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Marriage and Opportunism

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Our marriage is dead, when the pleasure is fled:
Twas pleasure first made it an oath.[1]

I. INTRODUCTION

SPOUSE abuse is no longer a secret. It has become a thorn in America's conscience. Abuse even warranted a lengthy Supreme Court discussion in an opinion on abortion.[2] It is certainly worth thinking about whether anything systemic caused the apparent outbreak of violence in the home. If there is a legal "fix" that would remove incentives to abuse, and therefore reduce the incidence of abuse at the margin, we should know about it.

It is the thesis of this article that increased abuse and other undesirable behavior is a natural consequence of the fact that in some states the marriage contract cannot be enforced. We therefore reexamine the idea of marriage as a relational contract, pose the question of whether it has been rendered illusory by reforms in family law, and demonstrate empirically that changes in divorce and alimony statutes affect not only divorce

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[1] John Dryden, Songs 25.7 (1673).

[2] Planned Parenthood of SE Pa. v. Casey, 505 U.S. ——, *98–108, *114–19, 112 S. Ct. 2791 (1992).

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rates and the parties' relative wealth following divorce but also their behavior prior to and during marriage. We conclude that it is time to question whether unilateral no-fault divorce is worth its costs to the institution of marriage.

Marriage has been characterized alternatively as a sacrament, an institution, a status, and a partnership.[3] Although each of these terms is descriptive, and adds to our sense of what marriage is and can be, for purposes of economic analysis it is more useful to look at marriage as a contract. No one denies the fact that it is a contract that begins the marriage relationship, but when we speak of what exists after its inception, the contract analogy appears problematic. One objection to thinking of the ongoing marriage as a contract is that many of the terms of the marriage are prescribed by the state, not to be varied by the parties' private agreements.[4] Perhaps a more telling criticism is that much of what makes a good marriage has to do with the affective relationship between the spouses.[5] It seems improper to speak of something at once so intimate and so integral in the same terms used for a business transaction.[6]

Despite these difficulties, academics writing about marriage[7] and jurists dealing with its consequences[8] frequently use the language of implicit, or long-term, relational contract. The relationship is designed to endure for a long time (hopefully for the lifetime of the parties) and to be so complex that any attempt to specify in detail all of its terms would be futile as

[3] June Carbone & Margaret Brinig, Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 Tul. L. Rev. 953, 957–61 (1991); Michael Trebilcock & Rosamin Keshvani, The Role of Private Ordering in Family Law: A Law and Economics Perspective, 41 U. Toronto L. J. 533, 537–39 (1991).

[4] Ira Ellman, The Theory of Alimony, 77 Cal. L. Rev. 1 (1989); Lloyd Cohen, Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life," 16 J. Legal Stud. 267, 272 (1987); Lee Teitelbaum, Placing the Family in Context, 22 U.C. Davis L. Rev. 801, 805 (1989); Douglas Allen, An Inquiry into the State's Role in Marriage, 13 J. Econ. Behav. & Org. 171 (1990); Gary Becker & Kevin Murphy, The Family and the State, 31 J. Law & Econ. 1 (1988). Becker and Murphy note that because minor children cannot contract, state involvement efficiently takes the place of private arrangements.

[5] Teitelbaum, *supra* note 4, at 805; and Milton C. Regan, Family Law and the Pursuit of Intimacy (1993).

[6] For example, Ellman, *supra* note 4, at 30, argues that instead of the usual profit incentive, in marriage it is the relationship itself that is the goal and purpose of the venture.

[7] Margaret F. Brinig & June Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855 (1988); Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1518–19 (1983); Comment, Marriage as Contract: Towards a Functional Redefinition of Marital Status, 9 Colum. J. L. & Soc. Probs. 607 (1973).

[8] See, for example, Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1928); Robinson v. Robinson, 187 Conn. 70, 72, 444 A.2d 234, 236 (1982).

well as perhaps destructive. It is, moreover, exactly the sort of enterprise in which it is efficient for the parties to make significant and specific investments: contributions of time and energy and money, to each other and to their children, that may not see fruition for many years and that may be worthless if the relationship does not endure.[9]

In any other contract, even if the agreement allows either party to terminate the relationship at will, the parties can still expect their investments to be protected and their dealings to be governed by the laws of contract through the usual damage remedies in cases of breach.[10] Otherwise, no one would enter into such agreements or make such investments, for who would choose a deal with unenforceable terms?

While marriage has many of the characteristics of relational contracting, it has become in many places a kind of unenforceable, illusory contract:[11] it is splendid as long as both spouses are committed to the relationship but ethereal once one spouse decides to take advantage of the other. The thesis of this article is that the terms of the marriage contract are, to a great extent, the expectations of the parties as to the allowable parameters of marital behavior. We argue that changes in the institutional structure reduce the cost to one or both of the parties of undertaking activities inconsistent with the marital agreement. This inconsistent behavior is what we define as "opportunistic behavior" in the marital context. The changes in the institutional structure that make marital promises unenforceable and allow opportunistic behavior are the enactment in many states of no-fault divorce with the simultaneous removal of fault (breach) as a consideration in grants of spousal support and property division.[12] A marriage is, as are many business relationships, now

[9] See Cohen, *supra* note 4, at 268. Because of the difference in men's and women's spousal services, and the greater specificity of women's investments in the marriage,"women, as a class, lose systematically far more than do men" by divorce.

[10] See, for example, Dresser Industries, Inc. v. Pyrrhus AG, 936 F.2d 921 (7th Cir. 1991); Sofa Gallery, Inc. v. Stratford Co., 872 F.2d 259 (8th Cir. 1989); Carpenter Paper Co. v. Kellogg, 114 Cal. App. 2d 640, 251 P.2d 40 (1953); Robinhorne Const. Corp. v. Snyder, 113 Ill. App. 2d 288, 251 N.E.2d 641 (1969).

[11] See, for example, Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 570 (1933). Of course, all promises are not enforceable. See, for example, Richard Posner, Gratuitous Promises in Economics and Law, 6 J. Legal Stud. 411 (1977); Anthony Kronman, Contract Law and the State of Nature, 1 J. L. Econ. & Org. 5 (1985).

[12] Elizabeth Scott, Rational Decisionmaking about Marriage and Divorce, 76 Va. L. Rev. 9, 52 (1990); Theodore Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C. L. Rev. 879, 884 (1988). In 1972, Victor Schwartz suggested a tort action for "abuse of the marital relationship" to fill the gap left by the no-fault opportunity to escape "any civil or criminal sanctions for such conduct." The Serious Marital Offender: Tort Law as a Solution, 6 Fam. L. Q. 219 (1972).

Much of the work by economists on the consequences of no-fault has as its foundation the important piece by Elisabeth Landes, Economics of Alimony, 7 J. Legal Stud. 35 (1978),

terminable at will,[13] *but* without penalties for breach of other conditions.[14]

What would one predict in places where there is no way to enforce the marriage contract? Assuming that couples contemplating marriage pay any attention to these things,[15] one would hypothesize fewer marriages ex ante, fewer children (born later, after a longer trial period), more investment in individual careers rather than in the marriage, more divorces, and, ex post, more breaches by spouses in positions to behave opportunistically.[16] Some of these consequences may be temporary. At some future time, everyone might view marriage as little more than a long-term date, entered into to please parents or to signal that the relationship is exclusive. Since there would be fewer negative consequences for either party, such a marriage might be entered into more rather than less frequently. This "lite" version of marriage, however, would not support much investment by either spouse. The depressive effect on the

analyzing the effects of enacting unilateral divorce legislation and the importance of the institution of alimony.

[13] See, for example, Donald Butler & Marilyn Russell, Casting Stones: The Role of Fault in Virginia Divorce Proceedings, 20 U. Richmond L. Rev. 290, 295 (1986). In a state where there is no-fault divorce, termination of the marriage is not in itself breach, so there is no legal reason for awarding either party the loss. See Brinig & Carbone, *supra* note 7, at 876 & n.89. See also Lynn Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. Rev. 79, 99–100 (no-fault may bring more contests over collateral matters such as property distribution, spousal support, and child custody).

Our referee has pointed out that the breaching husband could lose not only support but also the services of the nonbreaching wife, while after divorce she need provide him no future services. There are two replies to his statement. First, because of the marriage market, the husband will probably be in a much better position following dissolution of the marriage than will his mate. Second, she is not released from all her marital obligations at the time of divorce: if she remarries or cohabits, she loses her right to alimony in many states.

[14] Scott, *supra* note 12, at 53; Philip Selznick, The Idea of a Communitarian Morality, 75 Cal. L. Rev. 445, 452 (1987); Mary Ann Glendon, State, Law and Family: Family Law in Transition in the United States and Europe 25 (1981).

[15] The fact that they are increasingly entering into premarital contracts suggests that they might, but there is contrary evidence as well. See, for example, Scott, *supra* note 12; and Lynn Baker & Donald Emery, When Every Relationship Is above Average, 17 L. & Hum. Behav. 439 (1993).

[16] As defined by Timothy Muris, opportunistic behavior "occurs when a performing party behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the explicit terms of the agreement, leading to a transfer of wealth from the other party to the performer." Opportunistic Behavior and the Law of Contracts, 65 Minn. L. Rev. 521 (1981). Even a threat is costly because resources are expended by both parties to perpetrate or protect against the behavior. *Id.* at 524. See also Oliver Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975); Benjamin Klein, Robert Crawford, & Armen Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. Law & Econ. 297 (1978); and Oliver Williamson, Transaction Cost Economics: The Governance of Contractual Relations, 22 J. Law & Econ. 233 (1979).

birth rate should continue. Thus it may be the traditional type of marriage, meaning one with substantial investments, that is on a permanent decline. This article presents a theoretical discussion and an empirical test of the effects of the switch to no-fault divorce, which made the marriage contract illusory. We begin in Part II with an analysis of the elements of the marriage contract and a discussion of the historical enforcement of its terms. Part III discusses the idea of marriage as a relational contract in the context of such contracts in commercial law. Part IV presents an empirical analysis of three predictions of the illusory contract concept: fewer marriages, fewer children, and more opportunism in the form of spousal abuse. Part V concludes that it is time to rethink enforceability of the marriage contract.

II. The Marriage Contract

A. Terms of the Marriage Contract

When couples marry, they may be unaware of exactly what responsibilities they are undertaking.[17] They may not think that the ceremony that marks their becoming husband and wife is anything but a rite of passage. Almost certainly they are not thinking of the rubric of "contract": of consideration and enforceability. Yet even the words of the marriage ceremony give substantive content to the idea of marriage. The marriage contract usually begins with the promise of each party to take the other as a wedded spouse, to have and to hold, for richer or poorer, in sickness and in health, for better or for worse, from this day forward, "as long as life shall last."[18] These are words in present tense, unlike those of the engagement contract, and are therefore not simply hopes of what is to be. At the very least they mean that the parties intend their relationship to last permanently,[19] that they plan to live together, care for each other,[20] and support each other.[21] They anticipate changes and adversity and

[17] Baker & Emery, *supra* note 15.

[18] These words are from the West Virginia Code, § 48-1-12b, prescribing the exact ritual for the celebration of marriage by judges. Virginia is unique in having a requirement.

[19] Compare Marriage of Dawley, 17 Cal. 3d 342, 131 Cal. Rptr. 3, 551 P.2d 323 (1973).

[20] See Department of Human Resources v. Williams, 130 Ga. App. 149, 202 S.E.2d 504 (1973).

[21] See Fincham v. Fincham, 160 Kan. 683, 165 P.2d 209 (1946); Hilbert v. Hilbert, 168 Md. 364, 177 A. 914 (1935); French v. McAnarney, 209 Mass. 544, 195 N.E. 714 (1935); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950); In re Higgason's Marriage, 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973)(medical care).

pledge to work through them.[22] In some ceremonies, the couple also makes promises to "love and cherish" and to "forsake all others." Whether or not these words are used, the state will assume that the spouses will be civil to each other, respecting bodily integrity.[23] In most states, there is the further explicit pronouncement that the parties will be sexually faithful to each other.[24]

The fact that the promises made during the marriage ceremony have explicit consequences can be demonstrated in several ways. First, an intention (which exists at the time of marriage) by one of the parties *not* to perform one of the "essentials of the marriage relationship" will allow the other to obtain an annulment of the marriage on grounds of fraud.[25] Physical or mental incapacity to perform will likewise be grounds for what is, in effect, rescission of the marriage contract.[26] Second, although many aspects of the marriage relationship can be modified by the parties' written agreement, certain terms, those included in every marriage contract, cannot be altered.[27] Third, in those states continuing to have fault grounds for divorce, breach of the marital promises by one party will allow the other to sue for divorce,[28] in addition to any other remedies available under civil or criminal law,[29] and may affect the award of alimony or the distribution of property. We turn now to a discussion of

[22] Scott, *supra* note 12, at 12. Robert Scott, in Conflict and Cooperation in Long Term Contracts, 75 Cal. L. Rev. 2005, 2007 (1987), notes that initially parties to long-term contracts wish to distribute risks in the least burdensome way. Once conditions change they seek adjustments to realize greater benefits from the enterprise.

[23] Cruelty is a cause of action for divorce in many states. See, for example, Ill. Ann. Stat. ch. 40, § 401(2); Mass. Gen. Laws Ann. tit. 3, § 208-1; N.Y. Dom. Rel. Law § 170; Pa. Cons. Stat. § 201A(b).

[24] Adultery is a cause of action wherever fault divorce has been retained. See, for example, N.J. Stat. Ann. § 2A:34-2; Ohio Rev. Code Ann. § 3105.01; Tex. Fam. Code § 3.02; Va. Code Ann. § 20-91.

[25] See, for example, Cal. Civ. Code § 4425; Ill. Rev. Stat. ch. 40, ¶ 301; Mich. Comp. Laws § 552.38; N.Y. Dom. Rel. Law § 7; 23 Pa. Stat. Ann. § 205; Tex. Fam. Code § 2.44. See, generally, Margaret Brinig & Michael Alexeev, Fraud in Courtship: Annulment and Divorce, 1, No. 4 Eur. J. L. & Econ. (in press 1994).

[26] See, for example, Ga. Code § 19-5-3; Idaho Code § 32-304; Ind. Code § 31-1-11.5-3; Md. Code Ann. § 7-103; Mass. Gen. Laws Ann. tit. 3, § 208-1; Va. Code § 20-45.11(b).

[27] This would include provision of spousal support and necessaries and the infinite duration of the marriage. See notes 19 and 20 *supra*. Such standardized terms reduce transaction costs and make parties better off if they would have been agreed to anyway. Charles Goetz & Robert Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089, 1090 (1981); Becker & Murphy, *supra* note 4; see also Allen, *supra* note 4.

[28] See, for example, Ill. Ann. Stat. ch. 40, § 401(2); Ind. Code § 31-1-11.5-3; Mass. Gen. Laws Ann. tit. 3, § 208-1; N.J. Stat. Ann. § 2A:34-2; N.Y. Dom. Rel. Law § 170; Ohio Rev. Code Ann. § 3105.01; 23 Pa. Cons. Stat. § 201 (A)(b); Tex. Fam. Code § 3.02-3.05; Va. Code § 20-91.

[29] This might include tort actions and criminal actions for adultery or assault and battery.

historical models of marriage, emphasizing the way the terms of the marriage contract discussed above were enforced in each time period.

B. The "Old Marriage" and the "New Marriage"

For the first sixteen hundred years of the Christian era, marriages were viewed as indissoluble,[30] as well as central to the preservation of land within particular families.[31] Although affection might grow out of long and close association between the spouses, it was by no means necessary for the practical purposes of marriage. This oldest and nearly universal model of marriage became obsolete in England and her colonies as first the Church, and then land, ceased being necessarily central to the relationship.[32] Marriage for romantic reasons became the ideal, and since human emotions need not remain eternally constant, and because marriage was no longer absolutely necessary for wealth, divorce became practically possible.[33]

The consolidated remedy of divorce and alimony became an exclusive remedy during the nineteenth century, largely because of the development of the doctrine of interspousal immunity. Although a spouse could sue for breach of contract or for ejectment from solely owned property, there could be no action for torts to person or property. In part this was because of a reluctance to become involved with the intimacies of the marital relationship, in part because the doctrine showed a fear of disrupting marital stability that probably was not warranted, given the severity of some of the harm alleged. As one court said, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence."[34]

This, then was the "old marriage," an enforceable contract designed for the most part to be permanent, which encouraged values of altruism,

[30] William Everett, Contract and Covenant in Human Community, 36 Emory L. J. 557, 560 (1987). Most early clerics interpreted the Bible to mean that validly contracted marriages could not be dissolved. The Catholic Church formalized this position at the Council of Trent in 1563. Roderick Phillips, Putting Asunder: A History of Divorce in Western Society 34–36 (1988). Annulment was available because without a marriage there was no bond to dissolve.

[31] 1 William Blackstone, Commentaries 358, 408.

[32] Edward Shorter, The Making of the Modern Family 255–68 (1975); Carbone & Brinig, *supra* note 3, at 962–65; Phillips, *supra* note 30, at 364–69, 378–82; Carl Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1842–45 (1985).

[33] Michael Grossberg, Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony, 26 Am. J. Legal Hist. 197, 208 (1982); Shorter, *supra* note 32, at 5; Mary Ann Glendon, The New Family and the New Property, ch. 1 (1975).

[34] State v. Rhodes, 61 N.C. 453, 459 (1868).

sharing, and investment in the marriage.[35] The idea of fault, and of alimony as damages for breach of the terms of the marriage contract,[36] was central to the stability of this scheme, for the *threat* of an action for damages would encourage women to invest specifically in the marriage while encouraging their husbands to adhere to their portion of the marriage bargain.[37] This freed husbands to invest in market skills, easily transferable to a new relationship, and encouraged more efficient production of market and household goods because of wives' comparative advantage in "household production."[38]

The "old marriage," which might have existed at any time prior to the 1960s, was characterized always in terms of an entity or a union rather than as some sort of an arrangement for gain between two players.[39] There was a clear understanding of what conduct was acceptable and what the terms of the contract were.[40] And there were clear consequences for breaching those standards: for women, the loss of their status and support,[41] for men, the loss of wealth through property division or alimony.[42]

The "old marriage," however, began to be threatened as an institution by the Progressive Era. The mortal blow came in the 1940s, when because of World War II large numbers of women entered the marketplace.[43] Soon a pattern emerged of numbers of unhappy spouses going to states

[35] See, for instance, Scott, *supra* note 12, at 12. See also Jeffrey Stake, Mandatory Planning for Divorce, 45 Vand. L. Rev. 397 (1992).

[36] "Damages" here is used in its broader sense including the remedy of specific performance of some marital obligations. See, for example, James Leitzel, Reliance and Contract Breach, 52 L. & Contemp. Probs. 87 (1989); Steven Shavell, Design of Contract and Remedies for Breach, 99 Q. J. Econ. 121 (1984). Alimony was equivalent to damages in the sense that it continued marital obligations. See Brinig & Carbone, *supra* note 7, at 870–72; Allen Parkman, Remedies for Breach of the Marriage Contract (paper presented at the George Mason Law and Economic Center's Conference honoring Judge Richard Posner, January 28, 1993).

[37] See, for example, Sidney v. Sidney, 4 Sw. & Tr. 178, 164 Eng. Rep. 1485 (1865).

[38] Gary Becker, A Treatise on the Family, ch. 2 (1981).

[39] Scott, *supra* note 12, at 12; Everett, *supra* note 30, at 558; Phillips, *supra* note 30, at 17.

[40] Hendrik Hartog, Marital Exits and Marital Expectations in Nineteenth Century America, 80 Geo. L. J. 95 (1991).

[41] Max Rheinstein, The Law of Divorce and the Problem of Marriage Stability, 9 Vand. L. Rev. 633, 654 (1956); Lawrence Friedman & Robert Percival, Who Sues for Divorce? 5 J. Legal Stud. 61, 76–77 (1976).

[42] Trebilcock & Keshvani, *supra* note 3, at 539–40, 544.

[43] Teitelbaum, *supra* note 4, at 810–11; Daphne Spain & Suzanne Bianchi, How Women Have Changed, 5 Am. Demographics 18 (May 1983); and Paula England & George Farkas, Households, Employment and Gender: A Social, Economic and Demographic View 148 (1986).

where divorces were easier or less costly to obtain and procuring "quickie" ends to their marriages. Another means to evade a relatively strict divorce law was the practice of collusive or fraudulent divorce, where the complaining spouse would perjure himself or herself or actually manufacture incidents (most often, of adultery) with the collaboration of the other partner.[44]

"No-fault" divorce was first introduced in 1969 in California, which until then had retained adultery as its only ground for divorce.[45] California divorces could now be granted upon a finding of "irretrievable breakdown of the marriage," which not only eliminated the necessity for a showing of fault but also the need for both spouses agreeing to the divorce.[46] The California statute was heralded by its proponents as the opportunity for release from moribund marriages. Some feminists argued that with greater financial opportunities available to women outside marriage and no barriers to exit from wedlock, women ought to be truly free to reach their individual potential. In addition, the threat of fault divorce, with its disastrous economic consequences, would no longer be there to penalize them if they left a bad marriage.[47]

Freedom, however, from the restrictions of fault divorces, that is, a nonfault liability rule, proved troublesome for the institution of alimony. Since fault (breach), which had previously been the trigger for alimony (damages), was no longer necessary (or available, in some cases) for divorce, alimony was to serve the function of providing for the needy spouse who could not support himself or herself because of lack of job training or education or the competing burdens of child care. Alimony

[44] Rheinstein, *supra* note 41, at 643. Friedman & Percival, *supra* note 41, at 65 & n.11; and Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in the United States 33–35, 47–51 (1988).

[45] Before 1967, several states allowed divorce upon the "no-fault" ground of "living separate and apart" for some period of time. This usually required both spouses to agree to divorce, however, since otherwise the departure of one spouse would be desertion. This separation ground remains the only "no-fault" ground in a number of states. Friedman & Percival, *supra* note 41, at 67.

[46] This is called "unilateral" divorce in some papers. See, for example, Elizabeth Peters, Marriage and Divorce: Informational Constraints and Private Contracting, 76 Am. Econ. Rev. 437 (1986); Parkman, *supra* note 36.

[47] See, for example, Martha Fineman, The Illusion of Equality 53–75 (1991); Martha Fineman, Implementing Equality: Ideology, Contradiction and Social Change, 1983 Wis. L. Rev. 789; Grace Blumberg, Reworking the Past, Imagining the Future: On Jacob's Silent Revolution, 16 L. & Soc. Inquiry 115, 130–31 (1991). Jacob suggests, however, that feminists were not a part of the California no-fault divorce movement. See Jacob, *supra* note 44, at 95–86. See also Herma Hill Kay, An Appraisal of California's No-Fault Divorce Law, 75 Cal. L. Rev. 291 (1987); Herma Hill Kay, Equality and Difference, 56 U. Cin. L. Rev. 1 (1987); and Milton Regan, Divorce Reform and the Legacy of Gender, 90 Mich. L. Rev. 1453, 1464–65 (1992).

was only to be a temporary measure, for once the dependent spouse was rehabilitated, or was no longer in need, alimony payments should not bind the other spouse financially. The marriage relationship ended in a "clean break."[48] The primary method of securing economic equality was to be through (nonhuman capital) property distribution, which could be made without regard to fault and with a recognition that each spouse contributed to the marriage as a partner, whether working in the home or the labor market.[49]

The changes to equitable distribution of property and the provision of alimony in cases of real need, however, have not been complete solutions. Since many women do not earn as much as their husbands,[50] their opportunity costs of remaining out of the market are lower, and frequently they remain primary caretakers for their children.[51] Despite gender neutrality of custody laws, if the couple breaks up, they still get child custody. In those marriages that do not last long enough to accumulate significant tangible property,[52] many women upon divorce have found themselves with lower wealth than before no-fault divorce. This unintended consequence of no-fault divorce has been noted by many writers.[53]

[48] Jacob, *supra* note 44, at 122. Texas never allowed alimony following an absolute divorce and views it "like car payments on a car that's been wrecked." Levinsohn, Breaking Up Is Still Hard to Do, Chicago Tribune Sunday Magazine, October 21, 1990, at 16. The "clean break" concept is criticized by Milton Regan in Market Discourse and Moral Neutrality in Divorce Law (paper presented at the Utah Law School, October 15, 1993).

[49] Community property jurisdictions have always viewed marriage as creating a community of assets to be shared equally upon its dissolution, whether by death or divorce. Michael Vaughn, The Policy of Community Property and Interspousal Transactions, 19 Baylor L. Rev. 20 (1967). The difference between the two regimes is discussed in Susan Prager, Sharing Principles and the Future of Marital Property Law, 25 UCLA L. Rev. 1 (1977).

[50] England & Farkas, *supra* note 43; Victor Fuchs, Women's Quest for Economic Equality 44–45 (1988).

[51] See, for example, Gary Crippen, Stumbling beyond Best Interests of the Child: Reexamining Child Custody Standard-setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference, 75 Minn. L. Rev. 427, 453 (1990); Elizabeth Scott & Carolyn Derdeyn, Rethinking Joint Custody, 45 Ohio St. L. J. 455, 468 & n.58 (1984); Phoebe Ellsworth & Robert Levy, Legislative Reform of Child Custody Adjudication, 4 L. & Soc'y Rev. 167, 202 (1969).

[52] Many marriages end with the couple owning only their automobiles and perhaps a small equity in a home. If the house must be sold and the proceeds divided and the woman must find alternative housing for herself and the children, the small cash award of the property division will be quickly spent.

[53] See, for example, Lenore Weitzman, The Divorce Revolution (1981); Lenore Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181 (1981); Fineman, Implementing Equality, *supra* note 47; Peters, *supra* note 46; Heather Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L. Q. 79 (1986). Weitzman's work has been thoroughly criticized in many circles, including the recent popular work by Susan Faludi, Backlash 19–27 (1991). See also Greg Duncan & Saul Hoffman, A Reconsideration of the Economic Consequences of Marital Dissolution, 22 Demography 485 (1985); Suzanne Bianchi, Family Dis-

There is yet another repercussion of no-fault divorce that has been largely ignored in the literature, and that is its effect upon the marriage contract itself.[54] The marriage obligations have been themselves rendered illusory because no penalties can be exacted for breach of any marital promises. There is therefore no incentive other than a moral obligation or a feeling of affection to prevent either party from engaging in postcontractual opportunism.[55] Some legislatures have tried to meet this objection to no-fault divorce as well, by compensating spouses who make sacrifices during marriages. Courts, struggling with this problem, have modified existing legal doctrines to recognize additional assets.[56] Privately, more and more couples have written antenuptial (and postnuptial) contracts that can be the basis for actions for breach.[57] But there has been little recognition of the cost of the problem, that is, a change in economic incentives.

Although the divorce rate itself has leveled off after its steady growth since the Second World War[58] and its upward shift from trend after the introduction of no-fault statutes, there has been no apparent decrease in opportunistic behavior. For one thing, more and more cases of spousal

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ruption and Economic Hardship, Survey of Income and Program Participation, U.S. Bureau of the Census, March, 1991, Series P-70, no. 23; and Martha Garrison, Marriage: The Status of Contract, 131 U. Pa. L. Rev. 1039 (1983). Even Duncan and Hoffman, however, found that women's living standards declined 30 percent in the first year after divorce, while men's rose 10–15 percent. Although the question of whether women were much better off following divorce under the fault system remains controversial, the perception that they were is nearly universal. See Faludi, at 19. It is their perception (or fear of leaving) that may allow opportunism.

[54] It may, however, lie underneath Part 4 of Marjorie Schultz's Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 207 (1982); and it is certainly discussed in Cohen, *supra* note 4; in Stake, *supra* note 35; and Scott, *supra* note 12.

[55] Carl Schneider has reminded us that social norms inhibit breaching behavior even in the business context. The Contract in Family Life and Business Practice, (paper presented at the International Society for Family Law North American Conference, Moran, Wyoming, June 11, 1993).

[56] Obviously both alimony and property distribution are forms of division of future income streams. An advanced degree earned during marriage is thus property to be distributed at its dissolution, see O'Brien v. O'Brien, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985). Unlike most property, however, a degree does not have a fixed value at the time of divorce but depends upon the contribution of the degree-holding spouse. See, for example, Graham v. Graham, 194 Colo. 429, 574 P.2d 75 (1978). An award of its present value therefore constricts the future behavior of a spouse in a way that dividing an asset whose value is more completely determined upon market conditions does not.

[57] Trebilcock & Keshvani, *supra* note 3, at 556–59, suggest that this will deter opportunism.

[58] The rate leapt after no-fault divorce. Thomas Marvell, Divorce Rates and the Fault Requirement, 23 L. & Soc'y Rev. 537, 546–63 (1978). The trend may reversing, at least temporarily, although studies suggest that 60 percent of first-time marriages will eventually end in divorce. Carlee Scott, As Baby Boomers Age, Fewer Couples Untie the Knot, Wall St. J., November 7, 1990, at B1, col. 3.

and child abuse are reported. Of course, this may be due either to increased reporting facilities or to the increasing consciousness of women who may believe, for the first time, that something may be done if they complain about abuse. We would expect, however, this increase in reporting to occur across all states. Our empirical work attempts, through regression analysis, to control for some of the variables which might indicate increased reporting, such as per capita income. A second change is that more and more decisions chronicle sacrifices made to advance the career of an ungrateful spouse. It is possible, of course, that we are dealing with "lagged" behavior. The investments in human capital characteristic of the reported "degree division" cases occurred prior to a realization by the disadvantaged spouses that such investments might not be recouped. We would predict that henceforth there would be fewer such marriage-specific investments. Thus women would be less likely to specialize in household production or invest in their husbands' careers, and more likely to continue working to advance their own careers during the marriage. Some writers suggest that this behavior itself may undermine the marriage.[59]

These observations are consistent with the change from a paradigm that recognized that marriage, like any other relational contract, provides opportunities for rent-seeking opportunism. In the older system, the rule of fault was designed to limit such rent-seeking behavior through its delineation of implied or express covenants, violation of which led to breach of the marital contract with its concomitant damage remedy. Since the marriage contract can no longer be enforced, an unexpected consequence of the "divorce revolution" is that the bargain itself has become illusory.[60]

As we have already noted, many commentators see marriage as akin to a contract terminable at will.[61] Outside the marriage context, however, the principles of breach, and remedy for breach, remain in dischargeable contracts while the agreements remain in effect. What currently happens in marriages in many states[62] is that they are *never* effective contracts,

[59] See, for example, Stake, *supra* note 35, at 405–6.

[60] In some respects, the institution of marriage has come full circle: both in the covenant marriage and in the new marriage any behavior is tolerable, albeit for different reasons.

[61] See, for example, Scott, *supra* note 12, at 17; Haas, *supra* note 12, at 884; Stake, *supra* note 35, at 401, 406.

[62] Some states permit fault to bar or limit the award of alimony, while others have eliminated it entirely. Although in all states no-fault divorce is available, no-fault alimony is the rule in Alaska, Arizona, Colorado, California, Delaware, Florida, Illinois, Iowa, Maine, Montana, Oregon, Washington, and Wisconsin, a total of thirteen states. In eight states, marital misconduct amounting to grounds for fault divorce is an absolute bar to alimony, and in twenty-eight and the District of Columbia, it may be a factor. Texas has never offered postdivorce alimony.

so that the parties to them are free to act opportunistically at minimal cost.[63]

III. Marriage as a Relational Contract

Marriage before the age of divorce was a relationship in which the wife had only a slight source of power because she could threaten to impose a minimal financial burden on the husband if he "abandoned" her. The husband, however, had a very great deal of power because he could threaten to "cast out" the wife, whereupon she would have only very limited sources of income/social standing and no opportunity to remarry.[64] One would expect to find, and did find, many "marriages of convenience" where marital fidelity was not important, particularly for husbands,[65] and wives were thought of in some ways as little more than servants.[66]

There were all sorts of problems with this characterization of marriage, including the fact that husbands would frequently desert their wives, leaving them remediless and without any property or other means of support.[67] The law gradually evolved, in consequence, to a new form of "equilibrium marriage," where there was a state-imposed set of contractual obligations, a remedy for breach (specific performance through alimony, or continuation of the duty of support),[68] and a clear understanding of what was and was not permissible behavior. For this period of somewhere in the neighborhood of two hundred years in this country, marriage

[63] Schneider noted recently that social norms inhibit negative behavior even in the business context. See Schneider, *supra* note 55. In both business and family relations, freedom to take advantage often leads to opportunistic behavior. Charles Meyers & Steven Crafton, The Covenant of Further Exploitation—Thirty Years Later, 32 Rocky Mtn. Min. L. Inst. 1 (1986).

[64] Anthony Kronman, Paternalism in the Law of Contracts, 92 Yale L. J. 783 (1983), notes that substitution of damages for specific performance of obligations may increase feelings of regret, and threaten "moral health."

[65] Gerhard Mueller, Inquiry into the State of a Divorceless Society, 18 U. Pitt. L. Rev. 545, 577–78 (1957).

[66] See, for example, Amy Stanley, Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation, 75 J. Am. Hist. 471 (1988).

[67] Mueller, *supra* note 65, at 559, 567, 572, suggests that there was also a tremendous amount of adultery, migratory divorces, and even wife selling.

[68] See, for example, Smith v. Smith, 530 So. 2d 1389, 1988 Ala. LEXIS 424 (1988); Kelly v. Kelly, 183 Ky. 172, 180, 209 S.W. 335, 338 (1919); Hecht v. Hecht, 259 Cal. App. 2d 1, 67 Cal. Rptr. 293 (1968); Stoner v. Stoner, 163 Conn. 345, 307 A.2d 146 (1972); Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920); Anderson v. Anderson, 104 Utah 104, 138 P.2d 252 (1943); Tonjes v. Tonjes, 24 Wis. 2d 120, 128 N.W.2d 446 (1964); but see Aubert v. Aubert, 129 N.H. 422, 529 A.2d 909 (1987); and Heacock v. Heacock, 402 Mass. 21, 520 N.E.2d 151 (1988).

was a contract,[69] but because of its complexity and indeterminate length, it was a relational or institutional contract, one in which the parties were incapable of reducing important terms of the arrangement to well-defined obligations.[70]

North Dakota in 1985 became the last state to adopt no-fault divorce,[71] meaning that fault on the part of the other spouse need not be proved by the plaintiff in order to obtain a divorce. Some states, those we have called "no-fault" in this article, go a step further.[72] In these, fault cannot be considered either in obtaining the divorce or in securing alimony, so there can be no significant activities that trigger breach. There can be no breach and no remedies, and the contract has become illusory. The wife may have even less power than in the divorceless form of marriage because the only threat she can make is that it may take the husband some time to replace her "household services" after their divorce (either by purchase or remarriage). It is more difficult for the woman to remarry, and she usually earns far less than the husband in the job market, for a variety of reasons.[73] Upon leaving, therefore, she loses more than he does, which gives him more bargaining power.[74] The cost of deviant behavior has decreased, so one would predict both that there will be more divorces and that there will be more opportunistic behavior by spouses.[75]

This opportunism should occur primarily in marriages entered into under the old rules. For couples marrying more recently, the effect would be different and more complex. Our empirical work looks at both types

[69] Interestingly enough, however, it was during this period that Joel Bishop, in his Commentaries on the Law of Marriage and Divorce § 3 (6th ed. 1881), began the notion that marriage was a status.

[70] See Goetz & Scott, *supra* note 27, at 1091; Meyers & Crafton, *supra* note 63.

[71] Although the state laws vary from divorce upon a showing of "irreconcilable differences" to those allowing divorce after separation for a specified period of time ranging from six months to three years, basically all states now allow marriage to be terminable at will. See Scott, *supra* note 12, at 17–18.

[72] We disagree with Peters's division between "unilateral" and "mutual" divorce states according to 1978 divorce laws. One problem is that she puts the states retaining fault grounds as well as "unilateral" grounds into the unilateral category because "in these states the unilateral rule dominates." Peters, *supra* note 46, at 446. The other problem is that in several of her "unilateral" states, fault can still be used in the determination of alimony. Because we used data from years up through 1987, it is also relevant that some states have changed to what we would call a pure no-fault system since 1978.

[73] See Regan's thoughtful discussion of these issues, *supra* note 47.

[74] It may be the threat of leaving that in fact triggers spouse abuse. Joan Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1 (1991).

[75] People now pay attention to the situation where one spouse obtains a divorce after the other has worked to allow his or her graduate education, whether the other has been bilked systematically of assets for a separately held business enterprise, or where there is spousal or child abuse. See notes 92–94 *infra*.

of effects. Spouse abuse measures the first sort of effect: the effect of the change in regimes upon marriages entered into under the older system, or at least where there was not sufficient understanding of what the new system might mean in terms of compensation upon divorce. With marriages contemplated when no-fault divorce has been in place for some years, we would expect effects on the number of marriages contracted and the number of children.

IV. An Empirical Look at Opportunism in Marriage

The predictable consequences of marriage becoming an illusory contract therefore involve both ex ante and ex post conduct. In order to stave off opportunism, there would be less long-term marriage contracting.[76] Ex post, for those already married when unilateral no-fault divorce becomes possible, there should be less investment in the marriage (fewer children)[77] and more "taking advantage," or opportunism. There are data available on the first two of these, for academics including lawyers, sociologists, and economists have been interested for many years in the rates of marriage and fertility. What we test here is this behavior over time, contrasting birth and marriage rates in states with fault and no-fault regimes and looking at rates before and after the introduction of no-fault divorce.

The ability to impose opportunistic outcomes should be greater for the party with the lower costs of divorce. To the extent that the nonenforceability of marriage benefits one gender (the man) so that marriage becomes more attractive,[78] it acts to deter the other gender (the woman). That is, for the man it may be more attractive to marry rather than to stay in a nonmarital relationship with a particular woman. This is because, so long as the relationship is good, he gets all the benefits of the security

[76] Cohen, *supra* note 4, at 296, notes Landes's article, *supra* note 12, which studied the effect of the elimination of alimony on the number of marriages and the rate of marital fertility, finding that both decreased where alimony was unavailable. Cohen writes that "it is not clear if the causality runs from the divorce laws to the marriage rate or if both are moved by some independent vector of other variables." Cohen at 296 & n.63.

[77] Wardle, *supra* note 13, at 126, also sees lack of commitment as related to no-fault divorce (which he defines differently than we do in this article). Because they are easier to obtain, there should also be more divorces. Peters, *supra* note 46; Marvell, *supra* note 58.

[78] This occurs in part because for men the investment during marriage is, at least traditionally, more general. Women are more likely to invest in marriage-specific capital and are less likely to invest in the human capital necessary for success in the labor force. See Joan Krauskopf, Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital, 28 Kansas L. Rev. 379, 397 (1980); Joan Krauskopf, Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery, 23 Fam. L. Q. 253, 260–67 (1989); Carbone & Brinig, *supra* note 3, at 976–77.

and companionship and provision of services that marriage provides. If things sour, he may leave with little penalty other than the fees for filing for divorce and to pay his attorney.[79] For the woman, in contrast, the costs of divorce have increased through the introduction of no-fault divorce, particularly if she desires to have children.[80] Although the prospect of marriage, as opposed to one or more nonmarital relationships, may be appealing, being married is probably less important than formerly because of the reliability of contraceptives, her increased earnings in the labor market (higher opportunity cost), and the growing social acceptability of cohabitation. Since there is no compensating payment by men, and there must be agreement between husband and wife for the contract to be formed, there should be fewer marriages as women become aware of its costs. In fact, there is some evidence that this is occurring.[81] See Figure 1.

Since there is no real measure of the cost of divorce, or any data on the number of antenuptial contracts (since they are not registered with any official agency), the equation we tested was far simpler. We looked at the number of marriages per thousand population for the years 1965–87 as a function of population per state, the presence of true no-fault divorce, and a trend (or time) variable.[82]

The pooled time series regression appears as Table 1. What it shows

[79] There is increasingly less social stigma attached to divorce. Arland Thornton, Changing Attitudes toward Separation and Divorce: Causes and Consequences, 90 Am. J. Soc. 856 (1985). Thus the "reputational effect" of the noncooperative behavior of seeking a unilateral divorce may be ineffective to promote cooperation in the marriage. See Scott, *supra* note 22, at 2034.

[80] The transaction costs of obtaining a divorce have decreased for both spouses. See, for example, Margaret Brinig & Michael Alexeev, Trading at Divorce: Preferences, Legal Rules and Transactions Costs, 8 Ohio St. J. Dispute Resolution 279 (1993); Peters, *supra* note 46. These lower transaction costs are dominated for women by the higher economic and social costs of being a divorced person, frequently one with custody. Women with small children do not remarry as often, or as speedily, as other divorced women, and their subsequent marriages are also more likely to end in divorce. Gary Becker, Elisabeth Landes, & Robert Michael, An Economic Analysis of Marital Instability, 85 J. Pol. Econ. 1141, 1152, 1157 (1977). Single mothers of young children must also obtain child care for the times when they are dating.

[81] National Center for Health Statistics, Monthly Vital Statistics Report (August 26, 1991). In 1988, marriages among unmarried women ages 15–44 fell to its lowest rate ever, 91 per 1,000 compared to 147.2 per 1,000 in 1967. See also K. A. London, Cohabitation, Marriage, Marital Dissolution and Remarriage, U.S. 1988 Advance Data, Vital and Health Statistics No. 194; Barbara Vobejda, Americans Spending Less Time Married, Wash. Post, August 26, 1991, at A1.

Of course, the party more eager to marry (the man) could bribe the other's acquiescence through promises of a more favorable "deal" upon divorce. More couples would then enter into antenuptial agreements. We have no way of measuring the extent to which this occurs. See Trebilcock & Keshvani, *supra* note 3, at 446–59.

[82] It would take some time for the impact of no-fault divorce to be felt throughout the population.

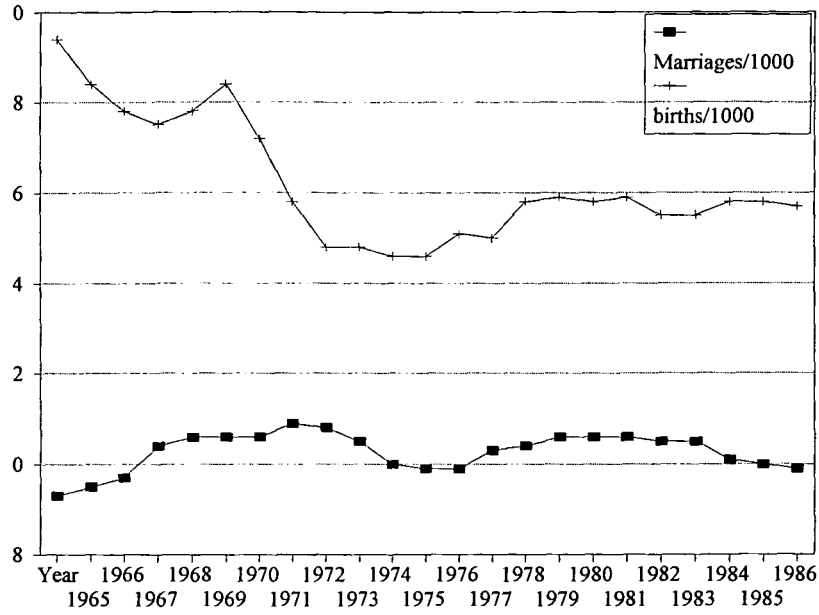

FIGURE 1

is that, during the years examined, the number of marriages per thousand population has generally increased. This general increase, however, has not taken place in the more populous states. (One might surmise that this is primarily where there is more cohabitation outside marriage.) Nor has the general increase taken place in the no-fault states: marriage is negatively and significantly related to the presence of a true no-fault regime. We therefore cannot reject our hypothesis that the presence of no-fault decreased the willingness of women to commit themselves to marriage.[83]

The matter of the effect of no-fault divorce on children is more problematic since a number of factors besides changes in no-fault regimes have undoubtedly contributed to the declining birth rate in the United States and other industrialized nations,[84] and there is a correlation be-

[83] Obviously there is a host of other variables affecting the marriage rate. Some are captured in the trend variable. Some account for the large portion of the variance that was not explained by this analysis.

[84] These include, in addition to a changed divorce, the change in the number of married women working, the fact that more women defer children until they complete higher education, the attractiveness for some couples of small families, and the availability of reliable contraception and legal abortion. There is a large literature on the economics of fertility. See, for example, Peters, *supra* note 46, at 452; Gary Becker & Nigel Tomes, Child Endowments and the Quantity and Quality of Children, 84 J. Pol. Econ. S143 (1976).

TABLE 1

POOLED TIME-SERIES REGRESSION: MARRIAGE, 1965–87

Variable Name	Estimated Coefficient	Standard Error	*t*-Ratio (1,001 df)	Partial Correlation
TREND	.041792	.0056401	7.4099	.2280
POP	−.00013553	.000016473	−8.2278	−.2517
NFDUMMY	−1.1819	.20748	−5.6963	−.1772
CONSTANT	12.152	.15007	80.977	.9314

tween these factors: women are earning more in the marketplace and therefore have a greater opportunity cost in staying home to raise children (or even in taking time off to bear them).[85] The real prospect of divorce for spouses in every state has indicated, even to those already married, that it is risky to bring children into a relationship, both because divorce is very difficult for children and because, for women, the presence of children reduces their chances of remarriage and their income earning potential.[86] This must be qualified since children could act as hostages to hold together an otherwise unenforceable contract. But this assumes that the consequences to both parties of divorce would be equally catastrophic. In fact, for whatever reason, women seem to value children more highly than do their husbands.[87] As discussed above, women usually end up with custody and, because of children, are less able to obtain high paying full-time employment or remarry. It might be assumed that, as with marriage, there would be countervailing incentives for men that

[85] Fathers share these costs as well since they must, theoretically at least, bear an increased share of child care if their wives are working. But see Shelley Coverman & Joseph Sheley, Change in Men's Housework and Child-Care Time, 1965–1975, 48 J. Marriage & Fam. 413, 420 (1986); Michael Geerken & Walter Gove, At Home and at Work: The Family's Division of Labor (1983), suggesting that not much change in the allocation of these responsibilities has occurred. The "domestic burden" borne by wives has been estimated to account for 70 percent of the difference in earnings between married men and women. Ellman, *supra* note 4, at 4 & n.2.

[86] Haas, *supra* note 12, at 887–88. See also Fuchs, *supra* note 50. For men the negative is primarily paying child support. They may shirk this obligation because they cannot control how the money is spent by the custodial former wives. Yoram Weiss & Robert Willis, Children as Collective Goods in Divorce Settlements, 3 J. Lab. Econ. 268 (1985).

[87] See Fuchs, *supra* note 50, at 67–68. Our referee has pointed out that, to the extent that children are important to their fathers, it might be in the interest of any particular mother to threaten to make visitation difficult in the event of divorce. If all women made such a credible threat, conscientious fathers might try harder to keep their marriages together, with a resultant cultural norm of lifetime marriages. Following divorce, however, it is not in the mother's interest to carry out the threat, especially if she is conscientious. Since marriages which result in children are not usually a repeat game, whether or not she carries out the threat herself will probably not affect her individual case, and the cultural norm will not be generated. This is a variant of the Prisoner's Dilemma or Rules-Discretion game.

TABLE 2

POOLED TIME-SERIES REGRESSION: BIRTHS PER THOUSAND, 1965–87

Variable Name	Estimated Coefficient	Standard Error	t-Ratio (1,001 df)	Partial Correlation
MARRIAGE	.58113E-2	.34108E-2	1.7038	.0538
TREND	−.15027	.83029E-2	−18.098	−.4965
NFDUMMY	−.55521	.16723	−3.3200	−.1044
CONSTANT	19.153	.14503	132.06	.9725

would encourage having children. But women are particularly well situated to prevent pregnancy through contraception and are uniquely able to terminate it by abortion. They therefore have much greater control over the decision.[88] Unquestionably, there has been a decreasing fertility rate, but so far there has been no showing that the birth rate is lower in those states with no-fault divorce than elsewhere. We ran a simple pooled time-series regression for the period 1965–87, testing the birth rate per thousand population against marriage, population, the availability of no-fault divorce, and time.[89] The results are included in Table 2. What Table 2 shows is that the birth rate has significantly decreased over time. The relationship between the birth rate and the marriage rate is not statistically significant (although positive). Most important for our analysis is the fact that, as we would predict, there are fewer births per thousand population in those states that have adopted a true no-fault regime.

This article is one of the first to focus on opportunism that occurs after marriage has taken place.[90] We argue that no-fault divorce raises the opportunity costs of divorce for those who are the victims of spouse abuse because of the strong wealth effects in no-fault states.[91] For the

[88] Although in functioning marriages husbands and wives are likely to agree on whether or not the wife should abort, the U.S. Supreme Court maintains that a state cannot require a married woman to notify her husband of her decision. Planned Parenthood of Southern Pennsylvania v. Casey, 1992 U.S. LEXIS 2751, 112 S. Ct. 2791 (1992). Even if the husband used no contraception, the wife could still prevent the pregnancy.

[89] A reader has expressed the concern that the model is underspecified: that is, that we should have included such independent variables as income, female labor force participation, urbanization, race, and ethnic composition. This would be important to the extent that these are correlated with the no-fault variable, but we have not found a correlation. For a general discussion of choice of variables in linear regression, see John Neter & William Wasserman, Applied Linear Statistical Models 371 (1974).

[90] Cohen's opportunism involves the unilateral termination of marriage by the husband before the wife can reap the "quasi rents" she expected in the later years of marriage when her value in the marriage market falls relative to his. Cohen, *supra* note 4, at 288–89.

[91] Of course, it is possible that other things are going on here. Women need not face the proof problems of the fault system or the prospect of desertion, both of which were barriers to exit. If these were important, there should be more rather than less abuse in states retaining fault. The other possibility is that we are only measuring the level of reporting, which undoubtedly varies from state to state. Reporting would be affected by the effective-

abusing husband, the opportunity costs of divorce are reduced on the margin because there are no real damages granted for his breach. In divorce he loses only the person he was married to, not any of his other wealth. The types of resulting opportunistic behavior that could be predicted in such an illusory marriage contract involve the situations where one spouse leaves shortly after the other has worked to allow his or her graduate education,[92] where one has swindled the other systematically of assets for a separately held business enterprise,[93] where there is adultery,[94] or where there is spousal or child abuse. Although the first three situations can be analyzed theoretically,[95] there is no way to obtain accurate data on the number of cases in which such self-seeking behavior has occurred. The degree or investment cases are anecdotal. Litigation will only occur when a change in the interpretation of the law is involved, so that the reported cases are not a fair sample of all times in which this has occurred and divorce has followed. Obviously the cases do not count the many times in which such an investment is made and there is no divorce. Even the claimed incidence of adultery cannot be gauged from the pleadings in the no-fault states since, by definition, fault cannot be considered. It is possible, however, to obtain data on spousal abuse.

Violence between spouses has undoubtedly been a problem for centuries, but it was not usually the subject of legal intervention because, as one court said in 1868, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence."[96] National attention, however, has focused on domestic violence since the mid-1970s.[97]

Since there is no central government or other authority that collects or indexes information about spousal abuse by state, data were obtained for

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ness of state protective orders, the frequency of police response, and the availability of social service networks. Our empirical analysis attempts to capture many of these favors. What the statistics show is that it is highly unlikely that our results were reached by chance.

[92] Cohen, *supra* note 4; Katharine Baker, Contracting for Security: Paying Married Women What They've Earned, 55 U. Chi. L. Rev. 1193 (1988).

[93] See Francois v. Francois, 599 F.2d 1286 (V.I. 1979).

[94] Cohen, *supra* note 4, at 300, predicts that there should be more extramarital affairs because the "law can do little to enforce the most meaningful and possibly onerous obligations of a marriage."

[95] Sam Rea worked this out for degree cases in Breaking Up Is Hard to Do (Working Paper presented at the American Law and Economics Association Annual Meeting, Chicago, April 30, 1993).

[96] See note 34 *supra*.

[97] U.S. Congress, Domestic Violence and Legislation with Respect to Domestic Violence, Hearings before the Subcommittee on Child and Human Development, 95th Cong., 2d Sess., 1978; Note, The Battered Wife Syndrome and Self-Defense: A Legal and Empirical Dissent, 72 Va. L. Rev. 619 (1986).

the single year of 1987 by contacting agencies in each state that would have information about crisis calls and shelter care provided for victims of spouse abuse.[98] Table 3 contains an alphabetical list of reported crisis calls and shelter visits by state.[99] Table 4 contains a ranking of states by number of crisis calls reported per thousand population.

Our theory would predict that the incidence of "negative" opportunism within marriage (behavior outside what would otherwise be the norm), proxied by spouse abuse, should increase in states allowing divorce and alimony without consideration of fault (EARLY and LATE).[100] Of course, abuse does not occur solely because of relaxed penalties in terms of divorce settlements. Abuse in the family (ABUSECAP) might also be expected to vary with such social characteristics as income per capita (INCOMEPC), urbanization (METROPOP), and the amount of violent crime in general (CRIME). Abuse might be more readily reported by some segments of the population than others (RELIG),[101] so that these groups would show greater numbers of crisis calls. Box-Cox regressional analysis was performed using the above factors as the independent (right-hand side) variables, with the number of crisis calls to abuse centers as the dependent variable.

The resulting estimated equation predicted about 35 percent of the variance in calls to abuse shelters. See Table 5. As predicted, spouse abuse occurred with greater frequency in states that had abolished consideration of fault in divorce and its incidents. It also varied positively and significantly with the reporting variables and with income[102] and varied negatively and significantly with urbanization and insignificantly with political liberalism (DEM).[103] The general incidence of violent crime was not significantly related to the number of spouse-abuse complaints, but

[98] Of course, victims of violence who are not married may also use these services. In states that separate the types of complaints, however, the incidence of nonspouse abuse was negligible.

[99] A date indicates the year a no-fault system was enacted. A zero indicates that fault is still available either in the grounds for divorce or in allocation of alimony or property distribution. In two states (Hawaii and Vermont), data for crisis calls were unavailable. The number used was extrapolated from the number of shelter days. It should be noted that, although these numbers are approximations, if the two states are eliminated, our empirical results are still stronger.

[100] Not only the presence of no-fault divorce but also the date the scheme was enacted makes a difference. We therefore ordered the data based upon whether no-fault legislation was enacted prior to 1975 (EARLY), between 1975 and the present (LATE), or not at all.

[101] This variable is a composite of those reporting to be Christians and Jews.

[102] This also may be a proxy for a willingness to report.

[103] We used the percentage popular vote for the Democrat (Mondale) in the 1984 elections.

TABLE 3

SPOUSE ABUSE BY STATE, 1987

State Name	Year of Enactment of No-Fault*	Crisis Calls	Shelter Visits
Alabama	0	5,262	. . .
Alaska	1974	23,419	8,080
Arizona	0	19,893	6,700
Arkansas	0	3,458	1,163
California	1969	11,684	32,766
Colorado	1971	52,956	8,217
Connecticut	0	20,000	1,106
Delaware	1979	1,185	. . .
Florida	1978	60,088	7,859
Georgia	0	20,273	2,074
Hawaii	1972	1,557	244
Idaho	0	4,087	827
Illinois	1984	385,700	30,856
Indiana	1973	109,704	3,741
Iowa	1970	4,543	. . .
Kansas	0	22,186	1,838
Kentucky	1972	25,927	2,227
Louisiana	0	10,707	1,213
Maine	0	6,200	6,200
Maryland	0	14,107	. . .
Massachusetts	0	54,000	5,496
Michigan	1974	48,071	7,044
Minnesota	0	16,542	3,752
Mississippi	1973	13,274	. . .
Missouri	1975	25,062	5,169
Montana	1972	1,180	. . .
Nebraska	0	44,479	4,651
Nevada	0	4,837	2,773
New Hampshire	0	6,079	1,714
New Jersey	0	52,209	. . .
New Mexico	0	11,133	1,925
New York	0	97,542	9,126
North Carolina	0	23,754	7,721
North Dakota	0	1,330	. . .
Ohio	0	18,292	. . .
Oklahoma	1971	8,181	7,235
Oregon	0	36,452	2,477
Pennsylvania	0	11,702	11,702
Rhode Island	0	17,968	2,196
South Carolina	0	1,812	396
South Dakota	0	9,863	1,192
Tennessee	0	19,595	1,857
Texas	0	387,000	23,805
Utah	0	7,972	1,294
Vermont	0	34,733	5,439
Virginia	0	13,597	1,851
Washington	1973	18,000	3,200
West Virginia	0	16,000	366
Wisconsin	1977	43,299	2,839
Wyoming	0	37,152	1,172

* A zero indicates that fault is still available, either in the grounds for divorce or in allocation of alimony or property distribution.

TABLE 4

ABUSE PER CAPITA, 1987

State Name	Crisis Calls/ 1,000 Population	Year of Enactment of No-Fault Divorce*
Wyoming	75.82041	0
Vermont	63.38222	0
Alaska	44.60762	1974
Illinois	33.30168	1984
Nebraska	27.90402	1972
Texas	23.05081	0
Indianà	19.83	1973
Rhode Island	18.22312	0
Colorado	16.06675	1971
South Dakota	13.91114	0
Oregon	13.38179	1971
Massachusetts	9.222886	0
Wisconsin	9.007489	1977
Kansas	8.96042	0
New Mexico	7.422	0
Kentucky	6.956533	1972
New Jersey	6.805136	0
Connecticut	6.228589	0
Arizona	5.88	0
New Hampshire	5.751183	0
Michigan	5.225109	0
Maine	5.223252	0
Mississippi	5.056762	0
Florida	4.997754	1978
Missouri	4.911229	1973
Pennsylvania	4.862265	0
Nevada	4.803376	0
Utah	4.745238	0
California	4.224198	1969
Idaho	4.09519	0
Tennessee	4.036045	0
Washington	3.966505	1973
Minnesota	3.895902	1974
North Carolina	3.704039	0
New York	3.269489	0
Georgia	3.258277	0
Maryland	3.110695	0
Oklahoma	2.500306	0
Louisiana	2.400134	0
Virginia	2.303015	0
North Dakota	1.979167	0
Delaware	1.840062	1979
Ohio	1.696217	0
Iowa	1.603035	1970
Montana	1.458591	1975
Arkansas	1.448074	0
Hawaii	1.437415	1972
Alabama	1.288758	0
West Virginia	.843437	0
South Carolina	.529051	0

* A zero indicates that fault is still available, either in the grounds for divorce or in allocation of alimony or property distribution.

TABLE 5

PREDICTORS OF SPOUSAL ABUSE

Variable Name	Estimated Coefficient	Standard Error	*t*-Ratio (42 df)	Partial Correlation
EARLY	.67572	.28007	2.4127*	.3489
LATE	−.08619	.26201	−.32896	−.0507
METROPOP	−2.1754	.82868	−2.6251*	−.3754
RELIG	2.1301	1.00850	2.1122*	.3099
CRIME	1.2141	.68497	1.7725	.2638
INCOMEPC	19.080	5.0156	3.8041*	.5062
DEM	−2.4790	1.4254	−1.7392	−.2592
CONSTANT	−77.149	21.276	−3.6262	−.4883

* Significant at .05.

was positively signed. Abuse indeed seems to be related to the absence of penalties embodied in the divorce statutes.[104]

V. IN SEARCH OF THE MARRIAGE CONTRACT

Our model predicts that no-fault has caused a change in the distribution so that behavior within marriage has become more variable. It has also caused a reduction in the investment in marriage and children that would occur otherwise. The presence of fault divorce caused the marriage contract's ex ante and ex post values to be relatively similar. There used to be incentives to marry, to have children, and not to surprise the marriage partner.[105] Now, with no-fault, the risk or uncertainty associated with marriage has increased.

The puzzle becomes how to provide incentives so that once again the majority of behavior clusters around what most people conceive of as "marriage." Without a wholesale reallocation of property rights, the mechanism that would seem most efficient is to provide once again for breach if significant events occur.[106] This could be done without resurrect-

[104] Tobit analysis endogenizing the timing and presence of no-fault divorce as a function of Catholicism (negatively related), women in the labor force (positively related), the divorce-to-marriage ratio (positively and already significantly related), and political liberalism (positively related) identifies only the extremes of early enactment of no-fault legislation and the lack of no-fault.

[105] Compare Becker, Landes, & Michael, *supra* note 80, suggesting that divorce occurs at least in part because during the marriage the spouses gain more (undesirable) information about each other.

[106] This view is supported at least in part by Haas, *supra* note 12, at 894–95; Cohen, *supra* note 4, at 302–3; and Carl E. Schneider, Rethinking Alimony: Marital Decisions and Moral Discourse, 1991 B.Y.U. L. Rev. 197, 253.

ing fault as grounds for divorce but would require the use of fault in the awarding of alimony.[107] In the language of contract theory, contractual partners could dissolve their contracts voluntarily, but if the dissolution were a result of breach of the agreement, then a damage remedy would be available to the nonbreaching party. If it is clearly understood what the marriage contract entails, significant breach of the terms of the agreement could then, once again, result in an award of "damages" through the alimony system.

A similar result, in terms of compensation, could theoretically be reached either by allowing an action for damages in tort for such outrageous behavior as spouse abuse[108] or in restitution for investments made in the other's career. But any action outside the divorce system would be expensive (because of the increase in transaction costs), might require abrogation of interspousal immunity,[109] and apparently is not giving spouses the incentive to abide by the marital contract.

Robert Scott speaks of various mechanisms for insuring optimum investments in commercial long-term contracts. He concludes that transferring risk to the party best able to control the production process, or to the party subjectively placing a lower cost on the risk, or distributing the risk between the parties will all decrease the likelihood of opportunism.[110]

[107] Although mutual consent divorce may seem attractive for law and economics scholars, see, for example, Allen Parkman, What's at Fault with No-Fault? (1992); Stake, *supra* note 35, it is not really an improvement. Mutual consent is in some ways like an order for specific performance of a personal services contract. The prevailing party can expect minimal performance in a situation that calls for mutual good feelings. Margaret Brinig, The Law and Economics of No-Fault Divorce, 26 Fam. L. Q. 453, 468–69 (1993); Cohen, *supra* note 4, at 299–301. Further, in modern times the granting of divorce is primarily a right to remarry. See, for example, Avitzur v. Avitzur, 58 N.Y.2d 108, 459 N.Y.S.2d 572, 446 N.E.2d 136 (1983). The need to divorce in order to remarry may not be systematically related to being the party breaching the marriage contract.

[108] There have been a number of successful suits in tort for abuse committed during the marriage. See, for example, Windauer v. O'Connor, 13 Ariz. App. 442, 477 P.2d 561 (1971); Simmons v. Simmons, 1988 Colo. App. LEXIS 430, 773 P.2d 602 (1988); Hudson v. Hudson, Superior Court of Delaware Sussex, Slip Opinion, April 28, 1987; Nash v. Overholser, 114 Idaho 461, 757 P.2d 1180 (1988); Duplechin v. Toce, 497 So. 2d 763 (La. 1987); Heacock v. Heacock, 402 Mass. 21, 520 N.E.2d 151 (1988); Aubert v. Aubert, 129 N.H. 422, 529, A.2d 909 (1987); Murphy v. Murphy, 109 App. Div. 2d 965, 486 N.Y.S.2d 457 (1985); Noble v. Noble, 1988 Utah LEXIS 72, 761 P.2d 1369 (1988).

[109] See, for example, Heino v. Harper, 306 Ore. 347, 759 P.2d 253 (1988), for a thorough modern analysis.

[110] Scott, *supra* note 22, at 2021. Under Scott's analysis, risk would be transferred to the man, who might have to place assets as collateral for the promise of subsequent cooperation or provide for liquidated damages should breach occur. *Id.* Reliance upon alimony, since the amount will not be determined ex ante, avoids the perils of liquidated damages, which are often construed by courts as penalty clauses. See Alan Schwartz, The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures, 100 Yale L. J. 369 (1990).

His ideas are echoed in the marital context by the then chairman of the American Bar Association Family Law Section, who wrote: "Substantial fault preserves the concept of individual accountability, which is missing from pure no-fault theories. One way to discourage adultery, physical cruelty or other genuine misconduct is to place the burden of dissolution squarely on the shoulders of the responsible party. Pure no-fault removes this disincentive and, indeed, promotes easy access to divorce without regard to accountability."[111]

All of the problems we have discussed—fewer marriages, less specific investment in children, and more opportunistic behavior—can, at least in part, be linked to the inability to enforce marital promises characteristic of what we have called no-fault divorce. As a society, we need to rethink the question of whether this particular reform is worth it.

[111] Harvey Golden & J. Michael Taylor, Fault Enforces Accountability, 10 Fam. Advoc. 11, 12–13 (1987). This echoes Schwartz, *supra* note 12, at 232.