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# Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law

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# Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law

Barbara Stark<sup>†</sup>

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# Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law

Barbara Stark

The world has gone mad today  
 And good's bad today,  
 And black's white today,  
 And day's night today,  
 And that gent today  
 You gave a cent today  
 Once had several châteaux.  
 When folks who still can ride in jitneys  
 Find out Vanderbilts and Whitneys  
 Lack baby clo'es,  
 Anything goes.

Cole Porter,  
*Anything Goes*<sup>1</sup>

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1. THE COMPLETE LYRICS OF COLE PORTER 121 (Robert Kimball ed., 1983). While it has been suggested that Porter may be legal authority since he has been cited by Justice Scalia, Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 693-97 (2000), that is not my purpose here. Rather, *Anything Goes* is background music, suggesting two major underlying themes of this Article. First, there is a widespread perception that "anything goes" with respect to contemporary marriage. We tend to think of this perception as "new," and even mildly daring, notwithstanding exhaustive evidence of its historical repetition, just as we endlessly rediscover Porter. Second, we are more likely to notice the availability of divergent norms, and to address them, (as Porter does) in times of economic upheaval, such as the thirties (when Porter wrote the play for which *Anything Goes* was the title song), and the present, when globalization has made world markets more interdependent, and more volatile, than ever before. Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503, 510 (2000); see, e.g., Alex Berenson, *The Case of the Instant Recession*, N.Y. TIMES, Dec. 31, 2000, at 10 (describing the abrupt end of the nation's decade-long boom). See generally SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996) (describing the changing role of the nation states); ANDREAS HUYSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* 21 (1986) (describing how "20th century capitalism has 'reunified' economy and culture by subsuming the cultural under the economic, by reorganizing the body of cultural meanings and symbolic significations to fit the logic of the commodity"). For a neoliberal account of the impact of globalization on Russia and Brazil, see THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xi (1999). The impact of globalization on the United States, of course, remains to be seen, although its influence is already widely felt. See, e.g., *infra* notes 10 & 185 (noting increasing multiculturalism), & note 36 (noting increasing self-consciousness about increasing multiculturalism).

*Before they marry, few couples have any real alternative to one-size-fits-all marriage. Expectations are often very different, however, not only among different couples but between the partners in a particular couple as well. Because these different expectations are rarely explicit, they are rarely addressed. During the marriage, similarly, the law neither reflects nor accommodates the partners' diverse experiences. There are no legal mechanisms for realizing their hopes or cushioning their disappointments. Rather, the parties are left to "work things out" through endless negotiations and compromises. If we as a society value marriage, and want marriage to succeed, we should provide more support.*

*After the marriage, the parameters of the divorce settlement depend as much on the state in which the parties find themselves as the time—and the judge before whom they appear—as on their expectations before marriage or their experience during marriage. Marriage law has become a bizarre variation on the proverbial sausage factory: rather than all manner of ingredients going in and everything coming out "sausage," everything is considered "sausage" going in but comes out in inexplicably—and unpredictably—different forms.*

*This Article addresses this disjunction between a wide range of lived experience and the law. Part I explains why one-size-fits-all actually fits none and how, in fact, this has already been recognized by all of the states in connection with divorce. Part II suggests approaching the problem through what I call "postmodern marriage law." By way of illustration, it sets out some modular alternatives—"Marriage Proposals"—to one-size-fits-all marriage.*

*Marriage Proposals are not simply an alternative to "regular" marriage, but an acknowledgment that there is no "regular" marriage. Marriage Proposals are not only necessary at divorce, but during marriage; not simply an alternative for a wealthy few, but for anyone who is married or who is considering marriage. I conclude that postmodern marriage law; that is, marriage law that explicitly contemplates varied, changing, contextualized forms of marriage, may in fact be more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstraction we now call "marriage."*

## INTRODUCTION

Every year, millions of Americans<sup>2</sup> take blood tests, pore over bridal magazines,<sup>3</sup> negotiate with caterers, and devote endless hours preparing for

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2. In 1998, for example, 2,256,000 couples tied the knot. National Center for Health Statistics, <http://www.cdc.gov/nchs/fasats/marriage.htm> (last visited 7/13/01). Ninety percent of white women

weddings, where they plunge blindly into legal relationships which they know little or nothing about.<sup>4</sup> Indeed, except for some of the lawyers, the only ones at all prepared are those who have already been divorced. While this comprises a substantial proportion of the population,<sup>5</sup> their understandings of the legal consequences of marriage are as apt to be skewed as informed by their own experience.

There are innumerable marriages, of course, and most of them go through different phases.<sup>6</sup> The law ignores this, however, until and unless the marriage ends in divorce—as almost half do.<sup>7</sup> Then its characterization becomes critical. In order to divide property, as well as to set any ongoing support obligations, the courts must decide what kind of marriage it was.<sup>8</sup> Was it a breadwinner/breadinaker relationship,<sup>9</sup> an economic partnership

marry; less than 75% of black women will. NANCY DOWD, *REDEFINING FATHERHOOD* 30 (2000); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 166 (2000).

3. Examples of bridal magazines are *ELEGANT BRIDE*, *WEDDING DRESSES*, *BRIDAL GUIDE*, *MODERN BRIDE*, *BRIDE AGAIN*, *BRIDES*, and *WEDDINGBELLS*. All are on prominent display at my local supermarket. The references to mass media throughout this Article reflect postmodernism's embrace of popular culture. Elizabeth Wilson, *These New Components of the Spectacle: Fashion and Postmodernism*, in *POSTMODERNISM AND SOCIETY* 209 (Roy Boyne & Ali Rattansi eds., 1990); cf. James Herbie DiFonzo, *Customized Marriage*, 75 *IND. L.J.* 875, 882 (2000) (attributing "the large proportion of references in [his] Article to popular journals and to sources on the Internet" to "Karl Llewellyn's dictum that 'divorce is the major area of interaction between the social institution and the legal'"). Due to the fact that divorce is the "major area of interaction," it is conspicuously susceptible to postmodern influence as well as to postmodern appropriation. *But see infra* note 181 (explaining how all law is already postmodern).

4. Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *CALIF. L. REV.* 204, 230 n.66 (1982) (citing L. WEITZMAN, *THE MARRIAGE CONTRACT* xv-xvii (1981)); Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 *STAN. L. REV.* 887, 901 (1997). As Carol Weisbrod observes, people marry without "serious consideration of what that joint life might entail in terms of . . . the actual daily and material base of the relationship." Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 *UTAH L. REV.* 777, 797.

5. Of all marriages, four of ten are remarriages of one or both parties. DOWD, *supra* note 2, at 29.

6. See Ralph Underwager & Hollida Wakefield, *Psychological Considerations in Negotiating Premarital Contracts*, in *PREMARITAL AND MARITAL CONTRACTS* 219 (Edward L. Winer & Lewis Becker eds., 1993) ("Marriage requires a continuous process of change.").

7. The actual figure is 43%. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 219 (3d ed. 1998). See generally ANDREW CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 21-27 (rev. ed. 1992) (presenting data and charts on demographics of marriage and divorce rates).

8. Except for Arizona and California, which have adopted equal division rules by which couples' property is divided equally at divorce, all of the states divide property according to "equitable" principles by which property is divided "fairly," according to various statutory factors. See Linda Elrod & Robert B. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 *FAM. L.Q.* 865, 908, chart 5 (2000) (showing states that have statutory lists of factors and states which take nonmonetary contributions, economic misconduct and contribution to education into account). The property subject to division, moreover, depends on whether the state is among the forty which follow civil law principles or the ten in which community principles are in effect. *Id.* The ten are: Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *Id.*

9. The phrase is June Carbone's. JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* xiv (2000).

between two wage earners, an arrangement in which the parties' roles changed over time, or none of the above?

As marriages become increasingly diverse,<sup>10</sup> this analysis becomes increasingly strained. Where is the certainty, the predictability, that law is supposed to assure? The widespread perception of divorce as an unfair, even arbitrary,<sup>11</sup> process is confirmed when the lived experience of marriage is so susceptible to the manipulation of lawyers<sup>12</sup> after the fact.<sup>13</sup>

Before the marriage, few couples have any real alternative to "one-size-fits-all marriage."<sup>14</sup> Expectations are often very different, however, not only among different couples<sup>15</sup> but between the partners in a par-

10. For a description of the "[p]ressures toward diversity . . . within traditional legal marriage" in the early 1980s, see Shultz, *supra* note 4, at 246. See also Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer-Sponsored Healthcare*, 30 N. MEX. L. REV. 19, 19-21 (2000). Globalization is a significant factor in this increasing diversity, as the U.S. becomes increasingly multicultural. See *infra* note 184 (describing multiple alternatives already recognized in family law); cf. *infra* note 35 (describing diversity in marital regimes in the eighteenth century). At the same time, non-western countries note an increasing "Westernization" of marriage norms. See generally WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* (1993) (describing spread of high divorce rates as a Western trend).

11. See, e.g., DOWD, *supra* note 2, at 63 (citing TERRY ARENDELL, *FATHERS AND DIVORCE* 16 (1995)) ("Broadly outlined, the story shared by a large majority of these divorced fathers was one of perceived injustice and discrimination, resistance, and frustration and discontent.").

12. Often, of course, the parties are unable to afford lawyers. See, e.g., Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 126-27 (1994). The proposal set out here is intended to reduce the chasm between family law for those who can afford lawyers and those who cannot. See *infra* note 35 (explaining how Marriage Proposals protect the economically vulnerable spouse); *infra* note 51 (explaining how Marriage Proposals encourage a single system of family law, rather than the dual system described by Jacobus tenBroek).

13. The ALI Final Draft thoughtfully addresses this problem, in part, through a scheme for "compensable loss." ALI FINAL DRAFT, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (1997); see J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801 (explaining how proposals would reduce the disproportionate burden on custodial parents). The focus here, however, is on planning, not *post hoc* adjustment.

14. "One size fits all" refers to the fact that marriage is a legal relationship establishing the same basic parameters for all entering into it, despite their often very different expectations, needs, and desires. See *infra* Part I.A.

Couples in Louisiana and Arizona may choose their state variations of Covenant Marriage. Covenant Marriage Act, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. § 9:224 2:309 (West 1997)); S. 1133, 43d Leg., 2d Reg. Sess. (Ariz. 1998) (codified at ARIZ. REV. STAT. § 25-901 to § 25-906 (1998)). For a description of Covenant Marriage, see *infra* text accompanying notes 28-29. In addition, almost all states allow couples to prospectively agree to alter property regimes through antenuptial agreements, as long as neither spouse becomes a public charge. Although these agreements are increasingly common, they usually address only the financial aspect of the marital relationship and address that only at divorce. For some couples, of course, even this is not an option. Homosexual couples are explicitly excluded from marriage in many states. See generally MARK STRASSER, *LEGALLY WED—SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997); Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 BRANDEIS J. OF FAM. L. 691 (1997); Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705 (1998); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219 (1998).

15. See, e.g., Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 495 (1998) (explaining how such expectations could be

ticular couple<sup>16</sup> as well. Because these different expectations are rarely explicit, they are rarely addressed.<sup>17</sup> During the marriage, similarly, the law neither reflects nor accommodates the partners' diverse experiences. There are no legal mechanisms for realizing their hopes or cushioning their disappointments. Rather, the parties are left to "work things out" through endless negotiations and compromises.<sup>18</sup> If we as a society value marriage<sup>19</sup> and want marriage to succeed, we should provide couples with more support.<sup>20</sup>

After the marriage, the parameters of the divorce settlement<sup>21</sup> depend as much on the state in which the parties find themselves at the time<sup>22</sup> and

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clarified through "legislatively approved, alternative, standard form contracts . . . [that] could be the focus of educational efforts that would help people learn about their options").

16. At least some marriages end because the parties had different expectations. For example, while male college seniors expect to do little housework, female college seniors expect to do no more than half. ELLMAN ET AL., *supra* note 7, at 43. In addition, "[p]olls show that men and women have different expectations about the roles they and their spouses will play during marriage, [although] the size of the gender gap varies over time, race, and class." CARBONE, *supra* note 9, at 19. See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 162 (1998) ("The prosaic facts likely are . . . that the mixture of the romantic and the practical/economical likely will vary not only from generation to generation, but also at any given time from one marriage to the next, and even within a single marriage as the partners' perceptions, needs, and values evolve.").

17. See, e.g., TODD OUTCALT, BEFORE YOU SAY "I DO": IMPORTANT QUESTIONS FOR COUPLES TO ASK BEFORE MARRIAGE (2000) (explaining why couples should make their expectations explicit and how they can do so); Amy Dickinson, *Asking for Trouble*, TIME, Feb. 21, 2000, at 134.

18. There is considerable evidence to suggest that women suffer economically from this give-and-take process because they often trade economic advantage for non-economic benefits. See *infra* Part A.1.2.b (discussing gendered default norms). This internal dynamic both is shaped by external market forces and perpetuates them. See generally *infra* note 134 (describing the economic consequences of divorce).

19. Whether in fact we do is debatable. See sources cited *infra* note 43 (questioning the value of marriage for feminists and for homosexuals); see also Tamala Edwards, *Why Marry When You Can Stay Single?* TIME, Aug. 28, 2000, at 46, 47 ("More women are deciding that marriage is not inevitable."). But see Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 815 (1998) [hereinafter Bartlett, *Saving the Family*] (arguing that marriage remains "an important ideal").

20. Or we should at least give couples the possibility of more support. The tangible support now provided, in the form of tax breaks, employment and insurance benefits, is set out in Sanford N. Katz, *Establishing the Family & Family-like Relationships: Emerging Models for Alternatives to Marriage*, 33 FAM. L.Q. 663, 667 (1999); see also *infra* note 73. In addition, in community property states the parties have a right to manage community property. See *infra* note 72. As Professor Glendon and others have observed, however, much of the value of marriage is symbolic. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10 (1987). Covenant Marriage represents an effort to increase this symbolic value. For critiques of Covenant Marriage, see *infra* note 29.

21. Ninety percent of divorce cases settle. Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 64 n.117 (1998) (citing Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 LAW & SOC'Y REV. 95, 108 (1974)); see Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994) (questioning the desirability of pervasive pressures to settle); see also Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133 (1988) (analyzing the process of negotiation among divorcing spouses in a Wisconsin study).



the judge before whom they appear as on their expectations before marriage or their experience during marriage. Marriage law has become a bizarre variation on the proverbial sausage factory: rather than all manner of ingredients going in and everything coming out "sausage," everything is considered "sausage" going in but comes out in inexplicably and unpredictably different forms.<sup>23</sup>

This Article addresses the disjunction between a wide range of lived experience and the law. Part I explains why one-size-fits-all actually fits none<sup>24</sup> and how, in fact, this has already been recognized by all of the states in connection with divorce.<sup>25</sup> Part II suggests approaching the problem

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22. This encourages forum shopping. The problems of migratory divorce, see, for example, *Johnson v. Muelberger*, 340 U.S. 581 (1951) (finding that full faith and credit precludes collateral attack where spouses have obtained migratory divorce), have been preempted by no-fault divorce, and child support enforcement has been federalized. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that due process satisfied where non-resident father visited his children in his former spouse's new home). However, jurisdictional disputes continue because of the still-pervasive lack of uniformity among the states. Even when states intend to comply with the regimes of other states, as common law states generally do when dealing with recent transfers from community property states, they frequently fail to do so. Richard W. Bartke, *Marital Sharing—Why Not Do It by Contract?*, 67 *Geo. L.J.* 1131, 1142 (1979); see, e.g., *infra* note 23.

23. Assume, for example, a 20-year old marriage between a corporate executive and his homemaker wife, during which the parties have moved several times due to the executive's relocations. If the parties' last move is to Arizona (an equal distribution community property state), the results will be very different than if it is to New Jersey (an equitable distribution common law state). See *supra* note 8 (explaining the difference between "equal" and "equitable" distribution). The technical rules governing distribution of "marital property" (in common law states) and "community property" (in community property states) are now virtually indistinguishable. Where the estate is large, however, "common law states are far more likely than community property states to order an unequal division favoring the primary breadwinner." ELLMAN ET AL., *supra* note 7, at 277; see also *infra* Part I.A.1.a (discussing differences between regimes during marriage). Few couples realize that the law governing their marriage, or divorce, changes every time they move. See Rasmusen & Stake, *supra* note 15, at 454 ("Yet marriage remains an exception [to the increasing number of written agreements marking the shift in the law from status to contract]. The large majority of marrying couples have no written agreement beyond the marriage license, which binds them to state marriage laws.").

24. As set out in Part I.A, legal norms are minimal and extralegal norms, while abundant, are inconsistent and unstable. Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 *IND. L.J.* 517 (1998) ("The salient fact about marriage, and divorce, is that one size does not fit all."). "One size" has not fit all for some time. As Lenore Weitzman argued in 1974, "State policy requiring all marriages to conform to a single set of legal rules was outdated because of the heterogeneity of desirable marriages." Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 *CALIF. L. REV.* 1169, 1263-66 (1974); see also Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 *N.C. L. REV.* 879 (1988) (explaining why couples should be allowed to contract for more restrictive divorce regimes).

25. As set out in Part I.B, several distinct models of marriage are recognized at divorce, although these models often fail to capture the parties' actual experience and are often applied inconsistently. Every state allows parties to structure their own settlement, within limits, and in fact the overwhelming majority of divorcing couples do so. See *supra* note 21. The equitable distribution states, moreover, describe a wide range of settlement parameters through statutory factors that typically include length of marriage, economic circumstances of the parties at divorce, respective contributions to the marriage, and a host of other factors that allow considerable flexibility. See, e.g., *TENN. CODE ANN.* § 36-4-121 (1998); *N.J. STAT. ANN.* § 2A:24-23.1 (West 1994). Even the states that follow "equal division" rules allow some flexibility in support arrangements. ELLMAN ET AL., *supra* note 7, at 365.

through what I call "postmodern marriage law."<sup>26</sup> By way of illustration, it sets out some modular alternatives ("Marriage Proposals") to one-size-fits-all marriage.<sup>27</sup>

The notion of alternative forms of marriage has emerged in recent years as a backlash to no-fault divorce.<sup>28</sup> Those Louisiana couples who choose Covenant Marriage,<sup>29</sup> for example, opt out of no-fault laws and subject themselves to a more rigorous standard. While many have serious doubts about Covenant Marriage,<sup>30</sup> the idea of marital options, and more

26. This may be understood as part of a larger project of postmodern family law, in which commentators call for an expansive reconstruction of family law and family forms. "[T]he radical task of postmodernism is to deconstruct apparent truths, to dismantle dominant ideas and cultural forms and to engage in the guerilla tactics of undermining closed and hegemonic systems of thought." Janet Wolff, *Postmodern Theory and Feminist Art Practice*, in POSTMODERNISM AND SOCIETY, *supra* note 3, at 187, 190; cf. Bartlett, *Saving the Family*, *supra* note 19, at 815 (criticizing "reformers who seek to strengthen marriage through the revival of fault-based divorce . . ."). See generally JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1995) (reconceptualizing traditional ideas of "family values"); NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997) (defending single parent families); Katherine T. Bartlett, *Re-Expressing Parenthood* 98 YALE L.J. 293 (1988) (criticizing current child custody law because it is based on possessive and self-centered notions of parenthood); Naomi R. Cahn, Review Essay, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (advocating a vision of family law that considers complexities of modern families). There are, of course, other projects of "postmodern family law." See, e.g., MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1998) [hereinafter REGAN, ALONE TOGETHER]. Professor Regan argues that a return to a reconstructed family law of status, as opposed to the current family law of contract, can provide a refuge from the anomie of postmodernism. His argument obviously addresses a perceived need for such a refuge, as discussed in Part II.B *infra*. It is not, however, a universal need, as I think Professor Regan would agree. For an explanation of Edward Shorter's use of the term "postmodern family" in 1975, see STACEY, *supra*, at 7. See also LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 11 (Maureen Cain & Christine B. Harrington eds., 1994) (describing how "post-modern insights about legal discourse can be connected with an institutional analysis").

27. As described in detail in Part II.B, Marriage Proposals are alternative forms of marriage that are agreed upon or crafted by the parties, which determine their respective rights and duties, and perhaps shared goals, during the marriage and in case of divorce.

28. See, e.g., MARRIAGE PREPARATION AND PRESERVATION ACT, H.B. 1019, 1998 Reg. Sess. (Fla.). For a critical description of this backlash, see, for example, Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L J.L. POL'Y & FAM. 216 (1997); Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719.

29. See *supra* note 14. Efforts to strengthen "traditional" marriages abound. "Marriage Savers," for example, is a self-described "movement" which promotes agreements, usually entered into by local religious organizations, to improve marriage and reduce divorce. In Modesto, California, ninety-five Protestant pastors agreed to require four months of classes for engaged couples, including a meeting with a "mentor couple" and scripture study. Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 976 (1998). As of May, 1998, eighty-four communities had signed Community Marriage Policies. *Id.* As Professor Ellman has recently pointed out, however, "The two states adopting covenant marriage have found that their constituents have little interest in it. . . ." Ira Mark Ellman, *Divorce Rates, Marriage Rates, and The Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 15 (2000) [hereinafter Ellman, *Divorce Rates*].

30. See, e.g., Susan Hager, *Nostalgic Attempts to Recapture What Never Was: Louisiana's Covenant Marriage Act*, 77 NEB. L. REV. 567 (1998) (challenging normative premises of Covenant

specifically the Marriage Proposals suggested here, deserve further attention<sup>31</sup> both for the benefit of the couple and to further important public policy objectives.

For the couple, Marriage Proposals recognize that there is more than one kind of marriage and by doing so offer a richer and more useful description of the options.<sup>32</sup> Second, they promote fairness, and the perception of fairness, by making expectations about marriage, as well as divorce, explicit.<sup>33</sup> This includes, crucially, making expectations about gender roles explicit.<sup>34</sup> Third, most spouses would probably opt for the form of marriage

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Marriage); Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 *FORDHAM L. REV.* 2471 (1998) (questioning constitutionality of Covenant Marriage); Jeanne Louise Carriere, *"It's Déjà Vu All Over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 *TUL. L. REV.* 1701, 1705 (1998) (criticizing pre-entry counseling requirement); Amy L. Stewart, Note, *Covenant Marriage: Legislating Family Values*, 32 *IND. L. REV.* 509 (1999) (explaining why such legislation is inappropriate).

31. The idea of marital options has already received considerable scholarly attention. See, e.g., sources cited *supra* notes 4, 15, 16, & 25. In the last few years this discussion has been renewed with a subtle but significant change in tone. Underlying recent scholarship is the understanding that this is not how marriage should be, but increasingly the way marriage is, whether we like it or not. See, e.g., Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 *BUFF. L. REV.* 1153, 1170 (1999) (arguing that "divorce settlements, contrary to popular wisdom, frequently restrict rather than enhance women's life choices by leaving them impoverished and embittered").

32. See generally Nichols, *supra* note 29, at 929 (arguing for "a more robust pluralism" in marriage law). Richer descriptions of marriage are more useful as a form of education, Rasmussen & Stake, *supra* note 15, at 495, as a consciousness-raising tool, and because they can provide more nuanced, less "extreme," models. As Professor Bix has observed in the context of prenuptial agreements, "Much academic discussion . . . has failed to consider the larger conceptual, doctrinal, and real-world contexts surrounding them . . . [These discussions] thus tend to come too quickly to extreme conclusions." Bix, *supra* note 16, at 147.

33. As Professor Stake points out, "[p]lanning can promote confidence by revealing, and thus securing, the common needs and hopes of the couple. Contracting processes have even been used as a tool in psychotherapy and marriage counseling. Premarital negotiations may help some couples to avoid unhappy marriages by exposing their incompatibilities before they exchange vows." Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 *VAND. L. REV.* 397, 417-18 (1992). Expectations about divorce, including non-economic expectations, may well affect the extent to which a spouse is "divorce-averse," although, as explained *infra* text accompanying notes 111-124, divorce-aversion is likely to be gendered and, as explained *infra* note 35, most couples assume that they will not divorce. Professor Gottman, for example, lists the "serious consequences of marital dissolution for the mental and physical health of both spouses." JOHN M. GOTTMAN, *THE MARRIAGE CLINIC: A SCIENTIFICALLY-BASED MARITAL THERAPY* 3 (1999). These include "increased risk of psychopathology; increased rates of automobile accidents, including fatalities; increased incidence of physical illness; suicide, violence, and homicide; decreased longevity; significant immunosuppression; and increased mortality from diseases." *Id.* (citations omitted); see also DiFonzo, *supra* note 3, at 880 (citing William A. Galston, *Divorce American Style*, *PUB. INT.*, Summer 1996, at 12, 16, for the proposition that "[b]eing divorced and a non-smoker is only slightly less dangerous than smoking a pack or more of cigarettes and staying married").

34. This is part of the feminist interrogation of family law. The importance of this interrogation is beyond dispute and noted in most of the major family law texts. See, e.g., JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 102-16 (3d ed. 1992) (describing feminist perspectives on divorce); ELLMAN ET AL., *supra* note 7, at 40-52 (describing the impact on family law of the "changing woman's role"); LESLIE J. HARRIS ET AL., *FAMILY LAW* 376 (1996) (describing feminist perspectives on no-fault

most protective of the economically vulnerable spouse, at least at the beginning of their first marriages.<sup>35</sup> Those who did not would be putting their future spouses (or would-be future spouses) on notice.

The public policy concerns here are equally compelling. Marriage law is undeveloped in the United States because we are a diverse society<sup>36</sup> with different and changing notions of what marriage should entail.<sup>37</sup> Instead of consensus, we have loose normative boundaries.<sup>38</sup> The lack of federalized family law<sup>39</sup> reflects the pragmatic acceptance of these boundaries, and

divorce); CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* 125-27 (1996) (describing gender as a pervasive theme in family law); WALTER WADLINGTON, *CASES AND MATERIALS ON DOMESTIC RELATIONS* 191 (3d ed. 1995) (listing common goals of women's groups); WALTER O. WEYRAUCH ET AL., *CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS* 829-31 (1994) (discussing the feminist analysis of surrogacy); see also Symposium, *Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2119 (1994).

35. See, e.g., Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147 (1996). Because Marriage Proposals would not require lawyers for either drafting or enforcement, moreover, this would increase protection for the most vulnerable (i.e., those who cannot afford lawyers). See Murphy, *supra* note 12. Most couples who marry, not surprisingly, assume that they will not divorce. See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993).

36. It may be argued that we have always been a diverse society. See, e.g., RICHARD H. CHUSED, *PRIVATE ACTS IN PUBLIC PLACES* (1994) (describing religious, cultural, and political diversity in eighteenth-century Maryland); Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, 1001 (2000) (noting the wide range of experience of eighteenth-century American women, depending on their class, race, location, and other specific circumstances). While diversity may not be new, it has not always been recognized. What is "new" is our self-consciousness. See, e.g., NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 13-14 (1997).

37. Thus, for example, while wives were generally subordinated in eighteenth-century marriages, this subordination took different forms among the indentured and the propertied, Northerners and Southerners, blacks and whites, Puritans and Catholics. For descriptions of marriages in eighteenth-century America, see MARY BETH NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN 1750-1800* (1980); STEPHANIE GRAUMAN WOLF, *AS VARIOUS AS THEIR LAND: THE EVERYDAY LIVES OF EIGHTEENTH CENTURY AMERICANS* (1993); JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* (1970). For a history of American divorce law, see CHUSED, *supra* note 36. For a history of custody law, see MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994). For a history of fatherhood, see ROBERT GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* (1993). For histories of black families, see E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939); *THE BLACK FAMILY: ESSAYS AND STUDIES* (Robert Staples ed., 4th ed. 1991) [hereinafter *THE BLACK FAMILY*]; PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); see also EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: *THE WORLD THE SLAVES MADE* 501 (1976) ("The slave family . . . rested on a much greater equality between men and women than . . . the white family."). See generally Weisbrod, *supra* note 4, at 788 (citing Nathan Isaacs for the proposition that "one should get away from an idea of legal history progress as movement on this point in one direction or another, and see 'a kind of pendulum movement back and forth between periods of standardization and periods of individualization'").

38. As discussed in Part I.A, these loose normative boundaries are set by the states as well as religious, ethnic, and socioeconomic groups.

39. In general, family law is left to the states. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 404 (1974) ("[D]omestic relations . . . [is] an area that has long been regarded as a virtually exclusive province of

their unavoidable inconsistencies. Couples should be allowed to select their own legal regimes within those boundaries<sup>40</sup> and within reasonable limits<sup>41</sup> rather than have their marital relationship defined by the state in which they happen to find themselves, and the judge before whom they appear,<sup>42</sup> when they get divorced. Allowing couples to do so would both demonstrate and increase respect for the institution of marriage,<sup>43</sup> the couple, and the law.<sup>44</sup>

Equally important, it would update marriage law to reflect our “postmodern condition,”<sup>45</sup> including the widespread skepticism toward

the States.”); see also Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995). At the same time, however, uniform laws are multiplying, see *infra* note 169, and there is more federal law in this area than ever before. See, e.g., *infra* notes 147, 149. But see U.S. v. Morrison, 529 U.S. 598 (2000) (provision for a civil remedy in the Violence Against Women Act struck down because Congress lacked authority under the Commerce Clause and the Equal Protection Clause to enact such a provision). This simultaneous proliferation of trend and counter-trend is characteristically postmodern. See *infra* text accompanying note 177.

40. As set out in Part II.B.2.c, these boundaries are rarely restrictive. Indeed, they may well contravene widely accepted public policy objectives. Divorce settlements often perpetuate the widely deplored “feminization of poverty,” for example. See *infra* note 134 (describing the increase in men’s, and the decrease in women’s post-divorce standard of living).

41. Such limits are obviously subject to debate. Those proposed here, Part II.B.1, reflect the growing concern of leading family law scholars such as Katherine Bartlett, Peg Brinig, June Carbone, Karen Czapansky, Peggy Cooper Davis, Nancy Dowd, Ann Estin, Martha Fineman, Marsha Garrison, Margo Melli, Jane Murphy, Milton Regan, Elizabeth Scott, and Barbara Bennett Woodhouse, for protecting the most economically vulnerable members of the family, usually the mother and children.

42. Ariela Dubler’s description of the legal rules of common law marriage is equally apt here: “[It] begins to look less like the codification of well-understood social understandings, and more like the judicial imposition of legal order in the face of social ambiguity.” Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 963 (2000).

43. As Professor Bartlett observes, “Marriage in this society is still an important ideal.” Bartlett, *Saving the Family*, *supra* note 19, at 815. This does not mean, of course, that it is universally respected. See, e.g., Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 5 (1997); Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535 (1993) (describing the limitations of marriage).

44. The effects of Marriage Proposals over time are obviously impossible to predict. See, e.g., *infra* text accompanying note 177 (explaining postmodernism’s acceptance of “chaotic currents of change as if that is all there is”). It should be kept in mind, however, that the substance of Marriage Proposals is not new; rather, what is new is their “marketing,” as well as the dissemination and universal availability of information. Thus, Marriage Proposals are less likely to alter marital norms than to clarify and make explicit a process that is already underway. Indeed, it is precisely because of the increasing proliferation of such norms that Marriage Proposals are timely and necessary. But see Bix, *supra* note 16, at 158 (“Changes to the regulation of an institution as central and pervasive as marriage are likely to have repercussions far beyond the change effected.”); see also Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage* (available from the SSRN Electronic Paper Collection, [http://papers.ssrn.com/paper.taf?abstract\\_id=224972](http://papers.ssrn.com/paper.taf?abstract_id=224972)) (arguing that “legal initiatives may have unpredictable effects on marital norms, partly because of the residual effects of norm bundling in traditional marriage, and partly because of a tendency to disguise private preferences on matters of public controversy”).

45. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Jeff Bennington & Brian Asumi trans., 1984); see *infra* Part II.A.1.

metanarratives,<sup>46</sup> the corresponding acceptance of fragmentation and contingency,<sup>47</sup> and the recognition of commodification<sup>48</sup> that characterize the present era.<sup>49</sup> Rather than moving toward some new consensus in marriage law, we are embracing increasingly divergent norms. Indeed, "private ordering," within some loose parameters, is what we are living with now. The failure to make this explicit only serves to perpetuate existing patterns of subordination in marriage, most of which are gendered.<sup>50</sup>

Thus, Marriage Proposals are not an alternative to "regular" marriage, but an acknowledgment that there is no "regular" marriage. Marriage Proposals are not only necessary at divorce, but during marriage. Nor do they simply provide alternatives for a wealthy few,<sup>51</sup> but for anyone who is married or who is considering marriage. I conclude that postmodern marriage law, that is, marriage law that explicitly contemplates varied, changing, contextualized forms of marriage,<sup>52</sup> may in fact be more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstraction we now call "marriage."<sup>53</sup>

46. *Id.* at xxiv. "Metanarrative" refers to a purportedly universal, comprehensive theory, in contrast to a particular, discrete story. See *infra* note 176.

47. DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 44 (1989); see *infra* text accompanying note 177.

48. See *infra* text accompanying notes 222-226.

49. "[O]ur postmodern age . . . has begun in a variety of discourses to question seriously the belief in unhampered progress and in the blessings of modernity. . . ." HUYSEN, *supra* note 1, at 56. But see IHAB HASSAN, *THE POSTMODERN TURN* 89 (1987) ("[W]e cannot simply rest . . . on the assumption that postmodernism is antiformal, anarchic, or decreative; for though it is indeed all these, and despite its fanatic will to unmaking, it also contains the need to discover a 'unitary sensibility' . . .").

50. See *infra* Part I.A.2.b (describing pervasive gendered default norms in marriage). I am not suggesting that making these patterns explicit will necessarily eradicate them. However, it is likely to expose them to increased scrutiny.

51. This has been a frequent criticism of antenuptial agreements. See, e.g., Bartke, *supra* note 22, at 1148. Family law itself has been criticized for effectively excluding the poor. Jacobus tenBroek famously described the "dual system of family law" in his three-part article, *California's Dual System of Family Law: Its Origins, Development, and Present Status*, 16 STAN. L. REV. 257 (1964) (Part 1), 16 STAN. L. REV. 900 (1964) (Part 2), 17 STAN. L. REV. 614 (1965) (Part 3). Because Marriage Proposals would not require lawyers, they would be available to everyone. For an argument against the proposition that Marriage Proposals would better serve historically subordinated groups, see Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992) (arguing that individual resistance as well as "movements" grounded in postmodernism have failed to produce institutional change). Even if this is persuasive in general, in the specific context of marriage law, postmodernism as contemplated in this Article may well promote change in ways that have eluded "movements" and "individual resistance." Indeed, an underlying theme here is that it already has. See also *infra* note 241 (citing Jana Singer for the notion of privatization as a "transition strategy").

52. As explained below, postmodern marriage law incorporates some skepticism toward the metanarrative of immutable love, the romantic ideal of love as unchanging and eternal, or at least lasting "until death do us part." See *infra* Part II.A.2.

53. As Professor Bartlett observes, "[F]amilies are messy, . . . people are often irrational in their personal affairs, and . . . even well-intentioned law cannot always make them act in their own self-interest, never mind someone else's." Bartlett, *Saving the Family*, *supra* note 19, at 854; cf. Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1253 (1998).

## I

## FROM ONE-SIZE-FITS-ALL MARRIAGE

As Milton Regan, Jr. has explained, every marriage is in fact two marriages.<sup>54</sup> First, it is an “external marriage,” that is, the marriage as it is perceived and treated by the rest of the world and as it shapes the married couple’s dealings with third parties, including anything from social forms of address (“Mr. and Mrs.”) to life or death decision-making (“Pull the plug”<sup>55</sup>). Second, there is the internal marriage, which is the relationship between the individuals within the marriage.<sup>56</sup>

Both marriages, moreover, are governed by two sets of norms, legal norms and extralegal norms, which include social, cultural and religious norms.<sup>57</sup> As explained below,<sup>58</sup> the legal norms governing marriage are quite limited. Extralegal norms, in contrast, range broadly from “anything goes”<sup>59</sup> to religious codes more comprehensive, and often more restrictive, than any civil law.<sup>60</sup> Moreover, the partners’ respective understandings of

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(assuming a “set of societal norms that are attached to marriage and the marital relationship” such that individuals can bring to the bargain a “fully internalized sense” of such norms). Professor Weisbrod cites Max Radin for the reciprocal duties owed in marriage:

(1) cohabitation, (2) sexual access, (3) sexual fidelity, (4) conjugal kindness. In addition, (5) the husband owes the wife maintenance and support and (6) the wife owes the husband the duty of household management . . . [The first four of these] are so inseparably connected with the status of husband and wife that they cannot be altered by any agreement between the parties nor waived by non-insistence or disuse.

Weisbrod, *supra* note 4, at 781 & n. 20.

54. REGAN, *ALONE TOGETHER*, *supra* note 26, at 5.

55. Baehr v. Lewin, 852 P.2d 44, 58-59 (Haw. 1999).

56. As Professor Regan explains:

Each stance [external and internal] offers its own account of personal identity and of the claims and obligations that arise in human relationships. In the course of everyday life, spouses move back and forth between these stances, seeking to balance their status as separate individuals with their roles as members of a marital community.

REGAN, *ALONE TOGETHER*, *supra* note 26, at 5.

57. As Elizabeth Scott points out, “norms, or ‘customary law,’ regulate family relations more effectively than do formal legal enactments because norms structure conduct into roles and functions that create stable expectations.” Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 669 (1992). Cass Sunstein thoughtfully argues that “behavior is pervasively a function of norms. . . [and that] norm management is an important strategy for accomplishing the objectives of law. . . .” Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996).

58. See *infra* Part I.A.1; *infra* Part I.B.1.

59. See, e.g., Richard Rayner, *Back in the Swing*, N.Y. TIMES MAG., Apr. 9, 2000, at 42 (describing the resurgence of “spouse-swapping” within the 310 functioning chapters of the North American Swing Club Association); see also Alan Wolfe, *The Pursuit of Autonomy*, N.Y. TIMES MAG., May 7, 2000, at 53, 54 (“There is a moral majority in America; it just happens to be unwilling to follow anyone’s party line about what morality ought to be.”).

60. In addition to the well-known Catholic prohibition against remarriage following divorce, Orthodox Jews, Muslims, and fundamentalist Protestants often impose barriers to divorce. Orthodox Jews, for example, require the wife to obtain a “get” (bill of divorce given to wife by husband) from the husband. See [www.jewfaq.org/divorce.htm](http://www.jewfaq.org/divorce.htm) (last visited 6/27/01). See generally Frances Raday, *Israel: The Incorporation of Religious Patriarchy in a Modern State*, in GENDER BIAS AND FAM. L. 209, 210 (Barbara Stark ed., 1992) (describing Jewish law, the *halacha*, under which divorce is the husband’s

the norms governing the marriage may differ dramatically, as many couples discover at divorce.

### A. Norms During Marriage

Many commentators have described the complex and multifaceted interactions between legal and extralegal norms.<sup>61</sup> For present purposes, two particular features of this relationship are most salient: First, because legal norms tend to legitimate extralegal norms,<sup>62</sup> the latter tend to compete for legal recognition or inclusion in the legal panoply.<sup>63</sup> Second, the more pervasive the extralegal norm,<sup>64</sup> the less necessary the legal norm. As a corollary, if extralegal norms are inchoate, legal norms are unlikely to be effective.<sup>65</sup>

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prerogative, and Shara'ite Courts which apply Moslem Law, including the husband's right to unilateral divorce and to marry up to four wives); Azizah Y. al-Hibri, *Marriage Laws in Moslem Countries*, in *id.* at 227, 228-29 (explaining how interpretation, along with the judiciary, "became the exclusive domain of men" in Islamic law).

61. See, e.g., Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2494 (1995) (stressing "the effects of legal rhetoric in shaping extralegal cultural norms"); cf. Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1463 (1998) ("The law's influence on norms is still necessarily modest."). See generally Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996) (proposing that extralegal norms are inefficient, but legal rules correct some extralegal deficiencies); sources cited *supra* note 44.

62. Adultery, for example, is generally condemned in our culture. In most states, accordingly, adultery is a specific ground for divorce. Elrod & Spector, *supra* note 8, at 908, chart 4. In some states, adultery may be a factor considered in an alimony award (as a kind of "marital fault"). *Id.* at 908, chart 1. Even where fault is not a factor in determining alimony or property distribution, it may provide leverage for the innocent spouse. See June R. Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990). See generally GLENDON, *supra* note 20, at 5-9 (explaining how law alters norms).

63. For a lucid account of this dynamic in the context of common law marriage, see Dubler, *supra* note 42, at 957 (explaining how "[l]egal standards that grant rights based on acting married simultaneously subvert and bolster traditional understandings of marriage . . ."). Obviously, "norms" aren't actors; rather, those espousing them are actors, and they are often hidden, exerting what leverage they can behind the scenes. See, e.g., Pierre J. Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991). In family law, some of these hidden actors have been dead for 200 years, see, for example, *infra* text accompanying notes 195-203, and others are unable to legitimate the imposition of their norms on the rest of us, see Wolfe, *supra* note 59, especially since no one is preventing them from subscribing to those norms themselves.

64. The obligation to provide a spouse with necessities, for example, is now well accepted. See *infra* text accompanying notes 67-71; cf. WOLF, *supra* note 37, at 78 (noting that wives who demanded support in the eighteenth century were guilty of "[s]colding," the contemporary term for nagging . . . a serious fault in a wife, probably as deserving of a beating as any other form of insubordination").

65. As social norms become increasingly feeble in certain areas, legal norms are likely to wither away. For example, although fornication statutes remain on the books in several states, enforcement is increasingly rare. See, e.g., IDAHO CODE, § 18-6603 (1972); MINN. STAT. ANN., § 609.34 (West 1987); N.C. GEN. STAT. § 14-184 (1999). See generally Robert A. Brazener, *Validity of Statutes Making Adultery and Fornication Criminal Offenses*, 41 A.L.R. 3d 1338 (1972).



## 1. Legal Norms

### a. The External Marriage

There is not much law governing the external marriage.<sup>66</sup> First, the parties are responsible for supporting each other, and providing each other with "necessaries."<sup>67</sup> Although courts will not interfere in an intact marriage to order one spouse to provide the other with such items as food, clothes or housing,<sup>68</sup> either party may be held liable for any such "necessaries" afforded the other.<sup>69</sup> It is well-established that third party medical providers may depend on this rule.<sup>70</sup> Because it may be unclear whether other types of goods or services are "necessary" or not, the prudent third party now requires two signatures when contracting with couples. A homemaker seeking to purchase a sports utility vehicle, for example, probably needs to have a wage-earning spouse co-sign the loan.<sup>71</sup>

Second, in community property states, the partners are entitled, at least in theory, to jointly manage community property; that is, property acquired by either spouse during the marriage (excluding inheritance).<sup>72</sup> In contrast, in most states, even though property acquired during the marriage may be deemed "marital property" at divorce, the non-acquiring spouse has no legal right to manage it during the marriage. Third, tax laws, Social Security and private insurance and pension plans often treat married couples differently from individuals and unmarried couples.<sup>73</sup> These are the

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66. See, e.g., Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 657 (2000) ("The effect of [the evolution from marital privacy to individual privacy and the demise of laws that promoted a specific division of marital labor] is to treat most married life as a matter for the spouses to arrange as they wish."). As Professor Weisbrod notes, "while marriage itself is a contract, the contract is executed with the marriage, and after that marriage is a status in which the judgment of the community, through law, then controls the situation." Weisbrod, *supra* note 4, at 780.

67. See, e.g., CAL. FAM. CODE § 720 (1994).

68. *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953); see also Garrison, *Autonomy or Community?*, *supra* note 21, at 110 ("[C]ourts have been extremely loathe to interfere with actual spending patterns in an intact marriage."). For a cogent overview of the "necessaries doctrine," see, for example, WALTER WADLINGTON & RAYMOND C. O'BRIEN, *DOMESTIC RELATIONS: CASES AND MATERIALS* 254-55 (4th ed. 1998) (suggesting that "[a]s a practical matter, widespread use of the joint credit card may have diminished the number of cases that otherwise might arise").

69. See, e.g., *Davis v. Baxter City Reg'l Hosp.*, 855 S.W.2d (Ark. 1993). See generally Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221 (1983) (examining marital property laws).

70. See, e.g., *N.C. Baptist Hosps. v. Harris*, 354 S.E.2d 471 (N.C. 1987).

71. For a sharp critique of this doctrine, and the ways in which it has been unfair to homemaker wives, see Joan M. Krauskoep & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974). See generally Garrison, *supra* note 21, at 107 ("Husbands are more likely to dominate spending decisions . . ."). But see *infra* Part II.B.1.a (arguing that this doctrine has come to represent a rough consensus).

72. *Brown v. Boeing Co.*, 622 P.2d 1313 (Wash. App. 1980) (holding that husband's election with respect to survivor benefits is binding against wife).

73. For a list of the benefits to which married partners are entitled, as distinguished from those to which cohabiting partners are entitled, see Katz, *Emerging Models*, *supra* note 20, at 667; Hein, *supra* note 10 (describing the need for employer-sponsored healthcare benefits for non-traditional families).

legal norms governing the external marriage, that is, the parties' relationship to third parties.

*b. The Internal Marriage*

Historically, the legal norms governing the internal marriage were better understood as the absence of legal norms. Grounded in Blackstone's infamous adage, "By marriage husband and wife are one person in law,"<sup>74</sup> rules of criminal and civil liability were effectively suspended within the marriage, causing a detriment to the weaker party, which was almost invariably the wife.<sup>75</sup> As Reva Siegel explains, for example, according to the "rule of thumb" the husband could beat his wife with a stick no larger than a thumb in diameter.<sup>76</sup> The modern trend has been to reduce this suspension of law within the marriage.<sup>77</sup> Thus, wife-beating is now recognized as assault and battery in every state,<sup>78</sup> and interspousal tort immunity has been abolished in most jurisdictions.<sup>79</sup> Vestiges remain, however, such as the marital rape exemption, under which marital rape is treated differently from stranger rape.<sup>80</sup>

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Martha Fineman has argued that legal benefits unfairly privilege married couples at the expense of others, particularly single parents. Thus, she argues, marriage should be abolished. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-30 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*]. Interestingly, she makes an exception for precisely the kind of explicit, negotiated relationship set out in Part II.B. *But see* REGAN, *ALONE TOGETHER*, *supra* note 26, at 7 ("Marriage, however, still has powerful cultural power as the paradigm of intimate commitment.").

74. WILLIAM BLACKSTONE, *I COMMENTARIES ON THE COMMON LAW* 442 (1771); *see also* MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 1881 (1986) (describing reforms to simplify the law, which further disadvantaged women by strengthening the concept of "unity of person").

75. *Cf.* Bix, *supra* note 16, at 164 (noting that the "states have removed the vast majority of stereotype-ridden, sex-based duties and obligations under which, for example... the wife was obligated to follow the husband's choice of domicile").

76. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996). *See generally* LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988) (discussing study of family violence trends in Boston from 1880 to 1960).

77. *See, e.g.,* Regan, *Marriage at the Millennium*, *supra* note 66, at 657 ("A more aggressive state response to domestic violence... simply extends to spouses the protection that strangers have always had against aggression...").

78. *See* Carl Tobias, *Interspousal Tort Immunity in America*, 23 *GA. L. REV.* 359, 466 (1989); *see also* Elizabeth Schneider, *Engaging with the State about Domestic Violence*, 1 *GEO. J. GENDER & L.* 173 (1999) ("Criminalization may be an appropriate strategy in some contexts, but it is only one of many that we ought to be considering.").

79. Tobias, *supra* note 78, at 359.

80. In Tennessee, for example, marital rape is a crime only if there is "serious injury" or if the couple is separated. *See* TENN. CODE ANN. § 39-13-507(b)(1) (1991). *See generally* Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 *STAN. L. REV.* 677 (1996) (examining the history of the marital rape exemption and suggesting more effective ways to deal with marital rapists); Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 *N.C. L. REV.* 261 (1993) (urging no exemptions).

The growing recognition of spousal autonomy within marriage<sup>81</sup> has produced significant shifts in intraspousal contracting.<sup>82</sup> Antenuptial agreements, once barred as conducive to divorce,<sup>83</sup> are now legal in every state, at least for certain purposes.<sup>84</sup> They are widely used, for example, to limit divorce settlements and to preserve property for children of a prior marriage. Antenuptial agreements are also increasingly accepted to restrict alimony, at least where doing so does not leave the former spouse dependent on public assistance.<sup>85</sup>

The law is more ambivalent about agreements purporting to govern relations between the spouses during marriage.<sup>86</sup> While the parties have the capacity to enter into contracts regarding services that might be contracted for with strangers,<sup>87</sup> courts remain leery about enforcing agreements regarding services traditionally considered incidental to the marriage, such as housekeeping, entertaining business associates, and childcare.<sup>88</sup> The dubious legal status of such agreements, as well as the pervasive perception that

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81. As the Supreme Court observed in *Eisenstadt v. Baird*, "[T]he marital couple is . . . an association of two individuals each with a separate intellectual and emotional makeup." 405 U.S. 438, 453 (1972).

82. See, e.g., Marston, *supra* note 4, at 891; cf. Shultz, *supra* note 4, at 209 (describing, in 1982, the continuing "sense of unreality, of intellectual or polemical gameplaying" with respect to marital contracting, and finding its source in "basic values, assumptions, traditions . . . 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 growing recognition of spousal autonomy is further buttressed by the right to co-manage community property during the marriage in community property states. See *supra* Part I.A.

83. ELLMAN ET AL., *supra* note 7, at 799.

84. Approximately 5% of marrying couples, or 50,000 couples, sign prenuptial agreements. Marston, *supra* note 4, at 891; see also Underwager & Wakefield, *supra* note 6, at 217 ("Matrimonial lawyers report that they are preparing from two to five times more of these contracts [in 1993] than they did five years ago."); cf. Stake, *supra* note 33, at 425 & n.119 (asserting that prenuptial agreements were rarely used in 1992). See generally UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 376 (1987).

85. ELLMAN ET AL., *supra* note 7, at 832-33; see *infra* text accompanying notes 252-254 (describing caveat regarding exacerbation of economic inequality to which Marriage Proposals would be subject).

86. As Professor Shultz documents, courts have refused to enforce agreements between spouses regarding "payment by one spouse to another for domestic, child care, or other services in the home; planned termination of the marriage after a given period of time; alteration of statutory duties of support; and provision in advance for the eventuality of divorce." Shultz, *supra* note 4, at 231 (citations omitted).

87. They certainly may agree, for example, that one spouse's gardening service will maintain the grounds of the other's office complex. See, e.g., Lewis Becker, *Premarital Agreements: An Overview*, in *PREMARITAL AND MARITAL CONTRACTS*, *supra* note 6, at 1, 5-8 (describing permissible content of premarital agreements).

88. See, e.g., LENORE WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 295 (1981) (describing contract in which wife agrees to invite her husband's business colleagues to frequent dinner parties). As Professor Shultz notes, "Private agreements recognizing the monetary value of domestic work would go far to equalize a wife's earning power with that of her husband." Shultz, *supra* note 4, at 271.

they should be subject to extralegal rather than legal norms, have combined to relegate such agreements to legal limbo.<sup>89</sup>

## 2. *Extralegal Norms*

As noted above,<sup>90</sup> marriage is governed, or at least influenced, by extralegal as well as legal norms, including social, cultural and religious norms. These encompass a wide range of beliefs, behaviors and customs, from who drives on family outings to norms so deeply and redundantly embedded in our social fabric, such as the notion that women are required to assume their husbands' surnames, that many mistakenly believe they are black letter law.<sup>91</sup> These extralegal norms also vary as a function of the larger families and communities to which the partners may belong.

Where extralegal norms are clear and consistent, both externally and internally, there is no need to be explicit. The partners know what is expected of them and what they can expect from each other. In addition, each can depend on the larger community to support these expectations.<sup>92</sup>

In the United States in the early 2000s, however, the extralegal norms purporting to govern the external marriage as well as the internal marriage are everywhere in flux: multiple, overlapping, inconsistent and rapidly mutating. Claims of normative authority are increasingly met with skepticism. Yet such claims reflect a deeply felt need on the part of many married couples for certainty and clarity. Those can be increased, and this need addressed, by making extralegal norms explicit.<sup>93</sup>

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89. The Scotts argue that the fact that "people seldom bargain explicitly over marriage is, in large part, a function of the relative harmony between their preferences and the societal norms and legal default rules that form the common understandings about marital behavior and of the relative immaturity of tailor-made alternatives to the standard marital regime." Scott & Scott, *supra* note 53, at 1251.

90. See *supra* text accompanying notes 57-60.

91. See, e.g., *In re Natale*, 527 S.W.2d 402 (Mo. App. 1975). See generally Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1 (1997).

92. Married people, for example, generally do not date other people. Neither is likely to feel the need to make this explicit, and both expect any larger community of which they are a part to support this norm. Thus, if a husband introduces his wife to a business associate, he does not expect the associate to ask his wife to have dinner with him. "Consistency" in extralegal norms may in fact exclude the experience of many, however. The cultural stereotype of stay-at-home mothers in the 1950s, for example, marginalized black mothers who worked outside the home. As Joan Williams notes, however, "Although black women worked outside the home in much higher proportions than did white women until very recently, 'the majority of wage-earning women, especially mothers and wives, usually did not believe that their presence or their position in the labor force was an accurate reflection of who they were or of how they should be viewed by members of the black community.'" WILLIAMS, *supra* note 2, at 165 (citation omitted). See generally *Making a Living Doing Domestic Work*, in BLACK WOMEN IN WHITE AMERICA 227-39 (Gerda Lerner ed., 1972) (Vintage 1992).

93. This tension between mutating norms and the need for certainty plays out in a wide range of contexts. Corporate relocation policies, for example, require frequent moves and a spouse who is not only portable but able to manage all the changes required for these moves, such as buying a house, finding a dentist and schools, and creating a place for the family in the new community. See, e.g.,

### a. *The External Marriage*

Because extralegal norms are in flux, paradoxically, many feel like members of a slighted minority, excluded by norms which benefit others. Thus, married women who stay at home with young children complain about their characterization as "soccer moms"<sup>94</sup> and about being asked, "But what do you *do* all day?"<sup>95</sup> At the same time, commentators ask why the work of black single mothers taking care of their young children is not considered work at all.<sup>96</sup>

Mothers who work outside the home, on the other hand, complain about being asked to volunteer for school activities and about being judged against a norm of motherhood modeled on someone without a job.<sup>97</sup> They complain about being treated differently from fathers, who are assumed to

Katherine C. Sheehan, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN'S L.J. 135 (1986) (criticizing court reliance in relocation cases on outdated notions of the roles of divorced men and women in a family); see also *In re Marriage of Burgess*, 913 P.2d 473, 476 (Cal. 1996) (holding that relocating parent need not prove necessity for relocation); *Tropea v. Tropea*, 655 N.E.2d 145, 150 (N.Y. 1996) (rejecting a mechanical, tiered analysis in which specific factors are rigidly prioritized in favor of fact-sensitive inquiry, including parental reasons for move, and the impact on child). Extralegal norms regarding care of newborn or newly adopted children, in contrast, implicate a different (albeit similarly gendered) set of factors. See, e.g., *infra* note 294 (describing Norway's recent law requiring new fathers to take part of the family's leave).

94. Cynthia Stames, *Reflections on Betty Crocker, Soccer Moms and Divorce: A Message from Detergent Manufacturers*, 97 WIS. L. REV. 285 (1997).

95. See, e.g., Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 18 (1992) ("For most of this century, the dominant model of motherhood has meant something closer to 'housewife'—a married, nonworking, inherently selfless, largely nonsexual, white woman with children."); Susan Chira, *Images of the Perfect Mother: Put Them All Together in a Multitude of Ways*, N.Y. TIMES, May 8, 1994, at A26 ("[T]he image of a suburban mother at home with her brood never reflected the reality for many Americans."). See generally ANN DALLY, *INVENTING MOTHERHOOD: THE CONSEQUENCES OF AN IDEAL* (1983) (describing the segregation of mothers and children in Western society); ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (10th ed. 1986) (examining, in feminist terms, motherhood in a social context and as part of a political institution). For a collection of essays exploring "representations of motherhood [that] are not essentialized, romanticized, or idealized," see *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* (Martha Albertson Fineman & Isabel Karpin eds., 1995) [hereinafter *MOTHERS IN LAW*].

96. Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994). Family research has overwhelmingly focused on white families until fairly recently. See Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 FUTURE OF CHILDREN 143, 148 (1994). Frazier explained how "[v]ariations in sex and marital practices . . . grew out of the social heritage of slavery" and described that "what slavery began—the pattern of racism and economic deprivation—continued to impinge on the family life of Afro-Americans." THE BLACK FAMILY, *supra* note 37, at 2. See generally OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) (popularly referred to as the Moynihan Report). The Moynihan study has been widely criticized, however, for "shift[ing] the burden of Black deprivation onto the Black family rather than the social structure of the United States." THE BLACK FAMILY, *supra* note 37, at 2. For an in-depth analysis of African-American families in the United States, see CARBONE, *supra* note 9, at 67-84.

97. See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1535 (criticizing the notion that all women have the same need and propensity for the female role in a traditional family structure).

"work outside the home" and who are warmly praised and supported for even the most minimal child-related activity.<sup>98</sup>

Traditional working fathers complain about missing out on the "new fatherhood."<sup>99</sup> Fathers who try to participate more in childcare complain that they are discriminated against at the workplace<sup>100</sup> as well as at the playground.<sup>101</sup> "Child free" couples<sup>102</sup> report being badgered to reproduce by strangers as well as family members,<sup>103</sup> and complain about their portrayal in popular culture as selfish and shallow.<sup>104</sup>

98. F.M. Deutsch & S.E. Saxon, *The Double Standard of Praise and Criticism for Mothers and Fathers*, 22 PSYCHOL. WOMEN Q. 665 (1998); see, e.g., *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986) (criticizing *In re Marriage of Estelle*, 592 S.W.2d 277 (Mo. App. 1979), in which a father was awarded custody over an "equally fit working mother," the court emphasizing "that the father often prepared the child's breakfast and dinner and picked her up from the day care center himself." As the reviewing court observed, "It is difficult to imagine a mother's performance of these chores even attracting notice, much less commendable comment."); see also Sean Elder, *Dabbling Dads*, N.Y. TIMES, June 11, 1995, § 6 at 30 (describing "Gentlemen Fathers" who parent on weekends, unlike the author, a primary caretaker father). But see Dowd, *supra* note 2, at 62 ("Ironically, it is the nurturing fathers who are poorly supported by the legal structure, and often socially viewed as unmanly by their peers."); sources cited *infra* notes 100-101.

99. For articles on the "new fatherhood," see, for example, Jerry Adler, *Are You a Better Father than Your Father?*, NEWSWEEK, June 17, 1996, at 58 (discussing whether better, more caring, sensitive fathers are what children really need); *Bringing Up Father*, TIME, June 28, 1993, at 54 ("America finds its stereotypes [about fathers] crushed in the collision between private needs and public pressures.").

100. See GRISWOLD, *supra* note 37, at 224-25 (most American corporations "look askance" at paternal leave); see also Joann S. Lublin, *Yea to That '90s Dad, Devoted to the Kids . . . But He's Out Again?*, WALL ST. J., June 13, 1995, at A1 ("As Fathers Put Work Second, Colleagues Can Resent It; Moms Feel Special Envy."); Dowd, *supra* note 2, at 56 (citing research showing workplace costs for involved fathers). But see Judith H. Dobrzynski, *Should I Have Left an Hour Earlier?*, N.Y. TIMES, June 18, 1995, § 3, at 1 (citing a Wharton School Study that found that "people who placed high importance on . . . a good family life actually ended up earning more money than those who were willing to sacrifice home life for their careers"); Joann S. Lublin, *Working Dads Find Family Involvements Can Help Out Careers*, WALL ST. J., May 30, 2000, at B1 (anecdotes about fathers being explicit about their needs for flexible schedules because of their children).

101. See generally KATHLEEN GERSON, NO MAN'S LAND: MEN'S CHANGING COMMITMENTS TO FAMILY AND WORK 215-55 (1993) (describing "Dilemmas of Involved Fatherhood"). Homemaker women are not the only ones to view such men as second-rate nurturers. Professor Stake assumes, for example, that his daughters

would make much better nurturers and homemakers than whomever they will marry . . . [B]ecause Laura is so much better at nurturing, she and her husband (not to mention her children) may be collectively better off if she stays home even though she could earn more than he could on the market. It is, therefore, not only from a sexist viewpoint that I might wish for her to stay home with her children until they are grown, and maybe beyond.

Stake, *supra* note 33, at 408-09. According to a 1995 CNN poll, 77% of fathers felt that balancing work and family was difficult. Dowd, *supra* note 2, at 48.

102. Valerie Takahama, *Childless by Choice: Their Reasons Vary, but a Growing Number of Couples Are Foregoing Parenthood*, GREENSBORO NEWS & REC., Sept. 27, 1999, at D1, available in 1999 WL 26300207 ("22% of all women born between 1956 and 1972 are expected never to bear children"); Lisa Belkin, *Your Kids are Their Problem*, N.Y. TIMES MAG., July 23, 2000, at 30 (describing emergence of a new "child free" movement). See generally PATRICIA LUNNEBORG, THE CHOSEN LIVES OF CHILDFREE MEN (1999) (describing men's experience of childlessness and noting how it differs from women's).

103. See Karla A. Mueller & Janice D. Yoder, *Stigmatization of Non-Normative Family Size Status*, 41 SEX ROLES: A. J. RES., Dec. 1, 1999, available in 1999 WL 18705898 (reporting pressure

This wild proliferation of extralegal norms, and the corresponding absence of clear expectations, has enormous and far-reaching costs. These include monetary costs, such as the costs of time-consuming divorce and custody litigation, which may be understood, in part, as campaigns for judicial endorsement of particular extralegal norms in particular contexts. The absence of clear expectations also contributes to the feminization of poverty, lulling middle-class white women into dependency. Many assume that strong extralegal norms support their nurturing efforts, for example, only to discover that such norms often evaporate at divorce.<sup>105</sup> There are also psychological costs, including bitterness and resentment toward those who are presumed to be benefiting from other norms at the expense of one's own. Finally, conflicting extralegal norms contribute to the backlash against women,<sup>106</sup> in which women are blamed for neglecting their children and their jobs, and at the same time, for taking both away from men.

Law explicitly endorsing all of these alternative norms as legitimate would obviously not eliminate arguments about their respective value. However, such law would relocate arguments about which norms are more legitimate, or more entitled to legal support, from the combat zone of the divorce courts to the more benign, and more hopeful, realms of the beginning and ongoing marriage.<sup>107</sup> Law grounded in analysis that takes nothing for granted would not eliminate bitterness or resentment. But it would reduce them; first, by situating the argument in a less charged context and second, by encouraging tolerance for increasingly diverse choices.<sup>108</sup>

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from outsiders on "mostly white, college-educated, employed women[ ]. . . to stay within normative parameters [2-3 children]," and citing other studies regarding stigmatization of other child free populations).

104. For a stinging example of such a portrayal, see *The Anti-Child Revolt*, July 29, 2000, at [http://www.salon.com/mwt/feature/2000/07/31/anti\\_child/index.html](http://www.salon.com/mwt/feature/2000/07/31/anti_child/index.html) ("An even bigger irony is that so many of these folks who feel victimized by other people's brats sound so much like overgrown brats themselves. . .") (last visited 7/13/01).

105. See generally FINEMAN, *THE NEUTERED MOTHER*, *supra* note 73, at 82-83 (describing "Motherhood Descending—Transformations at Divorce").

106. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* xxi, xxiii (1991) (describing the pervasive, albeit uncoordinated, opposition to feminism, including "New Right politicians . . . antiabortion protestors . . . fundamentalist preachers . . . and state legislatures"); see also ARENDELL, *supra* note 11, at 35 (explaining male backlash as resistance to a loss of male dominance by those with "the most to lose . . . the most powerful members of the dominant group" (citation omitted)).

107. But see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 150 (1993) [hereinafter REGAN, *PURSUIT OF INTIMACY*] (arguing that "the blush of romance may introduce cognitive biases that undermine our confidence that contract terms are the product of clear-headed deliberation"). The problem, of course, is that such "clear-headed deliberation" may be hard to come by at any stage of a marriage. The premise here is that perhaps it can best be cultivated through practice.

108. See *infra* text accompanying note 400 (citing Justice Brennan in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Brennan, J. dissenting)). This would not preclude deliberate measures to make divorce difficult. See *infra* Part II.B.2.b. But it might enable some couples to avoid some of the *sturm und drang* of divorce. See RANDOM HOUSE DICTIONARY UNABRIDGED 1890 (1987) (defining "*sturm und drang*" as "tumult, turmoil, upheaval, literally 'storm and stress'"). For those who prefer to wallow

### b. *The Internal Marriage*

The internal marriage, that is, the relationship between the partners, may be a safe haven from the confusion engulfing the external marriage for some,<sup>109</sup> but often the conflicts of the larger world are played out here as well. The internal marriage may function as a microcosm of the larger world, replicating conflicts on a smaller (but no less intense) scale. Or it may function as an inverting mirror, in which each partner seeks to balance her or his external role by assuming a very different role within the marriage. Whether the wife comes home and replicates her role at the office, supporting her husband as she supports her male supervisor, or changes her role, from supported supervisor to supporting spouse, the ways in which extralegal norms shape external roles are reflected in the internal marriage.<sup>110</sup>

Gendered norms, for example, remain conspicuously pervasive in the internal marriage, often functioning as default norms, and implicitly governing conduct that is not explicitly addressed.<sup>111</sup> They are reinforced by marketplace discrimination, so that most women still earn less than their husbands,<sup>112</sup> as well as by widely-internalized norms that require the man to be taller, richer, better-educated and a little older<sup>113</sup> than the woman.<sup>114</sup>

in it, see M. Sue Talia, *The Divorce from Hell: How to Maximize Everyone's Pain and Suffering*, FAM. ADVOC., Summer 1999, at 8.

109. See REGAN, *supra* note 107, at 83-87 (describing "postmodern intimacy" as a deliberate "restraint on the free play of subjectivity").

110. For a compelling account of the impact of gendered norms on "wifely behavior," see Dubler, *supra* note 42.

111. Thus, feminists have stressed the importance of consciousness-raising to make such norms visible. These norms may also be raced; that is, the magnitude, as well as the specifics, of gender inequality are likely to vary as a function of the partners' race(s). While gender inequality has different implications for same sex couples, the dynamics through which external subordination may be replicated—or avoided—has been observed in the 'internal' marriage of same sex couples as well. For in-depth explorations of these issues, see, for example, Symposium, *InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory*, 75 DEN. U. L. REV. 1129 (1998); Symposium, *Intersexions: The Legal and Social Construction of Sexual Orientation*, 48 HASTINGS L.J. 1101 (1997). But see Alice Truax, *An Ideal Husband*, N.Y. TIMES BOOK REV., July 2, 2000, at 5 (quoting Edmund White: "Heterosexuals didn't want to learn about the intricate domestic topography of Sodom; they preferred to draw a big X over the entire land.").

112. In 1995, while the median income for men was \$22,562, the median income for women was \$12,130. ANDREW HACKER, MONEY: WHO HAS HOW MUCH AND WHY 185 (1997); see also Paulette Thomas, *United States: Success at a Huge Personal Cost*, WALL ST. J., July 26, 1995, at B1 (according to the U.S. Labor Department, in the first quarter of 1995, U.S. women earned only 75.9 cents for every dollar earned by men and women held only 5% of senior level management jobs in America's 1100 biggest companies).

113. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 244-70 (1994); DOWD, *supra* note 2, at 29 (the median age at first marriage is 26.7 years for men, 24.5 years for women).

114. See Ellman, *Divorce Rates*, *supra* note 29, at 20 (describing the persistence of women's preference for "marrying up"). See generally Mary Becker, *Problems With the Privatization of Heterosexuality*, 73 DEN. U. L. REV. 1169, 1172 (1996) (explaining why men have an advantage in intra-couple bargaining).



This contributes to the surprisingly persistent division of labor within marriage described by Arlie Hochschild and Ann Machung.<sup>115</sup> Women still do most of the housework and childcare, working approximately an extra month a year, even when they earn more.<sup>116</sup>

Gendered default norms also function in the internal marriage to disproportionately allocate property to the husband. As Carol Rose explains, whether women are less interested in property or simply perceived as being less interested in property, they are likely to wind up with less.<sup>117</sup> Gendered patterns of communication, as described by linguist Deborah Tannen,<sup>118</sup> as well as pervasive cultural norms of coded sexuality (i.e., submissiveness as “feminine” and dominance as “masculine”), maintain the internal marriage as a male preserve.<sup>119</sup> The effect of these norms is exacerbated, of course, in common law property states. In these states marital property is not recognized until divorce. Wives, who usually have less income, also have less legal rights to manage property acquired by the couple during the marriage.<sup>120</sup>

These gendered norms may so comprehensively shape the internal marriage that, as Kathryn Abrams argues, it is doubtful whether any security can be assured for the wife in the event of divorce.<sup>121</sup> At the same time, norms which are rarely supported, or even recognized, in the public sphere

115. ARLIE HOCHSCHILD & ANN MACHUNG, *THE SECOND SHIFT* (1989). *But see* FRANCIS K. GOLDSCHIEDER & LINDA J. WAITE, *NEW FAMILIES, NO FAMILIES?: THE TRANSFORMATION OF THE AMERICAN HOME* 187 (1991) (arguing that husbands assume more household responsibilities as wives' earnings increase).

116. HOCHSCHILD, *supra* note 115, at 3, 82-83. *See also* Posner, *supra* note 61, at 1723 (explaining why norms in groups like families are likely to be inefficient).

117. CAROL ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 233, 238-41 (1994).

118. *See, e.g.*, DEBORAH TANNEN, *GENDER AND DISCOURSE* 5 (1994) (analyzing the different ways in which women and men signal meaning in conversation).

119. It may nevertheless, paradoxically, be where the woman feels most empowered, and where she “really runs things,” while allowing her husband to think that “he is the boss.” *See, e.g.*, Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 *VILL. L. REV.* 525, 526-27 (2000) (describing how “women may exercise some power” within the “patriarchal space” of the household).

120. *See supra* Part I.A.1.a.

121. Abrams, *supra* note 24, at 533 (explaining how, in the traditional marriage, the wife's dependency is redundantly reinforced through a series of implicit understandings and accommodations). I agree with Professor Abrams that “female dependency can[not] be made secure in a society where this is no longer feasible (if indeed it ever was).” *Id.* at 533. But for the sake of those women who do not agree, or who are not worried about their future security (at least at the time of marriage), it is still important to make female dependency more secure. *See infra* Part II.B.2.b. “Since women control few state legislatures or supreme courts, they must rely on men to assert their interests. Additionally, if advocates persuade judges and money persuades advocates, litigation at the time of divorce favors those with greater financial assets.” Stake, *supra* note 33, at 449; *see also* Rasmusen & Stake, *supra* note 15, at 473 (“Background rights accorded women by current law provide women with little protection. Women could hardly do worse bargaining for themselves, fixing their own background rights by premarital contract.”).

may implicitly structure the internal marriage.<sup>122</sup> In Sue Miller's disturbing novel *Family Pictures*,<sup>123</sup> for example, the couple tacitly agrees that the husband can have affairs if the wife can keep their autistic son at home.<sup>124</sup>

### B. Norms at Divorce

When the external marriage is extinguished, the internal marriage vanishes, at least in theory. The two are effectively collapsed at divorce. Most norms, accordingly, focus on the external marriage at divorce, such as how the parties meet the expectations of third parties, from their creditors to their children's teachers. As any divorce practitioner or marriage counselor can attest, this leaves many divorcing partners without a real sense of closure or resolution, notwithstanding a divorce decree.

#### 1. Legal Norms

In striking contrast to the one-size-fits-all marriage that everyone enters, many different models of marriage are recognized at divorce.<sup>125</sup> At that point, the state distributes property and allocates support according to elaborate rules which long ago recognized that one size does not fit all.<sup>126</sup> These rules, however, are neither transparent nor consistently applied. In many cases they seem almost arbitrary.<sup>127</sup> In addition, they vary substantially from state to state.<sup>128</sup>

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122. See, e.g., WILLIAMS, *supra* note 2, at 15-37 (conducting a close textual analysis of DEBORAH FALLOWS, *A MOTHER'S WORK* (1985), to expose the dynamics that lead women to "choose" domesticity). For a powerful argument that the same considerations of justice that govern the public sphere should govern the family as well, see SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25-43 (1989).

123. SUE MILLER, *FAMILY PICTURES* (1989).

124. Professor Weisbrod suggests

[T]hat social context dictates different kinds of default contracts to which individuals . . . may be presumed to have adhered . . . . Of course, one would have to define the relevant community to see what expectations might be in fact at any time. In general, however, we seem often to have such expectations, some of which may be uncomfortable for us to acknowledge.

Weisbrod, *supra* note 4, at 795.

125. But see Stake, *supra* note 33, at 417 (characterizing the law applied by judges at divorce as "one[-size]-fits-all").

126. Rather, "fairness" depends on a range of factors which vary from case to case. As Professor Stake notes, "[t]o determine fair property division and spousal support without knowing what the parties thought is to navigate without a destination." Stake, *supra* note 33, at 421 (citation omitted); cf. Broad, *supra* note 113, at 236 (describing equitable distribution and elective share statutes as a response to the risks confronting a non-acquiring spouse in common law states).

127. Garrison, *supra* note 21, at 57 ("[L]aws governing economic relations within the family no longer evidence common assumptions and consistent goals.").

128. It may be argued that local differences reflect local norms. This argument was more persuasive when we were a less mobile society. See, e.g., Carl Scheider, *The Next Step: Definition, Generalization and Theory in American Family Law*, 18 U. MICH. J.L. REFORM 1039 (1985); Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* (1989)); see also *infra* Part II.A.3.

Divorce law encompasses the internal as well as the external marriage and defines the parties' respective obligations with regard to each, at least in terms of support and property. After divorce, for example, the parties are no longer responsible for the necessities of the other, unless expressly provided for in the divorce.<sup>129</sup> Names can be changed or resumed.<sup>130</sup> In community property states, all property acquired by either spouse during the marriage, except by inheritance or gift, is subject to distribution. In three of the community property states, distribution is required to be "equal,"<sup>131</sup> while in the remaining five states it is "equitable."<sup>132</sup> In the other forty-two states, property is distributed according to variously understood equitable principles, further complicated by the respective common law traditions of the states.

Because of the lack of justification for alimony under no-fault laws, and the general demise of long-term alimony,<sup>133</sup> compensation is basically limited to the assets of the parties at divorce.<sup>134</sup> Empirical studies consistently show that these assets are minimal for most couples.<sup>135</sup> Rather, the most important asset at the end of a marriage is usually the income of the higher wage earning spouse, an asset which is not subject to distribution.<sup>136</sup> Thus, in Lenore Weitzman's memorable phrase, it is as if the family jewels are divided up after the diamonds are put aside for the breadwinner, usually the husband.<sup>137</sup>

129. See *supra* text accompanying notes 67-71.

130. See *supra* text accompanying note 91.

131. See CAL. FAM. CODE § 2550 (1994); LA. REV. STAT. ANN. § 9:2801 (4)(b) (1996). In New Mexico, "equality" has been judicially mandated. *Ruggles v. Ruggles*, 860 P.2d 182, 188 (N.M. 1993).

132. ELLMAN ET AL., *supra* note 7, at 259.

133. HOMER H. CLARKE, JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS 792 (6th ed. 2000). As Professor Singer explains, however, "[T]he husband's continuing 'duty of support' has always been more myth than reality for most divorced women." Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106-07 (1989).

134. At divorce, women on the average suffer a 30% decline in their standard of living, while men's standard of living improves by 10%. ELLMAN ET AL., *supra* note 7, at 377 (citing Richard Peterson, *A Re-Evaluation of the Economic Consequence of Divorce*, 61 AM. SOC. REV. 528 (1996)). See generally Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). For a thoughtful analysis of the negative impact of fault rules on women and children, see Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759, 770.

135. In New York in the early 1990s, for example, property subject to distribution was usually worth less than \$25,000. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 662-63 (1991).

136. The ALI Final Draft suggests several scenarios in which this is treated as a divisible asset. ALI FINAL DRAFT, *supra* note 13, at 257; see also sources cited *infra* notes 326-327.

137. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 109 (1985). But see Editorial, *Mom the Provider*, N.Y. TIMES, May 14, 1995, at E14 (citing a Louis Harris & Associates poll showing that women "share equally with their husbands in supporting their families"); Sue Shellenbarger, *Women Indicate Satisfaction with Role of Big Breadwinner*, WALL ST. J., May 11, 1995, at B1 (citing a study by the Families and Work Institute showing that "55% of employed women bring in half or more

The most contentious norms are those governing custody<sup>138</sup> and child support. Presumptions such as the tender years presumption, under which the mother was presumed to be the better caretaker for children under the age of 10, have been challenged, revised and repealed.<sup>139</sup> Presumptions intended to achieve the same result, such as the primary caretaker presumption devised by Justice Neeley of the West Virginia Supreme Court, have been adopted,<sup>140</sup> criticized,<sup>141</sup> and repealed.<sup>142</sup> The most enduring standard remains the "best interest of the child,"<sup>143</sup> a standard which encourages a detailed case-by-case analysis, ultimately depending on the discretion of the trial court.<sup>144</sup> Because custody is such an emotional issue, and because

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of their household income, and 53% say they don't want to give up any of their responsibilities either at work or at home").

138. Professor Carbone argues that custody disputes have become "ground zero in the gender wars because they are among the few remaining family law disputes where courts judge adult behavior." CARBONE, *supra* note 9, at 193. For a comprehensive history of custody law, see MASON, *supra* note 37. For a discussion of the ways in which courts subject men as well as women to gender bias in custody cases, see Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1075 (1996).

139. See, e.g., *Pusey v. Pusey*, 728 P.2d 177 (Utah 1986) (finding that the tender years presumption is based on outdated stereotypes); *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981) (holding the doctrine unconstitutional); *Bazemore v. Davis*, 394 A.2d 1377 (D.C. 1977) (holding that the doctrine violates best interest standard).

140. 278 S.E.2d 357 (W. Va. 1981).

141. See, e.g., Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 192-203 (1992) (analyzing cases to show that primary caretaker presumption actually benefits fathers). But see Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75 (1994) (comparing tender years and primary caretaker presumptions and concluding that the latter should be adopted). See generally Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 300-16 (1992) (applying feminist analysis of the primary caretaker presumption in Minnesota and West Virginia).

142. The Minnesota Supreme Court adopted the presumption in *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985). In 1990, the legislature made primary caretaker status merely a factor. MINN. STAT. § 158.17 (1990).

143. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 156 (1987) (including among factors to be considered in determining the "best interest of the child," parents' wishes, child's wishes, child's relationships with parents and others, child adjustment to home, school, and community, and mental and physical health of all involved); see, e.g., Beth K. Clark, *Acting in the Best Interest of the Child: Essential Components of a Child Custody Evaluation*, 29 FAM. L.Q. 19 (1995) (describing how psychologists involved in custody disputes can apply this standard). But see JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* (1973) (concluding that it is better for the child to be placed with the "psychological parent," that is, the adult with whom the child is most strongly bonded). For a summary of the scholarship refuting men's claims that the best interest standard is a pretext for maternal bias, see ARENDELL, *supra* note 11, at 78-83.

144. See Becker, *supra* note 141, at 195-96 (arguing that mothers who do not conform to the nurturing model risk losing their children). According to a recent study, men win more than 50% of litigated cases, and litigated cases "so often employ gender-stereotyped assumptions [that] virtually all feminists . . . favor restricted judicial discretion." June R. Carbone, *A Feminist Perspective on Divorce*, 4 FUTURE OF CHILD. 183, 198 (1994). See generally Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 265 (1994) (urging that custody evaluations "be grounded in a well-articulated theory of parenting competency" taking into account "the racial and ethnic diversity in our society").

it is so difficult to predict how a court will rule, the less risk-averse spouse has considerable leverage.<sup>145</sup>

While child support would seem more susceptible to an objective approach,<sup>146</sup> it has emerged as a similarly contentious issue. The most recent federal child support mandate was included in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>147</sup> (PRWORA) after years of studies, discussions and debate in academic journals<sup>148</sup> as well as state legislatures and Congress.<sup>149</sup> Building on earlier law requiring the states to promulgate guidelines,<sup>150</sup> it requires the states to devise procedures assuring the periodic review of child support orders. In a scathing and rigorous critique, however, Marsha Garrison has recently shown that the resultant guidelines consistently disadvantage children and their custodial parents, usually mothers.<sup>151</sup>

## 2. *Extralegal Norms*

As divorce has become increasingly common, it has become increasingly acceptable.<sup>152</sup> Before the no-fault revolution in the 1970s,<sup>153</sup> the law

145. See Jane W. Ellis, *Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads*, 44 STAN. L. REV. 471, 476 (1992) (book review) (arguing that mothers are especially vulnerable because they often put their relationships with their children above all other considerations). For a promising approach to this problem, see Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 527 (1995) (arguing that settlement agreements should be submitted in distinct stages so that custody and visitation arrangements would have to be approved prior to any financial agreement).

146. It is, in fact, subject to wide-ranging estimates. See, e.g., THOMAS J. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* (1984).

147. Pub. L. 104-193, 110 Stat. 2105 (1996). For a cogent summary of earlier efforts, see Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996).

148. Nan D. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983).

149. See, e.g., SOCIAL SECURITY ACT OF 1975, Pub. L. 93-647, 88 Stat. 2337 (1975) (requiring states to establish child support programs); CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984, 42 U.S.C. § 666(a) (1997 Supp.); 1988 FAMILY SUPPORT ACT, 42 U.S.C. § 667 (1997 Supp.).

150. See 1988 Family Support Act, *supra* note 149.

151. Garrison, *supra* note 21, at 57-72.

152. In the eighteenth century, for example, judicial divorces were unavailable in many states and legislative divorce was extremely rare. See CHUSED, *supra* note 36 (historical account of divorce law); LINDA GRANT DePAUW & CONOVER HUNT, *REMEMBER THE LADIES: WOMEN IN AMERICA 1750-1815* at 16 (1976) [hereinafter *REMEMBER THE LADIES*]; see also LINDA KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 183 (1980) (describing Nancy Shippen's discovery in 1789 that "[r]evolutionary freedom did not clearly extend to the right to be free of an unhappy marriage").

153. This refers to the wave of reform that made divorce generally available, without proof of "fault." See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 662-67 (1984) (discussing historical trends which produced no-fault divorce). For critiques of no-fault divorce, see, for example, MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 32-33 (1991) (describing the impact of no-fault divorce on women); WEITZMAN, *supra* note 137, at 20-28, 38-40 (noting that no-fault divorce in California launched a legal revolution in American family law). For a description of the "counterrevolutionary legal proposals" that have sprung up in response to no-fault divorce, see

required a showing of "fault" before a divorce could be granted.<sup>154</sup> Thus, the law explicitly proscribed certain behavior within marriage, such as adultery or, more colorfully, poisoning one's spouse.<sup>155</sup> The "guilty" spouse became a pariah.<sup>156</sup>

But the relationship between "fault" and the end of a marriage became increasingly unclear. Some marriages fell apart where fault was not present and some marriages survived where it was. At the same time, the notion of "public morality" was becoming less coherent.<sup>157</sup> By the 1970s many fault grounds were viewed more as lifestyle choices than as quasi-criminal behavior that should—or could—be legally proscribed. In thirty-four states, no-fault was simply added as a ground for divorce to the existing statute.<sup>158</sup> Thus, fault grounds remain in the statute side by side with no-fault grounds, a pragmatic recognition of a range of moral perspectives and practical considerations. In sixteen other states, no-fault is now the sole ground for divorce.<sup>159</sup>

Consensus remains elusive even as to how to treat the divorced couple as parents,<sup>160</sup> although there are clearly identifiable camps.<sup>161</sup> According to the current majority view, the ex-spouses are expected to "share decision

DiFonzo, *supra* note 3, at 881; Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997).

154. Alimony was generally available only to the "innocent spouse." Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 5-6 (1989); Garrison, *Autonomy or Community?*, *supra* note 21, at 51.

155. TENN. CODE ANN. 36-4-101 (7) (establishing a ground for divorce where "either party has attempted the life of the other, by poison or any other means showing malice").

156. See, e.g., CHUSED, *supra* note 36, at 1 (describing what was viewed at the time, 1790, as a particularly egregious case in which a white woman committed adultery with a black man. Her husband was granted the first divorce passed after the Revolutionary War).

157. For an in-depth investigation of this phenomenon, see Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

158. Elrod & Spector, *supra* note 8, at chart 4. For a description of the process through which no-fault became law, see HERBERT JACOB, *THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988). Fault grounds remain a popular alternative to the waiting periods mandated under no-fault. See Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 464 (1982). Thus, they still serve as a bargaining chip, albeit a less valuable one, for the spouse willing to remain in the marriage, especially if the other spouse is in a hurry to leave. See, e.g., ALLEN M. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* (1992). The actual value of fault as a bargaining chip varies widely, reflecting not only the different circumstances under which it may be considered by a court (in 29 states, for example, fault may be a factor in setting alimony. Elrod & Spector, *supra* note 8, at chart 1), but the range of behavior encompassed by "fault" and the range of judges considering it.

159. Elrod & Spector, *supra* note 8, at chart 4; see also UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 147 (1987) (establishing "irretrievable breakdown" as sole ground). For a thoughtful exegesis of the multiple, and often conflicting, roles of fault in divorce, see Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994) (including comments by Katharine T. Bartlett).

160. There may be tentative consensus where there have been egregious charges, such as the child abuse charges in the Mia Farrow/Woody Allen custody debacle. See, e.g., Laura Shapiro with Lucille Beachy & Elizabeth Ann Leonard, *Suffer the Children*, NEWSWEEK, March 29, 1993, at 56.

161. See CARBONE, *supra* note 9, at 180 (describing those who favor joint custody as opposed to those who favor "greater respect for the custodial parent's autonomy").

making" with respect to their children's education, health care and extra-curricular activities. This view is reflected in provisions in separation agreements that require the parents to cooperate with each other<sup>162</sup> and in provisions that, assuming such cooperation, leave specific visitation arrangements open.<sup>163</sup> The frequent failure of these norms (and the ways in which they often backfire), as well as the tendency of old resentments to resurface, can be seen in court orders requiring parents not to badmouth each other and the renewed call for explicit visitation schedules.<sup>164</sup>

Where there are no children, extralegal norms are inchoate.<sup>165</sup> A satire in *The Onion*, for example, describes a split between a college-aged couple in which the court awarded the parties' friends to the young woman.<sup>166</sup> In practice, parties may seek a similar adjudication of the external marriage by an award of a country club or health club membership.<sup>167</sup> With respect to the internal marriage, however, there are few mechanisms available in the law for resolution or closure.<sup>168</sup>

162. This reflects and supports state statutes which specifically require custodial parents to facilitate the other parent's relationship with the child. *See, e.g.*, IOWA CODE ANN. § 598.41 (West Supp. 1992); COLO. REV. STAT. § 14-10-124 (1.5)(f) (1987) (cited in KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 461 (2d ed. 1998)); *see also Developments in the Law: Legal Responses to Domestic Violence, Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1601 (1993) (indicated that eighteen states have enacted "friendly parent" statutes). For a critical assessment of such statutes, see Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 476 (1984). By 1999, Professors Elrod and Spector stated flatly, "A parent who undermines the children's relationship with the other parent will have that factor counted against him or her in a custody determination." Elrod & Spector, *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 684 (1999) [hereinafter Elrod & Spector 1999].

163. *See, e.g.*, RAOUL FELDER, *ENCYCLOPEDIA OF MATRIMONIAL CLAUSES V-11 to V-12* (Rev. 20) (2000) ("The Husband shall have the right to have the children visit with him at reasonable times and places, whether or not specifically set forth herein, it being the intention of the parties that visitation shall be liberally awarded to the Husband at such times as he may desire, provided that such visitation does not interfere with the children's schooling.") The author, however, warns counsel that "[v]isitation rights should be defined with great precision with appropriate notice so that parents know exactly where they stand. . . ." *Id.* at V-8.

164. *See* Marygold S. Melli, et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 800.

165. *See, e.g.*, Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2307 (1994) (noting "our inability to move beyond the dichotomy of spouses and strangers in thinking about the relationship between former spouses after divorce").

166. *Ex-Girlfriend Wins Custody of Shared Friends*, THE ONION, Feb. 16, 1999, at <http://www.fact.on.ca/newspaper/on990210.htm>.

167. FELDER, *supra* note 163, at S-12, S-13.

168. The absence of extralegal norms to channel the powerful emotions that may remain at the end of the marriage often results in bad behavior, including acting out. At a settlement conference in the film *Living Out Loud*, for example, the dumped wife, played by Holly Hunter, begins flicking little drops of coffee, soon followed by small chunks of donut, at her soon-to-be ex-husband. She is behaving inappropriately, childishly, and the lawyers as well as her almost ex-husband are extremely annoyed. While it is embarrassing to watch her, however, it is hard not to cheer her on. When she later attacks her ex-spouse, her flailing fists do him no damage; rather, they provide him with the leverage of an assault claim, for which the wife pays with a sizeable portion of the marital estate. *LIVING OUT LOUD* (New Line Productions 1998). For a more just, albeit less realistic, outcome, see *FIRST WIVES CLUB*

## II

## TOWARD POSTMODERN MARRIAGE LAW

A. *Postmodern Marriage Law*

The problems identified in Part I—the wild proliferation of extralegal norms, their uncertain and unpredictable effects, and the uncritical, even unconscious, reliance on gendered default norms—are widely recognized. Proposals abound for addressing these problems, including uniform laws to counter proliferating norms,<sup>169</sup> “strong forms” of marriage to counter the uncertainty of extralegal norms,<sup>170</sup> and gender task forces<sup>171</sup> to root out gendered norms in the law itself.

Many of these proposals are promising and some are relied upon in this Article.<sup>172</sup> The net effect of such proposals, however, is often simply to re-situate the norm competition. They fail to address the underlying problem, which is that we are not moving toward consensus in marriage law. Part II reconceptualizes marriage law and explains how postmodern marriage law can better reflect and grapple with our postmodern condition. Rather than resolve the competition among norms, Part II recognizes the growing range of acceptable models and encourages the partners to select their own.<sup>173</sup>

This rejection of a single, comprehensive norm in favor of multiple, overlapping norms is characteristically postmodern. As Jean François Lyotard explains, postmodernism is simply “incredulity toward

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(Paramount Pictures 1996) (depicting scenario where first wives obtain substantial settlements from their ex-husbands, with which they open a women's center).

169. See, e.g., UNIF. ADOPTION ACT, 9 U.L.A. 1 (Supp. 1999) (setting out notice requirements and uniform time limits for relinquishment and revocation so that adoption disputes do not become normative conflicts involving biological and adoptive parents' rights, as well as the best interests of the child); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 U.L.A. 257 (Supp. 1999) (resolving tension between provisions condoning “child rescue” and jurisdictional certainty in favor of the latter); UNIF. INTERSTATE FAMILY SUPPORT ACT, 9 U.L.A. 348 (Supp. 1999) (setting out rules establishing which court shall have continuing exclusive jurisdiction in support matters), cited in FAMILY LAW STATUTES, INTERNATIONAL CONVENTIONS AND UNIFORM LAWS 1, 72, 91 (Walter Wadlington & Raymond C. O'Brien eds., 2000).

170. See *supra* notes 14, 29-30 (describing Covenant Marriage).

171. See John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994); Saul Green et al., *Unfinished Business: Racial, Ethnic and Gender Issues Still Confront Bench and Bar*, 76 MICH. B.J. 938, 938-39 (1997); Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, 1169 (1999); Patricia M. Wald, *Glass Ceilings and Open Doors: A Reaction*, 65 FORDHAM L. REV. 603, 605 (1996).

172. See, e.g., *infra* Part II.B.2.a (describing provisions intended to preempt gender bias); *infra* Part II.B.4 (proposing a Uniform Marriage Proposals Act).

173. As noted above, partners effectively select their own models already. See *supra* text accompanying notes 45-50. But most do so un-self-consciously. See, e.g., *supra* note 4; see also Barbara Stark, *Divorce Law, Feminism and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483 (1991) (describing deeply internalized norms that influence these “choices”).



metanarratives."<sup>174</sup> Perhaps the major metanarrative to inspire postmodern "incredulity" is the Enlightenment and its assumptions that rational thought, the empirical method, and an ever-growing body of science will lead not only to human progress, but to human good.<sup>175</sup>

Postmodernism includes at least two additional distinct but related concepts.<sup>176</sup> First, according to David Harvey:

[T]he most startling fact about postmodernism [is] its total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic. . . . But postmodernism responds to the fact of that in a very particular way. It does not try to transcend it, counteract it, or even to define the "eternal and immutable" elements that might lie within it. Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is.<sup>177</sup>

Second, rather than abstract ideals, postmodernism is "rooted in daily life."<sup>178</sup> It is visible in the commodification of culture and the endless repetition of strip malls. As J. M. Balkin observes, postmodernism owes more to CNN and the shopping mall than to Richard Rorty.<sup>179</sup> In Fredric

174. LYOTARD, *supra* note 45, at xxiv. This "incredulity" resonates with feminist critiques of "grand theory" in general. As Martha Fineman explains, "The task of feminists concerned with the law and legal institutions must be to create and explicate feminist methods and theories that explicitly challenge and compete with the existing totalizing nature of grand legal theory." Martha L. A. Fineman, *Feminist Legal Scholarship and Women's Gendered Lives*, in *LAWYERS IN A POSTMODERN WORLD*, *supra* note 26, at 229, 233 [hereinafter Fineman, *Women's Gendered Lives*]; see also, CARBONE, *supra* note 9, at 4 (describing Gary Becker's "attempt[] to explain the family in terms of 'grand [economic] theory'").

175. Many feminists balk at the idea of "objectivity." We are all too aware of the contingency of perspectives and the risks of asserting "foundational" authority. *But see* Ruth Colker, *The Female Body and the Law: On Truth and Lies*, 99 YALE L.J. 1159, 1164 (1990) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988)) (arguing that "feminist theory needs to rely on objective truths").

176. In addition, Ihab Hassan offers a schematic set of dichotomies, which suggests how postmodernism may be understood by comparing it to modernism:

modernism	postmodernism
semantics	rhetoric
metaphor	metonym
purpose	play
design	hance
centering	dispersal
narrative/grande histoire	anti-narrative/petite histoire
metaphysics	irony

HASSAN, *supra* note 49, at 89.

177. HARVEY, *supra* note 47, at 44. This is related to the notion of "iterability . . . a repetition of the same in a different context." J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 779 (1987). Many "trends" in family law have been urged by different constituencies at different times for different purposes. See, e.g., DiFonzo, *supra* note 3, at 931-32 (describing the "surprising" roots of the distinction between divorce regimes involving minor children and those which do not).

178. HARVEY, *supra* note 47, at 63.

179. J. M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1976 (1992).

Jameson's oft-quoted phrase, postmodernism is "the cultural logic of late capitalism."<sup>180</sup>

Marriage law, accordingly, is both already postmodern and, at least facially, the antithesis of postmodernism. It is postmodern, first, because it is "incredulous toward metanarratives," especially, perhaps, the Enlightenment metanarrative with its emphasis on rational thought. Second, marriage law is "fragmented and chaotic," as shown by our crazy quilt of state laws.<sup>181</sup> Similarly, extralegal norms reflect multiple, often conflicting conceptions of marriage, grounded in various social, cultural and religious norms.

At the same time, however, marriage law reflects, however imperfectly, the notion that marriage is often entered into because of a deep longing for stability and continuity. If postmodernism is about commodification, similarly, spouses—unlike khakis and soft drinks—are not fungible.<sup>182</sup> Indeed, these characteristics of postmodernism have been blamed for the *anomie* for which Professor Regan suggests marriage as an antidote.<sup>183</sup>

By looking at marriage law from a postmodern perspective, however, we discern that it actually serves multiple functions. For some couples, marriage may well serve as a refuge from a cold postmodern world. But for others, marriage serves very different purposes, often changing over time, facilitating or even enabling their engagement with "fragmentary and chaotic currents of change."<sup>184</sup> Indeed, this is reflected in the multiple alternatives family law already embraces.<sup>185</sup> But these alternatives do not

180. FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1989).

181. See *supra* notes 22-23 (explaining how the result in divorce varies as a function of geography). As Pierre Schlag suggests, many of the features associated with postmodernism, such as "the increasing fragmentation and heterogeneity of culture, the weakening of traditional historical narratives, the devolution of the modernist syntheses, the increasing speed, proliferation and succession of forms of life, the new inodes of critical practice and technique—are all already suffusing law." Pierre Schlag, *Foreword: Postmodernism and Law*, 62 U. COLO. L. REV. 439, 444 (1991); see also Balkin, *supra* note 179, at 1973 (asserting that "jurisprudence produced during the postmodern era will turn out to display elements of postmodernity whether this is consciously desired or not").

182. But see CROSBY, STILLS & NASH, *Love the One You're With, on 4 WAY STREET* (Atlantic 1971). Nor, of course, are spouses "commodities." Rather, they are subject themselves, with views of their own. See, e.g., IVANA TRUMP, *THE BEST IS YET TO COME: COPING WITH DIVORCE AND ENJOYING LIFE AGAIN* (1995) (regaling readers with divorce stories and advice on life after marriage).

183. REGAN, *PURSUIT OF INTIMACY*, *supra* note 107, at 94 (explaining that marriage "creates a structure of meaning within which the individual can make sense of her experience"). As explained below, marriage is already commodified, but this is inadequately addressed by current marriage law. See *infra* Part III.A.3.

184. HARVEY, *supra* note 47, at 127.

185. See Weekend All Things Considered: Arranged Marriages (NPR broadcast, Mar. 11, 2000) (discussing arranged marriages); Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992) (reviewing domestic partnership ordinances adopted throughout the country, usually to recognize homosexual relationships); Robert Marquand, *Kid's Choice of Religion in Divorce*, CHRISTIAN SCI. MONITOR, Dec. 12, 1997, at 1, 9 (discussing different religions and pointing out that more than 50% of Buddhists and Jews, 40% of Muslims and 30 to 40% of Catholics marry outside their faith); *Loving v. Virginia*, 338 U.S. 1 (1967)

begin to capture the full range of contemporary couples' actual experience, including the often tacit assumptions about roles, gender, money, children, and sex that shape their lives. The result of postmodern marriage law would be that just as jeans and Coca Cola are available everywhere, the options available in family law would be available everywhere.

### 1. *Incredulity Toward Metanarratives*

There has never been a "metanarrative" of marriage in this country, at least not in the sense that Marx offers a metanarrative of the state or Freud offers a metanarrative of the psyche.<sup>186</sup> Rather, since the seventeenth century, there have been a growing number of "petit narratives," or "little stories," from the informal marriages between slaves in the colonies<sup>187</sup> to the various roles of husband and wife prescribed by the many religions

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(striking down Virginia miscegenation laws); Current Population Reports, P20-509, U.S. BUR. CENSUS, 1998 (as of 1997, there were over 3 million mixed-race couples in the United States); *infra* note 177 (data on "green card" marriages); *Pyeatte v. Pyeatte*, 661 P.2d 196 (Ariz. App. 1983) (upholding restitution verdict for wife whose husband divorced her before putting her through graduate school as he had promised, even though she worked during his schooling); *supra* note 14 (describing statutory authorization of restricted divorce, or Covenant Marriage regimes); Lynn Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1 (1983-1984) (discussing underage marriage); *THE OTHER SISTER* (Touchstone Pictures (1999)) (portraying marriages between mentally disabled individuals). For a fascinating account of the nineteenth-century perception of eugenics laws as necessary for a "fit citizenry," see Mathew J. Lindsay, *Reproducing a Fit Citizenry: Dependence, Eugenics, and the Law of Marriage in the United States 1860-1920*, 23 L. & SOC. INQUIRY 541 (1998). *But see* TENN. CODE ANN. 36-109 (1999) (barring "imbeciles" from marriage). At different periods in our history, some of these would have been illegal, others merely shocking. Some barriers remain, and I am not arguing against all of them here. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that polygamy is not an acceptable alternative). The basis for their exclusion, however, may not be as acceptable today, as Peggy Cooper Davis has pointed out. COOPER DAVIS, *supra* note 37, at 52-53 (citing the Supreme Court's description of polygamy as an "odious" practice" that is "a feature of the life of Asiatic and African people"); *see also* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997) (noting that some of the arguments supporting the latter may be similarly applicable to the former). For the specific parameters endorsed here, *see infra* Part II.B.

186. This is the view of contemporary scholars. "In short, generalizations are suspect; emphasis on the particular and recognition of differences across time, race, and class are the hallmarks of rigor in modern historical scholarship." CARBONE, *supra* note 9, at 57; *see also, e.g.*, STEPHANIE COONTZ, *THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES 1600-1900* (1988). Historically, of course, there have been innumerable attempts to impose such metanarratives on a broad range of actual marriages. *See, e.g.*, FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1891); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* (1977); EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* (1975). For an illuminating and entertaining guide through these histories, *see* CARBONE, *supra* note 9, at 56-57.

187. STANLEY ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 54 (3d ed. 1976); COOPER DAVIS, *supra* note 37, at 30. Legal marriage in the colonies was further diversified by the extralegal norms prescribed by the various religious denominations. The Puritans, for instance, considered the wife's submission to her husband's will a central tenet of their religion. SALMON, *supra* note 74, at 8. This tenet was in tension with English common law rules regarding conveyance, dower, and marriage settlements. *Id.*

which still flourish in the United States,<sup>188</sup> up through the *pro forma* green card marriages of the 1990s,<sup>189</sup> and the commercial farce of *Who Wants to Marry a Multimillionaire?*<sup>190</sup>

If Americans may be said to have embraced any metanarrative, it is that of the Enlightenment. Historically, the Enlightenment project simply omitted marriage.<sup>191</sup> Locke referred to the "voluntary compact between man and woman,"<sup>192</sup> and his notion of the social contract<sup>193</sup> challenged the traditional relationship, at least in theory. But it was a long time before that challenge was extended to the private sphere of the family in practice.<sup>194</sup> According to Locke, authority was grounded not in some natural, divinely-ordained hierarchy, but in the "social contract," the agreement between the governed and the governing.<sup>195</sup> American revolutionaries eagerly embraced Locke's theory to challenge the political order (the "public sphere"), but they left the private sphere of the home and the family to the laws and customs of the old regime.<sup>196</sup>

Colonial America was a profoundly hierarchical society, grounded in a profoundly hierarchical notion of family. As set out in the philosophy of Sir Robert Filmer,<sup>197</sup> each household was a little monarchy, each male head

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188. See *supra* note 60 (describing religions which proscribe or restrict divorce, all of which have practitioners in the United States); *infra* note 208 (describing a schism within Southern Baptists as to the proper role of the wife in marriage).

189. See ELLMAN ET AL., *supra* note 7, at 122-23. See generally 1998 D.O.J. Ann. Rep., *Legal Immigration, Fiscal Year 1998* (reporting that spouses of U.S. residents made up 22.9% of immigrants admitted to the U.S. in 1998).

190. James Poniewozik, *Fox's Bride Idea*, TIME, Feb. 28, 2000, at 86 (describing *Who Wants to Marry a Multimillionaire?*, a TV show in which fifty women competed for the hand of a multimillionaire). The "marriage" was subsequently annulled. *Id.*

191. See OKIN, *supra* note 122, at 8-9 (arguing that the family is not a "just" institution). During the Enlightenment, family law was viewed as beyond the scope of universal objectivity; rather, it was appropriately left to local subjectivity. Thus, family law was left to the states, federalized only in exceptional circumstances.

192. REGAN, ALONE TOGETHER, *supra* note 26, at 10.

193. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 294-95 (Peter Laslett ed., 2d ed. 1967).

194. "Most important, although the ideal of equality espoused in the Declaration of Independence did not work immediately to allow women greater autonomy, it represented a powerful weapon for future use . . . . In this sense, the influence of the American Revolution is still being felt today." SALMON, *supra* note 74, at xvii. For a general discussion of the movement "from status to contract," see Bix, *supra* note 16, at 162 (citing SIR HENRY MAINE, ANCIENT LAW 165 (Dorset Press 1986) (1861)). See also SCHNEIDER & BRINIG, *supra* note 34, at 307-98 ("The Vow and the Covenant: The Contractualization of Family Law").

195. LOCKE, *supra* note 193, at 294-95.

196. "If ever there were a site to examine the simultaneity of the personal as the political, it is here. The legal treatises of the early republic describe households as hierarchical as if Locke had never written." Linda Kerber, *A Constitutional Right to Be Treated Like American Ladies: Women and the Obligations of Citizenship*, in U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 21 (Linda K. Kerber et al. eds., 1995). See generally NORTON, *supra* note 37.

197. ROBERT FILMER, PATRIARCHA, in PATRIARCHA AND OTHER WRITINGS (Johann P. Sommerville ed., Cambridge Univ. Press, 1991) (1684). "[The Filmerian] outlook saw family and state as analogous institutions, linked symbiotically through their similar historical origins, aims, and functions . . . . [This] worldview assumed the necessity of hierarchy in family, polity, and society at

of household a benevolent despot.<sup>198</sup> Hierarchies of subordination and responsibility were replicated within the family structure; that is, just as the wife was subordinate to the husband,<sup>199</sup> the children and servants were subordinate to the wife. This was reinforced and internalized through social relations formalized in family law, culture (including religion), and economic institutions.<sup>200</sup> It was further buttressed by widely held beliefs about women's inferiority in general and their "irrationality" in particular.<sup>201</sup> Accordingly, the implications of Locke's theory reverberated weakly in the domestic sphere.<sup>202</sup> The notion of marriage as a compact, entered into by equals, was as a practical matter unthinkable for most colonists.<sup>203</sup>

It was not until the 1970s that Locke's notion of marriage as a "compact," terminable at will by the parties, became generally reflected in the law. Although the no-fault revolution made no-fault divorce available everywhere, it did not establish a new metanarrative of marriage. Rather, as noted above,<sup>204</sup> there were a wide range of idiosyncratic responses by the

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large. Authority in all aspects of life theoretically emanated from the top, not the bottom, of those essential hierarchal structures." MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMATION OF AMERICAN SOCIETY* 4 (1996).

198. See, e.g., DEMOS, *supra* note 37.

199. The wife's subordination to her husband was a specific case of the general subordination of women to men:

Eighteenth-century Americans proved to have very clear ideas . . . of what behavior was appropriate for females, especially white females; and of what functions "the sex" was expected to perform. Moreover, both men and women continually indicated in subtle ways that they believed women to be inferior to men. . . . [M]ost of the white women who lived in pre-Revolutionary America turned out to display low self-esteem, to have very limited conceptions of themselves and their roles, and to habitually denigrate their sex in general.

NORTON, *supra* note 37, at xiv.

200. See, e.g., Stark, *supra* note 36, at 1011-25 (describing the denial of women's rights with respect to ownership of property and the denial of their rights in connection with work outside the home).

201. Like other distinctions grounded in gender, women's ostensible irrationality was viewed as immutable. See Judy Cornett, *Hoodwinked by Custom: The Exclusion of Women from Juries in Eighteenth-Century Law and Literature*, 4 WM. & MARY J. WOMEN & L. 1, 14, 18-24 (1997); cf. Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1199 (1999) (arguing that "conceptions of the family played an important role in imagining and establishing political authority in England and in her colonies in North America").

202. "The legal treatises of the early Republic describe households as hierarchical as if Locke had never written." Kerber, *supra* note 196, at 21; cf. ALICE BROWNE, *THE EIGHTEENTH CENTURY FEMINIST MIND* 20 (1987) (describing that Locke "argues that women and men should receive similar educations, and that the extent of a wife's subordination to her husband is a matter of contract [and] can be varied, or even abolished altogether. . . . He does not deny women's natural inferiority, but consistently plays it down.").

203. There were some conspicuous exceptions. Mary Byrd, for example, claimed a right to sue on her own behalf. Stark, *supra* note 36, at 977. Abigail Adams, more famously, admonished her husband John to "remember the ladies." *Id.*; see also *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762-1784* (L. H. Butterfield & Mary Jo Kline eds., 1975) (restoring the spelling mistakes and the sections of Adams' letters deleted in an earlier edition by her grandson, Charles Frances Adams, regarding matters he considered "unseemly," such as her pregnancies and child rearing). See generally EDITH B. GELLES, *PORTIA: THE WORLD OF ABIGAIL ADAMS* (1992).

204. See *supra* text accompanying notes 157-159.

states. In short, like other innovations in family law, no-fault divorce generated a range of alternatives, reflecting and incorporating numerous critiques.<sup>205</sup>

Skepticism remains about subsuming marriage in the rationalist metanarrative. Rather, love is still considered more of an art than a science.<sup>206</sup> There have been innumerable efforts, of course, to describe marriage "scientifically" and to reform the laws which govern it, but these have been conspicuously inconclusive.<sup>207</sup>

So marriage law remains a hodgepodge of pre-modern Filmerian residue,<sup>208</sup> liberal notions of equality, and religious and other ideas of what marriage is and should be. These cannot be resolved by appeal to reason, because we are wedded to the idea of "companionate marriage," or marriage for love, and love is subjective and irrational rather than objective and rational.<sup>209</sup> Thus, the Enlightenment metanarrative, along with everything else, is reduced in the context of marriage law to just another "petit narrative," another option.

205. Some blamed no-fault for the demise of the norms that spawned it. Others argued that it hurt women (although women invoked no-fault more often than men), because the liberal rhetoric of equality which accompanied it ignored the actual circumstances of women's lives. *See, e.g.,* FINEMAN, *supra* note 153; *see also* Friedman, *supra* note 153. "Result equality," or "substantive equality," in contrast, applies different rules to women and to men so as to bring everyone up to the starting line. *See, e.g.,* BARTLETT & HARRIS, *supra* note 162, at 262. This is not intended to trivialize the strategic importance of formal "equality" as a legal argument in certain contexts. "For the generation of women who came of age in the 1960s and the 1970s, 'equality' was a mantra—and a crowbar that had pried open schools, jobs, and activities previously closed to women." CARBONE, *supra* note 9, at 21.

206. *See* THOMAS LEWIS ET AL., A GENERAL THEORY OF LOVE (2000) (explaining that psychiatrists have discovered that the "neural systems responsible for emotion and intellect are separate, creating the chasm between them in human minds and lives"); *see also* ELIZABETH YOUNG-BRUEHL & FAITH BETHELARD, CHERISHMENT: A PSYCHOLOGY OF THE HEART (2000) (discussing Sigmund Freud and how psychoanalysis relates to love); *cf.* Gretchen Craft Ruben & Jamie G. Heiler, Essay, *The Restatement of Love (Tentative Draft)*, 104 YALE L.J. 707 (1994) (setting forth a mock systematization of romantic love).

207. *See, e.g.,* JOHN GOTTMAN, WHY MARRIAGES SUCCEED OR FAIL: WHAT YOU CAN LEARN FROM THE BREAKTHROUGH RESEARCH TO MAKE YOUR MARRIAGE LAST (1994) (describing data collection which enables director of family clinic at the University of Washington to predict which marriages will succeed). For an anecdotal critique of Gottman's approach, *see* Philip Weiss, *Is This Marriage on the Rocks?*, N.Y. TIMES MAG., May 7, 2000 at 61, 64. Weiss asserts that:

The heart of Gottman's method was a coding of not just our facial expressions but also our statements, performed by a young technician—and we were sophisticated people in our 40's, who between ourselves had been in therapy a million years. The technician had, in my view, taken our honest dialogue for dissatisfaction.

*Id.*

208. Although Filmer's pre-modern marriage law norms are no longer supported by law, these norms have contemporary iterations. *See, e.g.,* Hanna Rosin, *Southern Baptists Vote to Ban Female Pastors*, WASH. POST, June 15, 2000, at A1. *But see* Texas Baptists Reject Policy on Wife's Duty, WASH. POST, Nov. 10, 1999, at A24.

209. *See supra* note 206. *But see* GARY S. BECKER, A TREATISE ON THE FAMILY (1981) (containing a Nobel Prize-winning economic analysis of the family).

## 2. *Contingency and Commitment*

Postmodernism may be about "flux" and "chaotic currents," but marriage is supposed to be a rock (or at least a buoy) to which one can cling. Marriage is about commitment, about avoiding contingency, not wallowing in it.<sup>210</sup> Marriage is about *akrasia*, the Greek word referring to Ulysses' successful plan to have himself bound to the mast so that he could hear—but resist!—the sirens' singing.<sup>211</sup> Recognizing his own weakness, he devised external constraints to save himself from its consequences. Marriage, some argue, may serve a similar purpose.<sup>212</sup>

This a very modern story of marriage, a postmodernist might reply. Indeed, as Theodor Adorno and Max Horkheimer argue, this is the story of modernity itself.<sup>213</sup> As Rita Felski summarizes their argument, Ulysses "epitomizes the disciplined male bourgeois individual, foreshadowing the repression of the body and the feminine that will determine the development of Western culture."<sup>214</sup> It is a story, as feminist Patricia Jagentowicz Mills adds, that precludes any "independent conception of female identity, agency or desire."<sup>215</sup> The sirens are a setup; they are already reified. These temptresses are not human; they are magical and no mortal can resist them. *Akrasia*, accordingly, refers to a transcendent standard, one which is necessary to counter an irresistible and fatal attraction.

Postmodernists are skeptical about this transcendent standard. As Martha Nussbaum has pointed out, however, "getting rid of transcendent standards does not mean getting rid of good reasons."<sup>216</sup> Here, getting rid of *akrasia* does not mean getting rid of "commitment."<sup>217</sup> Rather, it means an ongoing exploration and interrogation of the term, an engaged effort to

210. "Americans continue to rank family obligations as the most important obligations," notwithstanding the lack of clarity as to the extent and nature of these obligations. Garrison, *supra* note 21, at 116.

211. BULFINCH'S MYTHOLOGY 242-43 (Avenel Books 1978). For another treatment of Ulysses, concluding with a critique of his failure to anticipate unforeseen consequences, see DiFonzo, *supra* note 3, at 940-45.

212. See generally ELLMAN ET AL., *supra* note 7, at 6 (describing the "importance of stable family values to stable societal values").

213. THEODOR W. ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT xvi (1979).

214. RITA FELSKI, THE GENDER OF MODERNITY 5 (1995); DOUGLAS KELLNER, CRITICAL THEORY, MARXISM AND MODERNITY 91 (1989). See generally Sigmund Freud, *Civilization and Its Discontents*, in THE FREUD READER 742 (Peter Gay ed., 1982) ("Sublimation of instinct is an especially conspicuous feature of cultural development . . .").

215. PATRICIA JAGENTOWICZ MILLS, WOMAN, NATURE AND PSYCHE 89 (1987).

216. Martha Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUM. 197, 202 (1994).

217. I may be accused here of "domesticating" postmodernism. Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 152 (1999) (discussing how modernist scholars have "accept[ed] [the] postmodern insight that all substantive ends and legal processes reflect distinctive cultural values and social positions" but "domesticate [such] postmodern insights by putting them in the lawyer's toolbox, to be taken out and used only when needed").

make expectations explicit; an ongoing<sup>218</sup> dialogue between the partners, situated in a legal context.<sup>219</sup> Indeed, such dialogue makes "commitment" workable in a particular relationship.<sup>220</sup>

Ulysses's abandoned wife, Penelope, suggests a wider range of possible responses to temptation. She withstands the relentless entreaties of suitors through her own daily, conscious effort. Penelope safeguards her marriage by telling her suitors that she will choose among them when her tapestry is complete. Unlike Ulysses's one-time orders to his sailors, Penelope's stratagem requires her to weave every day and painstakingly undo her weaving every night.<sup>221</sup>

It is the partners' responsibility to think through and expressly set out their expectations. Some may well require being bound to the mast.<sup>222</sup> Thus, they may specify draconian penalties for succumbing to temptation in their Marriage Proposals.<sup>223</sup> For others, fidelity is a given; the perceived cost in terms of the loss of trust is in itself a compelling deterrent. For still others, fidelity may not matter.<sup>224</sup> A conscious reminder, such as a wedding

218. "Ongoing" here means "intermittent" rather than "continuous." See *infra* Part II.B.3 (suggesting that the terms of each Marriage Proposal be renegotiated every five years, unless the parties decide to do so earlier). If one partner groans at the notion of "ongoing dialogue," it is likely to be the partner who benefits from suppressing such conversations and maintaining the status quo. See TANNER, *supra* note 118; cf. Pat Manardi, *The Politics of Housework*, in VOICES FROM WOMEN'S LIBERATION 336-42 (L. Tanner ed., 1970) (describing resistance to discussions about housework), cited in ELLMAN ET AL., *supra* note 7, at 145-46.

219. But see Marion Crain, "Where Have All the Cowboys Gone?": *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1906 (2000) ("Where gender roles in marriage were once clear, now they must be constantly negotiated and renegotiated, which is time-consuming and itself becomes an additional source of marital tension.").

220. See Scott & Scott, *supra* note 53, at 1246 (arguing that "the premise of contract . . . holds that individuals can often fulfill their purposes only by voluntarily undertaking legally enforceable commitments that limit their freedom in the future").

221. BULFINCH'S MYTHOLOGY, *supra* note 211, at 185 (describing Penelope's work on the robe for the funeral canopy of Laertes, Ulysses's father). Scholars suggest that, in general, contemporary women similarly spend more time on family care than contemporary men. JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* 100, 334 (1996) (reporting that employed women spend 25 hours per week on family care, while employed men spend 14.5 hours per week). Women also spend more time on daily tasks, such as cooking and dishes, while men spend more time on chores that need to be done infrequently, such as changing the oil in the car. HOCHSCHILD & MACHUNG, *supra* note 115, at viii-xi, 8-10, cited in ELLMAN ET AL., *supra* note 7, at 41. See generally JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* 174 (1985) ("[T]he home-bound woman experiences time as a stasis—either as a perpetual repetition or 'eternal return' . . ."); KATHRYN ALLEN RABUZZI, *THE SACRED AND THE FEMININE: TOWARD A THEOLOGY OF HOUSEWORK* 129 (1982) (describing housework in opposition to male quest or model).

222. See CARBONE, *supra* note 9, at 142-43 (discussing the function of fault laws).

223. See, e.g., *infra* Part II.B.2.b.ii.

224. See Rayner, *supra* note 59, at 42. It is not surprising that this range is gendered in a gendered society. There is an extensive literature on the sociobiology of this question. See, e.g., ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994) (arguing that men are "naturally" more promiscuous than women because of "evolutionary psychology"); David Buss, *Sex Differences in Human Mate Preferences*, 12 BEHAV. & BRAIN SCI. 1 (1989). For a feminist



band, may suffice. Marriage Proposals would simply encourage the partners to make their respective understandings explicit.

### 3. Commodification

Postmodernism has been linked to the commodification, or the economic value to be assigned a non-monetized choice, of sexuality and desire.<sup>225</sup> It is not my purpose here to further commodify either. Rather, Marriage Proposals would reflect and make explicit the ways in which marriage is already commodified.<sup>226</sup>

As Gayle Rubin explained in her groundbreaking essay, *The Traffic in Women: Notes on the "Political Economy" of Sex*,<sup>227</sup> marriage has always been an economic institution. While Rubin's anthropological study focused on the economic relations between families, other scholars have examined the respective interests of the partners protected, and left unprotected, by the ideology of the family and the market.<sup>228</sup> These include the economic costs to women of their non-economic priorities, such as nurturing and love.<sup>229</sup> As Margaret Jane Radin points out, if the model of marriage is a contract between autonomous bargaining agents, women who have not

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psychoanalytic perspective, ascribing gendered behavior to deeply internalized norms, see DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS IN HUMAN MALAISE* (1976). For a dazzling refutation, see NATALIE ANGIER, *WOMAN: AN INTIMATE GEOGRAPHY* 352-88, 355 (1999) ("I don't know the depths of our desire to marry. I don't know why we choose the partners we do, or what women really want from men or what men want from women. What I do know is that nobody else knows either."). Fox Network has found a way to exploit our difficulties in dealing with temptations. Rebecca Mead, *Situationism Comedy*, *NEW YORKER*, Jan. 22, 2001, at 27 (describing new "reality TV" show, *Temptation Island*, which "surrounds [a young man] with scantily clad sexual mercenaries, and plies him with . . . sickly-sweet frozen drinks made with rum," so that his girlfriend—and Fox viewers—can see what happens).

225. Norman Denzin, *Postmodernism and Deconstructionism*, in *POSTMODERNISM AND SOCIAL INQUIRY* 182, 184 (David Dickens & Andrea Fontana eds., 1994). For an analysis of the ways in which this exposes women prostitutes to exploitation, see Noah Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 *SIGNS* 277, 289-90 (1997).

226. This is often derided as a crass perspective. See, e.g., Jack Hitt, *Marriage À La Market*, *N.Y. TIMES MAG.*, March 17, 2000, at 17 (complaining that marriage is becoming "[a] bunch of pension rollover deferments, tax loopholes and health-care portability abatements").

227. Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157 (Rayna Reiter ed., 1975).

228. This was stunningly explored in Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983). See also Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 *YALE J.L. & FEMINISM* 81 (1997) (arguing for economic understanding of household work). Professor Crain explains:

[T]he relationship between women's labor market participation and the rising divorce rate is a confluence of factors that revolve around the shift to a postindustrial labor market and the corresponding alterations in gender roles and cultural norms, including the norm of marital permanence. . . . Thus, in order to fully address the problem of divorce, we must look beyond marriage to the market.

Crain, *supra* note 219, at 1917.

229. See, e.g., Annamay Sheppard, *The Unfinished Business of American Family Law*, in *COMPARATIVE PERSPECTIVES*, *supra* note 60, at 1. Victor Fuchs argues that the source of women's disadvantage is "that women care more about children." CARBONE, *supra* note 9, at 19.

bargained effectively are likely to suffer at divorce.<sup>230</sup> In the alternative, if marriage is conceptualized as a noncontractual sharing status in which the partners' contributions are not to be monetized, it should be recognized that equal bargaining power is illusory. Thus, Radin suggests that we look at the nonideal choices in each case and decide which is less bad.<sup>231</sup>

There are innumerable contexts during a marriage and at its conclusion in which the question of commodification arises.<sup>232</sup> These include choices regarding children, such as whether a parent should take a lower-paying job which offers greater flexibility, enabling her to pick children up after school, or whether a parent should sacrifice a job requiring a long commute in order to spend more time with his family. Work-centered issues generate another set of commodification decisions. Whose job gets priority? Should the family move if the corporate breadwinner is relocated?<sup>233</sup> Will the couple take turns, investing first in one career and then in the other?<sup>234</sup> Or will they pool their resources to enable one of them to become a doctor?<sup>235</sup>

Such decisions are probably made by most couples on an *ad hoc* basis, being discussed as they arise. As reflected in statistics on part-time work<sup>236</sup> and relocation,<sup>237</sup> however, women overwhelmingly put their children's interests and their husband's careers before their own. Whether these decisions are grounded in altruism, gender roles, or utilitarianism, they usually benefit the husband. If he accepts that benefit, he should be willing to share in its costs. If he is not willing to do so, at least the wife should be on notice that she can expect to bear the cost alone.<sup>238</sup>

230. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699-1700 (1990).

231. *Id.* (describing the "double bind," that is, the dilemma when either choice presents a risk of harm to women, a dilemma Professor Radin attributes to "the fact of oppression").

232. See Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 765 (2000) (book review) (describing work of feminists who have recognized the "benefits of connecting women's family labor with the conventional indicia of work").

233. See generally Singer, *supra* note 133, at 1115 (describing the many ways in which women accommodate "the demands of their spouse's employment").

234. *Pyeatte v. Pyeatte*, 691 P.2d 196 (Ariz. App. 1983) (holding that couple's agreement to take turns putting each other through school was not certain enough to be enforceable as a contract).

235. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989) (holding that wife who supported husband through medical school was entitled to short term rehabilitative alimony).

236. Ellman, *Divorce Rates*, *supra* note 29, at 25 (describing tendency of women to work fewer hours). "Even wives with graduate and professional degrees do not usually work full-time when their husbands' income exceeds \$75,000 . . . . It thus appears that as economic pressures . . . lessen, American wives increasingly choose to work part-time rather than full-time, regardless of educational level." *Id.* at 30 (analyzing Division of Labor Force statistics).

237. See sources cited *supra* note 233.

238. Several scholars have devised mechanisms through which such wives may shift these costs. See, e.g., Martha Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); see also Silbaugh, *supra* note 228; sources cited *infra*

Postmodern marriage law would offer a legal form for marriages already saturated with postmodernism. Incredulity toward metanarratives would be reflected in multiple forms of marriage. Commitment would be reconceptualized within contingent, ever-changing frameworks. The law would explicitly take into account the ways in which marriage is already commodified, and the costs of noneconomic priorities. The next section explains how Marriage Proposals propose to achieve these goals.

### B. *Marriage Proposals*

Marriage Proposals, which serve as modular alternatives to one-size-fits-all marriage that the partners may further alter over time, reflect postmodernism's acceptance of contingency and flux.<sup>239</sup> Second, they share postmodernism's incredulity toward metanarratives,<sup>240</sup> contemplating instead a proliferation of petit narratives, reflecting a wide range of marital objectives and terms.<sup>241</sup> Third, Marriage Proposals recognize that couples' views regarding threats to their marriages may be very different, and that even the views of the partners within a couple may be very different. Although many may seek a bulwark against flux and chaos in marriage, their approaches to *akrasia* are likely to vary significantly and may well change over time. Finally, Marriage Proposals recognize that marriage is an economic institution and that partners' choices have economic consequences for each of them as individuals, as well as for the family unit.

#### 1. *An Overview*

My proposal here is for alternative forms of marriage ("Marriage Proposals") which would govern the parties' rights and obligations during the relationship<sup>242</sup> as well as in the event of its termination by divorce.<sup>243</sup>

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notes 357-358. Forewarned is forearmed, but Marriage Proposals would extend the warning beyond those who read law review footnotes.

239. See *supra* text accompanying note 177; *supra* Part I.A.2 (discussing contingency and *akrasia*).

240. See *supra* Part II.A.1.

241. See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (discussing how settlement at divorce recognizes a wide range of values and interests); cf. Singer, *The Privatization of Family Law*, *supra* note 97, at 1565-66 (discussing privatization as a "transition strategy—a way of moving from an unjust and outdated system of public ordering to a system whose publicly-imposed constraints more accurately reflect social reality and more fairly allocate the benefits and burdens of family life").

242. As Professor Weisbrod has noted, Llewellyn realized that marital stability "had more fundamentally to do with marriage than with divorce itself." Weisbrod, *supra* note 4, at 791.

243. For a similar proposal, see Bartke, *supra* note 22. The surviving spouse's rights and obligations in the event that the marriage is terminated by death is beyond the scope of this Article.

Marriage Proposals would be available to gays, lesbians,<sup>244</sup> and other sexual minorities,<sup>245</sup> as well as to heterosexual couples.<sup>246</sup> Although some options are available to couples now, there is an often correct perception that antenuptial agreements signify some lack of trust on the part of at least one of the parties. For this reason, these Marriage Proposals would be mandatory; that is, each couple would be required to select among them.<sup>247</sup> As Professor Stake has pointed out in a related context, "By requiring [couples] to come to an agreement about divorce, the law would eliminate [their] choice. By taking away that choice the state eliminates the basis for negative inferences."<sup>248</sup> Each Marriage Proposal would be binding for a set term of years, subject to renewal, conversion or termination.<sup>249</sup>

244. See sources cited *supra* note 14. Professor Shultz endorses homosexual marriage for those who believe that "dignity, commitment, protected status, and benefits . . . accrue to marriage." Shultz, *supra* note 4, at 223. Twenty-nine states bar same-sex marriage. Katz, *supra* note 20, at 673 n.35.

245. This would include transgendered people as well as the estimated 1 in 2000 babies born with anomalous genitals. Natalie Angier, *X + Y = Z*, N.Y. TIMES BOOK REV., Feb. 20, 2000, at 10 (reviewing JOHN COLAPINTO, *AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL* (2000)).

246. See, e.g., Katz, *supra* note 20, at 664 (describing the "inclusion of certain kinds of committed relationships" in family law during the past 30 years). Many countries recognize domestic partnerships which are generally marriage-like, but do not contemplate parenthood. Martha A. McCarthy & Joanna L. Radbord, *Family Law for Same Sex Couples: Chart(ering) the Course*, 12 CAN. J. FAM. L. 101, 121 & n.60 (1998) (explaining that Denmark, the Netherlands, Norway, Sweden, Hungary, Iceland, and Spain, for example, have instituted Registered Domestic Partnership (RDP) schemes). Under the Marriage Proposals set out here, domestic partnership-type arrangements would certainly be an option, but so would parenthood. For example, British Columbia (Canada) added gays and lesbians to the definitions of "spouse" and "parent," giving them rights and obligations with respect to custody, access, guardianship, spousal and child support, support enforcement, domestic contract enforcement, and possessory rights to property. Family Relations Act, R.S.B.C. 1996, c. 128, *amended by* Family Relations Amendment Act, 1997 (proclaimed February 4, 1998); Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 *amended by* Family Maintenance Enforcement Amendment Act, 1997 (proclaimed February 4, 1998); McCarthy & Radbord, *supra*, at note 179. See also WILLIAM ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996). But see Lynn D. Wardle, *Legal Claims for Same Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998); John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994) (opposing same-sex marriage as inconsistent with "biological purpose" of marriage). See generally AMERICAN PSYCHOLOGICAL ASSOCIATION, *LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS* 8 (1995) (reviewing 43 empirical studies as well as other articles and concluding that "not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents"), cited in David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 539 & n.50 (1999).

247. Since all states have marriage license laws, ELLMAN ET AL., *supra* note 7, at 56, it would be very simple to require couples to select among options, such as those suggested here, when they apply for a license. See *infra* Part II.B.1.c. A brief description of each option, such as those set out in Part II.B.2, could be attached to the license application. In addition, state and local bar associations as well as interest groups such as women's organizations, fathers' rights groups, and domestic violence shelters, would probably generate educational pamphlets. Rasmusen & Stake, *supra* note 15 at 495.

248. Stake, *supra* note 33, at 427. As Marston observes, "Negotiating a prenuptial agreement provides an opportunity to learn a great deal about one's fiancé." Marston, *supra* note 4, at 906; see also J. THOMAS OLDHAM, *DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY* 4-18.3 (2001) ("[A] substantial number of marriages that would have resulted will not occur when lawyers are inserted into premarital negotiations."). For a list of "possible negative effects of premarital contracts,"

All Marriage Proposals would be subject to two caveats.<sup>250</sup> First, while parties would have considerable scope to modify existing domestic relations law, they could not violate other law.<sup>251</sup> Second, they could neither exacerbate existing economic inequalities between the parties nor create new ones, within specified limits.<sup>252</sup> The Uniform Marriage Proposals Act<sup>253</sup> would establish a ceiling (i.e., the maximum inequality allowed) which the parties could always lower. This may be understood as a strong version of the bar, frequently found in state law, against agreements that leave one of the parties a public charge.<sup>254</sup> By incorporating standards from means-tested assistance programs,<sup>255</sup> however, such laws perpetuate poverty for those who receive too much to qualify for such programs, but not enough to support an adequate standard of living. This version is justified because of the continuing economic disparities between men and women.<sup>256</sup> While this caveat may not be as necessary for same-sex couples,

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including the risks that trust will be destroyed and that the relationship will become "cold and business like," see Underwager & Wakefield, *supra* note 6, at 217-18. For suggestions for avoiding such effects, see *id.* at 224-27 (urging drafters to "emphasize positive aspects of the contract" and to provide for "periodic renegotiation[s]").

249. See *infra* Part II.B.3.

250. The intent here is to recognize and support what Professor Bartlett refers to as a "broad range of family forms that are capable of providing nurturing environments to its members." Bartlett, *Saving the Family*, *supra* note 19, at 816.

251. As Professor Weisbrod points out, for example, judicial enforcement of marital duties imposed by religion may be barred, because "personal services contracts are not specifically enforceable and the Constitution guarantees the free exercise of religion." Weisbrod, *supra* note 4, at 812; cf. *infra* Part II.B.1.a (explaining how Marriage Proposals could be enforced by the parties themselves through informal mechanisms, as well as through legal remedies not otherwise barred). But see, e.g., Nichols, *supra* note 29, at 989 (indicating that South Africa, India, Egypt, Great Britain and Israel all allow religious laws to govern marriage). This would include criminal law, of course. See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 3 (a)(8), 9B U. L. A. 369 (1987) (allowing parties to enter into contracts about "any other matter" including their personal rights and obligations, not in violation of public policy or statute imposing a criminal penalty"), § 3(a)(8), reprinted in FAMILY LAW STATUTES, *supra* note 169, at 145. While remedies and penalties for crimes committed by one spouse against the other are beyond the scope of this Article, it is assumed that any such crime would entitle the other party to repudiate the Marriage Proposal either in whole or in part. See *infra* note 270 (discussing treaty remedies). Thus, for example, if a wife were abused, she would be able to opt out of the Marriage Proposal or rely upon it, as she chose. See Bartlett, *Saving the Family*, *supra* note 19, at 817 (opposing "family relationships whose terms are set through violence and abuse").

252. See *infra* Part II.B.2 (describing specific options).

253. The reasons for a Uniform Act are set out in Part II.B.4 (absent such a Uniform Act, many of the proposed provisions would be subject to challenge under most, if not all, state laws).

254. See, e.g., *Button v. Button*, 388 N.W.2d 546 (Wis. 1986); ELLMAN ET AL., *supra* note 7, at 810.

255. As suggested *supra* note 254, means-tested programs are those which provide assistance for those whose means fall below a specified level. See, e.g., PRWORA, *supra* note 147.

256. See HACKER, *supra* note 112, at 185, sources cited *supra* note 112; see also Brod, *supra* note 113, at 239 n.46 (arguing that antenuptial agreements are usually used to protect the husband's wealth). See generally Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1244 (1998) (describing "the backdrop of the economic realities facing divorced women . . . and the evident failure of some separation agreements to take them into account," leaving women to "bear the full brunt,

couples in which the partners' earnings are roughly the same, or couples in which the woman earns more; it not only affirms and strengthens the notion of marital sharing endorsed in all American jurisdictions, but also quantifies it, enabling the partners to predict the result with greater certainty.

As described above, social science research supports a growing set of generalizations about marriage: the division of labor within most marriages is gendered;<sup>257</sup> most husbands earn more than most wives;<sup>258</sup> and most women suffer a decline in the standard of living after divorce,<sup>259</sup> while most men find that their standard of living improves.<sup>260</sup> At the same time, as Professor Bix warns:

Legal commentators must be careful and somewhat skeptical in referring to . . . the current "reality" about some institution. . . . The analysis naturally presupposes that they know far more about the social situation than they probably do. This likely is the case with marriage and with premarital agreements, where empirical work on attitudes and practices is fairly sparse.<sup>261</sup>

Thus, an important reason for making arrangements explicit is to put couples entering marriage on notice that this is not well-mapped territory. Requiring couples to enter into explicit Marriage Proposals would forewarn them that the relationship into which they are entering is inevitably an evolving and variable one, and that it is up to them to define it.

The risks, such as encouraging divorce (to take advantage of a good deal about to expire),<sup>262</sup> and related but distinct, the risk of women losing leverage in the marriage market,<sup>263</sup> would probably not be much greater than the risks presented by the availability of no-fault divorce itself. Indeed, because potential dumpees would be more aware of their situation and, thanks to the educational pamphlets provided by Professor Stake's

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including potential poverty, of their now wasted marital investment"). It is also necessary to counteract what Jana Singer has described as the tendency of the privatization of family law to exacerbate existing gender inequalities. Singer, *supra* note 97, at 1540-49.

257. See sources cited *supra* notes 111-119.

258. See *supra* note 112.

259. See *supra* note 134.

260. See *id.* The actual extent of this disparity, as suggested above, is a matter of considerable dispute. See Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 480 n.22 (1999) (describing the refutation of Lenore Weitzman's assertion that women experienced a "73% decline in standard of living . . . while noncustodial fathers experienced a 42% increase"). Professor Bartlett concludes, however, that "most who have studied the matter agree that custodial mothers and their children suffer economically from divorce, while fathers suffer less, or even benefit." *Id.*

261. Bix, *supra* note 16, at 160.

262. For a discussion of the risks of allowing conversion, see Stake, *supra* note 33, at 433. As a corollary, it might encourage divorce to avoid a larger agreed-upon settlement in the future. See, e.g., Dareh Gregorian, *Donald & Marla Set to Settle on Divorce Deal*, N.Y. POST, Apr. 25, 1999, at 16; *It's No Peach of a Deal—Marla Settles with Donald for Mere \$2M*, N.Y. POST, June 9, 1999, at 7.

263. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 547-48 (1998).

interest groups,<sup>264</sup> more aware of their rights, they would probably be better protected.<sup>265</sup>

*a. During Marriage*

Marriage Proposals would not detract from the legal norms that currently structure the external marriage, such as the law regarding spousal responsibility for necessities and the option of both parties to adopt new surnames or to retain their own. These are so widely accepted, and so rarely contested, that they may be understood to reflect a rough consensus.<sup>266</sup> But Marriage Proposals would make these explicit so that couples entering marriage would be on notice of the legal consequences.

More significantly, Marriage Proposals would add to existing law.<sup>267</sup> Specifics would vary, but in general marriage would be more subject to explicit norms, including legal norms. Historically, this has been discouraged by the notion of marital privacy and the corresponding reluctance of courts to interfere in the intact marriage. This reluctance is eroding, however,<sup>268</sup> and informal methods of addressing breach during marriage, such as those suggested by Robert and Elizabeth Scott,<sup>269</sup> as well as more formal legal remedies, such as restitution or money damages, are increasingly feasible.<sup>270</sup> Even where there is no enforcement, moreover, "lifestyle" provisions dealing with matters such as communication, children, sex, and money can "help the couple set positive goals for their life together and can facilitate working out problems as they arise."<sup>271</sup>

264. Stake, *supra* note 33, at 437 (suggesting that women's groups, for example, could produce and distribute educational pamphlets).

265. See Ertman, *supra* note 238, at 112; see also sources cited *supra* note 237; sources cited *infra* notes 357-358.

266. But see WADLINGTON & O'BRIEN, *supra* note 68, at 255 (questioning the continuing need for the necessities doctrine).

267. It seems clear that state divorce law could not restrict remarriage, for example. Katz, *supra* note 20, at 672. By a provision in the Marriage Proposal, however, the parties could. See *infra* Part II.B.2.b.

268. This is evidenced by the demise of interspousal tort immunity, see *supra* note 78, as well as the increasing acceptance of prenuptial agreements. See *supra* note 84; see also Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 L. & CONTEMP. PROB. 221, 248 (1995) ("[T]he level of judicial supervision required post-divorce . . . may soon persuade courts that their jobs might in fact be easier if there were more intervention during marriages.").

269. See Scott & Scott, *supra* note 53, at 1284-95.

270. Enforcement of such formal remedies, as well as less formal remedies (such as "apologies," see *infra* Part II.B.2.b) could be sought through arbitration or mediation. Mike McCurley, *Same-Sex Cohabitation Agreements*, in *PREMARITAL AND MARITAL CONTRACTS*, *supra* note 6, at 195, 209. Remedies could include not only traditional contract remedies such as specific performance, restitution, and damages, but remedies available for breach of treaty obligations under international law, such as repudiation of the agreement (in whole or in part) and "self-help." The Vienna Convention on the Law of Treaties Art. 60, 1155 U.N.T.S. 331, 346 (1980).

271. Underwager & Wakefield, *supra* note 6, at 222.

b. *In the Event of Divorce*

In the event of divorce, similarly, Marriage Proposals offer options familiar from the existing legal models of divorce described above.<sup>272</sup> Again, the main differences are: one, that under Marriage Proposals these options and the values they assume are explicit;<sup>273</sup> two, they are known before marriage; and, three, they would be available everywhere. In addition, Marriage Proposals offer options that are not generally available in the extant legal models, if only because they are not widely known. They also offer the possibility of deleting features that are usually taken for granted, assumed to be “givens.” For example, existing models of child support would continue in effect, but only as a floor;<sup>274</sup> that is, the parties could agree to pay more, but not less, child support in the event of divorce.<sup>275</sup>

Custody, similarly, would still be subject to a judicial determination of the “best interest” of the child at divorce. There would be a presumption, however, that the parents’ Marriage Proposal reflected their child’s best interest.<sup>276</sup> This could be rebutted by either parent showing clear and convincing evidence that it did not. Such evidence could include testimony by

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272. See *supra* Part I.B.1.

273. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (examining the implicit effect that law can have on social norms).

274. Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695 (explaining why support enforcement alone will not solve problem of children in poverty); cf. Stake, *supra* note 33, at 439 (describing problems in 1992, pre-federal mandate for child support guidelines).

275. Professor Garrison’s recent work has persuaded me that the state child support guidelines promulgated pursuant to the federal welfare law are inadequate. Garrison, *supra* note 21. The incorporation of those guidelines as a floor is not intended as an endorsement. Rather, the hope here is that Marriage Proposals would contribute to an emerging consensus to change norms and the law. “Many guidelines fail to ensure that children are protected from poverty, even when parental income is adequate to meet that goal. Moreover, they often *improve* the living standard of the child support obligor, while causing that of his child to plummet.” *Id.* at 44. For descriptions of the guidelines adopted by each state, see DIANE DODSON & JOAN ENTMACHER, WOMEN’S LEGAL DEFENSE FUND, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES (1994). See generally LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (1996 & Supps. 1997-1999).

276. This assumes that parents, especially parents who agree, are best able to determine what is in their children’s interests. Some states have explicitly adopted this view. See MASS. GEN. LAWS, ch. 208, § 31 (Supp. 1997); WASH. REV. CODE ANN. §§ 26.09.040, .050, .070 (West 1997) (requiring divorcing parents to develop their own “parenting plans”). It is also the premise of the ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *Tentative Draft No. 4* (Apr. 10, 2000) ch. 2 (“The court should order any provision of a parenting plan agreed to by the parents [unless it is involuntary or harmful].” *Id.* at § 2.07, 246). This part of the Proposal also assumes, perhaps less realistically, that parents will actually divide childcare in accordance with their Marriage Proposal. See *infra* text accompanying notes 284-288 (discussing partners who ignore their agreement). This would be a question of fact to be determined by a court or other factfinder if the parties disagreed. See generally Gordon, *supra* note 61, at 1437 (“Contrary to the overbroad claims by some of no-fault’s critics, recent research shows that while some children suffer serious harm from divorce, other children benefit from divorce, and many others suffer mostly from harms connected with divorce but distinct from it.”).



the child, where appropriate.<sup>277</sup> The parties would also be required to make definite and specific arrangements for visitation.<sup>278</sup>

### c. *How It Would Actually Work*

#### i. *At and During Marriage*

When the partners apply for a marriage license, there would be three forms, reflecting the substance of the three models described below.<sup>279</sup> Each would be accompanied by a brief explanation in lay terms, clearly setting out the parties' respective rights and responsibilities during marriage as well as at divorce.<sup>280</sup> In addition, each would set out procedures for the enforcement of various legally binding provisions, such as mediation. During marriage a party's refusal to comply with such a legal provision would be enforceable by a court. The recalcitrant party could be required to pay a fee or perform a specified amount of "community service"; that is, some onerous household task that neither partner especially enjoys.

Nearby would be a rack of pamphlets from various interest groups.<sup>281</sup> These could include, for example, groups advocating "Children First Marriage,"<sup>282</sup> "Green Marriage" (in which the parties would commit to recycling, paying extra for "green power" and Sierra Club Outing vacations), "International Marriage" (addressing the specific legal problems faced by partners of different nationalities, or with families in different countries), and even specific religious groups. As explained above, while religious provisions per se might not be legally enforceable, many of the secular provisions endorsed by various denominations could be. In addition, provisions regarding particular religious observances could be precatory. Marriage Proposals websites would undoubtedly sprout.<sup>283</sup> The parties would

277. The Uniform Marriage and Divorce Act directs the court to take "the wishes of the child as to his custodian" into account. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 156, § 402(2) (1987).

278. Melli et al., *supra* note 164, at 800 (urging the inclusion of specific visitation schedules in all divorce decrees); see Dowd, *supra* note 2, at 60 (noting that the "visitation patterns of divorced fathers without custody are uneven, and contact is infrequent and diminishes rapidly over time").

279. See *infra* Part II.B.2. For a sample form, incorporating the Gender Equity Model, see Appendix.

280. These would be similar to the descriptions set out in Part II.B.2, without the footnotes.

281. See *supra* note 261. These would probably reflect the range of alternatives already recognized in family law, set out *supra* note 183.

282. See sources cited *infra* note 361.

283. There are already thousands of websites providing advice on marital and premarital agreements. A Google search, for example, shows 10,100 references to "prenuptial agreement." <http://www.google.com/search?q=prcnuptual+agreement> (last visited 1/13/01). These include religious sites (<http://www.orthodoxcaucus.org/prenup/default.htm>); women's sites (<http://womensfinance.com/marriage>); advertisements for law firms; and a growing number of sites intended to help avoid lawyers ([http://family-law.freeadvice.com/pre\\_marital\\_agreement/premarital\\_agreement\\_custody.htm](http://family-law.freeadvice.com/pre_marital_agreement/premarital_agreement_custody.htm); [http://www.divorcecentral.com/legal/legal\\_answers\\_5.html](http://www.divorcecentral.com/legal/legal_answers_5.html)). The proliferation of websites and pamphlets reflect the postmodern proclivity for "dispersal" and "*petit histoire*," in contrast to modern "centering" and "narrative." See *supra* note 176.

complete the form, sign it in front of a notary, and file it with the clerk. As set out below,<sup>284</sup> it would be necessary to refile every five years.

What if the partners ignore the provisions of their Marriage Proposal? Although the Gender Equity Model requires shared parenting, for example, what if childcare “naturally” devolves to the mother (as it typically does)?<sup>285</sup> First, the educational pamphlets described above<sup>286</sup> would stress the legally-binding nature of some, if not all, of the provisions. Second, the Marriage Proposal itself could include specific enforcement provisions, tailored to specific circumstances.<sup>287</sup> Third, if one partner noted a dereliction and the other was unresponsive, the aggrieved spouse, in addition to the options s/he has now (such as exit, self-help, or emotional retaliation), could provide for a binding remedy at the time of renewal. If neither partner sought enforcement of violated provisions, so be it. The point here is not to force a particular lifestyle on the parties. If they want something different than that to which they agreed, that is their prerogative. If the father is shirking agreed-to responsibilities, however, the Marriage Proposal would give the mother some leverage.<sup>288</sup>

## ii. *At Divorce*

The state has a well-established interest in marriage and divorce,<sup>289</sup> and any divorce would be subject to final judicial approval.<sup>290</sup> It would not

284. See *infra* Part II.B.3.

285. See *supra* text accompanying notes 110-121 (describing gendered default norms common during marriage).

286. See *supra* note 264; see also *supra* note 283 (listing websites offering advice on marital agreements).

287. See generally FELDER, *supra* note 163.

288. As lawyers know, it is one thing to say, “I don’t think you’re being fair” and quite another to say, “The Marriage Proposal provides for equal hours of childcare. Last week I did ten extra hours. When are you going to make them up?” Professor Regan argues that “contract law might disfavor a spouse who responded to changed conditions by being flexible rather than insisting on behavior in accordance with the contract.” REGAN, *supra* note 107, at 150. The weaker spouse is more likely to be “flexible,” however, because she has no choice. The Marriage Proposal would at least give her claim added legitimacy. Cf. Levmore, *supra* note 268, at 226 (distinguishing family law as an area “where the expected outcomes are limited to self-help, private negotiation, or the extreme step of dissolution”).

289. As the Supreme Court famously held in *Maynard v. Hill*:

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

125 U.S. 190, 205 (1894).

This does not preclude “Libertarian Marriage” (if, for some reason of their own, the parties wanted the imprimatur of the state), in which the parties agree to keep state involvement to an absolute minimum, living off the grid, and becoming self-sufficient. They could not, however, agree to violate the law by refusing to pay income tax or social security.

290. This reflects the states’ well-accepted interest in protecting vulnerable parties. For a critical analysis of the states’ real and professed interests in marriage, see Brian H. Bix, *State of the Union: The States’ Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1 (2000).

be necessary, however, to institute suit treating the person with whom you have shared a life like a stranger who had crashed into you at an intersection. Rather, the first step would be to check the procedure set out in the Marriage Proposal for initiating divorce. In the Relational Model, for example, if the parties had stipulated a waiting period, the exit-seeking spouse would notify the other that it had begun. If counseling were required, appointments would be made. If either party refused to comply with previously agreed upon procedures, the other could compel by filing a motion to comply. This would be like any other civil action seeking injunctive relief; it would not trigger the vast equity powers of the traditional family court.

## 2. *Three Models*

By way of examples, I suggest what I call a Gender Equity Model, a Relational Model and a Customized Model. The first two models incorporate explicit objectives that are reflected in their names. Like expressions of legislative intent, these objectives would provide guidance for the partners, as well as decision makers, in the absence of specific controlling provisions. The last model is for couples who wish to adopt different objectives (not barred by public policy) or who do not wish to articulate any objective.

The first Marriage Proposal, the Gender Equity Model, is inspired by Swedish law regarding family leave.<sup>291</sup> Sweden has adopted gender equality as a norm.<sup>292</sup> Although the Swedes had a gender neutral family leave policy, disproportionate numbers of women took advantage of it, perpetuating gendered norms about childcare.<sup>293</sup> Accordingly, the law was modified in 1995, so that each parenting unit shared the leave. If one parent does not take his share, a portion of the total leave is forfeited.<sup>294</sup>

The second Marriage Proposal, the Relational Model, draws on the recent work of several family law scholars, including Professors Scott and Regan.<sup>295</sup> It emphasizes the benefits of mutual sacrifice for the common

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291. See <http://www.si.se/eng/esverige/insuranc.html> (last visited Dec. 9, 1999).

292. Anita Dahlberg & Nadine Taub, *Notions of the Family in Recent Swedish Law*, in FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES, *supra* note 60, at 133, 138 (noting that the Swedish Marriage Code "states explicitly that its purpose is an educational one of shaping ideas and attitudes . . . [It is an] effort to realize 'full actual equality.'").

293. *Id.* at 144-45.

294. Norway has recently adopted a similar law. See <http://odin.dep.no/ud/nornytt/uda-739.html> (last visited Dec. 9, 1999). For an analysis of the difficulties faced by American fathers taking family leave, see Morton H. Malin, *Fathers and Paternal Leave*, 72 TEX. L. REV. 1047 (1994). See also Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000) (suggesting a contract set-aside program to reward employers for establishing leave policies that succeed in getting men to take more parental leave).

295. The proposals here also draw on the ALI Final Draft Proposal for merging alimony and property division and making future income available for distribution. ALI, FINAL DRAFT, *supra* note 13, ch. 5, reprinted in ELLMAN ET AL., *supra* note 7, at 396-99.

good, the welfare of any children of the marriage, and the married couple. The third Marriage Proposal, the Customized Model, draws on recent scholarship on private ordering<sup>296</sup> and invites those with other objectives to design their own relationships.<sup>297</sup>

*a. Gender Equity Model*

*i. During Marriage*

Those couples choosing the Gender Equity Model<sup>298</sup> would assume roughly equal bread winning responsibility, adjusted for marketplace discrimination,<sup>299</sup> and roughly equal homemaking/caregiving responsibility.<sup>300</sup> This is not, however, a "gender neutral" model.<sup>301</sup> Rather, the underlying premise here is that, as Aristotle explained, it is just as unfair to treat people who are not similarly situated the same as it is to treat those who are

296. See, e.g., Bix, *supra* note 16; Marston, *supra* note 4; Faith H. Spencer, Comment, *Expanding Marital Options: Enforcement of Premarital Contracts During Marriage*, 1989 U. CHI. LEGAL FOR. 281 (1989). See generally PREMARITAL AND MARITAL CONTRACTS, *supra* note 6 (suggesting provisions for a wide range of objectives).

297. As suggested by an empirical study conducted at the University of California in 1977, these might include: love and support, career and emotional goals, personal growth or education. WEITZMAN, *supra* note 88, at 419-21; see also *supra* text accompanying notes 281-283. As Professor Bix notes:

A case-by-case approach sometimes seems to be a cowardly way out, passing on the hard decisions to others. . . . If, however, one determines that the important factors to consider were too numerous and various, there may be little choice. Courts have reached similar conclusions in family law probably more often than any other area of dispute. . . .

Bix, *supra* note 16, at 207 n.241.

298. See *infra* Appendix; see also, WEITZMAN, *supra* note 88, at 319 (describing a Contract in Lieu of Marriage Between Two Lawyers), Domestic Partnership ordinances, as well as agreements drafted as alternatives to marriage for gays and lesbians, generally assume gender equity. See, e.g., Note, *supra* note 185.

299. Most commentators recognize that marketplace reforms are crucial to gender equity in the home. See, e.g., Jana B. Singer, *Still Hostile After All These Years? Gender, Work & Family Revisited*, 44 VILL. L. REV. 207 (1999) (introducing Symposium articles describing the continuing "hostility" to working mothers, the relationship between gender equality in the work place and the division of labor at home and, crucially, "the importance of taking a multipronged approach" in eradicating gender inequality); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); OKIN, *supra* note 122, at 176; WILLIAMS, *supra* note 2. This model assumes that the couple can aspire to rough justice by recognizing the burdens of discrimination and allocating them more fairly within the marital union.

300. As Okin observes, "Any just and fair solution to the urgent problem of women's and children's vulnerability must encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor." OKIN, *supra* note 122, at 171; see Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251 (1998). But see Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990) (arguing that a partnership model is inappropriate).

301. "To argue that gender neutrality is or should be the goal of feminist reformist law is to further legitimate and validate the underlying institutions constructed and maintained in the context of patriarchy and dominance as neutral, objective and value-free." Fineman, *Women's Gendered Lives*, *supra* note 174, at 237.

similarly situated differently.<sup>302</sup> Another premise here is that "gender-related behaviors are a process of individual and social construction."<sup>303</sup>

Under this model, the partners would recognize ongoing gender discrimination in the marketplace and civil society and the ways in which such discrimination operates to delegate private sphere responsibilities to women,<sup>304</sup> especially when they are mothers.<sup>305</sup> The male partner would assume some of the costs of this discrimination.<sup>306</sup> As a corollary, this model would attempt to compensate for the gendered default in which, as Karen Czapanskiy puts it, mothers are "draftees" and fathers are "volunteers,"<sup>307</sup> so that fathers could participate as fully as mothers in child rearing.<sup>308</sup> The Gender Equity Model would address what Amy Wax

302. WILLIAMS, *supra* note 2, at 205. See generally, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1296 (1987) ("[Acceptance] asserts that eliminating the unequal consequences of sex differences is more important than . . . trying to eliminate them altogether.").

303. Kay Deaux & Brenda Major, *A Social-Psychological Model of Gender*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 91 (Deborah L. Rhode ed., 1979).

304. Wax, *supra* note 263, at 513 ("Although both partners benefit from marriage, men on average have more power in the relationship. That is, men are in a position to 'get their way' more often and to achieve a higher degree of satisfaction of their preferences."). Thus, even when the law is gender neutral, like the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (Supp. 1997) and the Swedish family leave law described *supra* at text accompanying notes 266-268, it is nevertheless likely to perpetuate gendered norms.

305. As Professor Williams points out, current wage gap data "seriously underestimate the extent of women's marginalization in the workforce, because they compare the wage rates of *full-time* women with those of *full-time* men in an economy where more than half of mothers do not work full-time." WILLIAMS, *supra* note 2, at 274; see also Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994). See generally Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI-KENT L. REV. 345, 345-51 (1993) (explaining how child custody law's assumption of gendered roles systematically favors men and oppresses women).

306. Such discrimination obviously calls for remediation on a much broader societal scale. See, e.g., Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 317 (2000). Williams notes:

An analysis of domesticity as a gender system allows us to see that women's "choices" take place in a context that requires ideal workers to command the social power available to men—to relocate their families and to enjoy a flow of family work that most fathers (but few mothers) enjoy.

*Id.*

307. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991). "Caretaking patterns of mothers and fathers are similarly distinctive. On the whole fathers do not perform an equal share of caretaking or housework, regardless of the wage work status of the mother." Dowd, *supra* note 2, at 2.

308. Coltraine and others argue that "shared parenting is critical to achieving gender equality." Dowd, *supra* note 2, at 55; see, e.g., Williams, *supra* note 306, at 336 (urging a "work paradigm restructured around values people hold in family life. This would not only end systematic discrimination against women; it would also empower fathers to break away from the provider role domesticity scripts for them."). This would also require restructuring men's work-related gender practices. See Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 760 (2000).

characterizes as "women's growing distaste for marital inequality" on the assumption that some men share that distaste.<sup>309</sup>

Both partners would contribute to joint living expenses, rent or mortgage, utilities, telephone and insurance. However, contributions would be weighted so that the burden of marketplace discrimination did not fall disproportionately on the woman.<sup>310</sup> The partners would share in the economic consequences of this discrimination, although individual as well as joint savings would be possible.<sup>311</sup>

This Model would also assume shared responsibility for household tasks.<sup>312</sup> As Arlie Hochschild and Ann Machung have demonstrated, a gendered division of labor is almost universal among heterosexual couples.<sup>313</sup> Under the Gender Equity Model, the division of labor would be explicit and fair. To minimize the parties' own gendered assessment of fairness, they might agree to a fair procedure for dividing the work.<sup>314</sup> Tasks that needed to be done daily or weekly, such as washing dishes, buying groceries, preparing and cleaning up after meals, and laundry,<sup>315</sup>

309. Professor Wax suggests that most men do not, noting that "men's unsurprising desire to maintain [marital inequality] may represent the most potent and ominous threat to the institution of marriage so far." Wax, *supra* note 263, at 672.

310. "Roughly equal" could be prorated to take market discrimination into account, reflecting either the parties' particular circumstances or the general norms for the particular racial, professional or other group to which they belong, if available. As Professor Williams notes, for example, "[I]n white middle class families the husband typically earns about 70 percent of the family income while the wife earns only about thirty percent, in black middle class families. . . the husband earns roughly 60 percent while the wife earns roughly 40 percent." WILLIAMS, *supra* note 2, at 175. In the alternative, the parties could consider adopting a model "from each according to his/her abilities, to each according to his/her needs."

311. As Professor Regan argues, this model "gives priority to the external stance toward marriage [because it] conceptualizes spouses as parties who associate for mutual gain, each of whom makes his or her own distinct contribution to the common enterprise." REGAN, *ALONE TOGETHER*, *supra* note 26, at 13. Here, the partners would explicitly define "mutual gain" to include nurturing opportunities as well as money. For example, the partners might agree that a lawyer mother would opt for "mommy track" and a lawyer father would look for a less demanding job if there was no "daddy track." After meeting their mutually-agreed upon obligations, each would be free to spend, save or invest the remainder of his or her earnings as s/he chose.

312. Men's time on housework has increased by one hour per day, while women's has declined by a little more than half an hour, although women spend more time on housework than men do. Dowd, *supra* note 2, at 50 (citing Bureau of Labor Statistics).

313. HOCHSCHILD & MACHUNG, *supra* note 115. As Professor Dowd notes, "Men can mother as well as women, yet they continue to do less childcare and housework. . . . The sexual division of labor, inside and outside the home, has been stubbornly persistent." DOWD, *supra* note 2, at 53-54; see Abrams, *supra* note 24, at 518 ("[W]e should question how choice is produced within heterosexual unions, where power relationships are complicated and often unequal").

314. Family lawyers are familiar with many such procedures. One partner could make two lists of tasks and the other partner could choose, for example. Or the partners could brainstorm regarding the tasks to be done and choose (taking turns); or they could draw on lists available from housecleaning services. Does this seem trivial? See Manardi, *supra* note 218, at 146 ("Housework trivial? Not on your life! Just try to share the burden.").

315. These are typically done by women. HOCHSCHILD & MACHUNG, *supra* note 115, at viii-xi. For a thought-provoking and successful effort to map the concepts and historical experiences of

would be divided separately from tasks that need to be done at longer intervals, such as changing the oil in the car.<sup>316</sup> The parties could agree that one of them would do most of the housework, but she would be entitled to some additional, agreed-upon boon.<sup>317</sup>

If the couple had children, the Gender Equity model would equally divide childcare responsibilities.<sup>318</sup> Because the subjective experience of childcare is likely to be gendered (men are likely to feel that they are doing more than their share if they are doing half, and women are likely to feel that they are doing less than their share if they are doing half),<sup>319</sup> this division may better be effectuated on an hourly basis; that is, each partner would be responsible for a roughly equal number of hours of childcare each week. Again, like household tasks, the allocation of childcare shifts could be decided by one designating shifts and the other selecting, or by rotating shifts. Whatever the arrangement, the point would be to avoid the usual arrangement in which the mother assumes responsibility for meals, baths and homework and the fathers assumes responsibility for trips to the zoo.<sup>320</sup> Indeed, if the child is the parties' biological child, the father might

women, work and family, see LOUISE A. TILLY & JOAN W. SCOTT, *WOMEN, WORK, AND FAMILY* (2d ed. 1989).

316. These are tasks typically done by men. HOCHSCHILD & MACHUNG, *supra* note 115. As Professor Wax notes, "Most studies show that men and women generally perform different types of tasks, with women doing more routine, everyday, 'low control' work that cannot be put off; men take more sporadic, discretionary, or 'high control' jobs. Wax, *supra* note 263, at 520 n.18 (citing ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF* 179-82 (1996)).

317. This could take monetary form, or the other spouse could spend equivalent hours on managing household finances and yard work. See, e.g., Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (proposing ways in which housework might be valued).

318. As Rena Uviller observed over 20 years ago, "Feminists of both sexes correctly perceive that unless the daily concerns of child rearing become the shared responsibility of both father and mother, there is little chance that women with children will achieve equality outside the home." Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 109 (1978); see also GERSON, *supra* note 101, at 8 ("In a recent study, married women reported that their husbands' share of housework remained low but that their participation in child care was much higher, averaging just over 40 percent of the total."). As Professor Dowd notes, "[M]any contemporary concerns about fatherhood have echoes in the past, and are often strongly connected to fears about overfeminizing boys, as well as a presumption about the rightness of strict gender roles and gender hierarchy." Dowd, *supra* note 2, at 37.

319. See BARTLETT & HARRIS, *supra* note 162, at 336 ("Studies show that although working women do twice as much family work as working men, only one-quarter to one-third see this arrangement as unfair.") (citations omitted). Men spend an average of 2.3 hours per workday with their children. Mothers spend an average of 3.3 hours per workday, with no change over the past 20 years. Dowd, *supra* note 2, at 50. See generally Stark, *supra* note 173, at 1498-1503 (arguing that women's nurturing is not innate).

320. HOCHSCHILD & MACHUNG, *supra* note 115, at 8-10 (1989) (cited in ELLMAN ET AL., *supra* note 7, at 41); see also ARLIE HOCHSCHILD, *THE TIME BIND* (1997) (describing ongoing time pressures on parents, especially mothers).

assume some additional responsibilities in the early months to compensate for the mother's "work" during pregnancy.<sup>321</sup>

The roughly equal childcare split contemplated under the Gender Equity Model would be modified for stepchildren.<sup>322</sup> This would be explicitly addressed by the parties in the Marriage Proposal, taking into account the ages of the children, their relationships with other parents, the existing relationship between the child and the stepparent, and the desired relationship. There would be a presumption that the child's biological parent would assume any unspecified obligations. For older and more mature children, a separate "side agreement" between the child and the stepparent could be considered.<sup>323</sup>

ii. *In the Event of Divorce*

At divorce, jointly owned property acquired by the parties during the marriage would be divided equally between them. Separate property acquired or owned independently by either party before the marriage would be retained by the individual owner.<sup>324</sup> This arrangement could be modified, however, by mutual agreement. The parties could decide, for example, that if either committed adultery, that party would forfeit a portion of his or her share of the joint property.<sup>325</sup>

Each party would leave the marriage with his or her own income flow.<sup>326</sup> This is the law in most jurisdictions,<sup>327</sup> but in marriages with substantial assets, courts may compensate for large disparities in income

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321. See Dowd, *supra* note 2, at 40 (explaining that birth "marks the beginning of the sharply gender-differentiated patterns of fathers' and mothers' involvement with their children").

322. For a survey of the law concerning the duty of a stepparent to support a stepchild, see Laura W. Morgan, *Positive Parenting and Negative Contributions: Why Payment of Child Support Should Not Be Regarded as Dissipation of Marital Assets*, 30 N. MEX. L. REV. 1 (2000). Multiple families, that is, the families of divorced individuals who have remarried and have children in second and third marriages, are not addressed in the child support guidelines of most states. Misti N. Nelc, *Inequitable Distribution: The Effect of Minnesota's Child Support Guidelines on Prior and Subsequent Children*, 17 L. & INEQ. 97, 107 (1999).

323. See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1838 (1993) (urging adults to ask how "children's experiences and values have been left out of the law"); see also Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994) (urging the recognition of a child's liberty interest in certain parent-like relationships).

324. Property acquired through inheritance, bequest or devise is exempt from equal division under existing law. HARRY D. KRAUSE, ET AL., FAMILY LAW 720 (4th ed. 1998); J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 3.03 (1998).

325. Stake, *supra* note 33, at 432. "Without changing the current unilateral no-fault rules regarding grounds for divorce, the law might allow parties to specify different consequences at divorce depending on the fault of the parties." *Id.* at 431.

326. See, e.g., Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 313-14 (1987) (describing no-fault aspiration as a clean break between the parties).

327. ELLMAN ET AL., *supra* note 7, at 329.



flow with property division.<sup>328</sup> Moreover, under most child support guidelines children receive at least some of the benefits of the higher earner's income. Some commentators have argued that sharing in their husbands' income flow might discourage some low-income wives from pursuing their own careers.<sup>329</sup> Others have suggested ingenious plans through which the wife's investment in the marriage could be capitalized.<sup>330</sup> Many states favor short-term support for a lower income spouse on the theory that she will "rehabilitate" herself.<sup>331</sup> The partners could vary the formula, drawing on the Relational or Customized models, while retaining the objective of this model.

If the effect were to exacerbate or create economic inequalities between the parties, however, it would be barred.<sup>332</sup> Current law is mixed on this issue, reflecting the lack of consensus and the often incorrect assumptions that women now have "equal opportunity" in the workforce.<sup>333</sup>

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328. In a case that apparently struck a nerve in corporate America, judging from the flurry of media attention, Lorna Wendt rejected a \$10 million settlement from her husband, Gary Wendt, CEO of GE Capital, and demanded instead half of his net worth. She was eventually awarded an amount close to her demand, approximately \$17 million. See Judith H. Dobrzynski, *A Corporate Wife Holds Out for a 50-50 Split of Assets*, N.Y. TIMES, Jan. 24, 1997, at D2; Paul M. Barrett, "Corporate Wife" Gains in a Divorce Ruling, WALL ST. J., Dec. 4, 1997, at B1; Judith H. Dobrzynski, *Judge Splits on Issues and Money in G.E. Executive's Divorce Case*, N.Y. TIMES, Dec. 4, 1997, at D2; Hubert B. Herring, *What's a Corporate Wife Worth in Court? Go Figure*, N.Y. TIMES, Jan. 25, 1998, § 4, at 1; Paul M. Barrett, *Wendy Divorce Dissects Job of Corporate Wife*, WALL ST. J., Dec. 6, 1996, at B1.

329. See Barbara Stark, *Burning Down the House: Toward a Theory of More Equitable Distribution*, 40 RUTGERS L. REV. 1173 (1988). Sharing in their husband's income flow during marriage discourages wives from developing their own careers because doing so would make them less available for the multitude of supporting tasks, such as picking up dry cleaning, arranging dinner parties, going to the post office, that make their task-free husbands such "ideal workers." WILLIAMS, *supra* note 2, at 64-142.

330. See, e.g., Ertman, *supra* note 238 (suggesting that homemakers' work be valued through premarital security agreements); sources cited *infra* notes 357-358 (describing proposals for income sharing); see also Ann Laquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55 (1991).

331. BARTLETT & HARRIS, *supra* note 162, at 427; see, e.g., TENN. CODE ANN. 36-5-101(d)(1) ("It is the intent of the general assembly that a spouse who is economically disadvantaged, relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance."). Implicit here is the idea that the higher earning husband will not object to paying short-term support, even though he is no longer receiving the benefits of a live-in service provider, not simply because it is "fair" (i.e., that she deserves it), but in exchange for long-term freedom from any other support obligation. For a powerful argument that long-term support is deserved, at least where the marriage was long and there were children, see Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454-56 (1994).

332. See *supra* text accompanying note 252 (describing exacerbation of income inequality). The ALI Principles offer another constructive alternative, treating "any significant disproportionality in income-earning capacity that evolved during the marriage as a marriage-caused loss and requir[ing] payments to reduce it in accordance with the length of the marriage." Bartlett, *Saving the Family*, *supra* note 19, at 847.

333. Women still earn only \$.76 for every dollar men earn. See *supra* note 112.

Some states look to the "contribution" of the homemaker spouse.<sup>334</sup> Others treat the higher income as sacrosanct. The guiding principle here, as elsewhere in the Gender Equity Model, would be "result" equality rather than "rule" equality.<sup>335</sup>

Just as there would be a presumption in favor of shared childcare responsibilities during the marriage,<sup>336</sup> there would be a presumption in favor of joint custody at divorce,<sup>337</sup> assuming the parents agreed<sup>338</sup> and that joint custody was in fact in the best interest of the child.<sup>339</sup> This presumption would remain flexible by recognizing that children's needs change as they get older and that parents' needs change at divorce. The parties would continue to interrogate gendered assumptions about these changing needs.<sup>340</sup> It would not be accepted without some empirical proof, for example, that "a teenage boy needs to spend more time with his father."<sup>341</sup>

334. ELLMAN ET AL., *supra* note 7, at 275-77. State statutes typically refer to the homemaker's "contribution," leaving it to lawyers and judges to define the term, which generally includes care of the parties' children and home, and may include dinner parties to entertain the husband's business associates. *See, e.g.,* TENN. CODE ANN. 36-5-101-(d)(1)(J) (Among factors to be considered in determining support is: "The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party.").

335. Singer, *supra* note 133, at 1114. As explained in note 205, *supra*, Professors Bartlett and Harris refer to this as "substantive equality." BARTLETT & HARRIS, *supra* note 162, at 261 ("While formal sex equality judges the form of a rule, requiring that it treat women and men on the same terms without special barriers or favors on account of their sex, substantive equality looks to a rule's results or effects.").

336. *See supra* text accompanying notes 318-321.

337. *See* Margaret F. Brinig & F. H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998). *See generally* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992) (explaining how parents typically share custody as if one parent has sole custody, notwithstanding formal legal arrangements for joint custody).

338. For a thoughtful discussion of the advantages and disadvantages of allowing private ordering regarding custody, *see* Stake, *supra* note 33, at 435-36. The extent to which the child should participate in the determination of custodial arrangements is a matter of some debate. While most courts take the child's wishes into account, *see* Elrod & Spektor, *supra* note 8, at 712, chart 2 (1999), the criteria to be used in assigning weight to such wishes is unsettled. *See, e.g.,* Elizabeth Seott, *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988) (report of empirical study finding social norm supporting participation by adolescents in custody determinations). Marriage Proposals would allow the parents to determine this, rather than an unknown state judge.

339. Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201 (1998) (arguing that joint custody agreements should be carefully scrutinized).

340. *See, e.g.,* JEAN L. POTUCHEK, *WHO SUPPORTS THE FAMILY? GENDER AND BREADWINNING IN DUAL-EARNER MARRIAGES* 26 (1997) (describing gender difference as "subject to continual challenge and negotiation, and always in the process of creation and re-creation").

341. Such interrogation, as feminists have noted, has often been at the expense of women. *See, e.g., supra* text accompanying notes 115 & 117 (describing "tender years" and "primary caretaker" presumptions).

## b. Relational Model

### i. During Marriage

The Relational Model makes the nurturing relationships that hold the family together a priority. The guiding principle for the Relational Model is that "no one would be penalized for contributing to the family."<sup>342</sup> It would usually require one of the partners to make homework and nurturing work a priority, especially if there were children.<sup>343</sup> The other partner would be the primary breadwinner, responsible for the major portion of the family income. The homemaker would probably contribute to the family's income, since increasing numbers of homemakers do.<sup>344</sup> The breadwinner, similarly, would be expected to contribute to nurturing work. As in community property states, all of the property acquired by either during the marriage<sup>345</sup> would belong to, and be managed by, both of them.<sup>346</sup>

### ii. In the Event of Divorce

Divorce under this model would protect the partners' investment in the marriage.<sup>347</sup> First, divorce would be subject to a mandatory waiting period,<sup>348</sup> as suggested by Elizabeth and Robert Scott, and possibly

342. See REGAN, *supra* note 107, at 164. I didn't intend to quote Regan, but to draw on him for a guiding principle. This could also be referred to as a "Communitarian" Model. Communitarians, such as William Galston, emphasize the importance of families in promoting liberal virtues. CARBONE, *supra* note 9, at 39.

343. Wives are still much more likely than husbands to sacrifice their careers in order to care for their children. Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 803; see, e.g., Cynthia Stames, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Association Under No-Fault*, 60 U. CHI. L. REV. 67 (1993). For an analysis of the "effect" of the market on the breadwinner/homemaker stereotype, see Crain, *supra* note 219, at 1899-90.

344. HOCHSCHILD, *supra* note 320, at 6. In 1994, 69% of married mothers worked for pay; in 1950 only 12.6% of married mothers worked for pay. More than 55% of women return to work within a year of giving birth. Sue Schultz, *The New Face of "Mom,"* KNOXVILLE NEWS-SENTINEL, May 8, 1999, at 1. Most married women work outside the home, but earn less money than men. HACKER, *supra* note 112.

345. With the exception, again, of property acquired through inheritance, gift or bequest. See *supra* note 275.

346. See *supra* note 67.

347. "Since 1995, almost half the states have considered some form of legislation designed to deter divorce." Crain, *supra* note 219, at 1896. See also Hadfield, *supra* note 256, at 1243 (citing Justice L'Heureux-Dubé's decision in *Moge v. Moge*, 99 D.L.R. 4th 456, 462 (1992), for the proposition that "the economic impact of traditional marriages—in which women sacrifice investment in their own earning capacity in order to maintain a household, raise children, and support their husband's investment in his earning capacity—carry on long past the marriage's end"); cf. Shultz, *supra* note 4, at 273 (explaining that by 1982, "breaches of marital obligations [were] largely irrelevant" under no-fault divorce). As Professor DiFonzo has pointed out, the "most disturbing aspect [of customized marriage . . . to limit marital choice] may be the effort to reinvigorate traditional roles within marriage." DiFonzo, *supra* note 3, at 935.

348. Scott & Scott, *supra* note 53, at 1260 (distinguishing between "lifelong" and "clearly prescribed" commitments and explaining the "signaling justification" for a mandatory commitment period). For a catalog of the handful of states which have attempted to impose waiting periods on couples seeking divorce, see DiFonzo, *supra* note 3, at 927-28. This enforced waiting period does not,

pre-divorce counseling.<sup>349</sup> The point of such mechanisms is to prevent rash or ill-considered termination of the marriage precipitated by, for example, an infatuation on the part of one spouse or an angry outburst by the other. In addition, the parties could agree to allow divorce only upon proof of certain pre-specified grounds or mutual consent,<sup>350</sup> thus restoring the fault-era leverage of the "innocent" party.<sup>351</sup> Unlike unhappy spouses during the fault-era, however, parties in such Relational marriages would not have the option of "migratory divorce" by moving to another state to take advantage of more liberal laws.<sup>352</sup> The parties might include provisions addressing the possible loss of their relationship and the anticipated psychological consequences, such as parent education or psychotherapy for the children or even a monetary boon for the other spouse in the event of adultery. In some cases, an apology, either public or private, might be required.<sup>353</sup>

Second, custody would reflect the childcare arrangements during the marriage.<sup>354</sup> Thus, if the mother was the primary caregiver at divorce, she

of course, mean that the parties would have to remain living together. They would be legally unable to remarry for two or even three years, however. *Cf.* Katz, *supra* note 20, at 672 (describing domestic partnership laws which limit a person for a period of six months from registering a new relationship as "more restrictive than divorce laws"). *But see* Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1453-61 (1992) (criticizing the imposition of penalties on those seeking divorce).

349. Connecticut, Iowa and Utah have instituted mandatory premarital or pre-divorce counseling. Crain, *supra* note 219, at 1896-97. For a description of the ways in which such programs have backfired and been abandoned, see Carriere, *supra* note 30, at 1712-13. *See generally* J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 129-36 (1997) (noting criticism that counseling is counterproductive).

350. Tennessee already restricts parties with children to fault grounds unless they agree on the term of the divorce. *See, e.g.*, TENN. CODE ANN. 36-4-103(a)(3)(b)

No divorce shall be granted on the ground of irreconcilable differences unless the court affirmatively finds in its decree that the parties have made adequate and sufficient provision by written agreement for the custody and maintenance of any children of that marriage and for the equitable settlement of any property rights between the parties.

351. *See generally* Haas, *supra* note 24 (arguing in favor of contractual restrictions on divorce).

352. *See infra* Part II.B.4 (describing Uniform Act under which law would be the same everywhere). Of course this would not preclude court challenges, but their prospective costs would simply be another deterrent, or another "rope," binding the errant spouse to the mast.

353. For an example showing how apology can be "an important step toward a workable divorce agreement and relationship" with a soon-to-be-ex-spouse, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1054-55 (1999). Apologies are increasingly part of dispute resolution. *See, e.g.*, MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 112-16 (1998) (describing the apologies included in U.S. reparations for Japanese-American survivors of internment and President Clinton's apologies to the survivors of a study that withheld proven medical treatment from a group of African-Americans suffering from syphilis). But apologies remain rare in divorce. Steven Keava, *Does Law Mean Never Having to Say You're Sorry?*, A.B.A. J., Dec. 1999, at 64. *See generally* Gordon, *supra* note 61, at 1463 ("Scholars have noted the power of government expression even absent coercion.").

354. Scott, *supra* note 57, at 625. Professor Scott justifies this as least disruptive for the child. Professor Bartlett endorses Professor Scott's proposal for matching "custody outcomes with the percentage of caretaking each parent performed during the marriage." Bartlett, *supra* note 260, at 483 n.34. It is also endorsed in the ALI *Tentative Draft No. 4*, *supra* note 276, at § 2.09(1) ("Unless otherwise resolved by agreement of the parents . . . the court should be required to allocate custodial

would continue in that role. Moreover, she would be entitled to the financial support necessary for her to do so, and assuring her an adequate amount would be an explicit and binding priority, even if it resulted in a substantially lower standard of living for the non-custodial parent.<sup>355</sup>

Third, in addition to the equal division of all non-exempt property acquired during the marriage, future income flow would be shared.<sup>356</sup> Jane Rutherford suggests a workable formula. Incomes would be added and then divided by the number of people in the family. Each member would get an equal share for a period of years equal to the duration of the marriage, or until the remarriage of the lower wage earner.<sup>357</sup> The formula could be adjusted to suit individual circumstances.<sup>358</sup> Knowing concretely what divorce would cost, and explicitly recognizing the cost to each party, would arguably encourage people to stay married, or at least deter those who imagine divorce might be an "easy out."<sup>359</sup>

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responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation. . . ."). This arrangement responds to the criticism that "[joint custody] rewards fathers [who were not primary caregivers] and gives them leverage at divorce to wring concessions from their wives." Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 517 (1996). Accordingly, each parent would have an incentive for assuming a fair share of childcare. By investing time in the child during the marriage, one could assure a continuing relationship with the child if the marriage should fail.

355. The Melson formula used to calculate child support in Maryland takes noncustodial spouses' finances into account. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 735-36 (1998). Even those child support guidelines that do not, however, are careful not to take too much from the non-custodial spouse. June Carbone notes:

To reinforce the two-parent family, and the importance of keeping both parents involved in their children's upbringing, Galston advocates "braking" mechanisms that would require divorcing parents to pause for reflection, and more effective child support enforcement, with the state insuring the identification of every child's parents and requiring all absent parents to pay a percentage of their income to the child's support.

*See, e.g.,* CARBONE, *supra* note 9, at 40.

356. *Cf.* Brod, *supra* note 113, at 241 ("Women tend to be harmed by premarital agreements that preclude income sharing because of the gender gap in earnings.").

357. Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 578 (1990); *see* Singer, *supra* note 133, at 1117-18 (suggesting one year of post-divorce sharing of income for every two years of marriage); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2260-61 (1994) (arguing for post-divorce income equalization throughout the dependency of any children and for any additional years in the ratio of one year for every two years of marriage); *see also* June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 Hous. L. REV. 359, 392 (1994) (urging income-sharing between non-cohabiting parents, whether divorced or never married); REGAN, *ALONE TOGETHER*, *supra* note 26, at 14 (arguing that divorce law "should draw on the internal stance and an ethic of care to provide equalization of the post-divorce standard of living of the partners for a period of time related to the length of the marriage").

358. *See, e.g.,* Stake, *supra* note 33, at 453 (suggesting various options, including a "promise that I will support my spouse to the extent that she or he has made career sacrifices during the marriage. This sharing of incomes will continue while we are both alive and whoever earns less has not remarried or started cohabitation with someone else.").

359. For a rigorous critique of restrictions on divorce as detrimental to women and children, *see* Bartlett, *supra* note 19, at 834-43; *see also* Lacey, *supra* note 348.

### c. Customized Model

The two models described above reflect some widely-held views about marriage and might provide useful defaults for many couples. The Customized Model option would offer an even fuller menu of options by drawing on the rich scholarship on private ordering as well as the case law that has developed in the fifty states. In addition, as Professor Shultz has pointed out, "[i]f 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>360</sup> The customized option could incorporate principles such as "to love and care for each other," or "to respect the rights of the parties' children,"<sup>361</sup> or any other objective<sup>362</sup> that was not contrary to public policy. An explicit objective to "support a Christian home," for example, would probably be stricken in many states because of the First Amendment.<sup>363</sup> Parties could always opt for indeterminacy,<sup>364</sup> but they would do so with the understanding that failure to choose an option would simply leave the choice to someone else<sup>365</sup> at divorce.<sup>366</sup>

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360. Shultz, *supra* note 4, at 331. Professor Shultz considers the following areas: income production and support, domestic services, marital property, open marriage, domicile, traditional vows, homosexual marriage, and duration. *Id.* at 220-23. See, e.g., ROBERT E. BURGER, *THE LOVE CONTRACT: HANDBOOK FOR A LIBERATED MARRIAGE* (1973).

361. For powerful arguments for the recognition of children's rights in the context of family law, see Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992); Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497. Other scholars have similarly urged the law to focus on children. Mary Ann Glendon, for example, has suggested that minor children should receive a share of marital property at divorce to be managed by the custodial parent. Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1559 (1984). For a description of the ways in which the law generally disempowers children, see Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1318 (1994).

362. Professor Crain, for example, suggests a "Universal Caregiver" model, which "would seek to redesign institutions around women's life patterns so that men as well as women would be encouraged to combine breadwinning with caregiving." Crain, *supra* note 219, at 1931.

363. While such an objective could not be held binding against a spouse whose religious convictions have changed, courts have upheld parental agreements about the religious upbringing of children at divorce. See, e.g., *Gruber v. Gruber*, 451 N.Y.S. 2d 117 (1982) (requiring child to attend religious school as stipulated in parents' agreement). But see *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. 1990) (holding that father's constitutional rights were violated by order prohibiting him from taking his children to services "contrary to the Jewish faith"). For a discussion of the child's possible First Amendment claims, see Susan Higginbotham, "Mom, Do I Have to Go to Church?"—The Noncustodial Parent's Obligation to Carry Out the Custodial Parent's Religious Plans, 31 FAM. L.Q. 585, 594-95 (1997).

364. See Stake, *supra* note 33, at 444.

365. This would give the state a more active role. Professor Shultz sets out four options reflecting variations on the state's at divorce. Shultz, *supra* note 4, at 212. The "state" in family court is usually male, since 90% of family court judges are men. Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 401 n.93 (1994).

366. Some couples might choose "indeterminacy" during the first term of the marriage and opt for cleaner provisions in subsequent terms. See *infra* Part II.B.3.

In addition to the options explicitly set out in the Agreement, any provision agreed to by the couple, not otherwise prohibited by law or by the caveat regarding economic inequality,<sup>367</sup> would be allowed. An agreement that the wife would not leave the house unless accompanied by a male member of the family,<sup>368</sup> for example, would be prohibited because the woman would be bargaining away a constitutionally protected right.<sup>369</sup> An agreement between the parties to spend vacations with in-laws, in contrast, would be permissible.<sup>370</sup>

The possibility of enforcing such provisions under existing law is negligible. Under a Marriage Proposal, provisions not otherwise barred would be enforced through a variety of contract mechanisms<sup>371</sup> as well as through "self-help" (e.g., making reservations for the agreed-upon visit with the in-laws). ADR would also be a promising method for resolving disputes regarding such provisions both during the marriage<sup>372</sup> and at divorce.<sup>373</sup>

367. See *supra* text accompanying notes 252-254.

368. This is currently the law under the Taliban regime in Afghanistan. Nancy Hatch Dupree, *Afghan Women Under the Taliban*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 145, 156 (William Maley ed., 1998); see also Gary Marcin, *Taliban-King's College History Department*, at [http://www.kings.edu/womens\\_history/taliba.html](http://www.kings.edu/womens_history/taliba.html) (last modified Dec. 3, 1998); Christiane Amanpour, *Tyranny of the Taliban*, *TIME AUSTRALIA*, Oct. 13, 1997, at 50.

369. See also Margaret Jane Radin, *Market Inalienability*, 100 *HARV. L. REV.* 1849, 1904 (1987) (arguing that certain core "aspects of personhood" should similarly be inalienable).

370. This is not to say legally "enforceable;" rather, I draw here on the relational concept developed by the Scotts in which terms are adhered to through shared expectations and understandings. Scott & Scott, *supra* note 53. For example, the parties could agree to switch homemaker/breadwinner roles every year. An agreement to pool some percentage of the income of each, retaining separate control over the remainder, or to impose monetary penalties at divorce on a party guilty of traditional fault grounds, such as desertion, in contrast, would be legally binding.

371. As Professor Stake explains, "no single damages rule will be efficient in all situations. Which rule is more efficient depends on what sorts of concerns predominate. If it is most important to deter inefficient breach, expectation damages should be awarded. If it is most important to deter overreliance by the non-breaching party, restitution is preferred." Stake, *supra* note 33, at 411. For a discussion of the limitations of money damages or specific performance in the marital context, see Shultz, *supra* note 4, at 215.

372. See generally, e.g., JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (2d ed. 1996); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987).

373. As Professor Shultz notes, ADR may offer welcome alternatives to a binary system of adjudication. Shultz, *supra* note 4, at 317-19; see, e.g., Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 *MINN. L. REV.* 1317, 1330-48 (1995) (providing a comprehensive discussion of the regulatory schemes for mandatory mediation). In a New York study, women received a somewhat larger share of major assets in mediated settlement. Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 *FAM. L.Q.* 223, 231 (1994). Their child support awards, however, were less than those of women using other mechanisms. NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 45-56 (1989). But see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1559 (1991) (arguing that women are more likely to make financial sacrifices in order to maintain relationships); but cf. Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 *MEDIATION Q.* 227 (1992) (discussing the role of mediation in disputes between divorcing spouses).

### 3. *Renewal, Conversion, Default, and Termination*

Each Marriage Proposal would expire by its own terms at the end of five years.<sup>374</sup> At that point, couples would receive a form in the mail (or electronically) on which to indicate their election to renew, convert, or terminate the relationship. Those who were comfortable<sup>375</sup> could simply check the box for renewal.<sup>376</sup> In the absence of an election, the default would also be renewal,<sup>377</sup> but there would be a token penalty, perhaps a small fine or a few hours of mandated community service, for failing to refile. The purpose would be to encourage "relationship maintenance," just as many states encourage vehicle maintenance by requiring cars to pass inspection as a condition for license renewal. If this seems onerous, it should be recalled that the renewal processes for drivers' licenses or license plates are more demanding in most states and must be done more frequently.<sup>378</sup>

Those who felt committed to their partners but less so to the specific terms of their relationship would have an opportunity to tinker. The five-year expiration date would encourage couples to renegotiate or rethink rocky relationships. Conversion, which would effectively establish a new marriage, would also be available before the five-year expiration if the parties agreed. For example, if the parties had a Gender Equity marriage which they wanted to convert to a Relational Marriage, their respective property rights, as of the time of the conversion, would have to be calculated according to the terms of their original agreement. This would just be on paper, of course, but the parties would have a clear record of their fi-

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374. Underwager & Wakefield, *supra* note 6, at 226-27 (Mandatory renegotiation assures flexibility and provides "an opportunity for recognition, discussion, and resolution of conflicts and problems that might otherwise be unrecognized or buried."). As Professor Stake notes, "increasing the span of an agreement increases the time over which a person's attitudes can mature into a new notion of fairness." Stake, *supra* note 33, at 424; cf. Shultz, *supra* note 4, at 223 (proposing a trial two-year marriage for a couple ambivalent about commitment).

375. This is not to trivialize what Professor Regan describes as "[t]he companionate model of marriage that has become pervasive over the last two hundred years or so..." REGAN, *ALONE TOGETHER*, *supra* note 26, at 7.

376. For a description of a lawyer who, with her husband, "took the agreement with them on their yearly wedding anniversary vacation and reviewed the terms of the contract," see Marston, *supra* note 4, at 906.

377. The parties could stipulate otherwise, if they so chose. They could agree, for example, that termination would be the default. See *infra* text accompanying notes 380-382.

378. Professor Regan suggests that such "periodic amendment" of the contract "would regularly inject an orientation that emphasized the distinct interests of the individual parties, and their need to rely on text rather than trust to ensure personal welfare." REGAN, *supra* note 107, at 150. Even if this is true, and it would obviously apply more in some marriages than in others, the implication that this would adversely affect the relationship assumes that neither is already focused on his or her "distinct interests" or relying, perhaps more than s/he should, on "trust."



nancial situation and their respective assets at the beginning of their "new" relationship.<sup>379</sup>

Termination-as-default, pursuant to the stipulation of the parties,<sup>380</sup> in which the parties would simply allow their marriages to expire, would probably be the most controversial option. Fewer marriages would be maintained out of inertia. Absent the affirmative choice to continue the marriage, it would end, according to whatever property regime the parties had elected.<sup>381</sup> Termination-as-default would operate only where there were no dependent children of the marriage,<sup>382</sup> although termination as a deliberate choice would remain an option, pursuant to the terms of the Marriage Proposal.

#### 4. *Recognition by Sister States*

As Professor Stake has pointed out in the context of mandatory planning for divorce, such arrangements would work only if they were accepted by other states.<sup>383</sup> Otherwise, exit would be as close as the nearest freeway. I propose going a step further and incorporating Marriage Proposals into a Uniform Law.<sup>384</sup> That is, each state would require couples entering into marriage to choose the kind of marriage they want. Their choice, pursuant to the Uniform Marriage Proposals Act, would be binding and enforceable in any state.

In the absence of such a law, many of the provisions suggested above would be subject to challenge under most, if not all, state laws. Under existing law, for example, partners in a Covenant Marriage (which requires

379. This might not be a terrible idea for Americans who seem to be adverse to saving or planning. See, e.g., Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1 (2000).

380. See *supra* note 377.

381. Whether a court appearance would be necessary is beyond the scope of this Article. Cf. Rasmusen & Stake, *supra* note 15, at 475 (suggesting that those authorized to form the legal bond of matrimony, such as clergy, should be authorized to sever it).

382. The impact of divorce on children remains the subject of ongoing controversy. See, e.g., Walter Kirn, *Should You Stay Together for the Kids?* TIME, Sept. 25, 2000 at 74 (reviewing JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000)). Judith Wallerstein argues that "the harm caused by divorce is graver and longer lasting than we suspected." WALLERSTEIN, *supra*, at 76. But see *id.* (citing Time/CNN poll in which 66% of the respondents said that children are better off in a divorce than in an unhappy marriage and only 23% said that children are better off in an unhappy marriage). It is widely recognized, however, that parents should at least consider the impact of divorce on any minor children of the marriage, thus precluding "automatic" divorce by default. See generally Gordon, *supra* note 61 (urging, *inter alia*, pre-divorce counseling for families with children).

383. Rasmusen & Stake, *supra* note 15, at 499 ("What would be needed . . . is a national law that says agreements regarding the grounds for divorce that are effective in the couple's domicile at the time of execution must be honored by other states.").

384. The Uniform Premarital Agreement Act would be a useful starting point. See UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 69 (1996). It has already been adopted by the majority of the states. Marston, *supra* note 4, at 899.

them to wait two years before they can get a divorce in Louisiana)<sup>385</sup> can move to Tennessee, establish residence, and sue for divorce under its more liberal statute.<sup>386</sup> Similarly, under many states' alimony laws, a provision to assure income flow to the non-earning spouse would probably be stricken.<sup>387</sup> Under the Uniform Marriage Proposals Act, such arrangements would be explicitly condoned as a matter of state policy.

This condonation is a major problem, however, because there is as little consensus about state policy as there is about marital norms. Rather, the main area of agreement seems to be to allow each state to maintain its own turf, even if it requires overruling the full faith and credit clause of the United States Constitution, as shown recently in the Defense of Marriage Act ("DOMA") debacle.<sup>388</sup> The inclusion of an opened-ended term such as "state policy" in a uniform act, to be interpreted not only by different states but also in conflicting ways, has backfired before. In the recently overhauled UCCJEA,<sup>389</sup> for example, the various meanings given by different state courts to the term "significant connection" led to the perpetuation of the same jurisdictional conflicts that the act had been promulgated to address.<sup>390</sup> The law governing marriage and divorce remains a hot political issue everywhere,<sup>391</sup> moreover, and many state politicians still consider themselves guardians of public morality.<sup>392</sup>

As a practical matter, however, their arguments are increasingly irrelevant in an increasingly globalized society.<sup>393</sup> Globalization refers not

385. See *supra* note 14.

386. TENN. CODE ANN. 36-4-104 (requiring six months residence in state if acts alleged as grounds for divorce were committed out of state).

387. See *supra* notes 357-358. "Alimony remains one of the most state-specific areas of family law. . . ." Elrod & Spector 1999, *supra* note 162, at 672. But see *id.* at 671 ("[F]orty-one states and the District of Columbia now allow a premarital agreement to govern spousal support under some circumstances.").

388. The Defense of Marriage Act, 28 U.S.C. § 1783C (Supp. 1997), authorized each state to disregard the marriage laws of any other state, insofar as same may recognize same-sex marriage. As many commentators have noted, DOMA may well be unconstitutional. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997).

389. See *supra* note 169.

390. *Kumar v. Superior Court*, 186 Cal. Rptr. 772 (Cal. 1982) (holding that under the UCCJA, the predecessor act to the UCCJEA, the initial decree state retains exclusive modification jurisdiction if any party remains there, because the presence of such a party constitutes "significant connection" under the act, notwithstanding the very different meaning given "significant connection" in the context of an initial determination).

391. See *supra* notes 153-159 (describing "no-fault revolution" and counter-revolution); Kim, *supra* note 382 (*Time* cover story on latest research on the impact of divorce on children).

392. But see CARBONE, *supra* note 9, at 36. Carl Schneider argues that family law has renounced "any claim to regulate the family in the name of morality, sexual or otherwise." *Id.*

393. See *supra* notes 1, 10, 36, & 185 (describing increased multiculturalism and mobility throughout the United States as well as the related increase in uniform family laws and even, as in the area of child support, the development of federal law). There is more dramatic, albeit less prolific, evidence of this trend in the promulgation and ratification of international treaties dealing with family

only to mobility,<sup>394</sup> but also to the growing heterogeneity, fragmentation, and skepticism toward metanarratives described above.<sup>395</sup> As Boaventura de Sousa Santos explains, globalization is “the process by which a given local condition or entity succeeds in expanding its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local.”<sup>396</sup> While this may not directly promote tolerance, over time it tends to co-opt parochial norms.<sup>397</sup>

Nor is state family law able to compel compliance with local norms.<sup>398</sup> Louisiana may not recognize Domestic Partnerships, but it cannot keep those who are in them out. Louisiana legislators may well decide, eventually, that it is more constructive to recognize other states’ Domestic Partnerships in the hope that other states will recognize Covenant Marriage.<sup>399</sup>

As Justice Brennan eloquently dissented in *Michael H. v. Gerald D.*:  
 [W]e must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume

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law. See Barbara Stark, *International Family Law*, Remarks at the AALS/ASIL Workshop on Globalization and Its Discontents, AALS Annual Meeting (Jan. 5, 2001).

394. See Stark, *supra* note 393.

395. See *supra* Part II.A.1.

396. Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalization*, 23 L. & Soc. INQUIRY 121, 135 (1998).

397. Growing skepticism toward local norms, as the religious right has repeatedly pointed out, is fueled by mass media. Local homophobia, for example, is not so much refuted as drowned out in mass market images of likable gays and lesbians in sitcoms and movies. See, e.g., SEXUAL RHETORIC: MEDIA PERSPECTIVES ON SEXUALITY, GENDER, AND IDENTITY (Meta G. Carstarphen & Susan C. Zavoina eds., 1999) (analyzing how media depictions affect the social construction of gender).

398. While most states do not recognize common law marriages formed within their borders, for example, they do recognize such marriages, if they were recognized by the state in which they were entered into, under the general principle that the validity of a marriage is determined by the law of the place where it was contracted. See, e.g., ELLMAN ET AL., *supra* note 7, at 68. For a description of common law marriage as a kind of precursor to the Marriage Proposals considered here (and like them, recognized everywhere), see Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998).

399. “Universal solutions, however tempting, create troubling incentives and raise questions of fairness. Additionally, because any single solution will seem inappropriate for many couples, it will be hard to gain the political support necessary to make a legislative change.” Stake, *supra* note 31, at 414. But see Peter D. Kramer, *Divorce and Our National Values*, N.Y. TIMES, Aug. 29, 1997, at A23 (arguing against Covenant Marriage on the grounds that it “invites couples to lash themselves to a morality the broader culture does not support”). As of this writing, homophobic laws remain in effect in many jurisdictions. See Abrams, *supra* note 23, at 524 (noting that gay and lesbian couples might eschew such proposals as long as sodomy prosecution remains a risk in their jurisdiction); see also Calvin Underwood, *Where the Democrats Stand*, ASSOCIATED PRESS, Mar. 2, 2000, 2000 WL 15785269 (Gore supports domestic partnerships); Interview by Carl Cameron with George W. Bush, Presidential Candidate, Fox News, Apr. 13, 2000, 2000 WL 6325911 (Bush does not).

that we can agree on the content of those terms and destructive to pretend that we do.<sup>400</sup>

The overlap here between classic liberalism and postmodernism should not be surprising. Postmodernism is the cultural logic of late capitalism, and late capitalism is driven by free market democracy, simply a recent iteration of classic liberalism. Whatever its origins, and they are polymorphous, multiculturalism—ethnic, racial, nationality, sexual orientation, and different ableness—is where we live now.<sup>401</sup> Marriage Proposals enable us to adapt our various traditions, understandings, and perhaps, above all, our personal aspirations as to what marriage can be, to our new surroundings.

### CONCLUSION

This Article has explained why one-size-fits-all marriage is dead and suggested how we might finally bury it. It has drawn on family law scholarship on private ordering and postmodern theory to articulate alternatives. It has shown how these alternatives are more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstraction we now call “marriage.”

Marriage Proposals would require couples to think about the legal and economic consequences of the relationship they are entering into before they are trying to get out of it. This would concededly require some educated decision making by the couple before the marriage.<sup>402</sup> But this need not be more difficult, at least technically,<sup>403</sup> than choosing an HMO.<sup>404</sup> Deciding what kind of marriage you want is surely as important.

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400. *Michael H. v. Gerald D.*, 491 U. S. 110, 141 (1989) (Brennan, J. dissenting).

401. See GLAZER, *supra* note 36.

402. See *supra* note 199. Professor Stake also suggests that “the state should supply free premarital counseling or legal advice to the uneducated poor.” Stake, *supra* note 33, at 437.

403. The emotional work might be harder, requiring parties to come to terms, and in some cases, requiring them to find or invent a vocabulary with which to do so. According to Professor Gottman, however, this might not be a bad thing. GOTTMAN, *supra* note 207, at 158-61 (“Advice for Him and Her”).

404. See, e.g., Eric Roston, *Picking a Plan*, TIME, June 12, 2000, at 45 (clarifying types of plans available).

## APPENDIX: GENDER EQUITY MARRIAGE PROPOSAL

*Our Intent*

1. We believe in gender equality and intend to express this in our marriage. We recognize ongoing gender discrimination in the marketplace and civil society which operates to delegate private sphere responsibilities to women, especially when they are mothers. As a corollary, we recognize that fathers generally find it difficult to participate as fully as mothers in child-rearing. We believe that marriage should be a partnership of equals.

*During Marriage*

2. We are both employed now and we agree to contribute on a pro rata basis to joint living expenses.

3. We agree to assume shared responsibility for household tasks. Because we recognize that housework is generally gendered, we agree to the following procedure for dividing the work:

a. We will draft a list of all tasks which need to be done daily or weekly, such as washing dishes, buying groceries, preparing and cleaning up after meals, and laundry. Another list will be prepared of tasks that need to be done at longer intervals, such as changing the oil in the car.

b. For each list, one partner (determined by a flip of a coin) will divide the tasks in what s/he considers a fair division. The other partner will choose.

c. This allocation of household tasks shall be renegotiated at the request of either partner.

d. The failure to perform a task in a conscientious manner on two consecutive occasions will entitle the other partner to a movie and a dinner out, both of his or her choice, at the other's expense. In the alternative, after three derelictions, whether consecutive or not, the defaulting party shall clean out the garage (or the basement, or the attic).

*Children*

4. We hope to have (or adopt) at least one child and we intend to share childcare responsibilities. Because we realize that perceptions of childcare are likely to be gendered, we will divide each full day of childcare into four-hour shifts, and alternate responsibility for these shifts.

5. We agree to work half time for the first three months of the child's life, assuming each of us can negotiate leave. During that time, we agree to research childcare options together until we find an arrangement that we both consider satisfactory.

6. We agree that we will try to raise our children to respect the inherent dignity of all people and, in this regard, we agree to have long, agoniz-

ing discussions about toy weapons (guns, swords, etc.) and dolls (such as Barbie). We agree, at least in theory, that there will be no violent video games, or whatever the 2010 equivalent is, in our home, although we anticipate some lively discussion, in which the child will probably participate, as to what constitutes "violence."

### *Divorce*

7. We hope that we do not divorce, but realize that most of those who do divorce had a similar hope at one time. If either party, at any time, wants to terminate the marriage, we agree that the marriage will end within two months. In that two-month interval, if either partner wants to try marriage counseling, the other agrees to participate.

8. Assuming there has been no adultery by either partner, property acquired during the marriage will be divided equally between us. Property acquired through the partner's own earnings and kept in a separate account or used to purchase a particular lamp or automobile, shall be that partner's own property.

9. We both consider adultery a betrayal and a violation of the marital trust on which this marriage will be based. Therefore, if either commits adultery, that partner will forfeit his or her share of any joint property, including the house, joint bank accounts, and any furniture or books purchased jointly.

10. Each partner will leave the marriage with no support obligation owed to the other. If, however, because of our respective employment situations at the time, the effect of this would be to exacerbate, or create, economic inequalities between us, this provision will be modified so as to eliminate such inequality.

11. We are mindful that each state sets child support obligations and are equally mindful that, as of this writing, such guidelines are woefully inadequate. We therefore agree that if, instead of the joint custodial arrangement described below, we agree that any child of the marriage shall remain primarily with one parent, that parent will be entitled to the amount set forth in the state child support guidelines plus 25 percent, at a minimum.

12. Just as we would share childcare responsibilities during the marriage, we assume we would share childcare responsibilities in the event of divorce, if we were able to do so as a practical matter.

13. Even in the event of divorce, it remains our intent that any child of this marriage will be as free of gender bias as possible. Therefore, we agree to continue to interrogate gendered assumptions regarding child-rearing. We believe that fathers and mothers are equally important to children of either gender.

*Renewal, Conversion, Default and Termination*

We recognize that this Marriage Proposal will expire by its own terms at the end of five years. One week before the renewal date, we will decide whether we want to renew, convert or terminate the relationship. We recognize that we may well want different things from this marriage as time goes by, and pledge to make a good faith effort to respond to each other's changing needs.

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Signature

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Date

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Signature

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Date