated willingness to accept and enforce premarital agreements concerning post-divorce obligations of spousal support.<sup>301</sup> This step signals a substantial departure from the earlier barrier against such agreements as contributing to divorce.<sup>302</sup>

What does the exception for antenuptial support contracts tell us about the general resistance to enforceable contracting in marriage? This new exception rests on both substantive and domestic timeline rationales. On the substantive side, while support and property are still distinct notions, they have much in common. Rights to income or support represent the major form of property rights for all but a small minority of the wealthy. Support, like property, is principally an economic issue, relatively easy to adjudicate and somewhat severable from emotional aspects of personal relations. Given courts' willingness to allow private decisions made before marriage or at the time of divorce to control post-divorce support obligations, any continued refusal to allow such agreements to be made during marriage would seem an unreasonably literal application of traditional policies disallowing contracting during ongoing marriage; issues of substantive policy, institutional competence, and relationship harmony in the two situations would be nearly identical.

If agreements made during marriage to govern post-divorce support became enforceable, similar arrangements governing support during marriage, as in the Income Production and Support example, ought to be candidates for early approval under this Article's recommended change in state marriage policy. The only remaining argument for disallowing enforceable support agreements during marriage is the rationale about enforcement disrupting domestic harmony. Yet it is hard to see why that argument ought to be any more persuasive in regard to support than it was in regard to property agreements that are now enforceable during as well as after marriage. Furthermore, as we have

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300. C. FOOTE, R. LEVY & F. SANDER, *supra* note 38, at 892 n.2; 2 A. LINDEY, *supra* note 74, § 90, at 28.

301. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970); *Volid v. Volid*, 6 Ill. App. 3d 386, 392, 286 N.E.2d 42, 47 (1972); *Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973); *Unander v. Unander*, 506 P.2d 719, 721 (Or. 1973). See also discussion of antenuptial contracts in L. WEITZMAN, *supra* note 66, at 347-52; Clark, *supra* note 74, at 141-59.

302. See *supra* note 74 and accompanying text.

just seen in discussing divorce, relationships are not so easily compartmentalized as the legal stages of marriage might imply. Harmony and conflict, fixed expectations and changing circumstances are present before, during, and after marriage. Actions and attitudes in one stage affect other stages; indeed this was a major reason courts previously refused to honor antenuptial support agreements.<sup>303</sup> The need for and problems of dispute resolution during marriage are addressed in Section VI. Important here is that the acceptance of new types of antenuptial agreements reflects a change in attitude about the legitimacy of a couple making binding plans—in this case, plans about possible divorce. In the few courts that have taken this step, there is a new willingness to believe that such planning might facilitate marital harmony rather than disrupt it.<sup>304</sup>

#### 4. *Nonmarital Cohabitation Contracts*

Courts in several states have recently added another arena to the list of intimate relationship obligations that can be governed by contract. While they concern nonmarital cohabiting couples rather than marriage relationships, cases like California's *Marvin v. Marvin*<sup>305</sup> have important implications for the state's selection of roles in relation to marriage.<sup>306</sup>

303. See, e.g., *Allen v. Allen*, 111 Fla. 733, 735, 150 So. 237, 238 (1933); *Matthews v. Matthews*, 2 N.C. App. 143, —, 162 S.E.2d 697, 699 (1968); *Crouch v. Crouch*, 53 Tenn. App. 594, 604-05, 385 S.W.2d 288, 293 (1964). See generally Weitzman, *supra* note 65, at 1263-66.

304. See, e.g., *Buettner v. Buettner*, 89 Nev. 39, 44, 505 P.2d 600, 603 (1973) ("Antenuptial contracts . . . have long been held to be conducive to marital tranquility . . .").

305. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Cases following the *Marvin* pattern insofar as they do not use public policy to bar application of contractual principles to nonmarital cohabitation relationships include, e.g., *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977) (implied contract to share property, resting in part on recognition of homemaker services); *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1978) (express contract for support); *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980) (express contract to share property upheld but no contract may be implied); *McHenry v. Smith*, 289 Or. 337, 609 P.2d 855 (1980). See also cases collected in Freed & Foster, *supra* note 59, at 276-83, *Contra Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 395 N.E.2d 1204 (1979). Cf. *Jones v. Daley*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (2d Dist. 1981) (declining enforcement of cohabitation agreement because homosexual services involved as consideration). The *Jones* holding makes even less sense than holdings declining enforcement in a heterosexual context, since in the context of homosexual cohabitation no option to marry exists. For a discussion of the post-*Marvin* trend, see L. WEITZMAN, *supra* note 66, at 395-415; Bruch, *Nonmarital Cohabitation*, *supra* note 61, at 223 n.24.

306. Contractual ordering of such relationships was previously barred by public policy because of the illegality of illicit sexual relations as consideration. While previously courts invalidated an entire agreement where they presumed nonmarital sex to be a part of the bargain, *Marvin* expressed a willingness to sever and uphold the legal aspects of any alleged agreement unless it rested explicitly on a consideration of meretricious sexual services. 18 Cal. 3d at 671, 557 P.2d at 113-14, 134 Cal. Rptr. at 822-23. See Kay & Amyx, *supra* note 61.

In agreeing to allow greater use of contractual principles in the governance of nonmarital

As the number of cohabiting relationships has increased,<sup>307</sup> and as the moral judgments reflected in earlier legal decisions about cohabitation have come to appear obsolete in the face of sweeping changes in ideology, norms, and behavior, courts have sought to find a fair way to deal with intentionally nonmarital relationships. They have been forced to choose between demands for "equal," *i.e.*, identical, treatment of marital and nonmarital relationships, and demands for recognition of the potentially differing intentions of couples who choose to marry and those who do not.<sup>308</sup> Both definitions of fairness are legitimate. Cohabiting couples probably have some expectation of shared privileges and obligations, just as married couples do.<sup>309</sup> On the other hand, it may be presumed that certain of their expectations led them not to marry. Recent cases in a growing number of states show an inclination to resolve these varying pressures by granting permission for private contractual ordering of these relationships.<sup>310</sup> Indeed, for some, the hard question has been what state policy should control where there is no private agreement.<sup>311</sup>

Thus far, cohabitation contract disputes have usually arisen in the

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relations, the *Marvin* court endorsed an analysis suggested by Professor Bruch. See Bruch, *Property Rights*, *supra* note 61.

The practical result of this new policy is to allow vastly greater access to contractual ordering for nonmarital relationships. See *supra* note 305. Lenore Weitzman has discussed state policies toward nonmarital cohabitation cases as divisible into three categories: those still using the notion of illegality to bar all nonmarital cohabitation contracts, those using the more liberal severance doctrine discussed above, and those not applying notions of illegal sexual conduct to such agreements at all. See L. WEITZMAN, *supra* note 66, at 398-401.

307. While everyone seems to agree that the number of cohabiting relationships is rising rapidly, exact figures as to the amount of increase are difficult to come by. Perhaps the most useful yardstick is provided by the Bureau of the Census which confirms that the number of unmarried cohabitants doubled between 1970 and 1977. U.S. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 306, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1976, at 4-5 (1977).

308. This concept of differing notions of neutrality as between married and unmarried couples is drawn from Agell, *The Swedish Legislation on Marriage and Cohabitation: A Journey Without a Destination*, 29 J. COMP. L. 285, 292 (1981).

309. For an extremely thoughtful article on the expectations and assumptions of sharing among married couples, see Prager, *supra* note 256. In her empirical study of intimate contract preferences, Professor Weitzman emphasized that "the dramatic preference for sharing principles and community property ownership of all the assets acquired during the relationship is certainly one of the most important findings of our inquiry." L. WEITZMAN, *supra* note 66, at 427 (emphasis omitted). Nevertheless, Weitzman found the percentage of nonmarital contractors who espoused such principles was 76% as compared to 100% of married or premarried couples. *Id.*

310. See *supra* note 305.

311. Where traditional public policies punishing or ignoring these relationships are being changed, a series of difficult choices emerge. One issue concerns whether or not to treat these relationships as marriage-like in intention and consequence. See Kay & Amyx, *supra* note 61, at 958-59, 962-63, 974. To the extent that courts have decided to adopt party expectation as the basis for dispute resolution in these relationships, express agreements obviously make that task easier. Where such agreements do not exist, courts may have to make difficult judgments about what expectations were or should have been, using various doctrines of implied contract or equitable

context of breakup, paralleling divorce. Unlike divorce, however, the legal resolution of cohabitators' disputes has given recognition to the parties' agreements purporting to govern obligations during the relationship as well as after its termination. Furthermore, if these relationships are henceforth to be governed by contract, there seems to be no doctrinal reason why couples could not seek dispute adjudication during the relationship as well. This is particularly true given the rejection, at least by the California Supreme Court in *Marvin*, of the notion that cohabiting couples should be treated analogously to married couples.<sup>312</sup> If courts followed this reasoning and adjudicated disputes during cohabiting relationships, such intervention would further erode arguments that enforcement of marital contracts would be too disruptive of intimate relationships. It would also undermine arguments that intimate relationship obligations involve decisions that courts are incompetent to make.

The decision to treat nonmarital cohabitants differently from marital partners has elements of irony. A society that purports to want to protect and sustain marriage relationships is beginning to grant what is perceived as a great benefit—the right to determine the shape of intimate relationships and to have those determinations carry legal force—to couples who turn their backs on marriage. Most of the agreements illustrated in the examples in Section I, or relevant analogs of them, could be made by cohabitants,<sup>313</sup> but not by spouses. Thus, paradoxically, even as the state has moved toward Option Three as its governing stance toward cohabitation, it continues to deny the privilege of making enforceable private determinations of relationship obligations to those who elect to enter the supposedly favored state of marriage.

#### F. Section Summary and Implications

The changes in marriage law that we have just examined identify legal trends toward greater private ordering and greater public dispute resolution in marriage. They therefore prepare the state for a move away from Option Two toward Option Three as the appropriate governing posture for marriage. Constitutional mandates have forced the state away from regulating some aspects of marital conduct. Marital partners are increasingly treated as individuals rather than as a single merged unit. Previously rigid public policy about gender roles and sexual conduct is gradually being relaxed, reflecting new tolerance for di-

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remedy. See Bruch, *Property Rights*, *supra* note 61, at 117-26. Some courts have refused to undertake such a task. *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980).

312. 18 Cal. 3d at 680 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18. See also *Kay & Amyx*, *supra* note 61, at 958-59, 973-74.

313. Cohabitants could not, of course, elect a system of *marital* property, nor could they enforce an agreement that decreed homosexuals married.

verse lifestyles. Economic consequences, long subject to a high degree of private control, are becoming more apparent in marriage. Then, too, the state has largely ceased trying to define substantive criteria for the end of marriage, thereby implicitly conceding its inability to define the substance and viability of marriage itself.

To a significant extent, these changes in the law of marriage accommodate the societal pressures discussed in Section III by abandoning some of the framework of marriage previously imposed by public policy. Glendon has aptly described this as a process of draining the content from legal marriage.<sup>314</sup> Despite the strength of this trend, some components of the public policy of marriage still linger.<sup>315</sup> However, because the changes in marital policy resulted from efforts to remedy particular evils such as gender discrimination, unfair treatment of illegitimate children, state intrusion into sexual conduct or procreation decisions, and outmoded criteria for divorce, what remains is often fragmented, reactive, and hollow. For example, gender-neutral support obligations were substituted for male-only obligations without consideration of whether the state's imposition of any support obligation still made sense. This kind of specific rule revision is a workable remedy for grievances, but after a certain point it destroys the coherence of the system of marriage regulation. Moreover, the rewritten rules cannot draw nurture from an underlying system whose principles, premises, and values are conceptually divergent and factually obsolete.<sup>316</sup> For example, it is not simply the inequity of a gender-based division of roles within marriage that is questioned. At issue is the fundamental traditional premise that marriage is or can be a known quantity, an unalterable and standard ideal whose substantive content the state ought both to reflect and to dictate.

The thrust, then, of these changes has been a piecemeal with-

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314. M. GLENDON, *supra* note 61, at 68. This is a central thesis of Professor Glendon's extraordinarily comprehensive and insightful work on the evolution of family law systems in the United States and Europe.

315. For example, many states still have a statutory or common law notion of essential incidents of marriage. Since the content of these "incidents" is largely unspecified, they offer an obvious invitation to fill the vacuum with traditional norms about marriage. See examples of statutes collected *supra* note 67 and of cases cited *supra* note 68. Similarly, spouses are still required to support one another, e.g., CAL. CIV. CODE § 5100 (West 1970); heterosexual pairing is required for marital legitimacy, *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed* 409 U.S. 810 (1972); CAL. CIV. CODE § 4100 (West Supp. 1981); special rules govern marital domicile, e.g., DEL. CODE ANN. tit. 13, § 1702 (1975); GA. CODE ANN. § 79-403 (1973). For an extensive discussion of the terms of the traditional marriage contract and how it has or has not changed, see L. WEITZMAN, *supra* note 66.

316. In his article, *The Natural Case Against Contraception*, 10 NAT. L.F. 232 (1965), Professor Noonan examines a particular case in point of the impact of values on legal rules. Schwartz and Skolnick summarize Noonan's point in these terms: "[R]ules that are rational for the achievement of one set of values may become irrational as the values they were designed to serve undergo change." R. SCHWARTZ & J. SKOLNICK, *SOCIETY AND THE LEGAL ORDER* 10 (1970).

drawal from the old system of governance rather than the erection of a coherent new one. Admittedly, a new overall policy might be discerned in the changes here discussed: a broad delegalization of marriage and intimate conduct. Such a policy would reflect a choice of Option Four (low conduct control, denial of legal enforcement and dispute resolution) as the appropriate state strategy for the governance of marriage. The impetus for such a policy comes from rejection of outmoded public policy and from doubts about the feasibility of legal obligation in marriage. If there is a withdrawal of public policy without the substitution of legally cognizable private control, some degree of "lawlessness" appears to be the result.

Delegalization has auspicious consequences for some areas of intimate conduct, notably where certain types of sexual conduct cease to be punished for not conforming to the state's definition of "right" intimacy. Yet marriage relations involve far more than sexual conduct. As a strategy of governance for so crucial an institution as marriage, delegalization neither takes account of the entwinement of marriage with facets of life that are legalized, nor makes possible the vindication of expectations, the conferring of legitimacy, and the resolution of disputes that is the usual role of law. Delegalization may be an understandable resting place in a progression from public mandate to private ordering, but it cannot be the endpoint. The state needs a strategy of governance that not only allows private choices, but also grants them the dignity, support, and efficacy that law confers on important obligations.

While these assertions about the need for legal obligation will be more fully explored in Section VI,<sup>317</sup> certain of the changes in marriage law just surveyed illustrate a greater willingness to provide dispute resolution during marriage, and in particular, a willingness to recognize and enforce private agreements governing certain aspects of intimate relationship. Although most of these exceptions are at the edges of marriage in premarital and postmarital situations, and in cohabitation relationships, their existence makes it harder to justify the continued denial of the same privileges to spouses. Thus, the supposed uniqueness of substantively based exceptions like the one for property agreements breaks down in the face of new understandings of property and wealth, and in light of the increasing economic choices confronting today's marital partners. Rigid assumptions of harmony during marriage and conflict during divorce lag behind the emerging realities acknowledged by several of the exceptions. Moreover, experience with the presently allowed areas of intimate contracting makes clear that con-

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317. See *infra* text accompanying notes 391-464.

cerns about institutional competence must be balanced against the need for authoritative dispute resolution.

Marriage law has evolved far toward recognizing the need for private choice and the untenableness of uniform public policy as a strategy for governing the conduct and obligations of intimacy. It has also taken hesitant steps to allow legal dispute resolution during as well as after marriage and to recognize certain privately created relationship obligations. If marriage and intimacy are to avoid a Hobson's choice between outmoded public policy and a limbo of delegalization, steps must be taken to give greater recognition and dignity to the choices and expectations which individuals choose to formalize.

While these developments were reshaping the legal contours of marriage, developments were also taking place in the field of contract law that made it a far better tool for the governance of marriage. These changes are the subject of Section V.

## V

### DEVELOPMENTS IN CONTRACT THEORY AND DOCTRINE

Contract has long projected an image of greater stability and coherence than most other fields of the law. Despite this reputation, however, the classic model of contract has been challenged repeatedly on both theoretic and pragmatic grounds.<sup>318</sup> Although the outline of the archetype remains important, contract doctrines and theories have evolved to meet changing needs of society. In a sense, part of the definition of what constitutes rational management of contractual affairs has changed, causing reciprocal adjustments in the nature of private ordering and the methods of public enforcement. The resulting body of tools and principles is substantially more relevant and adaptable to the marriage context than was the classic model of contract law.

#### *A. Doctrinal Acceptance of Increased Flexibility*

##### *1. Greater Flexibility over Time*

Classic contract introduced flexibility into relationships previously governed by custom and status. Through bargain and exchange, parties could differentiate the terms of their individual transaction from other transactions. However, with its drive to stabilize the uncertain future in fixed present promises, classic contract doctrine did not allow much flexibility over time within a given relationship.<sup>319</sup> In a sense, the

318. See, e.g., L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); G. GILMORE, *THE DEATH OF CONTRACT* (1974); Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1 (1972); Macaulay, *supra* note 64; Macneil, *supra* note 11.

319. Macneil, *supra* note 11, at 763-65. Macneil has applied the term "presentiation" to con-



very purpose of the archetypal contract was to remove uncertainty—and hence flexibility—from a transaction by crystallizing obligations in the form of a binding agreement.

Yet modern economic conditions often call for complex, long-standing relationships that must survive changing circumstances. In such relationships—as is also true in marriage—the high degree of definiteness and finality demanded by classic contract doctrine is frequently impossible. Thus, the law of contracts had to adapt to the need for flexibility within legal relationships or become less relevant to modern economic reality.

The Uniform Commercial Code (U.C.C.), followed by common law evolution, introduced this flexibility into the contract framework. For example, the common law of contract originally required specification of such key terms as price, quantity, and time of performance.<sup>320</sup> The U.C.C., by contrast, allows various terms to be “open” or indefinite, without defeating the enforceability of a bargain.<sup>321</sup> Similarly, courts originally declared requirement and output contracts unenforceable.<sup>322</sup> These holdings stemmed in large part from judicial discomfort with transactions that left to developing circumstances the actual amount of goods that would be exchanged under the contract. Courts often deemed the parties’ promises illusory, since the buyer under a requirements contract could refrain from having requirements or the seller under an outputs contract could decline to produce.<sup>323</sup> Such analyses were unsatisfactory, however, since they implied the absence of valid business purposes or the presence of advantage-taking even where neither was involved. Rather, as the U.C.C. now recognizes,<sup>324</sup> the parties intentionally structured their transaction to provide a desired flexibility over time.

Another example reveals contract’s evolving acceptance of flexibility within relationships. The doctrine that determines whether unanticipated changes in the context of a transaction might either allow modification or excuse performance was once labeled “impossibility.”

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vey this idea of crystallizing the future in the form of definite present promises. Macneil, *supra* note 32.

320. *Wilcox Inc. v. Shell E. Petroleum Prod.* 283 Mass. 383, 186 N.E. 562 (1933). See L. SIMPSON, *CONTRACTS* 67 (2d ed. 1965).

321. *E.g.*, U.C.C. §§ 2-305 (open price term), 2-308 (place of delivery), 2-309 (time provisions), 2-310 (time of payment).

322. J. CALAMARI & J. PERILLO, *supra* note 20, § 2-13, at 47, § 4-19.

323. *Id.* § 4-19. See, *e.g.*, *Crane v. C. Crane & Co.*, 105 F. 869 (7th Cir. 1901); *Miami Butterine Co. v. Frankel*, 190 Ga. 88, 94-95, 8 S.E.2d 398, 402 (1940); *G. Loewus & Co. v. Vischia*, 2 N.J. 54, 59, 65 A.2d 604, 606 (1949); *Consolidated Pipe Line Co. v. British Am. Oil Co.*, 163 Okla. 171, 176, 21 P.2d 762, 766 (1933).

324. U.C.C. § 2-306(1).

Now it is called "changed circumstances."<sup>325</sup> More important than this change of nomenclature, however, is the change in the underlying analysis. As they shifted away from stringent rules stating impossibility as the standard for excuse of performance, courts could confront the problems presented by changing events, rather than relying on fictional labels or implied conditions.<sup>326</sup> In modern doctrine, analysis of claimed excuse rests on the presence of commercial "impracticability."<sup>327</sup> This change in analysis reflects the law's increased recognition that, even in commercial transactions, complete planning is frequently impossible.

To the extent that the tools of contractual ordering now permit long term flexibility, they have become more applicable to the marital context. For example, instead of either specifying in advance their place of domicile or leaving it to an unpredictable future, under modern contract rules John and Mary could establish a procedure for its later determination, as in the Domicile example. Similarly, in the Income Production and Support example, if John were to renege on his promise to support Mary during her postgraduate studies because he is involuntarily unemployed, modern changed circumstances doctrine could determine the legitimacy of his excuse for nonperformance.

## 2. Increased Flexibility of Contextual Principles

The modern pressure for flexibility in relationships has reshaped contract rules like those just discussed. It has also given rise to newly articulated principles of contract adjudication. Two recently enunciated principles, good faith<sup>328</sup> and unconscionability,<sup>329</sup> are among the

325. L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 845 (4th ed. 1981). See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966); Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEG. STUD. 119, 150-63 (1977). Modern analysis typically asks what is the economically efficient answer to the problem of who shall bear the loss resulting from an unanticipated event. Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEG. STUD. 83, 86 (1977).

326. Where initially, even impossibility did not discharge contractual duties, 6 A. CORBIN *supra* note 16, § 1320, liberalized attitudes about excuse gradually created a range of exceptions to absolute duties of performance. *Id.* §§ 1320-1366. In seeking to accommodate pressures toward more liberal excuse within the literal meaning of "impossibility," courts most frequently implied conditions in order to deal justly with unforeseen events. See, e.g., *Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B. 1863). Sometimes in order to grant a justifiable excuse they simply concluded that performance was "impossible" even when it was not. 6 A. CORBIN, *supra* note 16, § 1325.

327. U.C.C. § 2-615(a) and comment 3; RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). E.g., *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

328. U.C.C. §§ 1-203, 1-201(19), 2-103(1)(b); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). For discussion of this doctrine and its application, see Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

329. U.C.C. § 2-302. For discussion of this major new doctrine, see Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Eisenberg, *The Bargain Principle and*

broadest and most flexible in contract law today. Both are diffuse and fluid, giving courts broad discretion in their interpretation and application. To an unusual degree, both encourage judicial examination of the context of a contractual relationship. In so doing, they subtly alter notions of what constitutes rational management of such relationships. They dilute emphasis on narrow and adversarial self-interest, redefine standards of bargaining and performance, and look to nuance and context as well as to literal explication. In addition, these principles openly infuse public policy concerns into the domain of privately ordered contracts.

Flexible contextual principles like these help adapt contractual governance to marriage, because they endorse notions of appropriate rational management that are better suited to the context of marriage and respond to public concerns about its character and functioning. The principle of unconscionability, for instance, would permit a court to screen for advantage-taking by one spouse against an emotionally or economically defenseless partner. Similarly, the principle of good faith could be of great importance in judging the performance of agreements like those in the Domicile example. Good faith norms might well make possible a reasoned judgment about the genuineness of a reluctant spouse's efforts to find a new job. However, even the good faith principle might be inadequate to determine whether a promise like that of "no recriminations" for sexual infidelity in the Open Marriage example had been performed. In short, the use of flexible principles such as good faith can go far to accommodate contractual ordering to an area like marriage, but limits on the range of issues capable of adjudication necessarily remain.

### 3. *Increased Recognition of Noneconomic Dimensions*

Another change that is particularly important with respect to the feasibility of contractual governance of intimate relationships is the increased recognition of the noneconomic dimensions of contract. This development is reflected in a greater willingness to compensate parties for noneconomic injuries and in a wider acceptance of bargains based on noneconomic consideration.

#### a. *Contract Remedies*

Traditionally, contract damages compensated only for harm to economic interests.<sup>330</sup> Two narrow exceptions to the general rule permit-

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*Its Limits*, 95 HARV. L. REV. 741 (1982); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

330. J. CALAMARI & J. PERILLO, *supra* note 20, § 14-4. For discussion of the criteria and circumstances appropriate to projection of expectation interests as compared to reliance interests,

ted recovery for noneconomic injury in situations where mental distress accompanied bodily injury or where intentional, wanton, or reckless conduct accompanied the breach of a few traditionally identified contractual obligations.<sup>331</sup>

Some recent cases, however, illustrate a trend toward freer recognition of noneconomic injuries in contractual settings. In *Egan v. Mutual of Omaha Insurance Co.*, for example, the court was willing to allow damages for noneconomic injury resulting from an insurance carrier's breach of the contractual duty of good faith and fair dealing.<sup>332</sup> Although tortious conduct was found in *Egan*, the Second Restatement does not require wrongful or tortious conduct as the basis for recovery, as the First Restatement did.<sup>333</sup> Rather, emotional distress damages are permitted when "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."<sup>334</sup> Under this language, damages for emotional distress are presumably no longer restricted to a narrow class of contractual transactions as under the First Restatement,<sup>335</sup> but are available on the basis of a factual and policy-oriented analysis of any type of contractual relationship. Under such an analysis, it should be possible to make a case for recovery in many contractual categories.<sup>336</sup> Moreover, the

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see Fuller & Perdue, *supra* note 19, at 373 ("[T]he complex of policies which dictates a judicial protection of the expectation interest is strongest in the case of a promise which forms part of a bargain or 'deal' and which has for its subject matter some economic value dealt with on an open market . . .").

331. 5 A. CORBIN, *supra* note 16, § 1076. RESTATEMENT (FIRST) OF CONTRACTS § 341 (1932) provided:

In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was the wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

332. 24 Cal. 3d 809, 819-20, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979).

333. See *supra* note 331.

334. The full text of the section provides that "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981).

335. The exceptions used to be largely confined to cases involving engagements to marry, contracts of carriers and innkeepers with passengers and guests, and contracts for the carriage of human bodies or for the delivery of death messages. 5 A. CORBIN, *supra* note 16, § 1076; RESTATEMENT (SECOND) OF CONTRACTS § 353 comment a (1981).

336. It seems difficult to justify the granting of recovery in RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981), Illustration Two (innkeeper wrongfully ejects guest using foul language and accusing guest of immorality) but not in Illustration One (contractor, knowing owner is in delicate health and that proper completion of work is of great importance to him, is nonetheless not liable for emotional distress damages arising from delays and departures from specifications). Apart from historical tradition, it is hard to see why renting a room in a hotel necessarily involves greater likelihood of emotional distress upon breach than does having a house built. Furthermore, given that the basic underlying concern of § 353 is foreseeability, some rule like the *Hadley*

conduct involved in *Egan*—the breach of the duty of good faith and fair dealing—relates to a generic duty now implied by law in all modern contracts.<sup>337</sup> When this broad contractual duty of good faith becomes the basis for analysis of wrongful conduct, and when, as in *Egan*, punitive damages are approved because of tortious conduct,<sup>338</sup> but are justified partly “to restore balance in the contractual relationship,”<sup>339</sup> the door to broadened contractual damage analysis has been opened.

Even more striking evidence of a greater recognition of nonpecuniary injury in a contractual setting is found in *Sullivan v. O'Connor*,<sup>340</sup> where a contract for plastic surgery on the face of an entertainer yielded damages that included amounts for “consciousness of . . . disfigurement”<sup>341</sup> and for pain and suffering. The court discussed older views that “pain and suffering (or the like) are simply not compensable in actions for breach of contract” or that “such allegations rather belong in a claim for malpractice.”<sup>342</sup> It found such remarks “unduly sweeping” and ruled that “[s]uffering or distress resulting from the breach . . . should be compensable on the same ground as the worsening of the patient’s condition because of the breach.”<sup>343</sup> *Sullivan* broke ground by holding that such items were recoverable in a purely contractual context even though the defendant had been exonerated on the negligence count. The absence of even negligence in *Sullivan* illus-

v. *Baxendale* special knowledge rule, see RESTATEMENT (SECOND) OF CONTRACTS § 351(2)(b) (1981), would seem appropriate to take Illustration One outside the general limitation.

337. See *supra* note 328 and accompanying text.

338. 24 Cal. 3d at 821-22, 598 P.2d at 458, 157 Cal. Rptr. at 488. The actual award of punitive damages, however, was found to be the result of passion and prejudice on the part of the jury and was reversed. *Id.* at 824, 595 P.2d at 460, 157 Cal. Rptr. at 490. The majority did not comment on the fact that CAL. CIV. CODE § 3294 (West 1970), under which it approved punitive damages in principle, allows such damages in actions “for the breach of an obligation not arising from contract.” The dissent argued that this case should be excluded because the tortious conduct was based on an implied covenant of good faith which “must be considered an action arising from contract.” 24 Cal. 3d at 825, 595 P.2d at 461, 157 Cal. Rptr. at 491 (Clark, J., dissenting). Punitive damages are, of course, a rarity in contract actions, theoretically granted only where the breach also constitutes a tort. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). See Sassanian, *Punitive Damages in Contract Actions: Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980).

339. 24 Cal. 3d at 820, 598 P.2d at 457, 157 Cal. Rptr. at 487-88.

340. 363 Mass. 579, 296 N.E.2d 183 (1973).

341. *Id.* at 581, 296 N.E.2d at 185. The plaintiff was unable to prove economic injury from loss of employment. *Id.* at 580, 296 N.E.2d at 185.

342. *Id.* at 587, 296 N.E.2d at 188-89.

343. *Id.* at 588, 296 N.E.2d at 189. Such a holding differs from older medical contract cases such as *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1932), in which the court held that plaintiff’s pain and suffering were part of the price he was willing to pay for the good hand he was promised; or *McQuaid v. Michou*, 85 N.H. 299, 304, 157 A. 881, 884 (1932), in which the court concluded that while in principle extra pain and suffering might not be part of plaintiff’s promised performance, they were nevertheless not compensable because “incapable of division into the suggested grouping for the purpose of any satisfactory and reasonable division of allowance.”

trates how far the law has moved since the First Restatement restricted mental distress damages to cases involving "wanton or reckless breach."

In different ways, then, *Egan*, *Sullivan*, and the new Restatement illustrate a retreat from restrictions on the types of injuries compensable in contractual contexts. They demonstrate the present view that injured parties in contract actions should receive the benefit of their bargains, even if that measure requires expanding traditional notions of compensable harm.

Recent articles analyzing the criteria for specific performance<sup>344</sup> or urging enforcement of liquidated damages clauses<sup>345</sup> argue that various interests and injuries are inappropriately ignored by traditional contract remedies. Although these arguments emphasize unrecognized or undercompensated economic injury, they also suggest the need for greater cognizance of noneconomic injuries<sup>346</sup> that traditionally have gone uncompensated either because they were considered trivial or because they were difficult to define, prove, or monetize. Specific performance or liquidated damages clauses offer ways to achieve a truer recovery of the "benefit of plaintiff's bargain." The same arguments justify greater efforts to compensate injuries previously treated as outside the scope of contract damages.

#### *b. Noneconomic Consideration*

Parallel to this movement toward greater flexibility of remedy for noneconomic injury is a shift from economically based rules of consideration to analyses grounded on concepts of bargain and legitimate expectations.<sup>347</sup> Just as marriage contracts might, family-related agreements often have included noneconomic obligations or motives along with economic ones. Earlier contract scholars insisted such matters could not constitute consideration. Corbin, for instance, observed: "Love and affection and friendship are not subjects of barter and sale. No promise is made enforceable because it was induced by any of these. . . . Even if it is bargained for as consideration, it is not a legally sufficient one."<sup>348</sup> Corbin further commented that even where states purport to recognize moral obligation as adequate consideration, no

344. Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271-78 (1979).

345. Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

346. "Fanciful or sentimental value" is discussed by Goetz & Scott, *supra* note 345, at 572-73. "Frustration and anger" are mentioned by Schwartz as examples of presently noncompensable injuries. Schwartz, *supra* note 344, at 276.

347. RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 79 and comments to § 79. *See also id.* §§ 3, 17.

348. 1 A. CORBIN, *supra* note 16, § 232.

plaintiff can prove moral consideration without some degree of economic involvement: "[These states'] courts have said that the moral obligation must be one arising out of a transaction involving economic benefit or detriment."<sup>349</sup>

Modern trends deemphasize these earlier concerns with definable economic benefit and detriment as the gravamen of consideration and focus instead on whether a performance is bargained for.<sup>350</sup> Although this shift in analysis has reduced concern over equivalency or adequacy of consideration<sup>351</sup> and has been reflected to some extent in the more flexible remedies just discussed, it has not had as great an impact on the acceptance of noneconomic bargains as might be expected. This may be explained partly by the fact that in early cases, concern for definable economic exchange was frequently lumped together under a "no consideration" heading with a mélange of other policy concerns such as party capacity,<sup>352</sup> unconscionability,<sup>353</sup> abusive use of legal process,<sup>354</sup> or nonjusticiability and institutional incompetence.<sup>355</sup> Thus, it was often difficult to tell which issue determined the outcome of a given case. Of particular importance to this discussion, such undifferentiated analyses tended to blur and overgeneralize the noneconomic objection. When problems coming under these various headings were uniformly labeled as problems of "no consideration," bargained-for performances might simply be characterized as "worthless."

As the emphasis on bargain as the defining element of consideration comes more fully to replace the older economic benefit/detriment analysis, there should emerge a category of enforceable noneconomic bargains whose existence previously went largely unrecognized. As long as they suffer none of the other policy disabilities so frequently intermixed with the economic benefit/detriment concern under the "no consideration" heading, such bargains should now be enforceable. For

349. *Id.*

350. See *supra* note 347. *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891), is one of the early cases beginning a move away from definable economic benefit toward more modern bargain notions in defining consideration.

351. This policy is reflected in RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

352. This may be the underlying issue, for example, in *Cooper v. Livingston*, 19 Fla. 684, 694 (1883), in which a promissory note had been given in exchange for "conjuring." The court comments both that the consideration is not "valid" and that "no man with a healthy mind would voluntarily give a note for \$250" in return for such services.

353. Unconscionable conduct or pressure by the bank may be at the root of the no-consideration finding in *Newman & Snell's State Bank v. Hunter*, 243 Mich. 331, 220 N.W. 665 (1928) (widow exchanges her promissory note for deceased husband's "worthless" note). This case is further discussed *infra* in text accompanying notes 356-57.

354. This seems to be the primary underlying concern in *Springstead v. Nees*, 125 A.D. 230, 231, 109 N.Y.S. 148, 149 (1908) (two heirs promise to exchange their interest in one property for a promise not to be bothered by other heirs concerning their interest in another property).

355. The finding of no consideration in *White v. Bluett*, 23 L.J. Ex. (n.s.) 36 (1853) may perhaps be based largely on feelings of de minimus or nonjusticiability.

example, in *Newman & Snell's State Bank v. Hunter*<sup>356</sup> (where a widow exchanged her promissory note for her husband's because his estate had insufficient assets to pay his debts), the consideration the wife received in the exchange should not have been labeled "worthless."<sup>357</sup> True, she may have simply acted on a mistaken belief that she had to substitute her note. She may have been defrauded by the bank into that belief. She may have been temporarily incapacitated for decision-making by her grief. However, these issues should be separately analyzed. If neither they nor similar concerns prove to be independent barriers to enforcement, then the presumption should be that she made the exchange for reasons that were sufficient unto her values. The performance then would have been bargained for. Its adequacy should not be reviewed. It was not "worthless" simply because her return would have been apparently noneconomic; and the bargain should be enforced.

Another example of inappropriate generalization of the economic benefit/detriment analysis is found in the Second Restatement of Contracts. Comment (a) to section 71 imports notions of legal sufficiency into the bargain definition of consideration, although the language of the section itself does not impose such restrictions. Thus, the comment specifically mentions "love and affection" as a legally insufficient consideration. Yet most of the other examples discussed in the comment are distinguishable by use of the concept of bargain alone. Thus, past consideration, donative promises relied upon, nominal consideration, and falsely recited consideration are not actually bargained for. The judgment of their "insufficiency" follows from the definitional language of the section itself.<sup>358</sup> By contrast, "illegal" consideration fails despite the presence of bargain. Once having muddled the bargain analysis with vague notions about legal sufficiency, the comment is unable to illumine why agreements including love and affection ought to be automatically barred, given that a bargain analysis has replaced concern for economic benefit and detriment. Such a barrier either reflects an inappropriate carryover of the economic concern or is analogous to a conclusion of "illegality." If the latter, relevant public policies ought to be independently analyzed rather than smuggled into the bargain principle under the rubric of "sufficiency." Furthermore, the barrier against bargains for love and affection per se is far less troublesome than the related tendency to eliminate contractual bargains of any type in any context where love and affection play a prominent role. Attitudes about what kinds of injury should be legally

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356. 243 Mich. 331, 220 N.W. 665 (1928).

357. *Id.* at 335-36, 220 N.W. at 667.

358. *See supra* notes 16-17 and accompanying text.



cognizable, as well as notions about what kinds of exchange are subject to bargain and rational planning, are changing significantly; so are assumptions about appropriate public policy toward marriage and contract. Acknowledgement that these public policy determinations are separate and mutable and do not flow from the definition of bargain itself would make debate about policies toward marital contracting more honest.

*c. Implications for Marital Contracting*

The broadening of contract perspectives outlined in this section should diminish objections to marital contracting. As already discussed in Section IV, economic consequences and choices in marriage are being more fully recognized.<sup>359</sup> Previous tendencies to ignore most of the economic choices in marriage combined with the narrow focus on economic concerns in contract law provided a major explanation—now diminishing in force—for declining to apply contract models to marriage. Of course, marriage contracting, if allowed, might be restricted initially to economic dimensions of the relationship as being most capable of adjudication, such as those covered by the Income Production and Support, the Domestic Services, and the Marital Property examples. Even if that were the case, however, the developing contractual analysis of noneconomic bargains, injuries, and interests would make courts more comfortable with the noneconomic consequences and contexts of economic bargains in marriage and could eventually lead to recognition of agreements covering certain noneconomic aspects of marriage as well, as long as such developments were compatible with other public policies.

In sum, this willingness to recognize noneconomic as well as economic exchanges, benefits, and injuries; the recognition of need for flexibility over time; and the reference to flexible contextual principles, such as good faith, make contract's emphasis on private ordering less stark, its notions of rational management more fluid, and its criteria for enforcement more flexible. Together these developments have created a body of contract law that is far more adaptable to the governance of marriage relationships.

*B. Reformulations of Contract Theory*

Recent reformulations of contract theory also have important implications for contractual governance of marriage. The following discussion analyzes how new contract theories would alter traditional notions about deference to private ordering, the role of enforcement,

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359. See *supra* text accompanying notes 231-34.

and the character of rational management in ways that would make the theoretical foundation of contract law more compatible with contractual governance of marriage.

*1. Transactional and Relational Contracts: A New Model of the Content, Scope, and Degree of Rational Management in Contract*

Over the past decade, Ian Macneil has suggested a far-ranging re-definition of the scope and character of contract law.<sup>360</sup> Macneil argues that the classic contract paradigm fits only one pole of what is really a continuum of contractual behavior. The pattern assumed by traditional contract models Macneil labels the "transactional pole." The other pole, ignored or inadequately conceptualized within existing contract doctrine, he calls the "relational pole."<sup>361</sup> Macneil argues that the proportion of relational contracts has dramatically increased because of modern use of franchising, collective bargaining,<sup>362</sup> new intercorporate methods of doing business, leasing rather than buying, and contracts for services rather than goods.<sup>363</sup>

Of course, an actual transaction will rarely be entirely at one pole. Rather, it will exhibit some characteristics of each type, placing the contract somewhere along the continuum between the two extremes. For example, although the problem of anticipating changes in a rela-

360. I. MACNEIL, *supra* note 14; Macneil, *Contracts: Adjustment of Long Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Macneil, *supra* note 11; Macneil, *supra* note 32.

361. For fuller discussion of the types, see I. MACNEIL, *supra* note 14, at 10-16; Macneil, *supra* note 11, at 735-44.

362. For an exceedingly thoughtful delineation of the modern evolution of collective bargaining, see P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* (1969). Professor Selznick talks of the vital role of contractual concepts in understanding collective bargaining: they provide "an imagery," *id.* at 139, "a celebration of voluntarism and bargaining," *id.*, "an aura of legality," *id.* at 140. He comments that "the very generality of the contract idea has been an important resource for legal adaptation. The capacity of contract to serve many different settings and transactions, as well as its emphasis on the autonomy of private spheres of action, facilitated the development of a living law." *Id.* at 143. These comments have substantial applicability to the context of marriage and contract as well. Selznick speaks of a jurisprudence of association capable of reflecting conceptual elements which he believes the contract model too narrow to accommodate. Selznick describes a constitutive contract which "creates new and continuing institutions, new and irreversible commitments . . . Such an agreement . . . is only in part a determinate bargain struck. More important, it is an exchange of general vows, a pledge of continuing cooperation; it establishes an 'autonomous rule of law and reason'; it is a treaty, a charter, an instrument of industrial self government. . . . [C]ollective bargaining is constitutive of an organic social unity." *Id.* at 151. These ideas have obvious parallels to the concerns of this Article. Much of the jurisprudence of association which Selznick has described as transcending the limits of contractual constructs, Macneil has sought to capture within his relational contract model. Macneil argues persuasively that developments like those Selznick describes have come to characterize such large portions of the contract context that they demand the reconceptualization of contract law itself.

363. Macneil, *supra* note 11, at 694-95.

tionship may be more pronounced in relational contracts, even in highly transactional exchanges parties can seldom plan completely.<sup>364</sup> Then, too, although more obvious in relational contexts, concern about preserving the relationship is present in most transactional associations.<sup>365</sup> By the same token, according to Macneil, most relational contracts transactionalize particular terms or stages within the relationship.<sup>366</sup> For instance, agreements like those in the Economic examples in Section I represent efforts to transactionalize particular concrete exchanges within the complex marriage relationship.

Although Macneil mentions it largely in passing,<sup>367</sup> marriage is exceptionally well captured by his relational type. The overriding importance of continuing relationships; the whole-person nature of the exchange; the presence of quantifiable and nonquantifiable elements; the expected range of interaction, from altruism to self-interest to conflict; the need for planning as a continuing process that focuses on flexibility of structure and procedure rather than on any single transaction; the emphasis on remedies that repair and restructure relationships rather than replace a specific failed performance—each of these characteristics of Macneil's relational contract type<sup>368</sup> is an important characteristic of marriage. These characteristics help to explain why marriage partners might be particularly eager to agree on decisionmaking and conflict management procedures such as those in the Domicile and Dispute Resolution examples, to protect the basic relationship by settling disputes.

Macneil asserts that because most contract doctrine is based on a transactional model, much of it is ineffective in coping with relational interactions or with relational aspects of transactional exchanges.<sup>369</sup> According to Macneil, courts and commentators do not understand the inappropriateness of these transactional rules for the wider contract terrain he envisions. He urges that a new body of principles and rules be developed to govern the entire continuum from the presently emphasized transactional type to his newly articulated relational type.<sup>370</sup>

The process Macneil proposes is already underway. His theory

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364. See *supra* text accompanying notes 319-27.

365. Professor Eisenberg describes the process whereby parties who are originally independent will gradually become somewhat dependent, even as they negotiate whether or not to undertake a relationship. Eisenberg, *supra* note 8, at 679-80. Professor Fuller also noted that if a contractual relationship goes on long, it will develop greater intimacy and dependency. Fuller, *supra* note 11, at 208.

366. Macneil, *supra* note 11, at 754-55.

367. See, e.g., I. MACNEIL, *supra* note 14, at 13; Macneil, *supra* note 11, at 721, 725, 746, 747, 751.

368. For a chart of Macneil's overall typology, see I. MACNEIL, *supra* note 14, at 14-16.

369. Macneil, *supra* note 11; Macneil, *supra* note 32, at 595-99.

370. Macneil, *supra* note 11, at 813-16.

helps explain the impetus toward greater flexibility in long term exchange relationships, the greater acceptance of noneconomic concepts of bargain and harm, and the increased reliance on flexible principles rather than formulaic rules, all of which were examined in the preceding subsections. If legal rules like the ones Macneil envisions are emerging, then legal enforcement and dispute resolution for marriage contracts will be a less distressing prospect than they would have been under classic contract models.

## 2. *Subject Matter Transactions and the Infusion of Public Policy into Private Ordering*

Another frequently discussed challenge to traditional contract theory is more a deformation than a reformulation. This is the assertion that no general theory of contract is applicable in the modern world. The unity that characterized classic contract models has been dissolved by modern economic complexity and public policy. In its place stand discrete bodies of legal rules defined principally by the subject matter of the transactions they govern.<sup>371</sup> Whether or not differences between these specialized substantive areas are great enough to overwhelm common themes or theories, the traditionally unitary field of contract now provides a general—albeit important—foundation upon which special bodies of rules are erected.

Massive intrusions of public policy into the private law domains of traditional contract are largely responsible for these changes. Public law is usually enacted around a particular subject matter such as insurance, labor relations, consumer transactions, or landlord-tenant relations. The overlay of special substantively oriented rules on the basic contract substratum creates new legal fields whose boundaries are determined less by contract norms than by the reach of public law purposes. These developments not only fragment the domain of contract law, but also blur traditional boundaries between private and public law.<sup>372</sup>

Today, in areas historically governed by private contract law, public policy dictates packages of rights and duties. In this way, modern contractual relationships resemble "statuses" of old.<sup>373</sup> As in those sta-

371. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 15-26 (1965); Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 WIS. L. REV. 833, 833-34.

372. *See, e.g.*, Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Reh binder, *supra* note 54.

373. By "status" Sir Henry Maine meant a set of personal conditions usually acquired at birth, over whose creation and content the individual had no control. H. MAINE, *supra* note 252, at 140-41. More modern definitions apply the term to legal conditions imposed on the individual by public law, not usually as a result of birth characteristics, but through choice or consent. Reh binder, *supra* note 54, at 949. Status in this sense means:

A special condition of a continuous and institutional nature, differing from the legal

tuses, there is little or no bargaining by individuals about the detailed terms of a relationship. Unlike status conditions of earlier times, however, one chooses (contracts) to undertake particular roles rather than being born into them. As one commentator put it, this is an era of "role choice" rather than "role creation."<sup>374</sup> Thus, many relationships previously governed by private contract have made Maine's famous adage boomerang:<sup>375</sup> they progressed from status to contract, and then "progressed" right back again toward status.<sup>376</sup>

Traditional marriage regulation gives marriage a character much like the one just described as increasingly typical of modern contractual relationships: spouses can contract into a status "package" with little control over its substantive terms. This Article proposes that now, even while public law intrusion into other contractual relations is increasing, marriage ought to be moved toward the private law end of the modern continuum.

To argue that marriage ought to be governed to a greater degree by private choices about behavior and obligation is not to recommend the abandonment of public policy considerations. Important public policies already permeate contract law. If marriage contracts were legally recognized, special policies would be developed to meet the particular needs of this subject area as they have been in other areas of contract law. Thus, even while conceding greater private governance of marriage, the law might choose to retain public policy barriers that might, for example, render invalid contracts such as the Homosexual or Open Marriage examples.

In most fields, a mingling of private and public law is likely to be optimal, with the blend adjusted to the character and needs of the institution being governed.<sup>377</sup> Ironically, private law has thus far been given very little scope in marriage, a relationship that is perhaps the

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position of the normal person, which is conferred by law and not purely by the act of the parties whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social and legal concern.

*Id.* (quoting R. GRAVESON, STATUS IN THE COMMON LAW 2 (1953)).

In some ways these developments diminish the substance of contract, moving it toward a subsidiary role within a status theory of relationships. See Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1 (1972). By contrast, Max Weber incorporated the status concept into the contractual one, distinguishing between contracts of exchange on the one hand, and contracts of status on the other. By virtue of the latter type, according to Weber, a person could "become" something qualitatively different, e.g., a wife, a slave, a vassal. See Rehbinder, *supra* note 54, at 945 (quoting M. WEBER, RECHTSOZIOLOGIE 111 (1960)). Although to some extent the differentiation of the two concepts becomes one of semantics or emotion, there remains a valid core of emphasis, an issue of the relative balance of voluntariness as compared with outside imposition in the definition of a relationship.

374. Rehbinder, *supra* note 54, at 955.

375. H. MAINE, *supra* note 252, at 141.

376. Isaacs, *supra* note 372, at 37-38.

377. See Rehbinder, *supra* note 54, at 946-47.

most private of all. While in other types of contractual transactions, an imbalance arose from a lack of public control in the private law domain, the imbalance in marriage law presents the opposite problem. In marriage, too little private decision has been allowed to shape the relationship. Its regulatory structure has reflected a perplexing mixture of public law or no law at all. While both contract law and family law must strike an appropriate balance between public and private ordering, indexing disputes as contractual rather than simply as marital would call for selection of norms that place comparatively greater emphasis on private control.<sup>378</sup> To put it another way, to correct the imbalance in present policy, the state should now move away from Option Two toward Option Three of our analytic matrix.

A move to infuse greater private control into marriage policy might take the form of deference to private agreements except where they were as specifically barred by public law. A less direct move toward private control would be to create a diversified public law system with alternatives among which individuals might choose, like the selection of a marital property regime suggested in the Marital Property example.<sup>379</sup> Either approach would be compatible with modern contract theories while significantly increasing the degree of private ordering that this Article argues is necessary in modern marriage.

### 3. *The Role of Enforcement: Definitions Versus Behavior*

The final development to be noted in this discussion concerns not so much a change in theory itself as a change in emphasis within existing theory. The classic contract paradigm takes for granted that legal enforceability is the pivotal characteristic of contract. For example, the Second Restatement defines contract as "a promise or a set of promises

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378. While contract law includes strong traditions of deference to party decision about value and risk, the field of family law has long imposed normative policy preferences on individual actors. When a court is inclined to accept a contract ordering some aspect of a marital relationship, it will find itself pulled between contractual norms deferring to consensual decision and family law norms imposing outcomes which are deemed fair. This tension is revealed in *Rosenberg v. Lipnick*, 377 Mass. 897, 389 N.E.2d 385 (1979), a case upholding an antenuptial agreement because no fraud was shown even though the one party's significant lack of disclosure clearly made the court very uncomfortable. Despite its enforcement of this agreement, the court announced new standards for the future. These revolved around a mutual responsibility for disclosure, and the requirement that any contract contain fair and reasonable provisions. The breadth of requirements for disclosure is a contentious issue in contract law. *See, e.g.,* *Obde v. Schlemeyer*, 56 Wash. 2d 449, 353 P.2d 672 (1960). Fairness, too, is an increasingly legitimate question, but the contractual focus on fairness tends to be on outer limits, e.g., unconscionability, rather than on mainstream or core requirements. Again, the continuities are as important as the differences, but the divergent emphases of the two traditions are likely to yield different outcomes.

379. Both of these paths toward greater contractual ordering illustrate Emil Durkheim's summary of contract's central function as "the diversification in particular cases of pre-established rules." E. DURKHEIM, *DIVISION OF LABOR IN SOCIETY* 215 (G. Simpson trans. 1933).

for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty."<sup>380</sup> Thus, application of the label "contract" is dependent upon the legal consequences attached to promises.<sup>381</sup> Although other sections of the Restatement deal with the nature and characteristics of promises and with types of transactions structured by promises,<sup>382</sup> the threshold definition is lopsided in its emphasis on enforcement.<sup>383</sup>

In one sense, of course, the element of enforcement is central, since enforcement consequences are what make an obligation legal. But in another sense, a narrow enforcement focus is dysfunctional. It ignores much of the factual scope, impact, and function of contractual relations.

The actionable nature of promises is not the main part of their function any more than law is encompassed by litigation or court decision.<sup>384</sup> Rather, the primary function of contracts is the structuring of private exchange relationships projected over time. Promissory agreements furnish "a kind of framework for . . . ongoing relationship[s]."<sup>385</sup> The framework "almost never accurately indicates real working relationships, but [it does afford] a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work . . . ."<sup>386</sup>

Given their academic training, lawyers naturally emphasize dispute resolution and contract enforcement by courts. By contrast, the parties to a contract do not focus on enforcement but on goals, plans, relationships, exchanges. Performance planning "is, after all, the way most participants view most contract planning—only lawyers and other trouble-oriented folk look on contracts primarily as a source of trouble and disputation, rather than as a way of getting things done."<sup>387</sup> In-

380. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

381. In his article, *What Price Contract?*, 40 YALE L.J. 704, 707-08 (1931), Professor Llewellyn discusses different meanings of the term "contract," including meanings of agreement-in-fact or promise-in-fact. He chooses to use the term in the sense of the legal effects of promises; yet his listing makes evident the wider meaning the term often connotes.

382. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 2 (promise, promisor, promisee, beneficiary defined), 4 (how a promise may be made).

383. The Restatement definition also has an unsatisfying and slightly circular quality to it. What is a legal contract? A promise the law will enforce. What promises will the law enforce? Those it deems contracts. The purported definition is not a definition at all, but a mirage which begs the real question: what characteristics or qualities of promises justify their enforcement? At best, the definitional focus on enforcement delays examination of the real issues. At worst, it blurs their contours.

384. Macneil, *supra* note 11, at 732 & n.125.

385. Fuller, *supra* note 11, at 189.

386. Llewellyn, *supra* note 381, at 737.

387. I. MACNEIL, *supra* note 14, at xx.

deed, Professor Macaulay has documented that people who enter contractual relations rarely use legal enforcement or dispute resolution if they can avoid it. Even business people, whose traditions lie within the most developed areas of contract law, usually avoid litigation, rely on nonlegal sanctions to prevent or remedy breach, and focus their attention on planning rather than enforcement.<sup>388</sup>

Macaulay's findings about the behavior of contracting parties have led him to urge that contract theory and education give less emphasis to enforcement and greater emphasis to the parties' behavior and expectations and to the socioeconomic functions of contractual planning. Thus, Macaulay postulates two axes to define the degree of "contractualness" in a relationship. One axis represents actual or potential legal sanctions to induce performance or to compensate for breach. The other charts the degree of rational planning that characterizes the relationship.<sup>389</sup>

The contract perspective proposed by Macaulay seems a desirable corrective to the overemphasis on enforcement. Moreover, his approach suggests a more hospitable context for marriage contract proposals than traditional models. Since spouses, like most contracting parties, can be expected to avoid litigation,<sup>390</sup> concerns about enforcement issues—regarding both the impact on the marriage and institutional competence—may be less weighty than they first appear. Nevertheless, if the state were to adopt Option Three for governing marriage, it would stand willing to provide dispute resolution and enforcement for spouses. Consequently, it is essential to assess the need for such a move and its possible effects before proposals of marriage contracting are endorsed. Section VI addresses those issues.

## VI

### LEGAL OBLIGATION AND PUBLIC DISPUTE RESOLUTION IN MARRIAGE: LAW AND THE MANAGEMENT OF CONFLICT

This Article recommends that the state adopt Option Three from the matrix presented in Section I as its governing posture toward marriage. Such a choice would require not only a willingness to defer to private judgments about marital conduct and obligation, but also the

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388. Macaulay, *Noncontractual Relations in Business: A Preliminary Study*, in SOCIETY AND THE LEGAL ORDER, *supra* note 11, at 167-71. See also Macaulay, *supra* note 64, at 509.

389. Macaulay, *supra* note 388, at 162.

390. "Litigation concerning anything—including, but not limited to, contracts—is generally expensive, seldom offers a worthwhile payoff, and tends to disrupt the continuing long-term relationships that are vital to the success of the managers." Macaulay, *supra* note 64, at 510.



provision of institutions, including courts, which could enforce obligations and settle disputes.

The main objections to legal obligation and public dispute resolution during marriage cluster around two concerns: fear of disrupting domestic harmony and doubts about institutional competence. This Section examines three arguments that rely on interrelated assumptions about domestic harmony and institutional competence: (1) in a healthy marriage, harmony is the desired and presumed norm; (2) even if some process of conflict management is needed, legal obligation and legal institutions would be inappropriate resources for such a task; and (3) if legal conflict resolution is necessary, the marriage is headed for divorce anyway, and the divorce court is the appropriate place for legal dispute resolution between spouses.

### A. *Conflict and Its Management in Marriage*

Although we like to think of marriage as a haven of privacy and peace, modern psychological theory and practice make clear that conflict is normal within intimate relationships.<sup>391</sup> Even in the popular mind, there has been a recognition that conflict is inevitable, even potentially constructive.<sup>392</sup> The mark of a healthy relationship is not the absence of conflict, but its effective management and resolution.

The reasons for conflict in marriage are many and varied. Some of the causes are societal in origin, some inhere in the nature of the relationship. Most obviously, conflict arises from friction between personalities. Interaction cuts across many aspects of the couples' lives. Furthermore, as shown in Section III, consensus about roles and purposes of marriage has broken down.<sup>393</sup> A confusing array of lifestyle choices are available; conflict over alternatives is likely. As expectations of personal fulfillment increasingly dominate goals within marriage, the potential for intense disappointment increases, escalating the likelihood of struggle and disharmony.

Moreover, certain characteristics of two-person groups make the management of conflict within them especially important and difficult. Because it has only two members, a dyad is constantly subject to stale-

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391. A. SKOLNICK, *supra* note 127, describes Freud's conflict theory of family dynamics, *id.* at 76-79, and summarizes the body of recent sociological and psychological literature which undermines sentimentalized views of the family as always harmonious, loving, and peaceful, *id.* at 80-85. On the psychodynamics of conflict in love relationships, see *id.* at 228-29. See also I. ALTMAN & D. TAYLOR, *supra* note 162, at 166-80; CLOSE RELATIONSHIPS, *supra* note 127, at 26-27; H. RAUSH, W. BARRY, R. HERTEL & M. SWAIN, COMMUNICATION, CONFLICT AND MARRIAGE (1974); Goode, *Force and Violence in the Family*, 33 J. MARR. & FAM. 624 (1971).

392. See, e.g., G. BACH & P. WYDEN, THE INTIMATE ENEMY 17 (1969); H. RAUSH, W. BARRY, R. HERTEL & M. SWAIN, *supra* note 391, at 30-33.

393. See *supra* text accompanying notes 117-49.

inate and indecision on the one hand or "informal litigation" (quarrels) on the other.<sup>394</sup> There is no possibility of constructing a majority to transcend differences of opinion.<sup>395</sup> Furthermore, inequality is often more visible in dyads than in larger groups because the presence of only two parties allows direct interpersonal cost/benefit comparisons.<sup>396</sup> Awareness of inequality may contribute to conflict, particularly where equality is an expectation or goal of the relationship.

Whatever its sources, given the omnipresence of conflict, marriages, like other relationships, need effective systems for conflict management and resolution. Contractual planning can make significant contributions to meeting this need.<sup>397</sup> Since the willingness to use contractual planning as a tool of marital conflict resolution, like the willingness to use it as a vehicle of private choice, has been delayed by doubts about the impact of rational management on marital relationships, it is well to mention again our earlier conclusions about these issues. Section III argued that the values and assumptions of rational management were neither antithetical to nor destructive of intimacy.<sup>398</sup> Section V traced ways in which contract law's requirements for rational management have become considerably more fluid.<sup>399</sup> Both developments ought to increase our readiness to use contractual ordering in the management of marital conflict.

Most obviously, parties can use contractual planning to decide procedures for resolving disputes, agreeing to provisions such as the two-party decisionmaking process established in the Domicile example or the third-party arbitration required by the Dispute Resolution example. More subtly, contractual-type negotiation may serve to prevent marital conflict. By improving their ability to choose and reach goals, a couple's communication, clarification of expectations, and negotiation about aims and resources should reduce conflict.<sup>400</sup> When parties are able to express goals and expectations, the chance of realizing them

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394. J. THIBAUT & H. KELLEY, *supra* note 155, at 134.

395. *Id.* at 133.

396. P. EKEH, *supra* note 160, at 130-31. See Walster, Berscheid & Walster, *supra* note 162, for a discussion of the impact of inequity on relationships.

397. See, e.g., Dellapa, *Domestic Violence: Alternative Processes to Resolve Interpersonal Family Conflicts*, 17 CONCILIATION CTS. REV. 15, 19 (1979); Taylor, *Toward a Comprehensive Theory of Mediation*, 19 CONCILIATION CTS. REV. 1, 8 (1981).

398. See *supra* text accompanying notes 150-98.

399. See *supra* text accompanying notes 318-90.

400. See, e.g., G. BACH & P. WYDEN, *supra* note 392, at 17; H. RAUSH, W. BARRY, R. HERTEL & M. SWAIN, *supra* note 391; Sager, Kaplan, Gundlach, Kremer, Lenz & Royce, *The Marriage Contract*, 10 FAM. PROCESS 311, 324 (1971). For a discussion of the same kind of interpersonal process, see Sherwood & Glidewell, *Planned Renegotiation: A Norm-Setting OD Intervention*, in CONTEMPORARY ORGANIZATION DEVELOPMENT: ORIENTATIONS AND INTERVENTIONS 35-46 (1972). Although Sherwood and Glidewell's discussion centers on an organizational context, it is, as the authors themselves suggest, applicable in any relationship.

increases. Each must clarify what is the desired end, in order to enlist the aid of the other. Thus, enunciation of goals about education in the Income Production and Support example, or for sexual and intimate freedom in the Open Marriage example, may help to avoid later dispute between parties whose expectations might go unmet if unarticulated.

When conflict does inevitably emerge, as disappointments occur or expectations and resources change, problems can be identified and optimal solutions selected. Thus, planning, conflict prevention, and conflict resolution blend in a process that can be constructive for individuals and their relationship.<sup>401</sup>

Apart from solving problems or achieving goals, reaching agreement through a process of communication and bargaining helps decrease conflict in yet a further way: it establishes norms about performance, procedures, and dispute resolution. Both the visibility of such norms and their intrinsic validity can help to avoid or resolve disputes on some basis other than power.<sup>402</sup>

As Thibaut and Kelley have stressed, such norms can act as a third force in two-person relationships, stimulating compliance, placing restraints in a relatively impersonal source, and lessening the oppression of one party's winning through raw power.<sup>403</sup> Such norms create a focal point for a relationship, a norm of "ultimate appeal,"<sup>404</sup> enabling individuals to rise above the momentary or the petty. If parties commit themselves, as in the examples, to Open Marriage, alternating responsibility for support, or alternating choice of domicile, they may overcome one spouse's tendency to ignore the other's goals or hopes. Simmel sensitively traces the psychological dimensions of this process:

In the inevitably symbolic language of all psychology: our soul seems to live in two layers, one of which is deeper, hard or impossible to move, carrying the real sense of substance of our life, while the other is composed of momentary impulses and isolated irritabilities. This second layer would be victorious over the first and even more often than it actually is; and, because of the onslaught and quick alternation of its elements, the second layer would give the first no opportunity to come

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401. A particularly longstanding and energetic effort to use contract-like processes of dispute settlement and relationship planning has existed in the Los Angeles Conciliation Court. Of the couples agreeing to conciliation counseling after filing for divorce, one of three reconcile as a result of the counseling. Three quarters of the reconciled families stay together at least a year after the counseling process is completed. Elkin, *Conciliation Counseling: A Moral and Ethical Responsibility of Conciliation and Family Courts*, 19 CONCILIATION CTS. REV. iii, v (1981).

402. J. THIBAUT & H. KELLEY, *supra* note 155, at 126-48. Such norm-creating agreements, validated by their origin in the parties' own values and choices might emphasize not just specific performances or exchanges, but the structures, procedures, and assumptions by which a relationship would function over time.

403. J. THIBAUT & H. KELLEY, *supra* note 155, at 127-39.

404. Llewellyn, *supra* note 381, at 736-37.

to the surface, if the feeling of a coercion interfering from somewhere did not dam its torrent, break its vacillations and caprices, and thus, again and again, give room and supremacy to the persistent undercurrent.<sup>405</sup>

The concept of authoritative norms as a vital element in the management of marital conflict is related to the problem of the appropriate role of law in marital dispute resolution. Even if conflict management and resolution in marriage is needed, and even if a process of private contract-like bargaining is valuable, is that process at best a metaphor? Why should marital obligations and dispute resolution be legalized?

### *B. The Role of Legal Obligation and Public Dispute Resolution in the Management of Marital Conflict*

In one sense, the question of whether the state should impose legal obligation and resolve disputes in marriage seems superfluous, since marriage has always been regulated by law. The validation of marriage contracting that this Article proposes would mean only the transfer of marital obligations from one source and form of legal obligation to another: from public marital policy to private contract law. However, as the examples demonstrate, the marital obligations regulated by contract would be different and possibly greater than those traditionally regulated by state marital policy. Then, too, present legal practice makes many dimensions of marital policy unenforceable and disputes unresolvable, at least by the spouses during marriage.<sup>406</sup> Thus, to a significant degree, marital contracting would create legal obligations and legal dispute resolution where previously nonlegal social control held sway. Would that be wise?

#### *1. The Value of Legal Obligation in Conflict Management*

"Binding obligation" and "enforceability" are concepts central to the law, but not unique to it. Social and legal obligation have related functions in society: establishing desirable codes of conduct, structuring relationships, and defining roles. Nor is sanctioning uniquely legal. Failure to discharge either legal or nonlegal obligations may result in punishment, from social disapproval to imprisonment or death.<sup>407</sup>

Efforts to distinguish between legal and nonlegal obligation usually center on the law's legitimate power to sanction breaches of legal obligation.<sup>408</sup> In general, our concept of conflict resolution through law

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405. G. SIMMEL, *supra* note 156, at 299-300.

406. See *supra* text accompanying notes 80-91.

407. See P. BLAU, *supra* note 155, at 97; M. WEBER, *LAW IN ECONOMY AND SOCIETY* lxiv, 5-8, 20, 35; Eisenberg, *supra* note 8, at 637; Llewellyn, *supra* note 381, at 738.

408. Max Weber, in particular, has singled out coercive power concentrated in the hands of a specially authorized group as the defining element of legal obligation. M. WEBER, *supra* note 407,

is that it involves use of potentially coercive power to settle disputes authoritatively. But the law's role in the management of conflict is not limited to deciding disputed claims. More broadly, law confers legitimacy on obligations, norms, and procedures.<sup>409</sup> While the function of law's coercive authority in conflict adjudication is obvious,<sup>410</sup> the subtler influence of norm legitimation in ameliorating conflict is often overlooked.<sup>411</sup>

The law's ability to invest obligations with legitimacy increases the likelihood of compliance entirely apart from invocation of actual enforcement processes. "[T]he influence of legal symbols is indirect but powerful. Legal values condition perceptions, establish role expectations, provide standards of legitimacy . . . ."<sup>412</sup> As another observer puts it, "The threat of sanction can deter people from violating the law, perhaps in important part by inducing a moralistic attitude toward compliance."<sup>413</sup>

When should the law's resources for the support of behavioral norms be invoked? The answer to that question will change over time to reflect developments in the structure of society.<sup>414</sup> Complex and mo-

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at 5-27. See also E. GOFFMAN, *RELATIONS IN PUBLIC* 96 (1971); P. SELZNICK, *LAW, SOCIETY & INDUSTRIAL JUSTICE* 6 (1969); Fuller, *supra* note 11, at 182.

409. In this connection, see Professor Selznick's discussion of two roles of the legal order: (1) "a mechanism for upholding what is settled" and (2) "a mechanism for problem-solving . . . [which] sees law as a resource for facilitating change while maintaining core values." P. SELZNICK, *supra* note 408, at 26. This Article suggests that, in Selznick's terms, the law of marriage today needs to adjust its definitions of "what is settled" and invest greater energy in "facilitating change while maintaining core values."

410. For a discussion of this function, see *infra* text accompanying notes 421-25.

411. Alluding to this more comprehensive role of law, and thus of legal obligation, Fuller describes law "as serving the purpose of putting in order and facilitating human interaction." Fuller, *supra* note 11, at 203. Selznick observes that:

[C]oercion is an important and often indispensable resource for law. But so is education, symbolism, and the appeal to reason. Coercion does not make law, though it may indeed establish an order out of which law may emerge. In the authoritative use of coercion, whether by private or public agencies, the legal element is not the coercion itself but the invocation of authority.

P. SELZNICK, *supra* note 408, at 7 (emphasis in original).

412. S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* xi (1974).

413. Schwartz & Orleans, *On Legal Sanctions*, in *SOCIETY AND THE LEGAL ORDER*, *supra* note 11, at 533, 544. Other commentators have echoed these sentiments. See, e.g., Fuller, *supra* note 11, at 199 ("[T]he law's sanctions reinforce interactional expectancies and facilitate a respect for them."); Hoebel, *The Functions of Law*, in *SOCIETY AND THE LEGAL ORDER* *supra* note 11, at 17.

414. [T]he same contents of this relation (between legal and social norms) have historically been clothed in different motivations or forms. What at one time or place was a custom, elsewhere or later has been a law of the state, or has been left to private morality. What was under the coercion of law has become mere good custom. What was the matter of individual conscience, later has often enough been legally enforced by the state.

Simmel, *Custom, Law and Morality*, in *SOCIETY AND THE LEGAL ORDER*, *supra* note 11, at 121, 122.

bile modern societies have a greater need to root obligations in legal institutions than do smaller, simpler, kinship-based societies.<sup>415</sup> The mechanisms of social approval that guarantee observance of nonlegal norms in simple societies do not operate efficiently in complex societies.<sup>416</sup>

This Article has already documented the erosion of social consensus about desirable marital behavior and structure.<sup>417</sup> It is no longer clear who should support whom, how long marriage should last, or how intimate relations should be structured. As marital conduct becomes a matter of choice by individuals, the resulting choices lack the reinforcement and legitimacy automatically accorded to matters of universal truth. Furthermore, social institutions such as church, extended family, and community, which formerly played important roles in defining and supporting marriage norms, have been greatly weakened in recent years.<sup>418</sup> As a result, gaps have appeared in social networks that used to sanction violations of marital obligations.

These erosions in social support and enforcement suggest a greater need for legalization, particularly since the obligations and consequences of marital conduct remain practically and emotionally crucial for individuals and for society. The fact that choices about marital structure, behavior, and content vary widely does not alter the fact that intimate relationships—whatever their form—are vital to individual happiness and quality of life. Similarly, marriage has great social importance, because the state has an interest in its citizens' happiness, and because satisfying personal relations are thought to promote social stability and harmony.<sup>419</sup>

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415. P. BLAU, *supra* note 155, at 114 ("Impersonal restraints are . . . of special importance in modern societies, and a basic source of impersonal restraint is power.").

416. "The likelihood of legal control arising at all in a given sphere is a decreasing function of the effectiveness of informal controls." Schwartz, *Social Factors in the Development of Legal Control*, in *SOCIETY AND THE LEGAL ORDER* *supra* note 11, at 137, 138.

417. See *supra* text accompanying notes 117-49.

418. See Laslett, *The Family as a Public and Private Institution: A Historical Perspective*, 35 J. MARR. & FAM. 480 (1973).

419. Chief Justice Traynor of the California Supreme Court spoke of these state interests in marriage as follows:

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.

DeBurgh v. DeBurgh, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1952). The Supreme Court expressed similar views in *Maynard v. Hill*, 125 U.S. 190, 205 (1888): "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution . . . ;" and more recently in *Boddie v. Connecticut* 401 U.S. 371, 376 (1971): "[M]arriage involves interests of basic importance in our society." In *Fearon v. Treanor*, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936), *appeal dismissed*, 301 U.S. 667 (1937), the court

As we saw in Section II, the state traditionally assumed that its protection of these interests required legal reinforcement of a uniform set of conduct obligations and marital norms.<sup>420</sup> The kind of legal reinforcement of marriage suggested by this Article differs sharply from the traditional model. While state interests in citizen happiness and social stability remain valid, this Article has urged that protection of those interests can no longer automatically be linked to any particular definition of appropriate behavior or obligation in marriage. It is the existence of healthy and fulfilling intimate relationships that advances state interests, rather than the existence of marriages characterized by particular gender roles, sexual behavior, and economic or personal purposes. The specifics can no longer be equated with achievement of the underlying goal.

Yet precisely because of the continuing personal and social importance of intimate relationships and the erosion of nonlegal support, the privately chosen values and obligations that have replaced or supple-

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observed: "From time immemorial the state has exercised the fullest control over the marriage relation, justly believing that happy successful marriages constitute the fundamental basis of the general welfare of the people."

In addition to the important state interest in having a system which facilitates and maximizes viable, rewarding family relationships, the state has other, independent interests in marriage. The most notable are these: (1) the protection of the state's financial resources, and (2) the creation of a social system for the birth and rearing of the society's children. Each of these interests has traditionally been deeply entwined with state regulation of marriage. It is difficult to tell when substantive regulations, such as a husband's duty of support, arose from a desire to protect the state's purse, and when they arose from convictions that a given type of marriage would best produce desirable intimate relationships. Both asserted interests could be thought to parallel the duty of support and thus were inextricably mixed as motives for the requirement.

However, with the breakdown of the assumption that a single model of marriage was compelled by the state's interest in stable intimate relationships, certain previously entwined questions can now be separated for purposes of evaluating state policy and role. Given the state's very important interest in facilitation of good intimate relationships, if the policies which advance *that* cause come into conflict with policies that protect the public purse, or manage the rearing of children, then the competing interests will have to be weighed, and an appropriate balance struck. In the case of protection of the public purse, there may be better ways to effectuate that legitimate interest than by marital support obligations which simply substitute both spouses for the previous role held by husbands. In the case of children, competing individual interests in privacy, bodily integrity, and individual choice, as well as technological and moral evolution in the culture, have already radically altered automatic ties between policies about children and marriage regulation. So also the women's movement, changing labor force, and economic patterns, as well as changing views about private and public responsibility, have altered norms about husbands providing support for wives and children.

This Article takes the view, then, that state interests in such matters as protection of its purse and child bearing and rearing are concerns independent of and potentially conflicting with concerns about marriage. They have legitimate claims on policy, but can no longer be viewed as automatically paralleling the state's interest in the creation of a social and legal structure which will facilitate relatively stable and fulfilling intimate relationships among its citizens. This Article utilizes only this latter, "pure" state interest in marriage to evaluate one particular proposal about state role in marriage, and leaves the weighing of other competing state interests to other examination and analysis.

420. See *supra* text accompanying notes 65-66.

mented the traditional model need the reinforcement and legitimacy that law can provide. Thus, rather than exercising normative control over the substance of marital obligations while refusing interspousal enforcement or dispute resolution (the traditional Option Two stance from the matrix presented in Section I), the state ought to move toward Option Three, the stance it chooses in areas of behavior governed by contractual ordering.

The character of contractual ordering is particularly suited to the private and personal setting of marriage. Contractual ordering is private ordering. The substance of expectations and obligations within a relationship is articulated by the parties within broad limits set by public policy. It is these private choices about behavior and values, combined with contract norms about fair bargaining, free consent, party competence and the like, that are reinforced and legitimized when given legal stature.

Given the strength of modern pressures toward diversity, individual control, and privacy, contract offers the potential for joining these goals with the symbolic, educational, and supportive, as well as the coercive, functions that law holds. Such an involvement of law in marriage would confer legitimacy, dignity, and continuity on marital obligations. At the same time, the infusion of private choices into the process of legal regulation would help to legitimate the law's role in intimate relationships.

Yet the adoption of Option Three, a contractual form of governance for marriage, does not mean simply an indirect legitimation of conduct norms. Such a move contemplates potential dispute resolution by legal institutions. Is such resolution necessary, and is it possible?

## 2. *The Need for and Feasibility of Public Dispute Resolution in Marriage*

At the outset, it should be noted that even if legal dispute resolution were freely available, most marriage agreements would never be brought into a legal forum, either because their obligations would be performed or because the parties would settle privately any disputes. In marriage, as Professor Macaulay found to be the case in commercial contract relationships,<sup>421</sup> legal dispute resolution would take place only in special circumstances.<sup>422</sup> The bulk of contract law's impact on mar-

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421. Macaulay, *supra* note 64, at 509; Macaulay, *supra* note 388.

422. Thus, when Professor Macaulay suggests that contract would usually be an inappropriate instrument for governance of marriage, in part because of the negative impact of adjudication on continuing relationships, Macaulay, *supra* note 64, at 508, he seems to give insufficient weight to his own discovery that parties to commercial contracts normally avoid litigation precisely because it disrupts important ongoing relationships. Yet we do not for this reason deny commercial relationships access to contractual ordering or to dispute resolution. Macaulay does acknowledge



riage thus would be of the indirect type discussed in the previous subsection: a background influence on conduct and private dispute settlement, a vague threat keeping the parties reliable, a legitimization of certain ideologies, and a lever allowing the powerless to influence the powerful.<sup>423</sup>

A preference for private resolution of disputes is natural and exists in all kinds of contractual relationships. Indeed, such a preference may itself be expressed and implemented by private agreement, as the provision for arbitration by a friend in the Dispute Resolution example illustrates. However, such a preference does not dispose of the need for public dispute resolution, since it may be needed when private dispute resolution has failed.

Given the need for managing inevitable marital conflict, the continuing personal and social importance of intimate relationships, and the decline in social reinforcement and dispute resolution concerning obligations within marriage, a *prima facie* case for legal dispute settlement has already been made. Indeed, precisely because today's intimate relationships involve choices from an array of options rather than the imposition of mandatory norms, the need for systems of legitimate dispute resolution is accentuated. When relationship obligations become a matter of choice and the choice means foregoing alternate opportunities for the sake of reaching an important goal, the need for vindication of expectations and resolution of conflict becomes intense.

Consider, for instance, the Income Production and Support example. Assume that Mary has honored her agreement to support the couple while John attends law school. However, when Mary wants to return to school, John refuses to take her seriously. He is happy to contribute fifty percent of their living expenses, but he likes the luxuries he can buy with the remainder of his salary, which he feels is discretionary income. He urges Mary to retain her high-paying computer programming job. Knowing that unless John alters his spending priorities there will not be enough money if she goes to school, Mary hesitates to quit her job. She feels alone in her efforts to influence John. Neither of them belongs to a church. Their parents, who live 1,500 miles away and have the values of the older generation, are inaccessible to John and Mary and unsympathetic to their goals. John and Mary have tried to discuss their problem with their friends, but most do not want to get involved.

Mary's entreaties and rising anger fail to move John. Yet Mary

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that contractual ordering and third party dispute resolution may have more benefits than costs in marriage in situations where there is an effort to alter outmoded gender-based roles. *Id.* at 508 n.1.

423. Macaulay, *supra* note 64, at 512-21.

feels they had a bargain. She has acted in reliance on it; she has performed her part. She may well wish to seek legal dispute resolution in an effort to vindicate her expectations. Should Mary's claim be ignored? Surely not. The fairness achieved by insisting that voluntarily assumed obligations be honored may be even more important than "peace at any price." Furthermore, where the alternative is festering discord, there may even be gains to harmony in the authoritative resolution of disputes, even at the hands of the legal system.<sup>424</sup> Then, too, John is far more likely to honor his commitments to Mary if he knows he may be accountable for his actions in a dispute resolution forum.<sup>425</sup>

If some public dispute resolution system should be available to couples who, like John and Mary, face unresolved disputes about important commitments, what form should it take?

*a. The Role of Nonadjudicatory Forms of Legal Dispute Resolution*

Although legal dispute resolution often means court adjudication, other intervention modes are possible.<sup>426</sup> These include formal or informal, binding or nonbinding arbitration; mediation; or outside-initiated and assisted negotiation between the parties. The alternatives vary in a number of ways, including: the presence and authority of a third party; the extent to which a solution is consented to or imposed upon the parties; the extent to which results must be based on principle or may be ad hoc; the extent to which results are governed by fixed referents, as opposed to being responsive to present and future circumstances.

Alternative forms of dispute resolution may be devised by legislatures, by courts, or by the parties themselves. For purposes of this Article, their common thread is their provision of an optional resource to the parties, which is legitimated and assisted by authoritative legal in-

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424. A classic argument for the availability of legitimate channels of dispute resolution is the avoidance of situations where an injustice in the real world presents an individual with a choice between accepting a *fait accompli* or resorting to self-help or even violence to reestablish fair outcomes. Although we do not often think of marriage as a context for such dilemmas, this example illustrates the potential for just such problems to occur. The self-help in question may be more a matter of emotional violence than physical, but even physical violence is more a factor in marital conflict than we may previously have recognized. See *supra* notes 267-76 and accompanying text.

425. See *supra* notes 412-13 and accompanying text.

426. Various experiments in nonadjudicative dispute resolution in marriage are already underway. See, e.g., D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS (1977) (discusses mediation projects in Boston, New York, Columbus, and San Francisco); Coogler, *Divorce Mediation for "Low Income" Families: A Proposed Model*, 17 CONCILIATION CTS. REV. 21 (1979); Dellapa, *supra* note 397, at 15; Feldman & Bloom, *Conciliation Court: Crisis Intervention and Research Project on Domestic Violence*, 17 CONCILIATION CTS. REV. 1 (1979); Greenstone, *An Interdisciplinary Approach to Marital Disputes Arbitration: The Dallas Plan*, 16 CONCILIATION CTS. REV. 7 (1978).

stitutions. In many, perhaps most, cases of marital dispute, these alternatives would be preferable to adjudication. Ignoring the degrees of variation and contrasting only two extremes—adjudication and negotiated or mediated compromise—the reasons for this preference are apparent.

Adjudicative solutions are binary, perceived as involving all or nothing choices. Where norms compete, the adjudicator selects only one, declaring it to be controlling and rendering other norms invalid or inapplicable to the case.<sup>427</sup> Professor Fuller emphasizes that adjudication is best applied to problems he calls yes-no, or more-less problems, where all possible decisions can be represented along a single line—for example, an amount of money between zero and \$10,000. Problems that are polycentric in nature, involving solutions based on several variables, are not well suited, in Fuller's opinion, to adjudication.<sup>428</sup>

The binary quality of the adjudicative process results from its requirements for decisions that are reasoned, principled, and capable of generalization. By contrast, mediation and negotiation can compromise competing norms and party positions, because of a discretion born of the disputants' consent to the process and its outcome, as well as the absence of any need to rationalize or generalize outcomes.<sup>429</sup>

Adjudication also utilizes different kinds of norms and information than do mediation and negotiation. Because adjudicative processes stress impartial, objective, and generalizable reasoning, they result in impersonal decisionmaking. As much as possible, adjudicative processes abstract the facts about behavior from the context of the disputants' history and personalities. Following Fuller's classification, Professor Eisenberg elaborates this distinction between act-oriented norms used in adjudication and person-oriented norms used in mediation/negotiation.<sup>430</sup> The stranger-adjudicator seeks generic norms, and is ill-equipped to evaluate person-oriented issues or to administer person-oriented remedies. By contrast, the person-centered norms that in-

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427. See Eisenberg, *supra* note 8, at 654; Fuller, *On the Nature and Limits of Adjudication: Collective Bargaining*, in *SOCIETY AND THE LEGAL ORDER*, *supra* note 11, at 583, 586-87. But see Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964), for an insightful challenge to the notion that adjudicative solutions are inevitably binary. Professor Coons argues forcefully for the value and feasibility of judicially imposed compromise in a variety of types of disputes.

428. Fuller, *supra* note 427, at 587-89. The claim that adjudication is appropriately restricted to unicentric problems would likely be challenged by some observers today. Issues like legislative apportionment, school desegregation, prison and mental hospital reform, or disputes concerning euthanasia, wrongful life, or abortion do not seem unicentric. Indeed, Professor Chayes has described a whole new litigation type which is now inundating courts, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), but which clearly falls outside Fuller's conception of appropriately unicentric adjudication.

429. See sources cited *supra* note 427.

430. Eisenberg, *supra* note 8, at 643-44.

form negotiation/mediation allow for the importance of personal facts and circumstances. Thus, adjudicative process restricts the scope of relevant evidence while compromise methods expand it.<sup>431</sup>

The different approaches of the legal processes result in their treating disputing parties differently. Mediation or negotiation view the parties as full participants in decisionmaking, treating them as the equals of any intervenor. By contrast, parties to an adjudicative process have an inferior role as supplicants who cannot handle their own affairs and must seek a stranger's determination.<sup>432</sup> Negotiated or mediated settlements are also much quicker and cheaper (economically and psychically) than adjudication.<sup>433</sup>

These differences between adjudication and mediated or negotiated compromise make evident why alternatives to adjudication would be desirable for marital dispute resolution. In marriage, rational and chosen obligations are frequently entwined with issues of emotion and irrational motivation. Likewise, crystallized obligations are embedded in a fluid relationship. Moreover, given the ongoing and intense interpersonal character of marriage, solutions relying on empathy, compromise, and consent are likely to be more effective than those relying on imposition, distance, and findings of right and wrong. Given these characteristics, dispute resolution systems near the mediation/negotiation pole are likely to be preferable for marriage to those near the adjudication pole.

Of course, to the extent that more empathetic treatment of the parties and their circumstances might produce fairer resolutions of marital disputes, the same can be said of many disputes now adjudicated between family members, between franchisee and franchisor, between employer and employee, between long term supplier and buyer, and between others in long term relationships.<sup>434</sup> Many such disputes would profit from informal settings, quicker and cheaper decisions, and fuller examinations of context and personal motives. Yet we do not use these reasons to deny access to adjudication, and they should not be used to erect an absolute block to interspousal adjudication.

#### *b. The Need for and Feasibility of Interspousal Adjudication*

Despite clear and strong reasons for preferring nonadjudicatory dispute resolution, a number of important considerations argue against

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431. *Id.* at 644-45, 653-58.

432. *Id.* at 658-59.

433. *Id.*; Macaulay, *supra* note 64, at 510.

434. On Macneil's typology, discussed *supra* in text accompanying notes 360-70, most of these examples would, like marriage, tend toward the relational contract pole rather than the transactional contract pole. Yet in many of them, unlike in marriage, the parties may litigate contractual disputes when necessary.

erecting a general barrier to interspousal adjudication. First, as we saw in Sections II and IV, adjudication can already indirectly affect marital disputes, as when a creditor sues one spouse for necessities purchased by the other spouse or when a criminal action is lodged against one spouse because of a complaint by the other.<sup>435</sup> There may be direct litigation in cases involving marital property or interspousal tort as well as divorce.<sup>436</sup> The availability of adjudication in these situations makes clear that when the need for conflict resolution or enforcement of obligations is perceived to be sufficiently pressing, too general a presumption about marital harmony and too rigid a limitation on institutional competence are both set aside. Once it has been conceded that property disputes can be resolved through interspousal adjudication, it is hard to assert absolute inability to settle disputes over other economic aspects of marriage, such as support or payment for domestic services. Moreover, once courts, in granting and supervising divorce, have adjudicated a range of obligations (support, property, custody, visitation) requiring fairly broad institutional capabilities, it is possible to forecast their ability to respond to marital disputes in ways that respect the limits of institutional competence without ignoring legitimate expectations, important obligations, or the reality of conflict.

Second, although major differences between adjudication and mediation/negotiation do exist, they also share substantial common ground. Professor Shapiro, for instance, stresses that adjudication, like mediation, requires strong elements of party consent. The presence of consent in turn creates some discretion in an adjudicative decisionmaker to choose flexible, intermediate, or compromise solutions for the parties.<sup>437</sup> Indeed, Professor Coons has demonstrated the feasibility of judicially imposed compromise while probing the fact that "the law serenely assumes" winner-take-all outcomes "as the nearly universal facade for the system."<sup>438</sup> Professor Eisenberg, too, comments on continuities between negotiated and adjudicated dispute resolution processes, concluding that "principle, rule, and precedent," traditionally viewed as distinguishing characteristics of adjudication, play a sur-

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435. See *supra* text accompanying notes 98, 267-76.

436. See *supra* text accompanying notes 92-97, 279-80, 263, 238-51.

437. According to Professor Shapiro:

[W]e ought not to see compromise as antithetical to legal or even judicial resolution of conflict. In the first place, lurking within such judicial institutions as money damages and equitable discretion are major elements of compromise. Our tendency to ignore these elements derives from a false picture of courts as purely coercive mechanisms when in fact they seek to preserve significant elements of mutual consent by the conflicting parties to the legal outcomes they prescribe.

Shapiro, *Compromise & Litigation*, in J. PENNOCK & J. CHAPMAN, *COMPROMISE IN ETHICS, LAW AND POLITICS* 173 (1979).

438. Coons, *supra* note 427, at 787.

prisingly important role in dispute negotiation or mediation.<sup>439</sup> Marital dispute resolutions require elements of both compromise and principle, of both consent and authority. If the utility of mediation and negotiation within adjudication is acknowledged, a decision to allow adjudication of some marital disputes is simply a shift along a continuum, rather than a proposal to enter a wholly new dimension.

Third, we have seen that processes of contract adjudication are adapting in ways that make them more relevant to marital dispute resolution. Section V traced the increasing recognition of relational flexibility, the articulation of broad principles like good faith, the increased attention to maintenance of long term relationships as opposed to emphasis on performance specifications, the gradual acceptance of noneconomic interests and injuries, and the interplay of private control and public policy in the domain of contract law.<sup>440</sup>

Finally, we have seen that marriage itself is changing. In Sections III and IV we traced social and legal developments in marriage that make adjudication more appropriate to its conflicts: an emphasis on individualism and self-interest, a view that purposeful exchange and negotiation are likely and necessary, a belief in the possibility of rational management of some relationship choices, an accentuation of economic consequences and alternatives, a recognition of temporariness, change, and other limitations.<sup>441</sup> When these developments are considered together with those described in this Section—the inevitability of conflict and the decline in nonlegal forms of social support, sanction, and dispute settlement in marriage—it is hard to avoid concluding that adjudication may sometimes be possible and desirable in marital disputes such as the one between John and Mary discussed earlier.

The traditional assertion that legal institutions, especially adjudicative ones, are inappropriate to the resolution of marital conflict<sup>442</sup>

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439. In short, it is oversimplified to regard the element of reconciliation as necessarily standing in opposition to principle, rule, and precedent. Rather these elements are likely to interact: In cases where the disputants place a premium on the continuance of an ongoing relationship, the element of reconciliation is likely to provide each disputant with an incentive to give some weight to his opponent's good faith claim or defense and the norms and factual propositions that underlie it, even if he regards the norms as invalid and the facts as wrong. Admittedly, a disputant may also surrender in such a case even though he does not regard the claim or defense as either reasonable or asserted in good faith . . . . But in most such cases a perception of reasonableness or good faith will be critical: While interdependence or a shared ideal of interpersonal harmony may induce disputants to place a high premium on peace, the parties are unlikely to achieve peace through a settlement based on a norm or factual proposition that one regards as neither valid nor asserted in good faith.

Eisenberg, *supra* note 8, at 649.

440. See *supra* text accompanying notes 318-90.

441. See *supra* text accompanying notes 117-317.

442. Professor Lon Fuller asserted that intimate relationships like marriage are appropriately regulated by customary law, while relations between "friendly strangers" are appropriately governed by the law of the contract. Fuller, *supra* note 11, at 204-05. Fuller's conclusions about

tends to treat marriage as monolithic. Yet as the examples illustrate, marital agreements and the relationships they reflect would involve a wide range of types of obligation and interaction. Thus, marriage includes economic obligations and emotional-sexual ones; it includes elements of self-interest and of altruism;<sup>443</sup> it encompasses conflicts of interest and conflicts of value.<sup>444</sup> While adjudicative processes and competence may not always stretch sufficiently to accommodate every obligation a couple might wish to undertake, judicial dispute resolution would be feasible in many marital conflict situations. Promises about exchanged support, about salary for domestic services, about marital property holdings, about procedures for handling disputes, about methods for making job and residence decisions—like those in the examples—seem capable of being resolved in ways that do not require too much distortion of the adjudicative process. These examples seem sufficiently capable of rational management to allow determination of performance by parties and courts. They are at least arguably as amenable to adjudication as are a doctor's urging that he be allowed to reconstruct a "perfect" hand for an injured boy,<sup>445</sup> a daughter's promise to care for her mother for life,<sup>446</sup> a seller's claim that his drunken taunting of an acquaintance made apparent his lack of contractual intent,<sup>447</sup> or a brother-in-law's promise of a "place to raise your family."<sup>448</sup>

Breaches of the obligations in the examples would for the most part be amenable to traditional contract remedies. Like many contracts, some of the agreements—like the agreement to perform services or to move to a new location—could not be specifically enforced because such enforcement would intrude too much on personal liberty and on court resources for supervision.<sup>449</sup> But many such agreements would lend themselves to monetary remedy for breach. Breached

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in marriage may have been reached before the erosions of social consensus and nonlegal institutional support which are essential to governance by customary law had become as clear as they are today. See *supra* text accompanying notes 117-49, 182.

443. See *supra* note 187 and text accompanying notes 186-98.

444. The distinction between these two types of conflicts comes originally from Vilhelm Aubert's theory of conflict, as discussed in L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 178-88 (2d ed. 1977). Note that although the type of conflict has implications for the appropriate method of conflict resolution, the cited discussion indicates that the two kinds of conflict are intermingled in practice, *id.* at 182, and that dispute resolution processes often transpose one kind of conflict into the other, *id.* at 184.

445. *Hawkins v. McGee*, 84 N.H. 114, 115, 146 A. 641, 643 (1929).

446. *Brackenbury v. Hodgkin*, 116 Me. 399, 102 A. 106 (1917).

447. *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954).

448. *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

449. See Schwartz, *supra* note 344, for a general analysis of the liberty argument, *id.* at 296-98, and of the difficulty-of-supervision argument, *id.* at 292-96, 304-05, against granting specific performance.

promises of services could be remedied using the market value of such services, and promises of support or salary could be enforced in money terms. If the argument is made that the promise was broken because funds were insufficient for "unnecessary" expenditures on school or a homemaker's salary, the plaintiff can claim as much right to decide the distribution of scarce resources as the defendant. If resources are non-existent, the plaintiff is no worse off than any creditor of a judgment-proof defendant. Broken promises to relocate job and home may yield damages in the form of lost-income opportunities for the spouse denied the opportunity to decide domicile. Indeed, if one spouse refuses to move because he or she gains more by staying than the other spouse loses by not moving, there would be an "efficient breach," even after compensating the spouse whose legitimate expectations have been defeated.

Some of the example promises that do not easily lend themselves to monetary remedy might be made to do so through an agreement about liquidated damages. For instance, if in the Duration example one of the spouses sought a divorce before the time set by the agreement, a liquidated damages provision might well provide a good faith estimate of anticipated harm, which would otherwise be difficult to ascertain.<sup>450</sup> Without a liquidated damages clause, plaintiffs might establish damages by showing loss of support or services that were promised in the marriage agreement. Still other plaintiffs might fail to establish any damages with sufficient certainty to achieve a recovery.

The promises about dispute resolution procedures, while not particularly responsive to monetary remedy, could be ordered specifically performed without undue intrusion on party liberty and with the advantage of saving court resources. In and of itself, the agreement for a homosexual marriage presents few problems of enforcement or dispute resolution; its conflict is with substantive public policy. If the policies in question changed, the agreement would be self-enforcing.

Perhaps the greatest problem in adjudicating the kinds of obligations in the examples would be the difficulty of extracting them from a complex relationship. This fact reemphasizes the desirability of nonadjudicative dispute resolution, but it is insufficient reason to deny all interspousal adjudication. Increasing numbers of contractual disputes are embedded in complex, long term relationships, and adjudication has had to modify its techniques to accommodate that fact.<sup>451</sup> All lawsuits force courts to decide how much of an expandable context shall be considered "relevant" to the issue at hand. The lines that are drawn are always arguable and changeable. For example, why should

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450. See U.C.C. § 2-718; RESTATEMENT (SECOND) OF CONTRACTS § 356 (1) (1981).

451. See *supra* text accompanying notes 319-27.



a substantial increase in the number of dwellings in a town from which a contractor has promised to remove garbage be sufficiently relevant to allow a contractual modification that otherwise would be lacking in consideration,<sup>452</sup> while a worldwide depression does not warrant judicial abrogation of the rule against modification without consideration?<sup>453</sup> In part, the difference reflects evolutions in the rules, but these evolutions are themselves changing judgments about which contextual circumstances shall be taken into account in adjudicating a dispute. Should the court have inquired into the buyer's occupation before deciding whether a mistake was made in the purchase of the supposedly barren cow?<sup>454</sup> To what extent should a court attempt to trace actual gains and losses resulting from a breach of a given transaction through a series of related transactions, as opposed to employing a rule that attempts to establish a fair policy generalization?<sup>455</sup> What investigation is necessary before a court holds valid an exculpatory clause in a lease in part because the "relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid"?<sup>456</sup> These examples challenge any easy assumption that appropriate delimitation of context is more problematic in marriage than in other contractual settings.

Then, too, many issues are litigated even though they involve intense emotional content and context: witness, for example, abortion rights, paternity or custody disputes, contested wills, race or sex discrimination suits. No haven of pure objectivity is possible even in the courtroom. Furthermore, to conclude that there should be no adjudication because of emotionally entangled issues is to prefer to allow expectations to go unvindicated, and disputes to go unresolved, rather than to solve the problem of how to sever a dispute from its relationship context. Such a preference is unwarranted.

At bottom, access to adjudication for interspousal disputes is a question of balancing competing concerns. Adjudicative processes will not be able to accommodate every obligation a couple might undertake. An attempt to sue for breach of the "no recriminations" promise or the nights-out provision involved in the Open Marriage example probably presses beyond the point where adjudicative institutions might go. To a greater degree than the obligations involved in the

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452. *Angel v. Murray*, 113 R.I. 482, 322 A.2d 630 (1974).

453. *Levine v. Blumenthal*, 117 N.J.L. 23, 29, 186 A. 457, 459 (1936), *aff'd per curiam*, 117 N.J.L. 426, 189 A. 54 (1937).

454. *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

455. *See, e.g., Coombs & Co. v. Reed*, 5 Utah 2d 419, 303 P.2d 1097 (1956).

456. *O'Callaghan v. Walker & Beckwith Realty Co.*, 15 Ill. App. 2d 349, 146 N.E.2d 198 (1957), *as modified on denial of rehearing*, 15 Ill. 2d 436, 440, 155 N.E.2d 545, 547 (1959).

other examples, such a suit would be embedded in an emotional, non-rational context; would involve commitments for which it would be difficult to determine performance or breach; would allege injuries difficult to monetize and impossible to enjoin; and would require forms of evidence, evaluation, and remedy that would intrude heavily on personal liberty. A couple to whom such obligations were extremely important might surmount some of these hurdles by specifying liquidated damages, but more likely, this example is one where contractual governance could be used as a metaphor at most. Similarly, the Traditional Vows example presents difficult problems of determination and specification, inappropriateness of monetary remedy, and inextricability from emotional elements of the relationship. While it is arguable that promises like "love" or "respect" are as capable of behavioral specification as concepts like "due process," the comparatively low degree of state interest in such specification makes any effort at legal enforcement unwise.

The state's traditional governance of marriage denied access to interspousal dispute resolution on the ground that legal institutions were inappropriate instruments of marital conflict resolution that would unduly disrupt domestic harmony. This Article has argued that conflict in marriage is inevitable, and that there is need for greater legal support for obligations no longer receiving sustenance from social institutions. It has further argued for the availability of nonadjudicative methods of legally recognized and supported dispute resolution. Although such methods of dispute resolution normally would be preferable to adjudication, adjudication is feasible in more types of marital disputes than previously thought, albeit remaining inapplicable to some.

One issue remains to be addressed. If legal dispute resolution, particularly adjudication, is necessary in relation to marital conflict, why should anything other than a divorce court be necessary?

### *C. The Insufficiency of Divorce*

The traditional legal view has been that divorce is the only formal legal intervention needed between marital partners.<sup>457</sup> If anything, today's easier access to divorce has strengthened this conviction. To the extent that this view rests on a denial of marital conflict in healthy relationships or on a preference for nonlegal dispute resolution during marriage, it already has been addressed.<sup>458</sup> To the extent it rests on a view that divorce is the only type of dispute resolution that is needed or desired, it is discussed below.

The lack of access to legal enforcement and dispute resolution in

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457. See *supra* notes 113-14 and accompanying text.

458. See *supra* text accompanying notes 391-96, 407-20.

ongoing marriages may actually encourage divorce in situations where it is neither desired nor the best outcome.<sup>459</sup> Again, consider our hypothetical couple in the Income Production and Support example. On the same facts discussed earlier in this Section, Mary is justifiably angry about John's reneging on his promise, because she wishes to continue her education. Assume also, however, that Mary loves John and has no wish to terminate their relationship. If she cannot solve this problem privately, she, like the wife in *McGuire v. McGuire*,<sup>460</sup> is faced with two undesirable alternatives: she can acquiesce in the disappointment of her expectations and live with resentment; or she can escalate the conflict to the point of divorce, deciding that anyone who would act as John did is not worthy of being her spouse. Mary's range of choices in this situation seems unduly restricted; it defeats her purposes and, one suspects, those of the state as well.

Furthermore, even if Mary divorces John because of the conflict engendered by this issue, the divorce will probably not resolve the dispute about obligations under her agreement with John. Under present law, their agreement varies the "essential incidents" of marriage and is thus void.<sup>461</sup> Although Mary may, upon divorce, obtain an award of spousal support, such support would only be ordered on the basis of an agreement between the couple made at the time of divorce (when John is, by hypothesis, unwilling to honor his earlier promise) or on the basis of public policies, such as ability and need, which govern post-divorce support in the absence of such an agreement.<sup>462</sup>

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459. Economist Albert Hirschman discusses the comparative roles of two types of response to dissatisfaction in an organization or relationship: voice and exit. A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970). Voice, as a method of change and recuperation, involves protest and efforts to alter outcomes from within the relationship. Exit involves expressing protest by leaving. Hirschman theorizes that organizations often overuse one or the other of these approaches to handling discontent when a greater variety of remedies would be optimal. *Id.* at 123. Although his description is largely applied to economic organizations, he suggests its relevance to families, political parties, and states as well. In Hirschman's terms, this Article is arguing that marriage is over-relying on exit as a strategy of problem solving and that marriage could use a greater infusion of voice mechanisms than are now available. Hirschman summarizes a key part of his argument in words which are relevant here: "[In some relationships or organizations] exit drives out voice and assumes a disproportionate share of the burden involved in guiding a firm or organization back to efficiency after the initial lapse. . . . [I]n certain situations, voice could function as a valuable mechanism of recuperation and deserves to be strengthened by appropriate institutions." *Id.* at 120.

460. 157 Neb. 226, 59 N.W.2d 336 (1953). See *supra* text accompanying notes 84-88.

461. See *supra* note 69 and accompanying text.

462. See *supra* note 249. A particularly egregious example of the inadequacy of divorce processes to handle problems arising under marital agreements is found in *Fischer v. Wirth*, 38 App. Div. 2d 611, 326 N.Y.S.2d 308 (1971). In that case, described by Professor Johnston as illustrating "an almost incredible degree of insensitivity toward oppressive and unfair treatment of wives by their husbands with respect to marital property," Johnston, *supra* note 35, at 1073, the wife, in obtaining a property division at divorce, attempted to enforce an agreement alleged to have been made during the marriage. The agreement provided that wife's earnings were to be

Thus, as we saw in Section IV, divorce no longer resolves marital disputes other than in the simplest sense, *i.e.*, by terminating the marriage and establishing the parties' divorce relationship.<sup>463</sup> Under no-fault divorce, the purpose of dissolution is to record and legitimate marital termination, and to order, according to public or private policy, the terms of the new divorce relationship. In essence, the premise of no-fault divorce—like the premise of the arguments made in this Article—is that the issue of marriage termination is separate from the performance or breach of marital obligations. These policies governing divorce may well be appropriate and desirable, yet they highlight the fact that if marital obligations are to be taken seriously, they need some form of enforcement and dispute resolution other than divorce.<sup>464</sup>

In response to that need, this Article has argued that spouses should have access to legal dispute resolution regarding privately agreed marital obligations, even during marriage. In addition, reforms which have altered divorce's role in the settlement of disputes about marital obligations, especially when combined with the lack of any enforcement of such obligations during marriage, suggest the need for modification of present policies governing post-marital dispute resolution, with a view to giving greater recognition to private agreements about marital obligations. Such post-marital enforcement seems likely to present easier questions than enforcement during marriage, although a thorough evaluation of such changes would involve a more compre-

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used for family support, supplemented by only that part of husband's earnings that were needed. He was to invest the remainder of his income; he held title to said investments solely in his name. Wife alleged that husband had suggested the arrangement as a way of accumulating property "for the two of us." 38 App. Div. at 612, 326 N.Y.S.2d at 310. The court refused to impose a constructive trust on the assets so acquired by husband, although it seemed to assume that husband did make the statements attributed to him by plaintiff, *id.* at 612, 326 N.Y.S.2d at 311, because there was no concealment or fraud and the wife knew the assets were being placed in the husband's name alone. *Id.* at 612, 326 N.Y.S.2d at 311. The case illustrates the serious and legitimate expectations which may rest on husband-wife agreements. The court's statement that the wife was inappropriately trying to obtain a community property division under the guise of equitable relief, *id.* at 610, 326 N.Y.S.2d at 310, reveals the strength of attachment to a particular set of public policies governing the distribution of property at divorce, and the antagonism to efforts to vary those policies by private agreement undertaken during marriage. Finally, the court's closing observation that while moral judgments about husband's conduct might be made, those are not enough to "set a court in motion," *id.* at 612, 326 N.Y.S.2d at 311, reveals a deep resistance to making husband-wife agreements the subject of legal enforcement. While the wife's attorney may have erred in structuring the case around a theory of constructive trust, these attitudes about marital agreements are nonetheless discernable in both the outcome and the opinion.

463. See *supra* text accompanying notes 238-39.

464. Indeed, as Professor Kay wisely observes, "It is the deficiencies of the institution of marriage that leave American women little choice but to attempt to use divorce . . . 'as a gold-digging tool.'" Kay, *Making Marriage and Divorce Safe for Women*, 60 CALIF. L. REV. 1683, 1689 (1972). Professor Posner also recognizes the problem, although he concludes that the lack of normal enforcement of marital obligations may be justified by the difficulties of adjudication. R. POSNER, *supra* note 64, at 107-08.

hensive review of divorce policy and practice than is undertaken in this discussion of marriage policy.

#### RECOMMENDATIONS AND CONCLUSIONS

The traditional marriage law system had to change. For many years the state controlled the legal content and structure of marriage through public policy. This governing strategy depended upon and reflected a social consensus about the nature, purpose, and obligations of marriage that has now eroded. Both the norms themselves and the social institutions that defined and supported them have been greatly weakened. In place of the old model, new goals of sexual equality, personal choice and fulfillment, tolerance of differences, divorce reform, and marital and sexual privacy have emerged.

The law's efforts to accommodate these new values have drained much of the content from traditional legal marriage and have generated confusion about the appropriate role for the state in modern forms of intimacy. To remove the most offensive elements of traditional marriage law, the state has relinquished, in bits and pieces, much of its control over marriage. While selective reduction of legal control is appropriate and essential, wholesale delegalization is not ultimately a tenable strategy for state governance of marriage. The legal institution of marriage interacts, in terms of practice and policy, with many areas of the law outside the domain of domestic relations. Even more important, intimate relationships are too crucial, both to individuals and to society, to be abandoned to the brittleness or the isolation of a "do your own thing" philosophy. As Professor Glendon has aptly observed:

The lack of firm and fixed ideas about what marriage is and should be is but an aspect of the alienation of modern man. And in this respect the law seems truly to reflect the fact that in modern society more and more is expected of human relationships, while at the same time social conditions have rendered these relationships increasingly fragile.<sup>465</sup>

The fragility to which this passage alludes will increase as the attacks on the traditional governing posture continue and the legal system does not provide a coherent alternative. Despite modern demands for privacy, individualism, and diversity, the needs for legitimacy and support, for vindication of expectations and resolution of conflict, remain and are even increasing. Some new system of legalization of marriage that meets both kinds of needs must be developed. The balance is difficult: structure but not rigidity; deference to private value and preference without abandoning public concern or legitimacy; recognition of serious choices and consequences without ignoring the limits of legal

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465. M. GLENDON, *supra* note 61, at 180-81.

institutions or the unpredictability in intimate relations that may complicate efforts at rational management.

This Article recommends that the state strike the needed balance by deferring to private decisions about the obligations and conduct of marriage while providing to the relationship the legal tools of legitimacy and dispute resolution. In terms of the matrix presented in Section I, this would mean moving away from the traditional preference for Option Two, bypassing the transient attractions of Option Four, and adopting a posture close to that of Option Three. If the state were to make such a choice, marital partners could, within the limits of public policy, define and plan their relationships, giving them the content, character, duration, and structure that the parties themselves choose. Their choices would have the symbolic and supportive weight that the law attaches to deliberate voluntary commitments. The parties would have access to legal enforcement and dispute resolution. Such access is an incentive to honor legitimate expectations, is a backdrop to informal and private resolution of disputes, and is a last resort where informal and private solutions to conflict fail.

Contractual ordering has long been used in ways analogous to those described as desirable for modern marriage, to govern a variety of relationships. A legal system grounded in contractual traditions defers to private values and choices, yet gives them the dignity and legitimacy that legal recognition of obligations can confer. It allows considerable freedom for the play of individual preferences, but provides vindication for expectations formed and actions taken in reliance on consensual plans.

The evolving field of contract law is better suited to a marital context than it would have been a hundred years ago. Its doctrines have become more flexible, striving for compatibility with the complex long term relationships that they govern. As contract analysis has become more sophisticated, the legal system has softened previously rigid formulas of economic benefit and detriment, turning instead to broader principles of bargain and compensation which accommodate a variety of relationships and interests. An acknowledgment of the role of public policy in limiting private choice has encouraged debate about what policies are optimal. A new emphasis on the social and behavioral functions of contracting has helped to place its enforcement dimension in perspective.

Contract law's deference to private choice about value and risk, about right and obligation, fits extremely well with the trends emerging in marriage. Individuals are demanding greater autonomy and privacy in intimate relationships and a right to tailor their relationships to their needs and preferences. Marriage has lost the qualities of predetermina-

tion and permanence that once made a standard definition of marital status adequate. In the face of multiplying options, uncertainty, and impermanence, the pressure for planning and choice in intimacy cannot be ignored. Pursuit of one's own needs, as well as negotiation with a partner about goals and resources, are natural and necessary aspects of modern relationships. Furthermore, the importance for both partners of marital decisions about work, money, geography, lifestyle, and divorce is so obvious that when agreements about these vital matters are made, individuals have a right to rely on expectations that have been created. The contract model of bargaining, planning, and self-interest thus no longer seems so foreign to the context of intimate relationships. Nor does the existence of conflict and the need for its management offend the modern understanding of intimacy. Communication and bargaining can avoid conflict just as legal recognition and support for serious commitments can induce voluntary compliance. Most marital agreements would never come to court, but ultimately, legally initiated and assisted dispute resolution should be available. Nonadjudicative processes for marital dispute resolution will normally be preferable, because in marriage, as in most types of ongoing relationships, formal litigation is seldom the best recourse. But the fact that it is occasionally needed should not dismay us. Marriage is multifaceted; it includes obligations that are within the reach of courts' competence as well as some that are not. The greater potential for rational management within marriage combines with the flexibility of modern contract doctrine to make possible new forms of conflict resolution in marriage.

This Article has argued that, as parties to serious agreements on which important acts and choices may be based, spouses ought to have some recourse in law when obligations are ignored and private accommodation cannot be reached. It has also argued that termination of a relationship ought to be a separate question from whether marital obligations have been honored. Conflict over contract-like obligations may lead to divorce, but the criteria and policies governing divorce take little account of such marital obligations. While this may be an appropriate policy for governing marital termination, it leaves issues of marital dispute unresolved except in the sense that the relationship has ended. Even more important, serious conflict can occur within the context of a relationship that both spouses wish to continue. Divorce ought not be the only option offered by the law to a spouse with a legitimate grievance within marriage.

Marriage law has already begun to change in the direction suggested here. Domestic relations law has retreated from efforts to dictate conduct and roles in marriage, increasing its tolerance of diverse pref-

erences within intimate life. That trend has been accelerated by constitutional holdings about marital privacy. The state has also much reduced its efforts to make marriage permanent or to control the substantive grounds for ending the relationship. These changes in divorce law constitute an admission by the state that the parties involved must define and determine the viability of a relationship.

In tax law, in criminal law, in credit law, in marital property law, in tort and evidence law, marital partners are increasingly treated as separate individuals capable of distinct interests, goals, intentions, and injuries. As this trend continues, the kind of decisionmaking envisioned in marital contracting becomes feasible. Indeed, the state has created new exceptions to its longstanding policy against marriage contracting. Not only may spouses arrange property rights by contract before, during, and after marriage, they may so arrange most terms of divorce. Only recently have a few states begun to allow arrangement of post-divorce support obligations by antenuptial contract. Perhaps most interesting of all, a number of states have recently selected contract as the appropriate framework for determining relationship obligations between unmarried cohabitants.

These developments reveal acceptance of actual contractual ordering of some aspects of intimate relationships. More broadly, the changes reflect the general recognition of the legitimacy of private ordering, the need for dispute resolution, and the potential within marriage for the rational management needed to make both possible. On the strength of these developments, this Article has argued that the state, instead of resisting contractual ordering of marriage outside a few exceptional areas, ought to embrace it as a major organizing principle of marital policy. The zone of marital obligation in which contractual ordering is desirable and feasible is far larger than presently acknowledged. Even where literal application of contractual models might be inappropriate because the desirability or feasibility of private ordering, public dispute resolution, or rational management is problematical, a contractual metaphor may have great utility.

If the state were to broaden its acceptance of contractual governance of marriage, contracting would still be an option that couples could choose rather than a requirement imposed upon them. A body of public policy would be needed, sometimes mandatory and displacing any conflicting private choices, more often yielding to private choice but providing a package of standard marital obligations for couples who did not wish to negotiate the terms of their relationship. If openness to marital contract existed, model contracts probably would be developed by various groups, publications, or individuals seeking to



make couples aware of issues and possible solutions.<sup>466</sup> In harmony with a desire to increase the degree of private ordering, the state might well ask persons entering a marriage to either select one of several models of key marital obligations or design one of their own, as was suggested in the Marital Property example. The state would also evolve public policy concerning the justiciability of different types of marital disputes and would divert disputes to a nonadjudicative forum where appropriate. Moreover, prospective spouses could be encouraged to indicate preferences about dispute resolution processes as well as about substantive obligations. They could, for example, choose arbitration or mediation, designate a private or legal forum, and foreclose or request adjudication, with the state deferring to these private preferences where possible.

Whatever the exceptions public policy ultimately carved out from the arena of private ordering or public dispute resolution, they are best developed gradually, through discussion and the evolving wisdom of common law adjudication. Existing legal doctrines should resolve many of the anticipated issues. Undoubtedly, specialized policies and principles adapted to the context of intimate relationships would emerge, as they have in other specialized fields of contract. Exceptions to a new policy of contractual enablement ought to be established only in narrow areas where they are required by concerns of public policy, justiciability, or institutional competence. Even these exceptions should not be broad or numerous, nor should there be a rush to elaborate them, lest the end result be to eviscerate the proposed reform of policy.

Even with judiciously defined exceptions to a broad new governing policy, contract in marriage would have certain unavoidable drawbacks. The individualization of relationships—the most important strength of contract—imposes certain costs. It eliminates predictability and frustrates achievement of minimal policy objectives that could be guaranteed by standardization. Contract involves private choice, and sometimes people make choices that others feel are “wrong.”

A particularly troublesome problem of “wrong” choices arises from the tendency of private ordering to reflect and reinforce power disparities in existing relationships.<sup>467</sup> However, a weak party may also

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466. See, e.g., L. WEITZMAN, *supra* note 66, at 255-90; Cathey, *Ante-Nuptial Agreements in Arkansas: A Drafter's Problem*, 24 ARK. L. REV. 275 (1970); Edmiston, *supra* note 3, at 66; Emmanuel, *supra* note 3, at 287; Javert, *Guidelines for a Marriage Contract*, N.Y. L. J. June 15, 1967, at 4 (the same article appears in TRIAL Dec.-Jan. 1966-67, at 46).

467. Where such disparities arise from unequal relations between groups, they give special cause for concern. For example, to the extent that women as a class still have significantly less power and economic influence than men, marital contracting could entrench the disparity. How-

be aided by the potential of contract to redress imbalance. Especially if the weaker party's position is strengthened by shared ideological norms—for example, of equality between spouses—contract can offer powerful tools to reduce disparities and increase equitable treatment where that is the parties' goal. Public policy can place outer limits on the "bad" choices contracting partners might make, and procedural norms supporting a fair bargaining process, especially in confidential relationships, can help protect against such choices. Ultimately, a contractual scheme will have to accept some unwise choices falling inside these boundaries. Yet the costs in terms of policy standardization seem less important than the creation of a structure that is responsive to diversity. Any system which attempted to impose standardized rules, even where those rules reflected more modern and desirable goals like sexual equality, would not sufficiently respect the pluralism and privacy of intimate values nor allow for the planning and self-definition of goals posited by this Article as vital to an effective system of marriage regulation. The essential point is that in intimacy no one can say what is "right" except the parties involved.

On the obligation and enforcement pole as well, contract imposes costs. Although deference is given to private choices, some limits on freedom and privacy inhere in the binding nature of obligations and in the potential for coercive enforcement. Yet certain costs in coercion seem necessary to vindicate expectations and reliance, and gain the public support, formality, and commitment that only a structure like law can provide. Most important, the intrusion here is significantly mitigated by the fact that the obligations are individually chosen.

Tensions between freedom and obligation, between private and public control, pervade both marriage and contract. The parallels suggest the benefits that could be realized by blending the two arenas. Marriage is a social institution that has outgrown the legal structure that used to govern it. The evolving tradition of contractual ordering very closely tracks crucial values emerging in modern marriage.

One concern remains. If marriage is to be so drastically changed, its meaning and content opened to individual choice, its context vulnerable to new forms of intervention, is this not a suggestion tantamount to abandonment of the very meaning and purpose of marriage? The question is fair, yet the answer is negative. The social sciences have

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ever, as a practical matter, women have little to lose if the comparison is with traditional legal marriage. Even some new system of public ordering which attempted to detail requirements of sexual equality would not respond to modern demands for diversity. Despite the concern with women's equality, indeed ultimately because of it, women as individuals must increasingly be trusted to make choices which reflect and respect their diverse personal values. As consciousness about choices within marriage increases, any systematic tendency for women as a class to make "bad"—i.e. reflexive or imposed rather than autonomous—choices, should gradually disappear.

long been preoccupied with the origin of the family, asking whether it is instinctual and biological or cultural and relative. That quest is far beyond the scope or expertise of this Article. What is clear for this purpose is that the particular form of the family, of adult intimacy, is inmutable. What is not inmutable is the individual's need to form bonds of a deep and continuing nature, involving commitment, intimacy, and a degree of public acknowledgement and affirmation. Marriage is our predominant historical, legal, and cultural symbol of that need. Whether or not that is inevitable is less important than that it is true.<sup>468</sup> The vital concern here is that the legal system recognize and respond to enormous changes in the substance of marriage while conserving its symbolic embodiment of our profound yearnings for socially legitimated intimacy.

The state already has begun to edge toward the posture recommended in this Article, by relaxing its efforts to dictate conduct and obligation in marriage and by offering to spouses—albeit in a gingerly fashion—certain legal tools for enforcement and dispute resolution. Thus far, however, the change has been made one step at a time, with eyes on the ground rather than the horizon. This is a time-honored way to undertake legal change, especially within the common law tradition; but enough knowledge has now accumulated to make the leap to a new pattern. Once we believe that the direction suggested here is correct, difficult decisions of policy and implementation remain. Indeed, struggle over specific issues eventually may cause us to modify or reframe the proposed pattern. At this juncture, however, the task is different: this Article seeks to provide a conceptual map that, grounded in analysis of and extrapolation from current developments, can help to frame goals, quiet fears, direct choice, and bring coherence to the complex and changing field of modern marriage law.

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468. Thus, even subgroups of the population who reject much of the history, tradition, legality, and ideology of marriage often do eventually marry. Thomas, *Why I Got Married Now*, Ms. MAG., March 1981, at 47.