

2002

"Money Can't Buy Me Love": A Contrast Between Damages in Family Law and Contract

Margaret F. Brinig
Notre Dame Law School, mbrinig@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Contracts Commons](#), [Family Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Margaret F. Brinig, *"Money Can't Buy Me Love": A Contrast Between Damages in Family Law and Contract*, 27 J. Corp. L. 567 (2001-2002).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/731

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

“Money Can’t Buy Me Love”: A Contrast Between Damages in Family Law and Contract

Margaret F. Brinig*

“Cause, I don’t care too much for money,
Money can’t buy me love.”
—John Lennon (1964).

I. THE LAW AND ECONOMICS OF (COMMERCIAL) CONTRACT DAMAGES.....	568
A. Goal One. Encouraging All Profitable Contracts.....	569
B. Goal Two. Encouraging The Efficient Amount of Writing.....	570
C. Goal Three. Encouraging Performance of Efficient Contracts	572
D. Goal Four. Damages Should Reflect the Other Goals of Contract	580
1. Asymmetric Contracts	583
2. Some Possible Answers	585
II. WHERE DO CONTRACTS AND FAMILY LAW PART WAYS?	586
III. CONCLUSION: THE LIMITS OF THE ECONOMICS OF CONTRACT DAMAGES	600

As my contribution to this symposium in David’s honor, I submit the law and economics section of the damages chapter of our joint enterprise, *Understanding Contracts*. Because of David’s failing health, my own involvement with the publisher never reached contract stage.¹ The chapter concludes with a problem that illustrates some of the intricacies of mixing family law and contract. David and I grappled for some time with the answer to the problem, coming at it from our different points of view. On one occasion, David, with a twinkle, told me there was only one place where I was “absolutely wrong.” So here is our attempt to fuse two disciplines, followed by my analysis of why we had such problems (and such fun) doing it.

The family law problem does not illuminate every single part of an exploration of damages or every aspect of damages that might apply to family transactions. I leave that task for another time. It does, however, illustrate problems with predicting and planning for the future, problems that plague all contracts, but that make use of contract analogies (or any other theory) particularly frustrating in family law. I suggest that the enhanced

* Edward A. Howry Professor of Law, University of Iowa. Many thanks to Herbert Hovenkamp for his generous suggestions, as well as to Chad Sampson, who graduated in 2002 and who labored for three years on *Understanding Contracts*, and to Nicholas Keppel, my able research assistant, who took on this special project.

1. Before he became too ill to get much academic writing accomplished, David and I completed two chapters. The first was a general introduction to contracts while the second, the subject of this essay, concerned contract damages. My particular plan from the outset was to provide a law and economics approach to each topic presented earlier in the chapter. (I was also supposed to provide a fresh look at the writing David, or David and Alan Widiss, who died in late February of 2001, had already drafted, and to make sure citations and examples were current.)

earning cases featured here be analogized to a particular kind of commercial contract, the sort involving specific investments needed not only by the contracting parties but also by the economy as a whole.

I. THE LAW AND ECONOMICS OF (COMMERCIAL) CONTRACT DAMAGES

In section 13.01 of *Understanding Contracts*, we set forth the general goal of contract damages: to put aggrieved parties in as good a position (to the extent money can) as they would have been in had the other party performed as promised, subject to certain limitations (the aggrieved party should mitigate and avoid harms, while damages should be reasonably foreseeable).² If one thinks carefully about this goal, one should realize it has aspects that are both forward-looking (“reasonably foreseeable”) and backward-looking (limitations on what turn out to be losing contracts). The goal speaks directly only to the current contract and not to future dealings between the parties or to contracts in general.

Lawyer-economists see the goal, and therefore the aspects, of contract damages somewhat differently. Most of their writing is more concerned with forward-looking aspects and with shaping the behavior of future contract-makers and writers³ than with what transpired after the contract was made. Some of these academics (for there are few judges who are adherents of the school,⁴ and fewer practicing attorneys) also claim that an ideal system of contract law would promote getting the goods (or services) in the hands of those who value them most,⁵ regardless of whether such movement of resources involves the incidental (“efficient”) breach of an existing contract.⁶ Others of the school place more value on the ability of contract-makers to be secure that the promised duties will be carried out.⁷

The law and economics writers agree that remedies for breach affect incentives,⁸ although they may disagree about what those incentives should be.⁹ Followers of the law

2. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981); U.C.C. § 1-16(1) (1987).

3. For the distinction between backward- and forward-looking theories, see Avery Katz, *Reflections on Fuller and Perdue's "The Reliance Interest in Contract Damages": A Positive Economic Framework*, 21 U. MICH. J.L. REFORM 541, 544-45 (1988).

4. The exceptions whose opinions flavor current contracts case books are Judges Richard Posner and Frank Easterbrook of the Seventh Circuit Court of Appeals. See, e.g., *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986) (Posner J.), reprinted in STEPHEN J. BURTON, *PRINCIPLES OF CONTRACT LAW* 570-75 (2d ed. 2001); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (Easterbrook, J.), reprinted in BURTON, *supra* at 68-74.

5. Katz, *supra* note 3, at 557-60.

6. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 118-20 (4th ed. 1992) (discussing cases in which the breaching party will be better off paying the other party than continuing with the contract); Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) [hereinafter Macneil, *Efficient Breach*] (discussing fallacies in the theory of breach of contract); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974) (opining that contracts are not so much discrete as relational).

7. Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 20 (1989).

8. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (suggesting that default rules are chosen to give at least one party to the contract the incentive to contract around the default rule and therefore to chose the contract provisions they prefer).

9. Friedmann, *supra* note 7, at 20 (stating that a promisor is generally bound to perform contract promises unless he or she obtains a release from the promisee); RICHARD POSNER, *ECONOMIC ANALYSIS OF*

and economics school, like economists in general, make simplifying assumptions about people who make contracts. Though the assumptions may seem unrealistic and abstract, by varying the assumptions one at a time, economists hope to learn something about what happens in the real world of contracts. The goal is fourfold: (1) to encourage parties to create contracts that will leave at least one of the parties better off and neither party worse off;¹⁰ (2) to encourage parties to write contracts that will cause the parties to perform when it is efficient for them to do so; (3) to encourage efficient performance of valid contracts; and (4) to enforce contracts in ways that advance the preceding three goals. In actual practice, this way of looking at contract remedies results in damage awards looking much like, if not identical to, the damages sections of other contracts monographs. In some cases, because of the emphasis on creating and maintaining incentives, and therefore focusing on earlier periods rather than on ensuing events, the law and economics result may be quite different.

A. Goal One. Encouraging All Profitable Contracts

Encouraging profitable contracts involves two economic propositions: that of "Pareto optimality" and that of the theory of search.¹¹ According to the first proposition, people ought to undertake transactions (contracts) whenever both will be made better off or at least one of them will be made better off and the other no worse off than at the start.¹² The second proposition, popularized by economist George Stigler, is that people will search for contracting parties until the cost of search begins to exceed the possible benefit that could be gained from the contract.¹³ This search principle is related to the first proposition because it sets a limit for contracts in the world. At some point (for some

LAW 107 (3d ed. 1986) (stating that if a promisor's profits from breach exceed the loss to promisee, breach is to be permitted or encouraged on the ground it leads to maximization of resources).

10. While this might seem obvious, some scholars suggest that people might agree to "bad" deals. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); 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, 1236-37 (1998) (suggesting because of power dynamics, the least powerful party may choose to do something over which she is, at best, deeply conflicted); Katherine K. Baker, *Gender, Genes, and Choice: A Comparative Look at Feminism, Evolution, and Economics*, 80 N.C. L. REV. 465, 483 (2001) (feminists should be suspicious of parsimonious models relying on autonomy and choice preferences that are stable); W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 1 (2002) (describing the movement in law and economics to integrate findings from empirical social science to explain why rational actors follow rules that have costs that outweigh their benefits); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 688 n.51 (1979) (criticizing Posner's "rationalism"); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1450 (1986) (using the characters of Franz Kafka to illustrate the problems); cf. Steven Shavell & Louis Kaplow, *Fairness Versus Welfare*, 114 HARV. L. REV. 966 (2001) (arguing that legal policies should depend exclusively on their effects on an individual's welfare because rules based on fairness tend to make individuals worse off). *But see* Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 130 (2002) (criticizing Shavell and Kaplow by objecting to how they look at everything as costs and benefits and ignore fairness).

11. George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 216 (1961).

12. See ROBIN PAUL MALLOY, LAW AND THE MARKET ECONOMY 108 (2000) (discussing "Pareto optimality").

13. See Stigler, *supra* note 11, at 216; POSNER, *supra* note 6, at 111-12.

earlier than for others), we stop looking for better deals and just accept an offer.¹⁴

The point of these two propositions when it comes to contract damages is to get people to reveal information enabling others to see whether it is worth dealing with them.¹⁵ How truthful, accurate, and complete the information must be provides another set of questions for which developed contract law gives answers. Many of these questions and answers are taken up in the discussions of contract formation concerning mistake and fraud. Another related avenue of inquiry, better dealt with elsewhere, concerns who should be able to make contracts (capacity) and what the proper subjects of contracts should be. The discipline of law and economics was developed around (and thus claims to have the most value in answering) questions of commercial contracts.¹⁶

B. Goal Two. Encouraging The Efficient Amount of Writing

The point of requiring writings that will encourage performance also involves several economic principles. The first (and what many law and economics writers consider the most critical for contract law) is that in writing contracts the parties allocate risks of loss and gain.¹⁷ The second, related to the idea that people will continue to search

14. See, e.g., Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621 (1993) (illustrating offer acceptance when costs get too high).

15. See, e.g., Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 J.L. ECON. & ORG. 284 (1991) (limiting recoverable damages to foreseeable losses encourages contracting parties to reveal their true costs).

16. See, e.g., Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980) (discussing how chosen damage measures influence the behavior of parties who have entered a contract); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1263-64 (1980) (suggesting that liability or damage rules induce contracting parties to adapt their behavior in ways that affect social welfare).

17. *Compare Nicolet Instrument Corp. v. Lendquist & Vennum*, 34 F.3d 453, 456 (7th Cir. 1994) (Posner, J.) (“It is not a novel idea that an essential function of contracts is to allocate particular risks to the parties best able to bear them.”) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 300 (1881)); *Murray v. Abt Assoc., Inc.*, 18 F.3d 1376, 1378 (7th Cir. 1994) (Easterbrook, J.) (“Respect for the parties’ autonomy in shaping their arrangements, and for the allocation of risks they selected, mean that a court ought not find in a letter such as Stellwagen’s the very promise the more elaborate Proposed Term Sheet withheld.”) (citing 1 E. ALLAN FARNSWORTH, *CONTRACTS* § 3.8, at 181-86 (1990)), with *J.F. McKinney & Ass. Ltd. v. Gen. Elec. Inv. Corp.*, 183 F.3d 619, 622-23 (7th Cir. 1999) (Easterbrook, J.):

The documents exchanged between M&A and GEI did not by any stretch of the imagination reveal how the parties allocated the risk that interest rates would change before the expiration of the option. Asking a jury to supply its own answer would be no better than a coin flip, and we are confident that Illinois law does not entitle a party in M&A’s position to ask a jury for the sort of commitment it did not obtain from its negotiating partner.

See also *Cont’l Bank N.A. v. Everett*, 964 F.2d 701, 705 (7th Cir. 1992) (Easterbrook, J.) (“People write things down in order to assign duties and allocate risks—functions vital to economic life yet defeated if courts prefer hypothetical bargains over real ones.”); see generally Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (suggesting that the first way to assess a contract’s performance is understanding and creating rules for economic systems is to focus on ex ante analysis); Frank H. Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 AM. ECON. REV. 650 (1984) (explaining how agency costs can be reduced through residual ownership by managers and the dividends the ownership produces); A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427 (1983) (arguing that awarding lost profits interferes with the efficient allocation of risk between parties); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2007

for better contracts so long as an additional search will probably be profitable, is that people will negotiate terms and reduce them to writing when it makes sense for them to do so.¹⁸ This is called the critical risk allocation principle and means that when things break down later, judges will ask which party took that particular risk.¹⁹ In the absence of the risks being spelled out in writing, someone will have to allocate risk for the parties, and lawyer-economists will usually allocate risk, in order of preference, to the party (1) that could control the occurrence or nonoccurrence of the problem,²⁰ (2) with the most information about the situation (or who reasonably could have obtained it),²¹ and (3) that could best purchase insurance to cover the risk.²² The second principle requires that people spell out their intentions in writing whenever it makes sense for them to do so. Generally speaking, the more complex the contract, the more the terms that will have to be spelled out.²³ At some point though, the parties' affairs will be so complicated that they will stop relying upon written contracts and rely instead upon the structural or relational aspects of their dealings.²⁴ Because they want to encourage people to think

(1987) (stating that parties enter into long-term contracts only after considering alternative methods for achieving their objectives).

18. POSNER, *supra* note 6, at 92-93; ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 289 (1988); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

19. *See, e.g., Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993). Judge Posner stated:

They certainly don't have to grant such benefits *in perpetuo*. If they did so in the past, not anticipating the recent rise in health costs, they should not expect the courts to bail them out by undoing the contractually determined allocation of risk on the question. Courts do not sit to relieve contract parties of their improvident commitments, except within the limited dispensation conferred by the doctrine of impossibility, not here invoked.

Id.

20. POSNER, *supra* note 6, at 119; RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 141 (5th ed. 1998); Douglas G. Baird, *The Law and Economics of Contract Damages*, in *CHICAGO LECTURES IN LAW AND ECONOMICS* 49, 60 (Eric Posner ed., 2000) (discussing "reasonably foreseeable" damages and the rule of *Hadley v. Baxendale*).

21. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 124-25, 138-39 (1987).

22. Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and A Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 578 (1977).

23. Charles Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981) (describing how, in complex relational contracts, many terms will need to be spelled out).

24. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1248-49 (1998). Scott & Scott explain:

In relational contexts, where the future contingencies are complex and uncertain, the classical model of contract fails to capture the dynamic and interrelated functions of norms and legal rules, and of informal and formal methods of contract enforcement. Parties to such relational contracts are incapable of reducing important terms of the arrangement to well-defined obligations. Definitive and legally binding commitments may be impractical because the parties are unable to identify in advance uncertain future conditions and specify the complex adaptations required of each, or because they are unable to verify violations of the contractual obligation to third parties. Relational contracts thus create unique, interdependent relationships in which unknown contingencies, the intricacy of the required responses, and the inability to verify nonperformance prevent the specification and enforcement of legal standards of performance.

Id. (citing Goetz & Scott, *supra* note 23, at 1092). Goetz and Scott argue that even in relational contracts, parties will be required to exert the "effort necessary to maximize the joint net product flowing from the

their contracts through carefully in advance and because the written agreement will be so important for sorting things out at a later date,²⁵ law and economics writers support the parole evidence rule, which disallows introduction of discussions not reduced to writing that logically should have been. Law and economics writers also provide descriptions of when contract terms should be left incomplete²⁶ and how these “gaps” should best be filled to accomplish what the parties would have wanted at the beginning.²⁷ Thus, there is a good bit of writing about incomplete and “relational” contracts generally and quite a bit about default terms.²⁸

C. Goal Three. Encouraging Performance of Efficient Contracts

In the first flush of law and economics scholarship, writers suggested that promisees would be equally happy with continuing a contract as undertaken or receiving damages from the other party that would give them the profit contemplated by the original deal plus the costs associated with the “hassle” of recontracting.²⁹ Promisors would be happier because they could get a better (higher or lower, depending upon whether the promisor was the seller or buyer) price from a third party. The third party, who more highly valued the good or service under contract or who could provide the good or service at lower cost, would also be happier given the so-called “efficient breach.”³⁰ However, efficient breach

contractual relationship” and will have to assume necessary risks. Goetz & Scott, *supra* note 23, at 1149.

25. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-89 (1976) (arguing that if contracting parties know of arbitrariness of judicial decisions, “they will adjust their activities in advance to take account of them”).

26. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing how lawmakers should create rules of the game within which contracting parties can best make efficient contracts); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (challenging Ayres and Gertner’s conclusions); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992) (arguing that the default rules of the U.C.C. are actually consented to by the parties because these rules are tacitly assumed); Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL’Y 639 (1989) (arguing that default rules should not be used to rectify perceived injustices because the parties can contract around the default rules).

27. See generally *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1902); Robert E. Scott, *A Relational Theory of Default Rules For Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and The Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Ayres & Gertner, *supra* note 26.

28. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 508 (1989) (arguing that philosophical theories of promising cannot guide the legal system in deciding which default rules to adopt; instead, courts should protect the promisee’s efficient level of reliance in the promise); Charny, *supra* note 18, at 1859 (arguing that courts should “try to distinguish between customs that are efficient to use as nonlegal customs, i.e. standard social practices, as contrasted to customs that should be enforced as well as legal or contractual matter”). Both the liquidated damages discussions and those involving default rules rely on the theory of transaction costs to justify their positions. Bargaining is not costless, and very lengthy contracts cannot be waded through, let alone understood, by the principals who must perform them. For work by the pioneers of transactions costs literature, see OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, AND RELATIONAL CONTRACTING* (1985); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

29. POSNER, *supra* note 6, at 107, 118; MacNeil, *Efficient Breach*, *supra* note 6, at 963; Friedmann, *supra* note 7, at 5.

30. Richard A. Epstein, *Inducement of Breach of Contract as a Part of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 36 (1987); Friedmann, *supra* note 7, at 2; see COOTER & ULEN, *supra* note 18, at 289

caused two harms that were not taken into account by the first scholars to consider it. The first harm was the promisee's additional insecurity under the original contract, especially if the promisee had to sue for the breach.³¹ Second, there was a general loss for the contracting public. Each of us, when making contracts, might be less secure that our contracting partner will live up to the terms.³² We would also feel a moral loss because people would not be performing their agreements.³³

Nonetheless, while economists generally favor contractual performance, which is certainly less costly than a system in which people could not enforce contracts,³⁴ there are some contracts we would be better off without. These are contracts that, if performed, would create economic waste.³⁵ Everyone has probably had experience with "monuments

(illustrating a windfall for breach); OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 300-01 (1991), quoted in Friedmann, *supra* note 7, at 1-2.

31. See Katz, *supra* note 3, at 546 (explaining that the reason that *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) is widely cited and taught is because it is not always clear whether a promisee's expectation is restricted to his own gains from performance or whether he has an interest in holding the promisor to what she promised).

32. Friedmann, *supra* note 7, at 7-8; Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 291 (1979) (arguing that money damages are often under-compensatory and that routine availability of specific performance would not result in exploitations of promises by promisees).

33. Friedmann, *supra* note 7, at 4, 6. Contrast this with the findings of Stewart Macaulay in the 1960s that Wisconsin corporate officers operated on a handshake business and almost never resorted to lawsuits or the threat of them because to do so would be to suggest dishonor on the other's part. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 135 (1991) (suggesting in community contract disputes between farmers and ranchers in California, norms and self-help, rather than legal rules, tend to settle disputes); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1771 (1996) (stating extralegal as well as legal ties guide merchants in a number of industries including grains and cotton textiles); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115-16 (1972) (arguing in a religious community that deals in diamond cutting and exchange, nonlegal sanctions will prove more effective than legal ones).

34. See, e.g., MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) ("[T]he privileged and intermediate groups triumph over the numerically superior forces in the latent or large groups because the former are generally organized and active whereas the latter are normally unorganized and inactive."); John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421 (1978) (describing how gold miners protected their gold mines by collective arrangement whereby, at first, each member of the group agreed to defend the entire territory claimed by the group and, later, by land allotment whereby each member was allotted a specified subparcel within the territory); Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 9 (1985) (contemplating civic friendships arising out of a state of nature in which parties "develop sympathy, affection, or love for one another"); see also Robert D. Cooter, *Organization as Property: Economic Analysis of Property Law*, J. OF LEGAL ECON., Dec. 1992, at 89-90 (discussing the possibility of antitrust violations in allowing restrictive contracts in markets of less than four competitors).

35. For a general property rights discussion see, e.g., Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 626 (1998).

When markets fail to rearrange initial endowments, resources can become stuck in low-value uses at either end of the property rights spectrum. Whether this misallocation takes the form of overuse in a commons or underuse in an anticommons, the economic waste of scarce resources results.

Privatizing a commons and bundling an anticommons can solve the tragedies of misuse by better aligning individual incentives with social welfare.

Id.; see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 200-01

to stupidity,” many of them public works projects.³⁶ Others involve private arrangements that would cost more than their added value (as in the land restoration projects in the *Wunder*³⁷ and *Peevyhouse*³⁸ cases). Economists are loath to second-guess individual intelligence or taste.³⁹ And lawyers should recognize that some futile (but not unethical) suits are brought because there is no way to exit a partnership, marriage, or other situation gracefully⁴⁰ or because the client wants to cost the opponent money.⁴¹ In these situations, if the contracts are lawful to begin with and there is a breach, economists would suggest giving the nonbreaching party damages or a choice of contract performance.⁴² In other words, the law and economics tradition suggests paternalism is probably not appropriate.⁴³ (However, few economists would support specific

(1968) (describing the private measures taken to protect against crime, and hypothesizing that fines for criminal behavior would decrease this expenditure); Charles K. Rowley, *Rent-Seeking Versus Directly Unproductive Profit-Seeking Activities*, in *THE POLITICAL ECONOMY OF RENT SEEKING* 15, 22 (Charles K. Rowley et al. eds., 1988) (proposing that rent-seeking activities may increase the utility of the individual while decreasing wealth or social good). For a case example, see *Schneberger v. Apache Corp.*, 890 P.2d 847 (Okla. 1995) (selecting diminution in market value as the remedy because cost of completion damage remedy would lead to economic waste). For contracts-related explanations, see, e.g., Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995); Bailey H. Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863, 879-80 (2001).

For a utilitarian, who, as a teleologist, subordinates any independent requirements of justice to the promotion of preferred consequences or utility, the protection of expectations is often the linchpin of the law. From a utilitarian viewpoint, the protection of expectations, reasonable or not, follows from the emotions they arouse and the reliance they induce. A basic fact of human nature is that the dashing of expectations is painful, arguably more so if the expectations are reasonable. When dashed expectations have induced reliance, the pain is probably accompanied by economic waste. This is not good. On the positive side, it is beneficial for society to protect expectations. This encourages people to invest in the future and thereby increase overall social utility.

Id.; see also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1104 (2000) (describing how the expropriation of Indian land was “efficient”).

36. One of our ongoing family jokes was a multimillion-dollar highway interchange in Milwaukee, one loop of which just ended, suspended in mid-air over the lake. There is also an interstate road in West Virginia that does not go between (or service) any major cities.

37. *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939).

38. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962).

39. See GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 3-14 (1976) (stating that you cannot compare two people’s “utility functions”).

40. See Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807, 825 (1996) (explaining “the relevance of marriage to the communitarian perspective on the suitability of bargains” by looking at unenforceable marriage contracts); Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221 (1995) (comparing the “love-it-or-leave-it” rule of marriage dissolution to partnership law).

41. Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987) (arguing that tax legislation is a contract and can be used by a legislator to hurt private interests).

42. Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379 (1983); Edward Yoroi, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982).

43. See Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 351 (1984) (arguing all court decisions are value-laden, and the construction of rules masks the subjective values of the court); Anthony Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (presenting paternalism as

performance of a wasteful contract.)⁴⁴

Law and economics scholars recognize that while there are gains when two or more people work together on some activity (such as gains from specialization⁴⁵ and economies of scale⁴⁶), joint production also generates additional costs that must be considered when making contracts.⁴⁷ These costs, which economists dub moral hazard⁴⁸ or agency costs,⁴⁹ stem from problems in measuring individual contributions (as opposed to end products).⁵⁰ Shirking (the less fancy name for behavior occasioned by moral hazard) is encountered in torts⁵¹ as well as in contracts. Law students may have

justified by economic efficiency and distributive fairness, personal integrity, and notion of good judgment).

44. See Schwartz, *supra* note 32, at 277 (arguing that the decision between specific performance of a contract and damages should be made by the injured party, as he is in the best position to make an efficient judgment); Friedmann, *supra* note 7, at 9 (suggesting that contract rules generally do not allow a party to perform if the performance would be wasteful) (internal citations omitted).

45. Adam Smith first coined this phrase in writing about trade between nations. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES INTO THE WEALTH OF NATIONS 25-30 (R.H. Campbell & A.S. Skinner eds., Liberty Classics 1981) (1776). For applications to corporate law, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 389 (1937) (analyzing why a firm would want to emerge in a specialized exchange economy). See generally OLIVER WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975) (explaining how the choice of business form drives the efficiency of that business); George Stigler, *The Division of Labor is Limited by the Extent of the Market*, 59 J. POL. ECON. 185 (1951) (proposing that Adam Smith's theorem on division of labor is the core of a theory of the functions of firms and industry); HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996) (explaining the difference between ownership forms). For applications to family law, see GARY S. BECKER, A TREATISE ON THE FAMILY 277-78 (2d ed. 1991); William J. Goode, *Comment: The Economics of Nonmonetary Variables, in ECONOMICS OF THE FAMILY* 345 (Theodore S. Schultz ed., 1974); POSNER, *supra* note 6, 140. The predictions of the efficient specialization model include a fault system to protect against shirking. See Gary S. BECKER, A TREATISE ON THE FAMILY 49 (2d ed. 1991) (allowing alimony to protect the wife's human capital investment in marriage); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 46 (1978) (recognizing the husband makes important decisions for the couple); Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) (discussing the presumptions in favor of the wife in child custody actions); VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 42-74 (1988).

46. See ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 21-41 (1990) (examining the beginnings and growth of managerial capitalism in the United States, Great Britain, and Germany).

47. See Alchian & Demsetz, *supra* note 45, at 779 (describing the concept of "team production"); WILLIAM A. KLEIN, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES (1980) (elucidating the interrelationship of economic elements and legal principles in the fields of business organization and finance); see also Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743, 745 (1999) (describing the problems involved in team production); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) [hereinafter Blair & Stout, *Team Production Theory*] (noting agency costs associated with team production). For applications to family law, see MARGARET F. BRINIG, FROM CONTRACT TO COVENANT 49-57 (2000).

48. POSNER, *supra* note 6, at 108; Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981).

49. Blair & Stout, *Team Production Theory*, *supra* note 47, at 48.

50. ARMEN A. ALCHIAN & WILLIAM R. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, AND CONTROL 50-54 (2d ed. 1977) (discussing basic principles of supply and demand and their effects on price setting).

51. That is, if there is not "industry liability" with proportionate responsibility fixed by a share of the

experienced it personally in study groups or other joint school projects. Some student will find it easier to gain from others while not contributing as much as the others in the group. Contracts can eliminate some of these problems by, in effect, providing for “payment by the piece,”⁵² or for each unit produced. (In the study group, it might be payment for each page of outline contributed or for each section outlined that meets group standards). When this is not possible, contract partners may provide for some kind of performance monitoring.⁵³ Unequal contribution problems surface in damages questions as well. For example, payment “up-front” may encourage the party already paid to shirk at the end of a contract.⁵⁴ Liquidated damages that do not reflect quality, speed, or effort may create disincentives for optimal performance (from an objective perspective) and, therefore, warrant claims that they are “penalties.”⁵⁵ Again, these problems relate to economists’ desire to encourage performance of efficient contracts.

As one may have noticed from the preceding paragraphs, while economists generally support contractual efficiency, they do not entirely agree about what it means. For many, if not most, commercial contracts, the parties make agreements with each party having the simple goal of maximizing financial profits (usually by minimizing costs⁵⁶ or taking fewer risks).⁵⁷ Nevertheless, many contracts do not fit this model,

market or something similar. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980) (holding that if plaintiff could prove that defendants manufactured a substantial percentage of the drug on the market, liability should be apportioned in the proportion represented by the plaintiff’s market share).

52. Steven Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1, 2-3 (1983).

53. *Id.* at 8 (discussing the agents Chinese boatmen hired to whip workers who shirked); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976) (explaining that when the interests of the agent are not compatible with the interests of the principal, costs incurred by both arise due to divergence of their interests); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 311-12 (1993) (explaining that monitoring team member productivity is efficient only to the extent that the increment to productive efficiency of team production exceeds the increased monitoring costs).

54. See POSNER, *supra* note 6, at 129, 97-98 (discussing the holdout problem). For an example of how this might work, see *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985). The case sets forth the following proposition:

Suppose to begin with that the breach occurs the day after Lake River buys its new bagging system for \$89,000 and before Carborundum ships any Ferro Carbo. Carborundum would owe Lake River \$533,000. Since Lake River would have incurred at that point a total cost of only \$89,000 its net gain from the breach would be \$444,000. This is more than four times the profit of \$107,000 (20 percent of the contract price of \$533,000) that Lake River expected to make from the contract if it had been performed: a huge windfall.

Id.

55. POSNER, *supra* note 6, at 128-30; Goetz & Scott, *The Mitigation Principle: Towards a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 1000 (1983).

56. Economists draw distinctions between economic profits (higher than market rate of return) and accounting profits (revenues greater than costs). While all firms operating “in the black” have accounting profits, without market power (such as a patent or monopoly), it is impossible for the firm to obtain economic profits. Firms achieve accounting profits by devising more efficient means of production (since in theory they cannot control the price at which they will purchase inputs such as labor, machinery, or materials). But almost immediately the firms will lose their advantage, since their superior methods and any attempt to undercut market prices will be copied by all their competitors. Katz, *supra* note 3, at 551-52.

57. See, e.g., Dwight M. Jaffe & Thomas Russell, *Imperfect Information, Uncertainty, and Credit Rationing*, 90 Q.J. ECON. 651, 652 (1976) (explaining why banks do not just raise interest rates for bad credit risks); Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM.

making damage calculations more difficult. For example, contracts can involve heirlooms that are priceless only to an individual family.⁵⁸ They can also involve payment for one party's bearing a child for another.⁵⁹ Contracts can feature education that creates only intellectual wealth (for example, a Ph.D. in medieval philosophy⁶⁰ or in the language of an extinct people)⁶¹ or only religious wealth (as in Talmudic studies).⁶² Most law and economics scholars would support a person's ability to contract about such transactions (surrogacy perhaps excepted).⁶³ Damages for contract breach cause difficult valuation problems. In the heirloom case, specific performance may replace damages if a party to the contract was a member of the family concerned.⁶⁴ Though a single child is unique, many scholars (law and economics adherents among them) will support damage awards, but not specific performance, for breach of a surrogacy contract.⁶⁵ Children are not

ECON. REV. 393, 408 (1981) (same); *see also* Robert Cooter, *Unity in Tort, Contract and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 4 (1985) (discussing how the ability to externalize risks causes inefficiency). An example of this goal can be seen in the following quotation:

Maximizing profit is really just taking the amount of potential return and weighing it by the potential outcome, i.e., the risk. What we are trying to do is discern ways to develop a wider base, either by using bigger platform technology that can be spread across a number of different product opportunities, or by having the ability to develop five drugs in parallel instead of one. This is the goal of minimizing risk, and spreading it over many pieces. Risk always has to be gauged by how much money you have in the bank.

Symposium, *Financing the Biotech Industry: Can the Risks be Reduced?*, 4 B.U. J. SCI. & TECH. L. 1, 61 (1998).

58. *See generally* 2 WILLIAM D. HAWKLAND, HAWKLAND UCC SERIES § 2-716 (2001) (describing the limitation for buyer's remedy to unique goods); *cf. In re Estate of McDowell*, 345 N.Y.S.2d 828 (1973) (discussing a testator who willed his estate to his children to be divided equally. The children went to court over his rocking chair, over which each eventually got "custody" for half the year, with the survivor taking the chair in "fee."); *see generally* Wendy C. Lowengrub, *Unique or Ubiquitous: Art Prints and the Uniform Commercial Code*, 72 IND. L.J. 595 (1997); *cf. Sedmak v. Charlie's Chevrolet, Inc.*, 622 S.W.2d 694 (Mo. Ct. App. 1981) (refusing to grant recovery of specific performance for a 1962 Corvette when a like model could be obtained elsewhere).

59. *See Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993) (upholding surrogacy contract as valid).

60. *See* CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND POSSIBILITIES 363 (2d ed. 2000) (providing the Joe and Sheila example).

61. *See Srinivasan v. Srinivasan*, 396 S.E.2d 675, 678 (Va. Ct. App. 1990) (noting wife received education in Sanskrit "more for self-fulfillment than for the future financial support of the family").

62. *See Goldberger v. Goldberger*, 624 A.2d 1328, 1333 (Md. Ct. Spec. App. 1993) ("Appellant testified that he studies 'for the sake of studying . . .'").

63. Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2377 (1995) (using family law arguments to oppose specifically enforceable surrogacy contracts); Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533, 572 (1992) (presenting the advantages of surrogacy contracts).

64. If neither party was a member of the affected family, the transaction would be treated as though there was nothing special about the goods involved. Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

65. *See* Brinig, *supra* note 63, at 2397-98 (rejecting a movement toward specifically enforcing contracts for surrogacy); Trebilcock & Keshvani, *supra* note 63, at 585 (allowing cooling-off post breach); Ronald A. Cass, *Coping with Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73 (1987). *But see* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) (arguing for specifically enforceable surrogacy contracts).

measurable in monetary terms.⁶⁶ Both the children and the gestation needed for their survival are so closely related to emotions and the pregnant mother's self-definition that even if we were not worried about shirking,⁶⁷ we might be concerned about treating children as commodities.⁶⁸ With the expensive but non-income-producing degree or the perpetual scholar, law and economics scholars will want to equate the value of the education to the price paid in order to avoid having to estimate either how much value the education was going to produce (the usual expectation measure), how much it was really worth to the individual (a completely subjective measure), or how much was given up to acquire it in terms of another career (opportunity cost).⁶⁹

Assume that both parties agree that a valid contract has been made and both parties understand what performance is required. What does the contract *mean*? Law and economics scholars disagree whether in this case, and assuming no intervening event or state of facts, parties have a right to choose whether to perform or pay damages.⁷⁰ Some scholars argue each party has a right to efficiently breach, that is, to pay the other party the expectation value of the contract, particularly if a better deal has come along.⁷¹ Others (perhaps the majority) write instead that because we need a functional system of contracts, people should not be quite so free to breach.⁷² That is, each party to a valid contract has a duty to perform that goes beyond the pure compensation principle. Looking at the problem from the perspective of the nonbreaching party may allow one to see that there is not only an inconvenience, but also an almost immoral quality associated with contract breach. Some evidence suggests, for example, that adherents of religions emphasizing guilt and obligation are less likely to declare bankruptcy and more likely to perform contracts.⁷³ Stewart Macaulay's famous study noted that to threaten a lawsuit would breach the commercial norm of following "gentlemen's agreements" and trusting

66. See, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 850 (1994) (discussing problems with a free-market system for babies or discrimination); Joan Mahoney, *An Essay on Surrogacy and Feminist Thought*, 16 L. MED. & HEALTH CARE 81, 82 (1988) (analyzing issues raised by surrogacy and some answers feminist jurisprudence might suggest to deal with them); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987) (explaining the differences between inalienability as being nongiveable, nonsalable, or completely nontransferable); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 69-83 (1993) (discussing ways in which money damages for pain and suffering and loss of consortium can commodify the human experience).

67. For a discussion of shirking in this context, see Alan Schwartz, *supra* note 32, at 277.

68. Radin, *supra* note 66, at 1852, 1856; Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337 (1995).

69. See Allen M. Parkman, *Human Capital as Property in Celebrity Divorces*, 29 FAM. L.Q. 141 (1995).

70. See OLIVER W. HOLMES JR., THE COMMON LAW 300-01 (1881) (arguing that a contracting party is not subject to servitude); DOUGLAS G. LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 7 (3d ed. 1990) (explaining the difference between legal and equitable remedies); POSNER, *supra* note 6, at 120-21 (discussing how a damages award may not result in the best economic result).

71. POSNER, *supra* note 6, at 107; Yorio, *supra* note 42, at 1423-24 (arguing for modifying current damages rules to include more flexibility).

72. See Friedmann, *supra* note 7, at 2 (describing an entitlement to performance), 13 (stating the nonbreaching party should be able to recover more than expectation damages so as to get the benefit of the third-party interest); see also Epstein, *supra* note 30, at 40 (recognizing parties can negotiate beforehand or renegotiate for the possibility of breach).

73. See F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 200, 201 (1998) (arguing that changes in social norms, rather than legal changes, explain the tripling of bankruptcy filing rates from 1984 to 1991).

one's trading partners.⁷⁴

On a less lofty scale, we know that many outside forces affect contract performance. The most common of these (and therefore the most frequently allocated by contracts) is a change in market prices.⁷⁵ Such a change might include the price of a substitute,⁷⁶ or complementary goods,⁷⁷ or of something used to make the goods, called a factor of production.⁷⁸ Less often, there may be a change in technology (such as the invention of the Xerox process when your business was ditto paper)⁷⁹ or the intervention of an "act of God" that may render performance very costly, wasteful, or impossible.⁸⁰ If outside forces drastically change the ability to perform, one party may therefore seek to excuse performance. Sometimes the literature suggests that we look at what reasonable parties would most likely have intended in such a circumstance had they thought about it in advance.⁸¹ Sometimes, as with the matters involved in the first goal of encouraging contract formation, the argument will be that the contract should be discharged (neither required to further perform) because performance would occasion economic waste.⁸² (In other words, neither party could have foreseen nor insured against what occurred and to require performance would just be silly).⁸³

74. Macaulay, *supra* note 33; Simon Johnson et al., *Courts and Relational Contracts*, 18 J.L. ECON. & ORG. 221, 222 (2002).

75. *See, e.g.*, *Mo. Furnace Co. v. Cochran*, 8 F. 463 (W.D. Pa. 1881) (adjudicating case involving change in market price for Coke); Baird, *supra* note 20, at 49 (providing commentary on the *Missouri Furnace* case); *Chicago Coliseum Club v. Dempsey*, 265 Ill. App. 542 (1932) (discussing change in market price for fight when the fighters involved changed); TREBILCOCK, *supra* note 21, at 139-40 (discussing *Chicago Coliseum Club*).

76. *See* Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877, 898 (1990) (stating that when substitutes exist, contract damages seem reasonably capable, upon the promisor's breach, to make the promisee indifferent between performance and breach).

77. *See* *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 570-75 (1967) (documenting that though Procter & Gamble was not in the market for liquid bleach, it produced complementary goods and acquired Clorox as an alternative to entering the market independently); *see also* *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 F. 407 (2d Cir. 1917) (pancake flour and syrup); *Valmor Prods. Co. v. Standard Prods. Corp.*, 464 F.2d 200 (1st Cir. 1972) (hair care preparation and hair dryer); *Jetzon Tire & Rubber Corp. v. Gen. Motors Corp.*, 177 U.S.P.Q. 467 (T.T.A.B. 1973) (tires and automobiles). For definitions and general discussions, *see, e.g.*, Roger D. Blair & Thomas F. Cotter, *Rethinking Patent Damages*, 10 TEX. INTELL. PROP. L.J. 1, 85-89 (2001); Carmen Matutes & Pierre Regibeau, *Compatibility and Bundling of Complementary Goods in a Duopoly*, 50 J. INDUS. ECON. 37, 46 (1992); Lester Telser, *A Theory of Monopoly of Complementary Goods*, 52 J. BUS. 211, 211-30 (1979).

78. Baird, *supra* note 20, at 54-55.

79. *See, e.g.*, George A. Akerlof & Janet L. Yellen, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 279 (1996) (reasoning that technological changes shift available choices, creating winners and losers).

80. *See, e.g.*, Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863) (explaining the doctrine of contract impossibility); *Krell v. Henry*, 2 K.B. 740 (C.A. 1903) (explaining the doctrine of contract frustration of purpose).

81. POSNER, *supra* note 6, at 102-09 (discussing the doctrine of impossibility and related doctrines in the insurance contract context).

82. Muris, *supra* note 42, at 391 (discussing situations that can lead to economic waste); Yorio, *supra* note 42, at 1424 (providing an argument for discharge in an economic waste case).

83. Of course, we may want to leave parties where they were under the contract in order to encourage performance of contracts generally.

D. Goal Four. Damages Should Reflect the Other Goals of Contract

Both common law and the Uniform Commercial Code (U.C.C.) limit consequential damages to what the breaching party could reasonably have foreseen.⁸⁴ There are several law and economics explanations for this limitation. First, consequential damages that are not foreseeable from the contract itself or carefully pointed out to the other party are usually better known by the nonbreaching party.⁸⁵ This, in turn, means several things. First, such consequential harms may be controlled by the nonbreaching party. In tort, when the breaching party has done a “legal wrong,” it makes some sense to put the risk of the “eggshell skull” on the wrongdoer.⁸⁶ In contract, we might expect the nonbreaching party either to avoid the loss altogether (by purchasing an additional mine shaft in *Hadley v. Baxendale*⁸⁷) or to purchase insurance that will cover the risk.⁸⁸ For example, if having a car available at all times is really important to a driver, the driver can purchase insurance that will cover a rental car if the driver’s car must have body work done because of an accident, even one that was his fault. If there are important damages that are hidden and cannot be insured against, the legal rule in contract encourages the party who would suffer the damages to disclose them and make them part of the contract.⁸⁹

A related concern is that if consequential damages could be completely recovered in cases in which the other party breached, there would be less pressure to adhere to the contract in the first place.⁹⁰ (This is related to the problem of shirking discussed earlier.) In these cases, the nonbreaching party might also be tempted to exaggerate damage

84. Cooter, *supra* note 57, at 11-16; Goetz & Scott, *supra* note 16, at 1280 n.42.

85. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. Ct. 1854); *see also* U.C.C. § 2-715(2).

Consequential damages resulting from the seller’s breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

Id.; Gwen D. Quillen, *Contract Damages and Cross-Subsidization*, 61 S. CAL. L. REV. 1125, 1128 (1988); Ayres & Gertner, *supra* note 26, at 101; *see also* Bebchuk & Shavell, *supra* note 15, at 286 (discussing transfer of information).

86. *Cf.* *Hawkins v. McGee*, 146 A. 641 (N.H. 1929). *Hawkins* was a case wherein a surgeon promised Hawkins that an operation would leave him with a “one hundred percent good hand.” *Id.* However, following the surgery, Hawkins suffered ill effects from the operation, sued, and ultimately recovered as damages the difference between the value of a perfect hand and the value of the post-operative hand. *Id.*

87. 156 Eng. Rep. 145 (1854); *see* POSNER, *supra* note 6, at 126-27 (discussing consequential damages in the case of contract breach); Richard Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989) (arguing for the use of a plain meaning approach to contract interpretation in assessing damages); J.P. Kostritsky, “*Why Infer?*” *What The New Institutional Economics Has To Say About Law-Supplied Default Rules*, 73 TUL. L. REV. 497, 523-24 (1998) (discussing the “Hadley Rule” and possible alternatives); Bebchuk & Shavell, *supra* note 15, at 285-86 (finding limitations because of foreseeability rule).

88. *See, e.g.*, *Cretex Companies, Inc. v. Constr. Leaders, Inc.*, 342 N.W.2d 135 (Minn. 1984) (explaining the theory of intended third party beneficiaries in the context of a bond payment by a surety).

89. *See* POSNER, *supra* note 6, at 126-27 (analogizing this type of situation to the tort situation where disallowance of recovery occurs when a person injured could have, but did not, avoid the injury by wearing a seatbelt).

90. *See, e.g.*, *J.O. Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396 (Miss. 1996) (awarding expectation damages for breach of contract for cabinets in public housing project, which included a 26% profit and the salary of managers who worked on the breached contract and were therefore kept from other business); Bebchuk & Shavell, *supra* note 15, at 285-86; Epstein, *supra* note 87, at 116-18.

claims to include items that were not strictly related to the contract or were otherwise somewhat fanciful.⁹¹

In general, if damages are hard to predict, the expectation formula will present problems.⁹² Sometimes the damages will prove so intractable that only nominal damages will be awarded.⁹³ Sometimes the parties will specify damages in the contract, risking a later finding that the damages were a penalty. Sometimes, though, there will not be enough assets at the time of contracting to credibly bankroll liquidated damages. Sometimes, courts will abandon expectation notions in favor of some other remedy that does not leave the party in as difficult a valuation position. A common contemporary example involves a couple dissolving their marriage who have been married for a relatively short period of time and have not accumulated many traditional assets. However, one of them (often the complaining party in the divorce action) has acquired an advanced degree over the course of the marriage. The other has worked throughout, paying household expenses and contributing to tuition costs. The working spouse claims an expectation in a higher standard of living⁹⁴ or that after launching the other's career, the student spouse would fund further education for the working spouse.⁹⁵

However, most divorce courts do not treat the student's advanced degree as a species of property that can be divided⁹⁶ but turn instead to some type of contractual analysis. The first question involves how one might compute the nonstudent's expectation damages. Expert testimony could be used to establish the average difference between a person's lifetime earnings with and without the advanced degree.⁹⁷ Although

91. See Epstein, *supra* note 87, at 114-18 (explaining the weakness of the expectation damage remedy).

92. Katz, *supra* note 3, at 554 (explaining the "liquidated specific performance" formula for damages).

93. See Quillen, *supra* note 85, at 1136-37 (finding that courts are concerned with proportionality in contracts).

94. See DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981) (finding that although a working spouse had an expectation of a higher standard of living, the trial court award including only reimbursement for financial support she provided to the student spouse was not an abuse of discretion).

95. See McSparron v. McSparron, 662 N.E.2d 745, 750-51 (N.Y. 1995) (finding that the degree earned by the student spouse was an item of marital property subject to equitable distribution); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 863, 878-79, 898, 900 (1988) (stating this despite the working spouse's lost career opportunities and the expectations of additional benefits for the children or an enhanced family life).

96. New York goes the furthest in making professional degrees marital property. See, e.g., O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985) (holding that a husband's medical license was marital property). New York also equitably distributes other career gains that occurred as a result of the marriage. See, e.g., Golub v. Golub, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988) (holding that the increase in value of a wife's acting and modeling career was marital property).

97. At least one court has provided a mathematical approach to valuing the contribution one spouse makes to the other spouse's acquisition of a degree that seems to avoid the problems of "averaging" while nonetheless considering the worth of the degree. The idea in *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989), is that an investment in a professional degree, like any other asset that earns money, comes from two sources: labor and capital. *Id.* at 65. Contributions to labor come entirely from the spouse in school and constitute the bulk of what the degree (or other income-earning asset) will produce. *Id.* Contributions to capital, on the other hand, can come from either, or both, spouses. *Id.* at 64-65. These may be in cash or in kind, through earnings in the labor force or relieving the student spouse of household or parenting responsibilities. *Id.* Although there may be tremendous variations in the return to the contributions to labor, the returns to capital are thought to be quite predictable and easy to measure. *Francis*, 442 N.W.2d at 61. For instance, these returns are used by financial institutions to establish the interest rates for lending money. The expert witness who testified in *Francis* established that the conventional ratio of labor to capital for financial investments is 70/30. *Id.* at 65. Using this

such testimony often supports worker's compensation or wrongful death awards, both of these actions involve a tort concept of fault. In tort, if there is some chance that the person might not have actually earned as much as suggested by the expert, the fact of the legal wrongdoing justifies placing the risk on the tortfeasor.⁹⁸ That analysis cannot easily be carried over to the divorce case in which fault need not be proved (and may be irrelevant) in making awards.⁹⁹ In contract law, the student spouse may justly claim that he or she wanted a career in public service or academia where the monetary rewards were far less than the average professional salary.¹⁰⁰ The student may even claim that his or her spouse had no justifiable expectation of a higher standard of living or "payback" because a marriage resembles a contract terminable at will.

Divorce courts more commonly turn to other damage measures. Instead of trying to place the working spouse in the position he or she would have held had the contract been performed, courts look instead to what would have happened if the education contract had not been made—the reliance measure. Divorce courts might look to what other sources of funding the student spouse could have used (e.g., loans from banks or parents) or to the money the student would have earned during the marriage had the degree not

theory, the *Mahoney* court would have calculated the nonstudent spouse's contribution to capital at approximately $\$24,000/(\$24,000 + \$6500)$, or 80%. *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982). This 80% would then be multiplied by 30% (the proportion of the value of the degree attributable to labor) and the result (.24) multiplied by the value of the average business degree. Presumably an award under this system would be higher than the \$5000 awarded by the trial court. *Id.* at 534-35. It would be higher because the *Francis*-type measure would be an expectation, or gains-based, measure rather than a sacrifice, or loss-based, one.

98. See June Carbone, *The Futility of Coherence, The ALI's Principles of the Law*, 4 J.L. & FAM. STUD. 43, 75 (2002) (explaining that a husband will be expected to financially support his wife and children even though his wife, not him, filed for a no-fault divorce); Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 SETON HALL L. REV. 390, 426 (1997) (arguing that tortfeasors should be held liable for misrepresentation or concealment).

99. Brinig & Carbone, *supra* note 95, at 867 (arguing that the expectation and reliance explanations for alimony analogized from damage measures in breach of contract have no place in no-fault divorce, which does not require, or in some states admit, breach of marital obligation for dissolution of the marriage).

100. See *Gelletly v. Gelletly*, No. 1127-95-2, 1996 Va. App. LEXIS 39, at *2 (Va. Ct. App. Jan. 23, 1996) (holding that a husband's change in career from a high-paying job to a low-paying job did not excuse the payment of spousal support); *Stubblebine v. Stubblebine*, No. 1915-94-4, 1996 Va. App. LEXIS 98, at *2 (Va. Ct. App. Feb. 13, 1996) (holding that because the husband was capable of gainful employment, he must be imputed income based on his most recent job). For a discussion of this problem, see *DeWitt v. DeWitt*, 296 N.W.2d 761, 768 (Wis. Ct. App. 1980), in which the court stated:

We think they [approaches for valuing a professional degree] share the disadvantage of being wholly speculative. Whether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based upon the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after the divorce. Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties' circumstances, a property division may not. The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense.

Id.

been pursued.¹⁰¹ If the choice in a particular marriage involved a deferred degree for the student spouse, the court could look at the opportunity cost of the delayed degree (i.e., the future earnings lost by the working spouse). This last opportunity cost measure, of course, involves considerable more speculation than the court is likely to want to make.¹⁰²

The divorce court's typical calculation involves totaling up the money contributed by each spouse during the education period to the degree-obtaining effort and reimbursing the working spouse for his or her contribution.¹⁰³ This might be seen as a reliance measure or as restitution (disgorging the benefit that would not otherwise be obtained by the student spouse).¹⁰⁴ The award typically includes direct costs paid by the working spouse to tuition and books and half of the household expenses (support) paid by the working spouse during the time the student spouse was in school (assuming the student spouse was not also working).¹⁰⁵ Courts usually make these awards as some type of alimony (reimbursement alimony is one term used), thus avoiding contract terminology but not contract reasoning.¹⁰⁶

1. *Asymmetric Contracts*

For example, assume the following stylized facts:

The Buyer, Basalt Mining Company, and the Seller, Spur Railroad, entered into a five-year contract with an option to renew. Under the contract, Spur was to construct and operate a railroad line to Basalt's new mine. The coal from Basalt's mine would be loaded on Spur's railroad cars and shipped to Port City. A geological survey done by Basalt's engineers estimated that the coal seam in the new mine would last at least ten years. Basalt and Spur both estimated that an average of at least one railroad car per week could be loaded from the mine, 52 cars per year, or 260 cars over the life of the contract.

Spur knew at the time of contracting that it would cost \$100,000 to build the new railroad line and another \$100 per railroad car to ship the coal. Spur agreed to charge Basalt \$1000 per shipment. Spur calculated (reasonably) that it would net \$134,000 on its

101. See *In re Marriage of Lundberg*, 318 N.W.2d 918, 924 (Wis. 1982) (stating that if instead of supporting the medical-student husband, the wife had invested her money at a five percent rate of return, she would have acquired \$33,077 by 1980).

102. See PRINCIPLES OF FAMILY DISSOLUTION § 5.05, cmt. at 204 (Tentative Draft 1995).

103. See *Mahoney v. Mahoney*, 453 A.2d 527, 534 (N.J. 1982) (noting that such contributions may include "household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license"); *Hoak v. Hoak*, 370 S.E.2d 473, 478 (W. Va. 1988) (same).

104. See *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) ("[Respondent] had reasonable expectation that she would be rewarded for her efforts by higher standard of living."); *Hubbard v. Hubbard*, 603 P.2d 747, 751-52 (Okla. 1979) (holding a wife divorcing a physician immediately after he finished his residency was entitled to be compensated for the amount of her investment in his education and training in order to prevent his unjust enrichment); *Carbone*, *supra* note 98, at 56, 68-69 (discussing how lost earning capacity should be computed upon divorce when, during the marriage, one spouse gave up significant career opportunities for the other spouse or the couple's children).

105. See *Mahoney*, 453 A.2d at 534 (holding that reimbursement alimony should include all financial contributions toward the former spouse's education and living expenses).

106. See *DeLa Rosa*, 309 N.W.2d at 758 (using "expectation," reliance, and restitution to determine appropriate damages).

initial investment. $[(260 \times \$1000 = \$260,000) - (\$100,000 + 26,000 = \$126,000) = \$134,000]$. However, the \$100,000 it cost to build the line would not be recouped until early in the third year of the contract ($\$100,000/900 = 111.11$, or the third week of the third year).

The contract looked a bit different from Basalt's perspective. Basalt would begin to earn its profit immediately. It charged \$2500 per railroad car of coal to the distributor at Port City. It cost \$1000 to ship the coal on Spur's line and another \$500 per car to extract the coal from the mine. Basalt could assume that each carload would net \$1000, for a total expected yield over the first five years of \$260,000.

Things did not turn out as expected, however. Basalt cancelled the contract after shipping only 25 carloads of coal, since the seam was not as rich as expected. Now that the mine had been dug, engineers knew that only an additional 75 carloads of coal could be extracted at an additional cost of \$2000/carload to Basalt. By the time of cancellation, the mine had netted \$25,000. From Basalt's perspective, if the mine were emptied, it would lose \$12,500 ($\$25,000 - \$37,500$). It would be impossible to extract the last 160 carloads of coal from the mine. Basalt could allow Spur to run empty coal cars or just pay them the net price (net of the \$100 cost Spur would have to pay per car) for the unfilled 215 cars.

From Spur's perspective, at the time the contract was cancelled, it had a loss of \$77,500 ($\$100,000 - (25 \times \$900)$). If Basalt emptied the mine, Spur would still lose \$10,000 ($\$100,000 - (100 \times \$900)$). What is the correct damage amount?

The contract was, at the time of its making, a fair one. Both parties anticipated they would be better off undertaking the joint project than without it. It was reasonable for Spur to invest the \$100,000 in building the railroad (so its loss is foreseeable to Basalt). It would have been logical, had terms been ambiguous, to allocate the risk of coal deposit failure on Basalt. It hired the geological engineers, and Spur had no reason to know how much coal was in the seam. However, both parties knew at the outset that Spur could not make money until some time during the third year. A good argument could be made that Spur should have written some minimum number of carloads (some number greater than 111) or some minimum payment (some amount over \$111,000) into the contract.

In this hypothetical, Basalt has breached while it is still ahead and should not be able to walk off with the profit from its breach. Possible damage measures are:

(1) Expectation damages. But, should this be measured by the original estimates (\$134,000 net, assuming Spur runs 160 empty cars and Basalt pays as planned) or what would have happened if the contract were performed, with extraction of the coal remaining in the mine (\$10,000 loss to Spur)?

(2) Reliance damages. Spur has made a reasonable outlay of \$100,000. This outlay was not only foreseeable, but was known to Basalt. Should damages be limited by the expectation measure (so Spur would get back an additional \$67,500 from Basalt, ending up with a \$10,000 loss)? Or, should Spur get \$100,000 plus the cost of shipping the 25 cars (an additional \$2500) with interest (the opportunity cost to Spur of undertaking this project, assuming it had other customers for whom it could build and operate railroads)?

(3) Restitution damages. Should Spur get the \$25,000 Basalt has made on the first 25 cars? In this case, Spur would still lose \$75,000. Should Spur get the entire amount Basalt received from the first 25 cars, or \$62,500 ($\2500×25)? (They would then lose \$15,000 on the contract.)

2. Some Possible Answers

The appropriate measure of damages depends on the facts of each case, and it also depends on whether the parties themselves allocated the risk of loss to the nonbreaching party.¹⁰⁷ Specific performance is not appropriate in a losing contract because such performance is economically wasteful. Even in a profitable contract, the court will not award specific performance if the investing party can recoup its investment in another contract.¹⁰⁸

Expectation damages may be appropriate when the profits can be calculated with specificity. In a new venture, where profits are speculative, courts are unwilling to award expectation damages and assume no (zero) profits.¹⁰⁹ This may understate the nonbreaching party's damages, but protects the breaching party from suffering too harsh a penalty.

Restitution damages, or "off the contract" damages, are appropriate when rescission is the appropriate remedy.¹¹⁰ The court will seek to put the parties back into the status quo ante the contract was made.¹¹¹ Restitution would not be appropriate in the Spur/Basalt action because the contract is not "being unmade." It seems unfair to force Spur to repay Basalt the revenues Spur made on the contract since Spur has not yet recouped its investment. Though Basalt intentionally and substantially breached,¹¹² the

107. *Cf.* *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 194-95 (2d Cir. 2001) (applying New Jersey law and finding large corporate parties to a three-part telecommunications contract had themselves allocated the risk of various types of outcomes, including the risk that the system would not function); *see also* *McLish v. Harris Farms, Inc.*, 507 F. Supp. 1075, 1084 (E.D. Cal. 1980) (involving allocation of risk under a cattle and cattle feed contract).

108. *See, e.g.*, *Baltimore & Ohio R.R. Co. v. Potomac Coal Co.*, 51 Md. 327 (1879) (involving a contract to provide railroad cars at coal company's expense in exchange for price reduction when Potomac shipped coal on B & O's railroad lines. This contract remained in effect long enough for both parties to profit, and Potomac's investments could be used in other contracts.).

109. *See, e.g.*, *Autotrol Corp. v. Cont'l Water Sys. Corp.*, 918 F.2d 689, 694 (7th Cir. 1990) (Posner, J.) (involving a contract that specified application of Texas law and involved design of a control system for a water purifier upon which Continental owned the patent. Another firm purchased Continental and terminated the contract over a dispute in how the market would be shared, to the detriment of Autotrol. The court held that profits were not speculative, but could be calculated in this case, since Autotrol was an established business involved in many concurrent projects. The court also allowed recovery of variable expenses including salary of employees who were allocated to the project.); *cf.* *Cyberchon v. Calldata*, 47 F.3d 39, 41-42 (2d Cir. 1995) (applying New York law and involving a plaintiff who sought overhead and "shutdown" expenses under a promissory estoppel claim on a contract involving the creation of software for a defense contractor, when the plaintiff could establish a "demonstrable past history of ongoing business operations" and shutdown costs incurred due to reliance upon Calldata promises); *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 127-28 (S.D.N.Y. 1997) (allowing a pro rata distribution of cash under Texas law paid by broker for losses on investments falsely represented as safe because the damages resulted from misrepresentation).

110. *See, e.g.*, *Earthinfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 115-17, 121 (Colo. 1995) (involving a contract for the production of hydrological and meteorological information on CD-ROM that was rescinded after Earthinfo, which succeeded the marketer's interest, refused to pay royalties on a derivative product. Both parties sought rescission of the contract, and profits not attributable to Earthinfo's efforts should have been returned to Hydrosphere.) (citing E. Alan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341 (1985)).

111. *See* 1 DAN B. DOBBS, *LAW OF REMEDIES* § 4.03(6) (2d ed. 1993) (explaining the meaning of rescission).

112. *See* *Earthinfo*, 900 P.2d at 119 (stating that if the defendant's wrongdoing was intentional or substantial, recovery of profits may be granted).

parties did not mutually rescind the contract—Spur wanted the contract to continue so it could realize a profit. Further, profits depended on efforts made by both the breaching and nonbreaching parties.¹¹³

Courts award reliance interests when the nonbreaching party cannot hope to recover its investment on a losing contract because the assets gained by the investment cannot be applied to another contract (the investment is contract-specific).¹¹⁴ The nonbreaching party has a right to collect variable costs expended in reliance on the contract, but not fixed costs it would have incurred anyway.¹¹⁵ In the Spur/Basalt agreement, the investment of \$100,000 to build the railway fits the definition of a variable cost, made only because of the contract, and not capable of recoupment in another contract. Running the cars, however, might represent overhead (fixed costs) because the cars could be used for other contracts. Also, these expenses were compensated for by Basalt.

II. WHERE DO CONTRACTS AND FAMILY LAW PART WAYS?

Family law often becomes clearer to students and jurists when explained using theories from general civil litigation.¹¹⁶ Academics have found contract and corporate explanations particularly useful.¹¹⁷ However, these theories have problems, problems

113. See *id.* at 120 (stating that even if a willful breach, a wrongdoer should not be made to give up that which is his own); DOBBS, *supra* note 111, § 4.1(4) (explaining the measurement of restitution). These included mining the coal and paying Spur to ship the coal for \$1500. Since each shipment cost Spur \$100 per railroad car plus \$384.62/week (the initial cost of building the line divided by the number of weeks in the contract), Basalt contributed a little more than 75% of the costs.

114. See *Interstate Indus. Unif. Rental Serv., Inc. v. Couri Pontiac*, 355 A.2d 913, 916-17, 922 (Me. 1976) (involving a contract with a liquidated damages clause and a seller who incurred costs of more than \$2000 manufacturing and tailoring uniforms. Couri, the buyer, discovered that it had a duplicate agreement with another service and cancelled its contract with IIURS. IIURS successfully sued to enforce the liquidated damages clause for the uniforms for the balance of the contract (\$3000), which was reasonably related to the loss sustained by the breach.).

115. *Autotrol Corp. v. Cont'l Water Sys. Corp.*, 918 F.2d 689, 692 (7th Cir. 1990). In *Autotrol*, \$245,000 was a contract-specific variable cost. *Id.* at 692. Autotrol would not have made these expenses had it not been for the contract and furthermore, the expenses represented a loss. *Id.* While Continental owned the patent on the system and could always find another partner, Autotrol had invested its money in research and materials that could not be used on another project. *Id.* at 691. Engineers employed on the project would have been paid their regular salaries (\$700,000) even without the Continental contract. *Id.* at 692. However, they would have been employed on another (potentially profitable) project if not for the contract with Continental. *Autotrol*, 918 F.2d at 689.

116. See, e.g., June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 957-60 (1991) (using contract and restitutionary remedies in discussion of damages).

117. See, e.g., Carbone & Brinig, *supra* note 116 (using contract and restitutionary remedies in discussion of damages); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (stating that marriage is governed by emotional as well as societal norms that fill gaps in the formal marriage contract); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993) (suggesting that when one spouse is disadvantaged because of the marital division of labor, the other should be required to do the equivalent of a partnership buyout on divorce); Martha M. Ertman, *Marriage As A Trade: Bridging The Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (stating that parties to intimate relationships should be able to contract enforceably). *But see* Ira Mark Ellman & Sharon Lohr, *Marriage As Contract, Opportunistic Violence, And Other Bad Arguments For Fault Divorce*, 1997 U. ILL. L. REV. 719, 742-47 (suggesting that alimony is not really like contract damages because the contract promises are hard to sort out

that surface readily as we try to explain rules for sorting out couples' finances following divorce. Divorce can be described as an occasion of breach,¹¹⁸ dissolution of the marriage contract,¹¹⁹ or a contract terminable at will.¹²⁰ A dissolving marriage seems like any other failed enterprise but involves problems that go beyond the simple dissolution of a relationship. Like a sliding house of cards, a dissolving marriage includes numerous other agreements made in the expectation that the relationship would continue.¹²¹ It is these "side deals," which resemble the contract-specific investment made by Spur and Basalt in the problem, that I would like to address here.

David taught contracts for thirty years. Matthew Bender published his casebook,¹²² and he had numerous articles to his credit.¹²³ He was clearly an authority in the field. I was not as experienced. Unlike some contracts doctrines, which I have not systematically thought about since my own law school experience, damages seemed familiar ground to me. Our discussions regarding damages remained interesting and fruitful until shortly before David's death. I am glad that at least a segment of the project—the part where our two interests overlapped and where I, like generations of students, learned from David—will be available to a wider audience.

Although damages are taught in the first term of contracts at the Iowa College of Law, and I have taught only in the second term, I had worked through many of the damages cases before coming to Iowa and in addition have taught remedies for a number of years. In fact, my first purely theoretical work in family law was entitled *The Reliance Interest in Marriage and Divorce*,¹²⁴ and I have written other family law articles dealing with damages as well.¹²⁵ In short, I had thought through the issues and read enough to have my own views. Of course, I was neither as learned nor as confident about them as was David, but I do think I have a fairly good grasp of the problems posed by asymmetric

and are left necessarily unenforceable).

118. See Brinig & Carbone, *supra* note 95, at 867 (suggesting that no breach is possible after no-fault for the contract itself, though "side deals" may be protected); Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 879-81 (1994) (explaining how the marriage contract has become illusory).

119. See *Maynard v. Hill*, 125 U.S. 190, 205, 207 (1888) (describing various laws governing the dissolution of a marriage contract).

120. See Brinig & Crafton, *supra* note 118, at 880 (explaining how opportunism is affecting marriage).

121. See Brinig & Carbone, *supra* note 95, at 877-82 (explaining the effects of lost opportunities during marriage).

122. DAVID H. VERNON, *CONTRACTS: THEORY AND PRACTICE* (2d ed. 1991).

123. See, e.g., David H. Vernon, *Expectancy Damages for Breach of Contract: A Primer and Critique*, 1976 WASH. U. L.Q. 179, 186 (arguing that under the market damage measure, a breaching party is indifferent between performance and breach); David H. Vernon, *A Week to Remember: Of Pregnant Cows, Slipped Horses, Sterile Bulls, Chickens, Heifers, and the Human Animal*, 32 J. LEGAL EDUC. 403 (1982) (discussing mistake cases in first year contracts); David H. Vernon, *Cases on the Law of Contracts*, by Laurence P. Simpson, 35 TEX. L. REV. 156 (1956) (book review).

124. Brinig & Carbone, *supra* note 95, at 855.

125. See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203 (1990) (dealing with remedies for breach of engagement promises including forfeiture of a bond in the form of the engagement ring); Brinig & Crafton, *supra* note 118, at 869 (considering the incentive effects of removing fault sanctions in alimony, which arguably can be seen as damages for breaching marriage vows); Margaret F. Brinig, *Property Distribution Physics, The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93 (1997) [hereinafter Brinig, *Physics*] (considering the various ways of distributing the gains, including human capital gains, as well as the losses flowing from failed marriages).

contracts—the ones in which one party must perform well before the other.¹²⁶

Perhaps my concern with distributive fairness in asymmetric performance contracts comes from my graduate school experience, during which I remember discussing a railroad and railroad mine case much like that of Spur and Basalt. The interest there was in reducing the risks for firms that might need to make large contract-specific investments.¹²⁷ If one who reaped the benefit of the contract first could breach after recouping the investment without paying off the nonbreaching party, these contracts would never be undertaken in the first place. Since these contracts were often essential to the developing American economy (particularly along the frontier),¹²⁸ economists rationalized that encouraging them made long-term sense.

More likely, though, my concern for distributive fairness comes from my everyday thinking and writing about families with problems, particularly divorcing couples. In marriage, the interests are in encouraging spouses to be self-sacrificing for the well being of each other and of the marriage itself.¹²⁹ In other words, more than the single timeframe, and even more than the two contracting individuals, is involved. David and I reached an impasse about damage awards in such losing contracts. He told me I was “absolutely wrong,” and we ultimately eliminated the Spur and Basalt problem because we were coming at this set of issues from two different perspectives.

Perhaps this vignette illuminates a larger and more profound debate between academics in the commercial law area and those in family law. If the goals that the law of commercial contracts facilitates are as I state them in the *Understanding Contracts* chapter,¹³⁰ do they match up with the goals of family law? I think not. Family law, and

126. The discussion here will involve cases in which the parties may usually resort to the enforcement mechanism of the courts. Cases in which the parties cannot rely on external enforcement are thoughtfully discussed in Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. & ORG. 5 (1985).

127. For examples of the economics literature, none of which directly involves the mining train case, see Bruce R. Lyons, *Empirical Relevance of Efficient Contract Theory: Inter-firm Contracts*, 12 OXFORD REV. ECON. POL'Y 27 (1996) (testing various theories empirically); Bruce R. Lyons, *Contracts and Specific Investment: An Empirical Test of Transaction Cost Theory*, 3 J. ECON. & MGMT. STRATEGY 257 (1994) (discussing small subcontractors making specific inputs for customers in the engineering industry and stating more than half the subcontractors avoided making efficient, specific investments); W. Bentley McLeod & James M. Malcomson, *Investments, Holdup, and the Form of Market Contracts*, 83 AM. ECON. REV. 811 (1993) (discussing take-or-pay contracts or specific investments by firms that appear to benefit only their employees); Darlene C. Chisholm, *Asset Specificity and Long-Term Contracts: The Case of the Motion-Pictures Industry*, 19 E. ECON. J. 143 (1993) (considering the high degree of vertical integration and concentration in the motion picture industry, prevalence of star promotion systems, antitrust litigation, and the rise of competition in the form of television all contributed to specific investments by studios and actors during the “Age of the Studio”).

128. See, e.g., DOUGLASS C. NORTH ET AL., *GROWTH AND WELFARE IN THE AMERICAN PAST: A NEW ECONOMIC HISTORY* (1983) (explaining theories of growth as they relate to the establishment of infrastructure such as railroads).

129. MARGARET F. BRING, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 18, 83 (2000) (stating that people marry because they believe that marriage will make them happy, and within a marriage what makes one's spouse or child happy will also make them happy).

130. See *supra* Part I. Paraphrased, the goals are: (1) to encourage parties to create contracts that will leave at least one of the parties better off and neither worse off (Pareto optimality), (2) to encourage parties to write contracts that will cause the parties to perform when it is efficient for them to do so (adequate disclosure and efficient allocation of risk), (3) to encourage efficient performance of valid contracts (appropriate handling of agency costs), and (4) to enforce contracts in ways that advance the preceding three goals.

particularly the law of husbands and wives, is not about a series of contracts.¹³¹ The idea, at any rate, is to make one contract and to stick with it. Family law does not contemplate repeated contracting,¹³² efficient breach,¹³³ or even something akin to the multiple short-term contracts common to franchising.¹³⁴ Nor will specific performance of marital obligations work very well, because the contract depends upon things being done in a spirit of love.¹³⁵ In effect, as in the losing contracts cases discussed in the commercial context, forcing spouses to continue trudging onward in a de facto "dead" marriage would be akin to economically wasteful behavior.

Family law does not encourage efficient investments, as much as true believers in the Chicago school would have it so.¹³⁶ Instead, it encourages investment in the relationship and each other, without expectation of short-term reward.¹³⁷ Love, in the

131. Thus, there are no five-year marriages with options to renew, and parties cannot vary important terms of the contract (particularly terms concerning support of each other and their children).

132. Some states have enacted laws requiring waiting periods before divorce. *See, e.g.*, VA. CODE ANN. § 20-91(A)(9) (Michie 2002). Other laws require support of needy former spouses and require support of children from all relationships, not just the latest. *See, e.g.*, IOWA CODE § 598.21 (2001); CAL. FAM. CODE §§ 4059, 4070, 4071 (West 2002); *see also* State v. Oakley, 629 N.W.2d 200 (Wis. 2001). Each of these laws makes multiple marriages more difficult. Still, about two-thirds of divorced people remarry. UNITED STATES BUREAU OF THE CENSUS, MARRIAGE, DIVORCE AND REMARRIAGE IN THE 1990S 5 (1992) (reporting at least 54% of women remarry, but there is a lower rate for black women); *see also* Larry L. Bumpass et al., *Changing Patterns of Remarriage in the U.S.*, 52 J. MARRIAGE & FAM. 747, 753 (1990) (stating that two-thirds to three-fourths of divorced persons remarry).

133. Fred S. McChesney, *Tortious Interference With Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL. STUD. 131, 132 (1999) (suggesting efficient breach as a possible origin of tortious interference). For some of my thinking on breach, see Margaret F. Brinig, *Some Concerns About Applying Economics to Family Law*, in FEMINISM CONFRONTS HOMO ECONOMICUS (Martha Fineman & Terence Dougherty eds.) (forthcoming 2002).

134. To get to the "efficient" or in my view "covenantal," relationship, one first needs permanence or at least a very long time horizon. *See* BRINIG, *supra* note 129, at 6-7. In game theory terms, this would be translated into an indefinite termination in a repeated game. *See, e.g.*, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 8-9 (1984) (explaining that in an infinitely repeated game, the best strategy is not to defect but to play "tit for tat" in which cooperative moves will be reinforced with more cooperative moves—thus increasing total benefits—but uncooperative moves will be "punished" by one round of uncooperative behavior); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 5 (1963) (dissecting conflicting behavior in the bargaining process); Alvin E. Roth & Francoise Schoumaker, *Expectations and Reputations in Bargaining: An Experimental Study*, 73 AM. ECON. REV. 362, 371 (1983) (explaining that players expect their opponents to expect equal payoffs).

135. For a good discussion of this problem, see Lloyd Cohen, *Marriage, Divorce, and Quasi-Rents, Or "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 300 (1987).

136. *See* Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461, 2470-73 (1994) [hereinafter Brinig, *Comment*] (criticizing Becker's efficiency analysis in the era in which both spouses work outside the home and pointing out how no-fault divorce, "best interests" custody laws, disallowance of interests in the other's earning capacity, and the elimination of periodic alimony in the vast majority of cases all operate against such investment); *see also* Brinig, *Physics, supra* note 125, at 113-18 (arguing that "enhancements to earning capacity made during marriage are just another form of marital investment," and discussing why they should not be subject to the fault rule of divorce in order to create a fairness in divorcing couples).

137. Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1995) (describing why contracts involving the exchange of homemaker services for money are not enforced); *see also* Cooper v. Cooper, 17 N.E. 892, 894 (Mass. 1888) ("Labor in housekeeping was a small incident to a great wrong . . ."); Alexander v. Kuykendall, 63 S.E.2d 746, 747-48 (Va. 1951) (disallowing contractual recovery by a putative wife because she acted out of love, rather than hope of reward). The Alexander court reasoned:

ideal, is unconditional,¹³⁸ not the subject of continued renegotiation coupled with threats of breaking off the relationship.¹³⁹ In some ways, as Saul Levmore put it, marriage is “a love it or leave it” relationship.¹⁴⁰ Families, even less than the Wisconsin corporations studied by Stewart Macaulay,¹⁴¹ do not operate either as a “nexus of contracts” or under continued pressure to sue if there is a breach. Large outstanding balances are encouraged, while faith in the other person and in the marriage keeps the marriage “business” running, even when marginal revenue is less than average cost. Given this sort of thought process—in which covenant is more common than contract—it is unsurprising that family lawyers and state legislatures hesitate before enacting laws that might discourage investment in these marriages, even for a dream or for “hedonic” reasons.¹⁴²

Most of us spend years before marriage comparison shopping without full information,¹⁴³ for marriage partners are in some sense “credence goods”¹⁴⁴ value of

Not business or money, but wedlock is what the parties contemplate. They are, or should be, motivated by love and affection to form a mutual and voluntary compact to live together as husband and wife, until separated by death, for the purpose of mutual happiness, establishing a family, the continuance of the race, the propagation of children, and the general good of society.

Id.; see also *Pyeatte v. Pyeatte*, 661 P.2d 196 (Ariz. Ct. App. 1982) (upholding the use of the installment method for restitution damages for divorce); see generally, Margaret F. Brinig, *The Influence of Marvin v. Marvin on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311 (2001) [hereinafter *Influence of Marvin*] (arguing that while homemaking contributions should be valued at the end of marriage—a positive contribution of *Marvin*—regarding marriage as a series of contracts destroys much of its value).

138. See Margaret F. Brinig & Steven Nock, “*I Only Want Trust*”: Norms, Trust and Autonomy, (SSRN Elec. Library, Working Paper No. 269289, 2001) [hereinafter Brinig & Nock, “*I Only Want Trust*”] (illustrating that the normative exception of unconditional love is the basis for trust that a relationship will function appropriately); Margaret Brinig & Steven Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9 (2000); Margaret F. Brinig, *Equality and Sharing: Views of Households Across the Iron Curtain*, 7 EUR. J. L. & ECON. 55 (1998) (explaining the difference between the East German regime of requiring equal work hours for each spouse and the West German regime of allowing spouses to set their own schedules and arguing that forcing equal division, while it encourages labor force participation by wives, apparently also created less stability in the East German marriages).

139. See STEPHEN J. BURTON, PRINCIPLES OF CONTRACT LAW 586-87 (2d. ed. 2001) (citing cases regarding the adjustment of contractual relations); Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988 (1993).

140. Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807, 825-26 (1996).

141. See Macaulay, *supra* note 33, at 55 (discussing findings concerning when contract is and is not used by businesses and law firms in the Wisconsin area).

142. In labor economics, the term refers to nonprice qualities that affect the worker’s decisions. See Jennifer A. Roback, *Wages, Rents, and Amenities—Differences Among Workers and Regions*, 26 ECON. INQ. 23, 23 (1988) (arguing that one cannot easily apply the “hedonic” price paradigm to the problem of urban amenities because of the difficulties associated with comparing various worker’s subjective demands to two variable markets—the land and labor markets—simultaneously); Jennifer A. Roback, *Wages, Rents, and the Quality of Life*, 90 J. POL. ECON. 1257 (1982) (arguing that regional wage differences are a function of local attributes).

143. PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT AND GENDER 31-42 (1991) (describing the spousal search process); Margaret F. Brinig & Michael V. Alexeev, *Fraud in Courtship, Annulment and Divorce*, 2 EUR. J. L. & ECON. 45 (1995) (analyzing annulment and divorce and showing that a socially optimal amount of fraud exists in marriage); Margaret F. Brinig, *In Search of Prince Charming*, 4 J. GENDER, RACE & JUST. 321, 323-35 (2001); see generally Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. ECON. 20 (1994) (regarding oil deposits); Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885 (2000) (suggesting that a hidden, secrecy-related cost to obtaining compensation accounts for the businessman’s hostility to the economist’s notions of

which must be accepted on faith. When we do decide to marry, it is because, most of the time, we "love" the other person.¹⁴⁵ Perhaps, we are programmed to select well.¹⁴⁶

However, once we are in marriage, we continue to make decisions, or what I have elsewhere referred to as "side deals."¹⁴⁷ We decide where we will live, whether we will have children, and who will stay home to care for them.

Not every financial loss incurred in reliance on the continued sharing of the other spouse's income is compensable. Distinction is necessarily drawn between compensable and noncompensable reliance losses by reference to the purpose of the behavior which gave rise to it. The spouse who sacrifices career prospects to care for the couple's children, in reliance upon the other spouse's income, has a claim for that reliance loss; the spouse who sacrifices career prospects to pursue a passion for golf, in reliance upon the other spouse's income, does not. But if the spousal earning disparity continues, then as their marriage lengthens both develop an expectation to share their spouse's income the loss of which is presumptively compensable¹⁴⁸

Professor Ellman's confinement of "rational" investment¹⁴⁹ to two categories (investment in careers and career loss occasioned by care of a dependent)¹⁵⁰ again points out (as he notes) the problems with trying to work from a law-and-economics-driven

efficient breach).

144. Brinig & Alexeev, *supra* note 143, at 145; Philip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 311 (1970). Credence goods are like work done inside an automobile or operations done while a person is unconscious. To have some idea (right at the time) of the quality of the work done (and whether or not the price paid is fair), one must trust the reputation of the mechanic or surgeon. See Michael Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973).

145. See Brinig & Alexeev, *supra* note 143, at 49 (explaining that divorce or annulment of a marriage is a function of asymmetrical information at "contract" formation).

146. GARY S. BECKER, A TREATISE ON THE FAMILY 325-27 (2d ed. 1991) (discussing how participants in marriage markets are assumed to have limited information, and suggesting that traits of people would be positively sorted in the marriages generated by efficient markets with full information); Gary S. Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL: A CONFERENCE REPORT OF THE NATIONAL BUREAU OF ECONOMIC RESEARCH* (Theodore Schultz ed., 3d ed. 1974) (discussing assortative mating).

147. Brinig, *Comment*, *supra* note 136, at 2466.

148. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 102, § 5.05, cmt. at 204 (Tentative Draft 1995).

149. "Financially rational sharing behavior" is discussed in Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 58-60 (1989). Professor Ellman excludes lifestyle choices, stating:

[i]n this example, the couple's rejection of the San Francisco-Houston move is not financially rational; it results from nonfinancial preferences in matters such as geography, lifestyle, and climate. For most people, these preferences will have a strong influence on their decisions when the differences in income are relatively small. People sometimes indulge such preferences even where the income differences are great. When a couple foregoes economic opportunity to satisfy their nonfinancial preferences, little adjustment is required if they later divorce. Divorce does not distribute the benefit of their decision inequitably; both still retain the advantage of living in San Francisco. The real question is whether we should permit the husband in our example to establish a claim by proving that he gave up Houston entirely to accommodate his wife, that he, unlike she, had no special fondness for San Francisco.

Id. at 61.

150. Ira M. Ellman, *Should the Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259, 270-71.

contractual approach¹⁵¹ to one that will work in family law.

Consideration of hedonic damage in torts¹⁵² has perplexed generations of law students, academics, and judges.¹⁵³ Should we award additional (or lower) damages to someone when another's tortious act has affected the victim's ability to appreciate life or even the compensation for out-of-pocket losses?¹⁵⁴ What do we do, if instead of being dead, the victim is now in a vegetative state?¹⁵⁵ Is loss of awareness preferable to the pain and frustration suffered by, say, Christopher Reeve?

The ability to enjoy life in all its richness unquestionably figures heavily in our desire to marry and, especially, in the myriad of decisions we make as spouses and parents.¹⁵⁶ Putting aside such obvious hedonic decisions as vacations,¹⁵⁷ we might select

151. *Id.* at 264.

152. See, e.g., *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985) (refusing to allow the submission of loss of enjoyment of life as a separate element of damages); *Stern v. Wesley Coll.*, 747 F. Supp. 263, 273 (D. Del. 1990) (refusing to allow a distinct basis of recovery under a survival action statute for the decedent's loss of life); see generally Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4TH 293, 300-04 (1984) (outlining the history of procuring damages awards for loss of enjoyment of life); Ellen S. Pryor, *The Challenge of Teaching Damages*, 45 ST. LOUIS U. L.J. 817, 823 (2001) ("many cases on hedonic damages rule turn mostly on statutory construction"); Gretchen L. Valentine, Comment, *Hedonic Damages as an Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 543, 555-56 (1990) (finding that hedonic damages case law divided into two categories: personal injury and wrongful death).

153. Compare Nathan P. Feisinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417, 420 (1935) (noting recent laws enacted prohibiting causes of action for breach of promise to marry), with *Hakkila v. Hakkila*, 812 P.2d 1320, 1325 (N.M. Ct. App. 1991) ("Even though one may question the utility of such comments, spouses are also free to express negative opinions of one another. 'You look awful' or even 'I don't love you' can be very wounding, but these statements cannot justify liability."). See RESTATEMENT (SECOND) OF TORTS § 46, illus. 13 (1965) (you look "like a hippopotamus").

154. In contracts, hedonic damages, because they are related to pain and suffering, are excluded from consideration. They are said to be reflected in prices. Otherwise they would be consequential damages, and fall within the rule of *Hadley v. Baxendale*, 9 Exch. 341 (Ex. Ct. 1854). In the rare bad faith insurance case, something akin to hedonic damages is awarded to the victim of an insurer's refusal to settle within policy limits or to provide first-party coverage in a clear case. See *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1040 (Cal. 1973) (finding a duty of good faith unconditional for insurer); *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 426 P.2d 173, 178 (Cal. 1967) (finding insurer guilty of breach in a psychosis case). For an effort to compare remedies, see David W. Barber, *Remedies for Imperfect Transactions in Contracts and Torts*, 38 SAN DIEGO L. REV. 193, 216 (2001).

155. See Michael B. Kelly, *Reflections on Remedies*, 39 BRANDEIS L.J. 547, 554 (2000) ("The availability of pain and suffering or hedonic damages to a comatose victim will be subjected to constant attack, making slavish reference to precedent a relatively weak approach to securing a client's goals." (citing *McDougald v. Garber*, 536 N.E.2d 372 (N.Y. 1989)); cf. *DeShaney v. Winnebago County Dept. Soc. Servs.*, 489 U.S. 189, 193-94 (1989) (holding no private cause of action exists under 42 U.S.C. § 1983 in a case in which social services did not act to prevent child from being beaten into a coma by his father. The child "suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded."). For an argument that hedonic damages are not severable from emotional damages generally, or if so, separation should be declared by the legislature, see Kyle R. Crowe, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA L. REV. 1275, 1291-92, 1302 (1990); Erin O'Hara, *Hedonic Damages For Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687, 1688 (1990); Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 93 (1990).

156. For a recent opinion dealing with this problem, see *In re Marriage of Field*, 110 Wash. App. 1059

a career like teaching law not only because it is lucrative, but also because it presents us with intellectual stimulation, the ability to be creative, the opportunity to spend time with family during the week and to take vacations with them during the summers, a day a year of medieval pageantry, and the luxury (sometimes) of ignoring everything else to get engrossed in something that really interests one. If I choose to give up money and perquisites of a commercial practice, and ask my spouse to give up a similar job to move to a college town—say Iowa City or Charlottesville or Ithaca—is our decision rational according to Professor Ellman's definition?

If my spouse does this for me—gives up a law partnership for a foundation job or even teaching high school civics—it may be a wonderful thing for our relationship or perhaps for our children, who can live in a house with a yard instead of a luxury apartment, and who can have at least one parent around all the time.¹⁵⁸ But is my sacrifice, made in love and for hedonic reasons, compensable if, down the pike, the marriage does not last?¹⁵⁹ Professor Ellman says not.¹⁶⁰ The contracts answer would have the hedonic part built into the price (if a small town life is so wonderful, the law school will not have to pay as much to attract the perfect professor as would a school in a big city, even taking cost-of-living differences into account). Assuming spouses can make rational calculations, they will not undertake the move unless the immediate rewards compensate the compliant spouse for the career sacrifice.

Even though for selfish reasons I do not think every law partner should turn in his or her palm pilot and become a law teacher, I think such sacrifices are a good thing. But should the former attorney-cum-foundation worker, who can support him- or herself after

(Wash. Ct. App. 2002) (adjudicating a case in which the couple, both physicians, wanted to work less at their professions in order to have more time to spend with their children and the wife had taken care of the children full-time for nine years preceding dissolution). This is why gender differences in conversations become so baffling. See DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 23 (1990) (discussing linguistic complexities between men and women); JOHN GRAY, *MEN ARE FROM MARS; WOMEN ARE FROM VENUS* 59 (1992) (noting different words and meanings between the sexes); Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 899-900 (1994) (noting constructed dialogue may transform meaning of message).

157. See DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* (1981) (describing the bargaining between a hypothetical husband and his wife about their vacation choices of mountains or beach); see also Daniela E. H. Damian et al., *An Empirical Study of Facilitation of Computer-mediated Distributed Requirements Negotiations* abst. (2002) (unpublished Ph.D. dissertation, University of Calgary) (on file with *The Journal of Corporation Law*) (describing group facilitation as an essential element of group approaches to Requirements Engineering (RE) and illustrating the different social behaviors when dealing with a facilitator and when without); Donna Dosman & Wiktor Adamowicz, *Combining Stated and Revealed Preference Data to Construct an Empirical Examination of Intrahousehold Bargaining* abst. (2002) (unpublished Staff Paper 2-01, University of Alberta, Canada) (on file with author) (discussing household decisions as a bargaining process "in the context of determining the location of family recreation vacation choice." The study resulted in an empirical model, providing information on factors affecting bargaining power with the household decision.).

158. Cf. NICOLA KRAUS & EMMA MCLAUGHLIN, *THE NANNY DIARIES* (2002) (discussing the complicated lives of two-career families in which children are largely raised by their au pairs).

159. Cf. Silbaugh, *supra* note 137 (contending that housework is not legally compensated as set forth in a variety of legal doctrines).

160. See Reporter's Notes to American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, Tent. Draft No. 1, at 205 (1995) (providing an example of giving up a career for golf).

the divorce,¹⁶¹ be, in effect, stuck with what seemed best because it was good for the professor-spouse? If one really wants to live in Iowa City, she finishes the marriage with her ideal job in an ideal location. But her spouse is now stuck in the middle of nowhere with depreciated labor force skills¹⁶² and years of lost networking and seniority-driven status.¹⁶³

This example resembles the Spur-Basalt problem that David Vernon and I talked about. It does not make any sense to continue what was once a mutually wonderful marriage when things will run quickly into the ground.¹⁶⁴ But it also seems most unfair to stick the nonprofessor spouse with the loss not only of marriage, but also of an entire lifestyle.¹⁶⁵ The modern divorce rules allow easy exit when either spouse wants out.¹⁶⁶ For many reasons, not the least of which is to cure asymmetrical power dynamics (particularly physical ones), no-fault divorce aids women.¹⁶⁷ Nonrecognition of sacrifices

161. Divorce ought to be less common in such cases. Perhaps this greater certainty is itself an adequate reward. Perhaps the nonacademic will learn to love the new life. *But see* BETTY HARPER FUSSELL, *MY KITCHEN WARS* (2000) (describing, not very enthusiastically, one New Jersey college town with its seemingly forced entertaining competition between faculty wives).

162. *See* VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988) (arguing that in accounting for family contributions by spouses, one must keep in mind what is a wise social policy to encourage); ENGLAND & FARKAS, *supra*, note 143, at 156-58 (discussing the amount that a person's wages decline when they leave and then re-enter the job market); Brinig, *Physics, supra* note 125, at 104-07 (arguing that investment in marriage justifies an entitlement to future income).

163. *See* Gaurang Mitu Gulati & Devon Carbado, *Conversations at Work*, 79 *OR. L. REV.* 103, 109 (2000) (examining how stereotypes of workplace outsiders, such as minorities and women, affects employer-employee dynamics and the workload the outside employee is expected to bear); Felice Schwartz, *Management Women and the New Facts of Life*, 67 *HARV. BUS. REV.* 65, 69-70 (1989) (arguing that management should create a more flexible working schedule for those career women who are family-minded as opposed to career-primary women).

164. For an old argument, see John Dryden:

Why should a foolish marriage vow, which long ago was made,
Oblige us to each other now
When passion is decay'd? We lov'd, and we lov'd, as long as we could,
Till our love was lov'd out
in us both: But our marriage is dead, when the pleasure is fled:
'Twas pleasure first made it an oath.

If I have pleasures for a friend, And farther love in store,
What wrong has he whose joys did end,
And who could give no more? 'Tis a madness that he should be jealous of me,
Or that I should bar him of another: For all we can gain is to give ourselves pain,
When neither can hinder the other.

John Dryden, *Why Should a Foolish Marriage Vow*, in *MARRIAGE Á-LA-MODE* (1673), available at <http://www.library.utoronto.ca/utel/rp/poems/dryden10.html>. (last visited Oct. 24, 2002); *see also* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 *VA. L. REV.* 1497, 1529 (2000) (arguing, in vain, for "companionate divorce"); James Herbie DiFonzo, *Customized Marriage*, 75 *IND. L.J.* 875, 894 (2000) (illustrating a British reform document that made divorce rather like a coroner's inquest); Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 *FAM. L.Q.* 543, 548 (1999) (noting that although only eight states adopted the UMDA's, Uniform Marriage and Divorce Act, 9A U.L.A. Part I, 159, 160 (Master ed. 1998), divorce provisions more or less intact, almost every state substantially modified its statutory grounds for divorce, while no state followed "in recognizable form" its marriage doctrines). The UMDA was amended in 1971 and 1973. UNIF. MARRIAGE AND DIVORCE ACT §§ 101-309, 9A(1) U.L.A. 159 (1998); *Id.* §§ 310-506, 9A(2) U.L.A.1 (1999).

165. Compare the Cinderella existence in *Pfohl v. Pfohl*, 345 So. 2d 371 (Fla. Dist. Ct. App. 1977).

166. Law and economics scholars term them unilateral. *See* H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 *AM. ECON. REV.* 437, 449 (1986) (arguing that in applying the Coase Theorem, unilateral divorce does not itself increase the divorce rate, but does change the distribution of financial resources on divorce).

167. Women are the partner most likely to file for divorce and are even more likely to do so in no-fault

does not,¹⁶⁸ even, and especially, when they do not make financial sense.¹⁶⁹

Ellman concludes that what the law ought to do is merely remove disincentives that might otherwise drive people not to act in the best interests of their spouse or marriage.¹⁷⁰ But are people in happy, ongoing marriages influenced in the slightest by the share of marital property they might get on divorce? I think not. There are several problems. One is that couples invariably are overoptimistic about their own marriage's permanence, at least when they are engaged.¹⁷¹ Another is that imagining that laws have this kind of influence means that spouses in happy marriages must at least subconsciously be involved in exchange behavior¹⁷² (tit for tat)¹⁷³ rather than unconditional love.¹⁷⁴ In fact, happy couples do not tend to keep track of how much each contributes at any given time.¹⁷⁵ To them, concentrating on the particular moment seems unimportant, because marriage exists in past memories and expectations of the future.¹⁷⁶

Both the information problem and the overenthusiasm problem have their analogies in the corporate world as well. Some academics are concerned about over optimism in the purchase of securities¹⁷⁷ and offer disclosure laws as an antidote. Likewise, some courts have allowed, perhaps overenthusiastically, consumers to avoid policies unsuitable for

states. Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126 (2000).

168. See Brinig, *Physics*, *supra* note 125, at 109 (explaining the losses borne by divorced spouses after the divorce); Brinig, *Influence of Marvin*, *supra* note 137 (explaining how to value the contributions of a homemaker during marriage).

169. Lloyd Cohen provides a rationale of differences in the timing of returns on "investment" in marriage and his frustration with other possible remedies like "specific performance." Cohen, *supra* note 135, at 200-01.

170. Ellman, *supra* note 150, at 265.

171. See Lynn A. Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993) (explaining the optimism with which engaged people who have applied for marriage licenses expect alimony and child support following divorce and are over-optimistic about the likelihood that their marriage will last for their lifetimes).

172. See Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235, 239-41 (1998) (arguing that the spouses in happy marriages do not expect immediate rewards). For a full explanation, see Gary L. Hansen, *Moral Reasoning and the Marital Exchange Relationship*, 131 J. SOC. PSYCH. 71 (1991).

173. This term comes from ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 20 (1984).

174. Were the laws to have influence, they would be involved in the economist's game of the Prisoner's Dilemma. See JACK HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 518-19 (4th ed. 1988) (describing such games). The idea is that two prisoners accused of a common crime are separated and then questioned. Each is told that if he confesses, he will get a reduced punishment. If neither confesses, both will go free because there will not be enough evidence to convict. The theory is that they will both confess if they remain isolated because for each of them confession represents the lowest risk strategy. For applications of this idea to marriage, see, e.g., Antony W. Dnes, *Application of Economic Analysis to Marital Law: Concerning a Proposal to Reform the Discretionary Approach to the Division of Marital Assets in England And Wales*, 19 INT'L REV. L. & ECON. 533, 538-40 (1999); Milton C. Regan, *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 646; Scott & Scott, *supra* note 117, at 1278, 1294 n.113.

175. See Brinig & Nock, "I Only Want Trust," *supra* note 138 (explaining that an attribute of unconditional love is not scrupulously keeping track of separate contributions).

176. See Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1971-87 (2000) (arguing that marriage is not like contract because marriage is experienced mainly in the future and in the past, where as contracts embody temporal assumptions that envision the future as predicated on the present).

177. See Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 611, 636 (1995) (using the analogy of a "Lake Wobegon Market"). *Id.* at 636.

them,¹⁷⁸ and legislatures have enacted so-called “lemon laws”¹⁷⁹ and other private remedies¹⁸⁰ to guard against momentary lapses in consumers’ judgments. In general, courts have policed “bad faith” in contracting¹⁸¹ and, particularly, have sought to deter parties from using minor excuses to terminate long-term contracts when others have been waiting in the wings¹⁸² or when termination would work substantial forfeitures.¹⁸³

In the end, public policy favors laws set up to maximize behavior that is not profit-maximizing in the financial sense (even though housework may increase GNP¹⁸⁴ and maximize gains from specialization¹⁸⁵ and efficiencies of scale).¹⁸⁶ This thought itself

178. *Anderson v. Knox*, 297 F.2d 702 (9th Cir. 1961) (holding misrepresentations were made concerning the suitability of an insurance program); *see also Sanghera v. Orefice*, 191 F.3d 461 (9th Cir. 1999) (describing “vanishing premium” life insurance); *see generally* Alan M. Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387 (1966) (arguing that the enactment of state disclosure statutes on sellers is deterring the erosion of the doctrine of caveat emptor).

179. *See, e.g.*, ALA. CODE § 8-20A-1 (1993) (allowing consumers a private cause of action against a manufacturer who does not allow return when car is nonconforming; refers to cause of action found in ALA. CODE § 8-20A-3 (1990)); ARK. CODE ANN. § 4-105-201 (Michie 2001) (general consumer remedy for assisted devices when goods are nonconforming); CAL. CIV. CODE § 1793.23 (West 1998) (regarding automobiles and requiring decal advising purchaser of buyback deal).

180. *See, e.g.*, *Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971) (enjoining a seller of a package of “educational” material from engaging in deceptive practices or misrepresentations and awarding damages under Consumer Fraud Act as class action); *In re Fleet*, 95 B.R. 319 (E.D. Pa. 1989) (holding that under New Jersey law, a bait-and-switch technique used by a financial counseling service was a deceptive trade act).

181. *Greer Props. Inc. v. LaSalle Nat’l. Bank*, 874 F.2d 457 (7th Cir. 1989); *see generally* Muris, *supra* note 48, at 541 (explaining that courts applying the U.C.C.’s provision do not take into account good faith as opposed to when they apply the common law).

182. *See* McChesney, *supra* note 133, at 131 (arguing that the doctrine of tortious interference should be favored over the efficient breach model).

183. *See* *Burger King Corp. v. Family Dining, Inc.*, 426 F. Supp. 485, 493 (E.D. Pa. 1977) (finding that the franchisor was not entitled to have a condition strictly enforced because that would involve divesting the franchisee of territorial exclusivity which would amount to a forfeiture); *see generally* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) (discussing the tension in franchising contracts between express terminable-at-will provisions and implied terms to terminate in good faith); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1, 3 (1981) (stating that good faith performance as used by the courts serves to “effectuate the intentions of the parties, or protect their reasonable interests”); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 499 (1984) (arguing that “courts generally do not use good faith doctrine to override the agreement of the parties”); Eric G. Anderson, *Good Faith in Enforcement of Contracts*, 73 IOWA L. REV. 299, 348-49 (1988) (arguing that courts resort to a variety of techniques, including avoidance of forfeiture, to accommodate the parties’ interests).

184. *See, e.g.*, Morton Paglin, *The Underground Economy: New Estimates from Household Income and Expenditure Surveys*, 103 YALE L.J. 2239, 2244 (1994).

At the public policy level, the lack of recognition of the economic value of housewives’ work is indicated by the fact that housework is included in the GNP only if it is paid work done by a housekeeper. . . . [I]t has been estimated that, if it were included, unpaid housework done in the industrialized countries would constitute between 25 and 40 percent of the GNP.

SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 204 n.48 (1989) (citing DEBBIE TALYOR ET AL., WOMEN: A WORLD REPORT (1985)).

185. GARY S. BECKER, A TREATISE ON THE FAMILY 30-53 (2d ed. 1991) (analyzing the divisions of labor among family members as determined by biological and experiential differences).

186. *See, e.g.*, Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 28 (2000) (finding no marriage penalty tax if economies of scale are eliminated); Jagdeep S. Bhandari & Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 AM.

drives noneconomists crazy with Becker's theory.¹⁸⁷ Family law relationships follow the public policy of behavior that is not necessarily profit-maximizing. In my view, couple relationships seem most "efficient" when they produce intimacy,¹⁸⁸ and parenting relationships seem most efficient when they allow children to flourish.¹⁸⁹

Like the Spur-Basalt problem, marriages that end in divorce are failing enterprises.¹⁹⁰ The question is whether specific laws (or even concepts like status¹⁹¹ that largely keep legal enforcement out of an ongoing enterprise¹⁹²) best encourage couples in general—not a specific couple—to undertake the wonderful enterprise of marriage.¹⁹³ At the same time, policymakers want to do what is fair in the individual case at hand, although this preference for individualized justice is more likely in family law than in commercial contracts.¹⁹⁴ Should we let losses fall where they may because this will make people smarter in their next marriage (or the marriage after that)? This idea seems rather like that of former Dean Herma Hill Kay who argued that discontinuing permanent alimony was appropriate to encourage married women to remain in the labor force.¹⁹⁵ Or is the contracts analogy here more like a forfeiture,¹⁹⁶ which equity abhors? Consider Professor Ellman's example of a wife who invests in her husband's degree but has a

BANKR. L.J. 1, 7 (1993) (stating loss of economies of scale upon divorce pushes some into bankruptcy).

187. Economist Gary Becker explains that because of the efficiency gains from specialization and their comparative advantage at doing housework, in each marriage the woman will choose to do the majority of the housework, the man to do most of the labor force work. Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2437-53 (1994) (setting forth the economic justifications for alimony and the feminist critiques of these justifications).

188. *Accord* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993) (introducing the promises made during a relationship and their ultimate effect on children).

189. *See* BRINIG, *supra* note 47, at 18 (arguing that covenant allows intimacy to grow for couples and encourages children to flourish); *see also* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2416, 2476 (1995) (explaining that privacy allows a filial bond between a parent and child to flourish).

190. For one article looking at the similarities between the two, *see* Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201, 206 (1996) (asserting that both commercial and family debtors who flee jurisdictions to escape payment are deadbeats).

191. *See* REGAN, *supra* note 188 (explaining the relationship between status and intimacy).

192. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1531-65 (explaining the role of contracts in marital relationships).

193. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas famously wrote:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

194. One constraint is the presence of children. Their best interest must be considered in any family law decision, even overriding fairness to their parents. *See, e.g.*, PRINCIPLES OF FAMILY DISSOLUTION § 2.02 (stating best interests are of primary importance and fairness is of secondary importance). Safety of children takes precedence over the parental rights of parents threatened with losing them by out of home placement or termination of parental rights. 42 U.S.C.A. § 671(a)(15)(A) (Supp. 2000).

195. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 309 (1987).

196. *See generally* Burger King v. Family Dining, Inc., 426 F. Supp. 485 (E.D. Pa. 1977) (explaining the role of forfeiture in the enforcement of contracts).

secret love interest on the side.¹⁹⁷ A contract analogy would at least allow her restitution of her investment in the career.¹⁹⁸ However, what happens if we look only at losses and not expectations (profits)?¹⁹⁹

Family law cases decided during the last two decades have typically not used contract law at all,²⁰⁰ but have sought to remove distortions that might be created by not, at least, providing compensatory payments.²⁰¹ Occasionally, in the degree cases, courts have explicitly provided for restitution,²⁰² but have limited the award to the amount contributed by the working spouse.²⁰³ When the degree is treated as property, New York courts do award some portion of the expectation of future profit.²⁰⁴ But as June Carbone

197. Ellman, *supra* note 150, at 304. Carl Schneider also thinks there should be recovery for financially nonrational decisions. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197, 220, 222-24.

198. Similarly, even though a promisee has breached a contract "totally," he or she may be awarded some of the benefit conferred on the nonbreaching party so as to avoid forfeiture. This is particularly true in the construction cases where the breaching party was the contractor. See *Kirkland v. Archbold*, 113 N.E.2d 496, 500 (Ohio Ct. App. 1953) (citing 5 WILLISTON, CONTRACTS §§ 4123, 1475); *Thermal Master, Inc. v. Greenhill*, 1987 WL 17801 (Ohio Ct. App. Sept. 29, 1987); *Kass v. Todd*, 284 N.E.2d 590 (Mass. 1972). For application to a personal service contract, see generally *Britton v. Turner*, 1834 WL 1176 (N.H. 1834).

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service near the close of his term, by ill-treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason

Id. at *10.

199. See *Brinig, Physics, supra* note 125 (explaining the role of human capital gains and losses in distribution at divorce and arguing that not only reliance losses but also expected gains should be shared on divorce).

200. See *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978) (stating an advanced degree education of one spouse is not marital property and cannot be divided on dissolution); *In re Marriage of Weinstein*, 470 N.E.2d 551, 560 (Ill. App. Ct. 1984) (considering relevant factors, such as earning potential and spousal financial contribution, when awarding shares of marital estate); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982) (holding that courts may not make permanent distribution of value of professional degrees and licenses unless spouse received from partner a financial contribution for this education).

201. See *Mahoney*, 453 A.2d at 535 (stating spouses supported through professional school may have to "reimburse the supporting spouses for the financial contribution they received in pursuit of their professional training").

202. See *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (awarding wife restitution for financial contributions made to her husband during his medical schooling); *In re Marriage of Francis*, 442 N.W.2d 59, 66 (Iowa 1989) (basing the formula for reimbursement alimony on husband's future earning capacity and wife's contribution to its attainment).

203. See *Mahoney*, 453 A.2d at 535 (holding that the working spouse is only entitled to the money contributed to the other spouse's education); *DeLa Rosa*, 309 N.W.2d at 758 (upholding a reward granting financial support given by the working spouse); *Inman v. Inman*, 478 S.W.2d 266, 269-70 (Ky. Ct. App. 1979) (apportioning to the spouse who provided support "the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation," when "there is little or no marital property acquired through the increased earning capacity provided by the supported spouse's degree or training").

204. See *O'Brien v. O'Brien*, 489 N.E.2d 712, 717 (N.Y. 1985) (stating a license to practice medicine acquired during the marriage is a marital asset); *McSparron v. McSparron*, 662 N.E.2d 745, 748 (N.Y. 1995) (holding that a spouse who contributes to the other spouse's professional license is entitled to an equitable share thereof).

and I noted more than ten years ago, courts do not seem to realize even in a losing venture like a marriage ending in divorce, similar to the termination of a contract at will, compensation paid out by the party seeking to pull out cannot be limited to the bare amount expended by the other party. There must be some return on the money—a reasonable rate of return on the money reflecting the riskiness of the investment made by the other party.²⁰⁵

If we wanted to limit such investments to obvious expenditures on human capital like degrees, there would be some economic, as opposed to practical,²⁰⁶ reasons for doing so.²⁰⁷ The economic reason lies in the desire to encourage the growth of GNP and

205. A counterargument is that treating the degree as nonmodifiable property will force the newly degreed spouse to live at least up to the average earned in the profession.

A third criticism of earning capacity awards is the suggestion that although such awards may be fair when given in other contexts, they may be unfair when given in the property distribution context because they force the professional spouse to follow the occupation he or she is licensed in, or at least one as lucrative. Thus, in earning capacity based awards, a spouse's career options are quite restricted because a court has financially strapped him or her to his or her licensed profession using the nonmodifiable property award. These awards necessarily assume that the earnings projections of the court will be achieved, when, in fact, the opportunity to practice a profession is not a guarantee that any, much less the average, income of that profession actually will be earned.

Eric Julian Mayer, *For Richer or Poorer—Equities in the Career-Threshold, No-Asset Divorce*, 58 TUL. L. REV. 791, 813 (1984). For a more recent description, see Alicia Brokars Kelly, *Marital Partnership Pretense And Career Assets: The Ascendancy Of Self Over The Marital Community*, 81 B.U. L. REV. 59 (2001), in which she notes:

The second, more critical concern, is for the effect on the enhanced spouse's ability to follow or not to follow a career path according to his own free choice, a choice that is free from any constraints flowing from divorce. What if the professional wanted to change careers, to accept a job for lesser compensation, or to quit all together, and to become say, a poet? The divorce award could seriously impair his freedom to do so. As one court explains, a "professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award . . . leaves him or her no alternative . . . [E]quitable distribution was not intended to permit a judge to make a career decision for a . . . spouse . . . ["]

Id. at 116-117 (citing *Dewitt v. Dewitt*, 296 N.W.2d 761, 768 (Wis. Ct. App. 1980); *O'Brien*, 489 N.E. at 720 (Meyer, J., concurring)). One court has even gone as far as to consider this potential slavery within the meaning of the Thirteenth Amendment. *Severs v. Severs*, 426 So. 2d 992 (Fla. Dist. Ct. App. 1983).

206. See Ellman, *supra* note 149, at 53-73, 81 (arguing that if we do not limit expenditures on human capital, we will necessarily be stuck with the problem of valuing other than "economically rational" investments). *But see* Brinig, *Physics*, *supra* note 125, at 96-99, 105-106, 109-113 (arguing sacrifices of time and talent that increase a spouse's income enhancing capacity, whether or not they lead to advanced degrees, ought to be as compensable as the degrees).

207. One court has suggested that changing the idea of marital property for degree cases only displays a kind of elitism:

The question, then, is whether there should be a different rule and a different basic jurisprudence which would place on a strictly commercial basis the financial contributions made by one spouse during the marriage to the other spouse's education and training in order that that contribution alone be commercially recompensed. Unless the spouses themselves have otherwise agreed, we think not, even if the marriage terminates before the expected "fruits" of the education and training are borne.

The claim of special recompense is based on the notion that there are unique considerations involved when one spouse's financial contribution is made in order to enable the other to obtain a

thus human capital that is directly tied to productivity. Increases in patents,²⁰⁸ or in degrees in science and engineering,²⁰⁹ would seem the obvious cases. These are like investments in the railroads²¹⁰ or other infrastructures that have made America so productive historically.²¹¹ These are the contract-specific investments we might as a society want to encourage.²¹² Arguably, however, any rule allowing returns from investment in a spouse's career should extend to any provable increase in a spouse's human capital.²¹³

III. CONCLUSION: THE LIMITS OF THE ECONOMICS OF CONTRACT DAMAGES

The four law and economics goals of contract damages help explain a wide variety of puzzles for the contracts student. For example, the discussion of goals should help show why punitive²¹⁴ and consequential damages²¹⁵ are not collected in contracts cases. A caricature of law and economics as applied to contracts does not recognize any "moral quality to promise making and promise keeping."²¹⁶ Thus there should be no additional damages paid to the "victim" of an "efficient breach," because the breaching party by

professional degree or license. In our view, that claim represents a kind of elitism which inappropriately depreciates the value of all the other types of contributions made to each other by other spouses pursuing different life styles and responding in their individual ways to their life experiences.

Mahoney v. Mahoney, 442 A.2d 1062, 1070 (N.J. Super. Ct. App. Div. 1982), *rev'd*, 453 A.2d 527 (N.J. 1982).

208. Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002 (1986).

209. Paul M. Romer, *Should the Government Subsidize Supply or Demand in the Market for Scientists and Engineers?* 772 (working paper, 2000), <http://www.nber.org/papers/w7723> (last visited Sept. 16, 2002).

210. See DOUGLASS C. NORTH ET AL., *GROWTH & WELFARE IN THE AMERICAN PAST: A NEW ECONOMIC HISTORY* 79, 101-10 (3d ed. 1983) (noting that human capital accumulation provided the essential skilled labor force that was so important to obtaining high levels of productivity in both manufacturing and agriculture, railroads dramatically lowered shipping costs and, therefore, the costs of producing goods, and the return of investment in human capital is higher for society than for the individual); ROBERT FOGEL, *RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY* 223 (1964) (noting that social savings of the railroad was approximately five percent of the gross national product in 1890).

211. For a general discussion, see THEODORE W. SCHULTZ, *THE ECONOMIC ORGANIZATION OF AGRICULTURE*, ch. VII (1953) (determining that overall rate of return on research in agriculture is about thirty percent). For some applications, see Charles I. Jones & John C. Williams, *Measuring the Social Return to R&D*, 113 Q.J. ECON. 119 (1998) (discussing the results of new growth theory and its implications on social rate of return to R&D); Josh Lerner, *The Government as Venture Capitalist: The Long-Run Impact of the SBIR Program*, 72 J. BUS. 285 (1999).

212. This of course would be an argument for the Ph.D. in microbiology or engineering, but not the law degree, unless one can argue that lawyers add value to the economy by structuring contracts that enhance investment. They obviously do enhance investment if they are facilitating patent acquisition. See, e.g., Deborah Ben-Canaan, *Despite a Down Economy, Attorneys are Still in Demand*, SAN DIEGO DAILY, Apr. 30, 2002, <http://www.sddt.com/reports/2002/04/lawweekwed/td.cfm> (last visited Sept. 16, 2002). Attorneys do not enhance investment if they are defending criminals or, arguably, handling divorce cases. *Id.*

213. Alternatively, a noncontract remedy could be used—the so-called equitable lien favored in former civil law jurisdictions. For examples of how the equitable lien works in the family law context, see *Robinson v. Robinson*, 429 N.E.2d 183 (Ill. App. Ct. 1981) (involving a wife and husband who made improvements on property that belonged to the husband's parents); *In re Marriage of Wolfe*, 110 Cal. Rptr. 2d 921, 925 (Cal. Ct. App. 2001).

214. See *supra* note 83 and accompanying text.

215. See *supra* note 88 and accompanying text.

216. See *supra* note 33 and accompanying text.

definition makes the other whole.²¹⁷

Applying formulaic law and economics to cases involving fundamental institutions, the outcomes of which critically affect society, also poses some real problems for most of us. We can say that contract or economic analyses cannot apply to such investments,²¹⁸ that public goods overwhelm the private objects of contract (thus justifying regulation).²¹⁹ For the family, this might translate into concluding that family law somehow becomes a sphere in which commercial law never operates or in which government always exerts an oversight role.

Further, though law and economics claims to be positive, so that all contracts are equal, reality teaches us that some investments are not equal to others. Some investments are so important they deserve government funding or the benefits given by the patent system. Even if they remain purely private, some contracts have such wider social impact that, when they fail, damages are not calculated in precisely the usual way. If one party or one spouse invests in a venture that promises to benefit the economy as a whole, I argue here that damages should not be limited to reliance losses. In situations in which timing make returns asymmetric, somehow the party making the investment should recognize a return to investment even when, without anyone's fault, the contract terminates.

David's and my conversation successfully traversed much of this territory, but I failed to understand the greater social gain point until he was no longer around to continue his end of the discussion. But, as the teacher that he was, he asked me the questions that forced me to work the problem out on my own.

217. See *supra* note 29 and accompanying text.

218. See *supra* notes 134-138 and accompanying text.

219. See Singer, *supra* note 192.
