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Ann Laquer Estin

For a non-economist interested in theoretical and policy aspects of family law, the economic theories of divorce are a puzzle. Economists, and lawyers influenced by economic analysis, tend to conceive of divorce as a problem in efficiency. This analysis treats family law as a structure within which rational individuals negotiate self-interested agreements concerning marriage and divorce. Recent writers agree that current divorce practices are not efficient, but they differ significantly in their prescriptions for policy reform. Their recommendations range from abolishing judicial divorce proceedings entirely, and substituting a system requiring parties to reach private divorce agreements, to restoring the notion of fault, recast in terms of contract breach, to judicial divorce proceedings. Although many of the specific recommendations are contradictory, they are nonetheless presented with a claim of scientific authority.

Among the economists who propose dramatic changes in our present divorce rules is Gary Becker of the University of Chicago. Professor Becker, who was awarded the Nobel Prize for his work in 1992, is generally credited with inaugurating the movement of economists into the study of non-market behavior. Based on the premise that all human behavior is rational, all human behavior becomes grist for the economic mill. One of Professor Becker's chief concerns has been an economic analysis of family life: marriage, divorce, the bearing and raising of children. In his academic writing, Profes-
sor Becker has approached the family largely in the positivist tradition. In less academic settings, he has offered explicit policy recommendations. Among these is his proposal that unilateral no-fault divorce should be abolished because of its harmful effects on women with children. This Article assesses the applications of normative economic argument to marriage and divorce. In addition to Professor Becker's work, recent literature in this area includes a growing body of theoretical and empirical work by other economists, as well as a wave of law and economics writing on marriage and divorce.

4. Gary S. Becker, Finding Fault with No-Fault Divorce, Bus Wk 22 (Dec 7, 1992) (Unilateral "[n]o-fault divorce laws discourage married women from leaving the work force to care for their young children. . . ."). See also Becker, 101 J Pol Econ at 396 (cited in note 1) ("[T]he theory does indicate that no-fault divorce hurts women with children whose marriages are broken up by their husbands."). Becker's argument is discussed more fully in the text accompanying notes 119-24 and 132-37.


approaches to family law, my conclusion is that the economic analysis of
divorce presented in these recent works is not a sufficient basis for sweeping
policy reform. The analysis is not useless or wrong, but it seriously underesti-
mates the project at hand. Law may indeed promote efficiency in society, but
law's work in the family is vastly more complex than normative economics has
been able to model. Indeed, this complexity is reflected in the divergent
approaches and recommendations in the current economic literature.

Section I of this Article describes the positive and normative economic
understandings of marriage and divorce and explores two different ways in
which divorce is described as an economic problem.

Section II demonstrates that the two different views of the problem of
divorce lead to two different proposals for reforms. The first of the two
approaches, that of Professor Becker and several other writers, conceives of the
interest in continuing a marriage as a type of property right and argues that
it should be transferable only with both parties' consent. I argue that this
formulation constructs divorce as a bargaining problem and applies Pareto
efficiency norms with the goal of effecting optimal levels of divorce. These
writers recommend that divorce be available only with the mutual consent of
wife and husband. Problems within marriage are largely ignored, on the
apparent assumption that these are less serious than the problem of divorce.

The second approach, more common in law and economics literature,
emphasizes the goal of efficiency within marriage and argues for liability rules
for divorce rooted in Kaldor-Hicks efficiency norms. Here, recommendations
for divorce policy stress making the marital “contract” an enforceable one.
This approach is less centered on the interest in remaining married and tends
rather to define the entitlements of marriage in financial terms.

The contrast between these solutions reveals different understandings of
efficiency and different concerns as to where family life should be rationalized.
I argue that the merits of the two “solutions” therefore cannot be assessed
without a broader normative frame of reference than this theory has devel-
oped. My concern is greatest with those economic theories that treat the
interests of men and women in marriage and divorce as property rights.
Although these theorists claim their solutions can improve the efficiency of
divorce practices, they recognize only one of many important competing
normative interests in family and private life. I argue that, while problematic,
proposals to create new liability rules to govern divorce may provide a better
framework for policy, because they are better able to accommodate a range of
different interests.

In Section III, I argue that neither of these theoretical frameworks ade-
quately accounts for most of the work of family law. Although economis
often argue that the central purpose of law in a market system is to compensate for the effects of market and contracting failures, this insight has not been recognized in the economic analysis of marriage and divorce. I argue that protecting individuals against the consequences of such failures in the family is a central purpose of family law and suggest that whether these factors can be adequately addressed in an economic analysis remains unresolved. In addition, I argue that the economic models conceal a tension between "economic" and "moral" entitlements in family life. Any normative foundation for marriage and divorce law must confront this distinction. I believe this is a fundamental problem with the efforts to reconstruct family law on the basis of efficiency principles. Given these difficulties, I conclude that the project of establishing a Pareto optimal level of divorce or a set of efficient breach rules for marriage is not a useful goal for family law reform.

I. Economic Perspectives on Divorce

Economic theories of divorce rest on two pillars: a body of economic thinking about marriage, and a set of standard definitions of efficiency used in economic discourse. Generally, these theories depict divorce as a problem roughly analogous to the problem of efficient breach in contract theory. However, the efficiency problem in divorce is conceived in two distinct patterns.

A. ECONOMICS AND FAMILY BEHAVIOR

Economists argue that their analytic tools are appropriate to the family as well as the market because in both settings individuals make choices in a context of scarce resources. In his Nobel lecture, Gary Becker explains the principles that have governed his investigations into family behavior:

The point of departure of my work on the family is the assumption that when men and women decide to marry, or have children, or divorce, they attempt to raise their welfare by comparing benefits and costs. So they marry when they expect to be better off than if they remained single, and they divorce if that is expected to increase their welfare.

Initially, economic theorizing about the family remained close to the traditional concerns of economics, exploring the connections between the household and the larger economic system, and developing better analyses of human capital, labor force participation, and household production. More recently, economists

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7. Sawhill, 106 Daedalus at 115-16 (cited in note 3); Blaug, Methodology of Economics at 221 (cited in note 3).
have become more ambitious, seeking to explain wider ranges of behavior with their models.  

This broader range of concerns has impelled a greater interest in law. Initially, this work was descriptive, focused on discovering latent economic effects of (or explanations for) family law rules. However, writers in economic and legal publications increasingly have offered explicit policy arguments. In this work, economists model divorce decisions as problems of exchange and test outcomes against efficiency norms.

Although there is a substantial literature in law and economics on efficient breach of contract, the concept of efficient divorce is still startling. In legal traditions, marriage and divorce regulation has been very different from the law applied to other varieties of contracts; the “contract” idea has been used met-

10. See Blaug, *Methodology of Economics* at 221 (cited in note 3). This represents an incursion into terrain that was once the province of psychology or sociology and anthropology. For an assessment of this trend, see generally Ronald H. Coase, *Economics and Contiguous Disciplines*, 7 J Legal Stud 201 (1978).

11. See, for example, Landes, 7 J Legal Studies 35 (cited in note 5).

12. See, for example, Zelder, 22 J Legal Studies 503 (cited in note 5); Parkman, 8 BYU J Pub Pol L 91 (cited in note 6). There are two distinct models of family life in the economic literature. See Pollak, 23 J Econ Lit at 581-84 (cited in note 5). One is based on Becker’s household production theory, sometimes referred to as the “new home economics.” This model depicts the household as a firm that combines the resources available to it—the time of household members and various market goods—to produce the outputs or commodities it desires. See Becker, *A Treatise on the Family* (cited in note 3); Posner, *Economic Analysis of Law* at 139-41 (cited in note 2). A second model, rooted in “transaction cost” economics, is more directed toward exploring how marriage serves to structure the complex, long-term relationships of husband and wife. The original development of transaction costs approach is credited to Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Free Press, 1975). See also Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J L & Econ 223 (1979).

Articles that apply a transaction costs approach to marriage and divorce include Cornell, 26 Family L Q 103 (cited in note 6), Pollak, 23 J Econ Lit 581 (cited in note 5), and Ben-Porath, 6 Pop & Dev Rev 1 (cited in note 5). This model is implicit in other work, including writings describing marriage as a type of “relational contract.” See Brinig and Crafton, 23 J Legal Stud 869 (cited in note 5); Cohen, 16 J Legal Stud at 271-73 (cited in note 6), but see Ellman, 77 Cal L Rev at 28-32 (cited in note 6) (arguing that the relational contract analogy does not work because there are no common, external standards for marital relationships that courts could apply to guide resolution of disputes.) On relational contract theory, see generally Ian Macneil, *The Many Futures of Contract*, 47 S Cal L Rev 691 (1974); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law*, 72 NW U L Rev 854 (1978); Charles J. Goetz and Robert E. Scott, *Principles of Relational Contracts*, 67 Va L Rev 1089 (1981). Under both approaches, however, marriage is understood as a type of contract, and the policy recommendations for divorce law place efficiency as a central norm.

13. See notes 31-36.

14. The legal literature is full of reinterpretations of the idea of “contract” in the family setting. According to the United States Supreme Court, in 1888: "\[W\]hilst marriage is often termed by text writers and in decisions of courts a civil
aphorically in family law, empty of most of the content it carries in other settings. With the advent of no-fault divorce, however, marriage laws have shifted toward market principles.

Some recent legal academic writing has urged greater freedom for parties to a marriage to set the terms, conditions, and duration of their marriages. The new economic approaches to the family, with their foundation in market principles, also suggest a much broader role for contract-based approaches to marriage and divorce. These theories treat marriage not as a fixed category...
with clearly defined legal and economic consequences, but as a relationship subject to continual renegotiation by its participants. At any point, breach is one option available to the parties, and the problem of divorce is fundamentally a problem of remedies for breach of the marital contract.

The family law reforms that economists propose cast family obligations and disputes in the mold of business contracts. These writers discuss the importance of enforceable contractual rights in enabling a business (or marriage) to operate efficiently. They view contractual protections as an incentive toward entry into formal marriage and decisions to commit resources to the marriage.

Contractual ordering of marriage and divorce is appealing because of the belief that it best accommodates a wide variety of preferences. The advocates of contract assert that it facilitates private choices about the family, from the economic structure of relationships to a broad range of lifestyle issues. In addition, they argue that contract accommodates the shift away from permanence, by offering a better mechanism for dispute resolution and divorce.

From this perspective, divorce is not in itself a problem, just as breaches of business contract are not necessarily bad. Rather, economists argue that the goal of contract law and divorce law alike should be to encourage efficient

“contract-theoretic framework” to model marriage).

19. See, for example, Cohen, 16 J Legal Studies at 296 (cited in note 6) (“[W]henever contracts are not fully enforceable, an inefficient allocation of resources will follow.”).


22. See, for example, Shultz, 70 Cal L Rev at 307-28; Temple, 8 Harv J L & Pub Pol at 161-65. See also Trebilcock and Keshvani, 41 U Toronto L J at 549-50 (cited in note 6). Writers disagree on what the effects of a shift toward contract would be. Elizabeth Scott argues that a more systematic use of contractual principles could help to foster “binding commitment and fulfillment of responsibility in family relations.” Elizabeth S. Scott, Rehabilitating Liberalism in Modern Divorce Law, 1994 Utah L Rev 687, 689. Carl Schneider argues that the net effects of the move toward contract in family regulation has been to release people from obligations historically embodied in law and social norms. Carl E. Schneider, Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse, 1994 Utah L Rev 503, 532-35.

23. If divorce itself were the problem, economists would no doubt advocate abolishing it entirely. Although this position has some economic justification, it is generally rejected because it would prevent “efficient” dissolutions of marriage as well as inefficient ones. Cohen, 16 J Legal Studies at 302 (The virtues include “extreme incentives for greater care in choosing a spouse.”); Posner, Economic Analysis of Law at 144 (cited in note 2) (“[M]aking divorce more difficult may actually foster happy marriages.”).
allocations of resources. The obvious difficulty in both settings lies in identifying and regulating those breaches that lead to inefficient behaviors, whether during marriage or on divorce. In the process, the first step is to define efficiency.

B. EFFICIENCY THEORIES

Economists define efficiency in two ways. An efficient allocation of resources may be defined as one in which their value is maximized, understanding that “value” is measured by how much an individual is willing to pay. This is described as a Kaldor-Hicks approach. This method values the aggregate of values in society rather than their distribution. Alternatively, the Pareto model defines an allocation as efficient when it results from the exchange of resources in a voluntary, informed transaction. Here, the consent of the parties indicates that both believe the transaction will make them either as well or better off than previously.

Pareto efficiency norms follow two premises: that individuals are always the best judges of their own utility, and that interpersonal comparisons of utility are impossible in the absence of exchange. Decisions that are not the product of voluntary agreement may generate winners and losers, and because it is difficult to measure the impacts of those decisions on the affected individuals, it is hard to determine if there has been a net improvement in social welfare. "The normative preferences of economics dictate that as far as possible, relationships should be based on exchange and consent." As Judge Posner argues, the conditions for determining Pareto efficiency must be stringent: an exchange is not a valid indicator of consent unless it is completely voluntary and has no effects on anyone external to the exchange.

In commercial settings, these norms dictate that exchange relationships

24. According to Lloyd Cohen: "Just as it is often efficient for contracts to be dissolved, so too both parties to a marriage may gain as a result of divorce." Cohen, 16 J Legal Stud at 302 (cited in note 6).

25. Posner, Economic Analysis of Law at 13 (cited in note 2). Trebilcock and Keshvani posit that “Kaldor-Hicks efficiency . . . would ask the question: would this collective decision (a change in legal rules, for example) generate sufficient gains to the beneficiaries of the change so that they could, hypothetically, compensate the losers sufficiently to render the latter fully indifferent to it but still have gains left over for themselves . . . ?” Trebilcock and Keshvani, 41 U Toronto L J at 534 (cited in note 6) (emphasis in original).

26. Posner, Economic Analysis of Law at 13-14. According to Trebilcock and Keshvani, “Pareto efficiency would ask of any transaction or policy or legal change: will this transaction or change make somebody better off while making no one worse off?” Trebilcock and Keshvani, 41 U Toronto L J at 534.

27. Trebilcock and Keshvani, 41 U Toronto L J at 534.

28. Id at 535.


should be freely entered into and freely terminable, particularly where there are only two parties involved; however, there must be either consent to terminate the relationship or an appropriate remedy for breach. Contract law rules allow breaches that are efficient under either criterion of efficiency: parties to a contract can agree to modify or rescind their contract, or, failing agreement, a court can require that the party in breach compensate the other's losses from nonperformance. In order for a breach to be Pareto efficient, both parties must consent to termination. In an action for damages, a judicially-determined compensation is substituted for consent to the contract termination. Economic theory suggests that remedies can promote efficient allocation of resources if compensation is determined in a manner reflecting Kaldor-Hicks efficiency norms.

In normative terms, it is an ideal solution when parties to an agreement determine on what terms to go their separate ways, because by hypothesis they are best able to judge their own utility. In commercial law, of course, contract breaches are not always resolved by agreements to terminate. Economists defend the role of court determinations of damages for breach of contract when coming to agreement is not feasible without extensive and costly negotiation. In economic terms, these damages discourage a contract breach or termination unless the benefits to the breaching party are greater than the loss that breach imposes on the other. Thus, legal rules making contracts enforceable and providing remedies for breach appear to be designed to further efficiency goals rather than as a moral obligation to keep promises.

These two sets of norms are not sharply delineated in contract law: the fact that contracts are legally enforceable through damages serves in part to bring the parties to a bargain over termination. In unusual cases, a court may order specific relief rather than damages, which has the effect of returning the matter to the parties for decision. In law and economics theory, the boundary between damages and specific relief in contract law is contested. The distinction reflects a difference between, on the one hand, efforts to limit breach and protect reliance in individual cases, and on the other, efforts to permit breach and allow exchanges that will move resources to the place where they are the most use throughout the economy. Thus, the economic literature on contract breach recognizes that the choice of remedy may vary depending on whether excessive

31. Id at 117-20. But see Weisbrod, 1994 Utah L Rev at 778-79 (cited in note 21) (discussing the “perform or pay damages” approach to contract breach that is attributed to Holmes).
32. Judge Posner considers Kaldor-Hicks efficiency norms to be preferable here, because he views the transaction costs of applying Pareto standards to be too great. Posner, Economic Analysis of Law at 62, 119, 131 (cited in note 2).
33. The breach cannot be simply opportunistic, or an attempt to take advantage of the vulnerability of the nonbreaching party with no countervailing economic gain. Id at 117-18.
34. Id at 117-19. See also text accompanying notes 445-57.
breach or excessive performance seems to be a greater problem. The choice between normative efficiency principles reflects this difference in concern.

In the economic literature on divorce, there is a similar difference between a concern with the efficiency of divorce decisions, which parallels the concern in commercial settings with excessive breach, and a concern with efficiency in social institutions of marriage, which parallels the commercial concern with excessive performance. When these different understandings of efficiency are applied, the problem of divorce is conceptualized in two distinct ways.

C. THE PROBLEM OF DIVORCE

Both normative economic approaches to divorce are rooted in the positive economic theory of marriage pioneered by Gary Becker. In his *Treatise on the Family*, Professor Becker discusses divorce in two significant ways: first, he analyzes the circumstances in which an individual may gain from divorce; and second, he provides a demographic discussion of the economic basis and effects of changing divorce rates in modern society.

Becker describes divorce decisions as an occasion for rational decisionmaking. In particular cases, decisions to divorce do not evidence failure; rather, "[d]issolution is a response . . . to new information, favorable as well as unfavorable." Becker distinguishes between early and later divorces, arguing that early divorces occur because potential marriage partners have only imperfect information about each other prior to marriage, and that later divorces are a "response to a demand for variety in mates or to life-cycle changes in traits." As Lloyd Cohen writes: "[O]ver time, the utility functions, information and opportunities of both marriage partners change."

Becker and others explain rising divorce rates in economic terms. As women's earning power has increased, the value to a family of a wife's time has also increased, raising the "cost" of her nonmarket work. As raising children has become relatively more expensive, there has been a dramatic decline in fertility. Taken together, the drop in birthrates and the increase in women's earnings have reduced the economic gain from specialization of labor in marriage.

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38. Id at 350-361.
39. Becker, Landes, and Michael, 85 J Pol Econ at 1151-52 (cited in note 5). The authors continue: "Moreover, the freedom to dissolve reduces the impact of unfavorable information, and thereby reduces the incentive to delay marriage or otherwise search more in order to avoid a mismatch." Id at 1152.
41. Id at 327. See also Becker, Landes, and Michael, 85 J Pol Econ at 1143.
42. Cohen, 16 J Legal Stud at 267 (cited in note 6).
This explanation of divorce suggests that marriage is caught in a vicious circle. The increasing likelihood of divorce has consequences for family behavior, such as reducing fertility, "because children are more difficult to rear and may provide less pleasure after a marriage dissolves."

Moreover, these factors lead women to increase their labor force participation and investment in market-oriented human capital as a hedge against divorce. This in turn further reduces the economic gain from marriage.

These positive analyses take an agnostic stance, offering no opinions on whether the labor market changes that have driven or accompanied changes in the social institution of marriage are good or bad, or whether individual decisions to divorce are right or wrong. In more recent normative work, however, Becker and other economists have recommended that laws be changed to make divorce more difficult. Their argument for limits on divorce is formulated in apparently neutral terms: divorce should be freely permitted as long as it is efficient. Their criticism of current no-fault divorce laws is that many divorces are not efficient; they recommend that the law be designed to prevent such divorces. They define an "efficient" divorce as one in which the combined benefit to the husband and wife from divorce is greater than their combined benefit from remaining married.

Another recent argument posits that divorce should only be permitted on terms which encourage efficient arrangements within marriage. This is a premise of work by Lloyd Cohen, Ira Ellman, and others who argue that these factors should be the basis of financial remedies made available to spouses at the time of divorce. An "efficient" household is one in which there are gains from a specialization and division of labor. The rationale of this work is that changes in the legal entitlements that spouses acquire as a result of marriage could help stem or reverse the general economic trends away from specialization of labor in marriage.

Analysis of Law at 141 (cited in note 2) ("The declining marriage rate and rising divorce rate suggest that the benefits of marriage have been falling relative to the costs."); Becker, Landes, and Michael, 85 J Pol Econ at 1180-81 (cited in note 5). For a detailed demographic analysis, see Andrew J. Cherlin, Marriage, Divorce, Remarriage: Revised and Enlarged Edition (Harvard, 1992).

44. Becker, A Treatise on the Family at 355.
45. Id at 355-56. See generally Kathleen Gerson, Hard Choices: How Women Decide about Work, Career and Motherhood (California, 1985) (detailing factors that influence women's decisions concerning domestic or market orientation).
46. See, for example, Parkman, No-Fault Divorce at 137-40 (cited in note 6); Becker, Bus Wk at 22 (Dec 7, 1992) (cited in note 4); Zelder, 16 Harv J L & Pub Pol at 242 (cited in note 5). I argue below that the normative economic policy argument for new legal restrictions on divorce has not been well synthesized with the positive economic explanation of increasing divorce rates; see text accompanying notes 180-90.
47. See, for example, Landes, 7 J Legal Stud at 36-39 (cited in note 5).
48. See, for example, Cohen, 16 J Legal Stud at 302-03 (cited in note 6); Ellman, 77 Cal L Rev at 50-51 (cited in note 6).
50. See, for example, Becker, Bus Wk at 22 (Dec 7, 1992) (cited in note 4).
Both models challenge the policies which have made marriage effectively terminable at will by either partner. As many writers have noted, these rules have effectively converted the traditional marriage contract into something more akin to a traditional at-will employment contract\textsuperscript{51} or to a voluntary contractual association terminable at will by its members.\textsuperscript{52} Yet while economists are generally supportive of employment at will,\textsuperscript{53} marriage at will appears to be a significant social problem. One concern is that if the divorce decision can be made by one partner, acting alone, that partner will not typically take into account the full range of costs and benefits of marriage and divorce for both parties. Thus, divorce may occur even when the parties' combined gain from marriage is greater than their combined gain from divorce.\textsuperscript{54} Divorce in these circumstances also will generate distributive problems: one partner can appropriate a greater share of the parties' combined gain by choosing divorce, particularly where there are no effective financial remedies in place.\textsuperscript{55} A third concern is that no-fault divorce discourages economically efficient marriages, set up along traditional gender role-divided lines, by failing to compensate women for their contributions

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Allen Parkman criticizes this point, arguing that an analogy to a “commercial contract,” with a requirement of compensation in the event of a breach, is a more “appropriate” analogy. Parkman, *No-Fault Divorce* at 128, 147 n 50 (cited in note 6). However, this seems to miss the point, which is that the at-will analogy more accurately captures the current law. Sugarman, *Dividing Financial Interests* at 138-39.

Where there is at-will employment, one party has no legal remedy if the other chooses to terminate the relationship. A remedy would only be available for breach of the agreement before termination. See, for example, Margaret F. Brinig, *The Law and Economics of No-Fault Divorce: A Review of No-Fault Divorce: What Went Wrong?* by Allen M. Parkman, 26 Fam L Q 453, 468 (1993) (arguing that “if the parties breach a contract at will before termination, there is compensation for the breach”).


\textsuperscript{53.} See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U Chi L Rev 947 (1984) (arguing that over a very broad range of circumstances, at-will employment works to the benefit of both employer and employee at the time their contract is formed); see also Cohen, 16 J Legal Stud at 299 (cited in note 6) (noting that at-will contracts are not used in commercial contexts in which parties make differential investments, because the risks to one party from opportunistic behavior—breach—are too great). It is ironic that the shift in divorce law has taken place as employment law has begun to shift toward increasing the protections afforded to workers. See Glendon, *The New Family* at 151-170.

\textsuperscript{54.} See text accompanying notes 85-87.

\textsuperscript{55.} See text accompanying notes 151-58 and 266-98.
in the home.56

While sharing these concerns, economists and lawyers influenced by economics reach different policy recommendations. Some scholars, including Professor Becker, call for abolishing unilateral divorce, so that marital freedom could be achieved only by an exchange of consents. In effect, this group argues that divorce should be permitted only when the stricter Pareto criterion of efficiency is met. Others would allow divorce more freely, but in the context of new rules that create incentives and protections for certain "efficient" behaviors in marriage. These proposals would implement something closer to the Kaldor-Hicks efficiency norm, by making marriage contracts enforceable through determinations of breach and damages. Both approaches would protect certain entitlements in marriage, but the former would do so with a property rule, the latter with a liability rule.57

D. PROPERTY RULES AND LIABILITY RULES

Law and economics theory begins with some ideas about the relationship between law and economics. At one level, theorists explore the role of law in facilitating (or imitating) market relationships.58 At another level, economic theorists seek to explain legal rules through economic reasoning.59 At a deeper level, theorists recognize that law is the background and foundation for economic activity; our system of voluntary exchange commonly modeled in economic theory is built on a foundation of property, contract, and tort law.60 In their explorations of legal rules, economic theorists distinguish two important questions: what entitlements the law will grant or recognize, and how those entitlements will be legally protected.61 Guido Calabresi and A. Douglas Melamed contrast three types of rules used to protect various entitlements throughout the common law system: property rules, liability rules, and inalienability rules.62 Their elaboration of these concepts makes clear that the three

56. See text accompanying notes 120-24 and 205-16.
57. Eric Talley has pointed out to me that the usual understanding of these concepts is that Pareto efficiency "nests" the Kaldor-Hicks variety. See text accompanying notes 69 and 72-80.
59. Id at 23-25.
62. They distinguish three means of protecting entitlements: An entitlement is protected by a property rule to the extent that someone who wishes to remove [it] from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. . . . Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. . . . An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.
methods have significantly different effects. Entitlements protected by property rules can be shifted only in a consensual transaction—the domain of contract. Although property rules define entitlements, the rules do not attempt to specify the value of these rights, which is normally left to the subjective measurement of their holder. Entitlements protected by liability rules can be shifted without the consent of their holder, subject to compensation—the usual domain of tort. Liability rules contemplate that the value of these entitlements may need to be determined on some objective ground by some collective process. Inalienability rules define entitlements that cannot be shifted. Calabresi and Melamed review a series of considerations that come into play in setting entitlements—some derived from economic efficiency criteria, and some not. Ideally, the initial choice of an entitlement would lead to optimal allocations of resources, taking into account various types of transaction costs and how readily they can be avoided under different rules. It would also take into account the effects of different entitlements on distributions of wealth, as well as external or third party effects and existence of “moralisms.”

For Calabresi and Melamed, the choice between property and liability rules, and between two entitlements, requires a careful assessment of these costs. They suggest that property rules will be preferable whenever an entitlement may be readily exchanged in a privately negotiated transaction. But in “situations where markets may be too expensive or fail,” Calabresi and Melamed argue that collective valuation and transfer through liability rules may be more efficient. They also point out that liability rules may be employed “to favor distributive goals” that would be difficult to achieve under property rules.

This distinction between property rules and liability rules in many respects parallels the distinction between Pareto and Kaldor-Hicks efficiency norms. Pareto norms imagine a voluntary transfer, an exchange of entitlements between two participants who have made independent determinations of the values at stake. Kaldor-Hicks norms, on the other hand, imply the sort of collective valuation process that is characteristic of liability rules.

The questions of what entitlements the law should grant and how those

Id at 1092.

63. Calabresi and Melamed note that “most entitlements to most goods are mixed.” Id at 1093. For example, an entitlement to real estate “may be protected by a property rule in situations where [a buyer] wishes to purchase it, by a liability rule where the government decides to take it by eminent domain, and by a rule of inalienability in situations where [the owner] is drunk or incompetent.” Id.

64. Id at 1092.
65. Id at 1092-93.

66. Id at 1093-1105. For discussion of transaction costs and third party effects, see text accompanying notes 423-39.


68. Calabresi and Melamed, 85 Harv L Rev at 1110.
69. See text accompanying notes 25-34.
entitlements should be protected are extremely important and deserve a central place in these debates. Calabresi and Melamed provide a framework which invites the contributions of law and economics into both inquiries, as well as into the larger methodological questions suggested by the different efficiency norms. So far, however, the invitation has not been accepted. Instead, the economic analysis of divorce has split into two approaches: the argument for mutual consent rules, which is an argument based on a property interest in marital status, and the argument for contract enforcement remedies, which is an argument based on liability rules. Although the difference between property rules and liability rules has enormous practical and theoretical significance, it has gone virtually unacknowledged.

II. Two Solutions to the Problem of Divorce

Two different understandings of the problem of divorce correspond with two different, and inconsistent, solutions. Both solutions are based on arguments from economic efficiency, but they conceive and apply these norms differently. One would allow divorce only on mutual consent grounds, leaving the specification of rights and responsibilities entirely to the parties. The other would provide for unilateral divorce based on a judicial determination of breach, and accompanied by orders for payment of damages.

"Mutual consent" proposals, rooted in a Pareto efficiency model, reflect the concern that no one should be made worse off individually as a result of divorce. The proposals build upon a variety of empirical and theoretical studies of divorce decisions under laws which do not require mutual consent. By de-

70. This is explicit in the literature; see text accompanying note 113. In his discussion of contract remedies, Macneil describes specific performance as a property rule and expectation damages as a liability rule. Macneil, 68 Va L Rev at 962-63 (cited in note 35).

71. Some discussions attempting to apply the Coase Theorem to divorce rules contrast a property interest in marriage with a property interest in divorce. See text accompanying note 113. My question is whether there is a sound basis for either form of property rule. See text accompanying notes 114-18 and 312-48.

72. A divorce freely agreed to by both husband and wife would be Pareto superior. By definition, the parties' consent means that neither is being made worse off. The premise of mutual consent rules is that a party who stands to suffer from divorce will bargain over the price of consent. If the gain from divorce is great enough, the partner will be able to pay the price of consent. On the other hand, if the price of consent is more than the spouse can afford, the divorce will not occur. Becker acknowledges that a divorce might be blocked despite generous terms by a "bitter or spiteful spouse" who refuses consent; this is one reason he advocates allowing arbitrated divorces after several years' separation. Becker, Bus Wk at 22 (Dec 7, 1992) (cited in note 4).

73. Economists dispute whether changes in the legal rules of divorce substantially affect the rates of divorce. See Parkman, No-Fault Divorce at 75-79 (cited in note 6). As an application of the Coase Theorem, mutual consent and unilateral divorce rules would be equivalent if the parties had equal and unbiased information and if all aspects of marital income could be costlessly transferred. Landes, 7 J Legal Stud at 38-39 (cited in note 5). These conditions are not met in the setting of divorce, however. I.d at 39-40. Even if the Coase Theorem applied, however, shifts in the rules would have distributional consequenc-
ning divorce where there is no agreement, this proposal is the equivalent of an argument for enforcement of marital obligations through specific performance remedies. These proposals define the entitlements of marriage as property rights, and thus accord each partner ownership of the other's marital status. In other words, the parties must stay married until they agree otherwise.

"Contract enforcement" proposals, similar to the efficient breach theories used in business contract settings, follow a Kaldor-Hicks standard of efficiency. Enforcement proposals purport to foster efficient decisions during marriage. Although these theories also assert that divorce should be discouraged unless there is sufficient gain to the breaching party to offset the other's losses, the mechanisms relied upon to encourage efficient marital decisions and discourage inefficient divorces are liability rules which provide financial recoveries to the party who would prefer to remain married. As with contract damages, these are intended to approximate that party's losses from divorce, particularly economic losses.

These policy recommendations are difficult to compare, because they express different decisions as to what entitlements society should recognize and how those entitlements should be protected. In effect, mutual consent proposals place primary normative concern on divorce, while contract enforcement proposals place this concern on marriage.

In theoretical work, the divide between these approaches is often minimized. The concept of Pareto efficiency is understood to "nest" the Kaldor-Hicks variety, so that results that satisfy the Kaldor-Hicks test are also understood as potentially Pareto optimal. Liability rules are described as efforts to replicate the results that an actual bargaining process would yield if it were feasible. Moreover, the Coase Theorem suggests that the legal rules governing divorce may not affect the levels of divorce in society, at least where all aspects of marital income are completely divisible and can be costlessly transferred between husband and wife. Even then, however, different divorce rules would result in

es. See Peters, 76 Am Econ Rev at 438 (cited in note 5); Allen, 82 Am Econ Rev at 683-84 (cited in note 5); Zelder, 22 J Legal Stud at 504-06 (cited in note 5) (arguing that because children are not transferable, no-fault divorce increases the divorce rate).

74. See, for example, Brinig and Crafton, 23 J Legal Stud at 892-94 (cited in note 5). See also text accompanying notes 193-98 and 205-42.

Lloyd Cohen has written to me that he disagrees with the distinction as I have drawn it here. He argues that although "a property rule is of necessity Paretian" given the need for the parties' consent, liability rules should be based on a Pareto standard as well. Because it is possible to compensate the losers in divorce, he writes, "efficiency and justice call for full compensation" and "no economist should be talking Hicks-Kaldor as a normative standard." Letter from Lloyd Cohen to Ann Laquer Estin (Mar 23, 1995) (on file with author). Nevertheless, Judge Posner relies primarily on Kaldor-Hicks norms in his analysis of contract remedies, see note 32, and Zelder describes his framework in these terms as well, see note 112.

75. See text accompanying notes 312-48. This argument uses the framework developed by Calabresi and Melamed. See text accompanying note 62.

76. See text accompanying notes 25-26.

77. See text accompanying notes 230-32.

78. See, for example, Landes, 7 J Legal Stud at 36 (cited in note 5) (citing R. H.
varying distributions of wealth between husband and wife after divorce. Also, these results will be influenced, perhaps dramatically, by externalities, transactions costs, and other types of market and contracting failures. Moreover, analysis based on economic theory and large empirical samples is not well suited to explore the practical effects that different legal frameworks may have for individuals facing divorce decisions.

A. MUTUAL CONSENT PROPOSALS

Many economic theories of divorce conceptualize the process as an exchange or bargaining problem. Where there is sufficient gain from divorce, the gain can be shared between the parties so that neither is made worse off as a result of the divorce. Mutual consent proposals envision that this allocation results from negotiation and agreement between the two divorcing parties. Absent agreement, there is no ground for divorce. This is Professor Becker’s position: “[T]he no-fault experiment should be abandoned and replaced by laws that allow divorce only when both the husband and wife agree—what is called divorce by mutual consent.” Changing divorce laws to limit dissolution to circumstances of

Coase, The Problem of Social Cost, 3 J L & Econ 1 (1960); see also Allen, 82 Am Econ Rev at 683-84 (cited in note 5); Peters, 76 Am Econ Rev at 437-38 (cited in note 5). In addition, strategic behavior and various contracting and market failures can distort this outcome. See generally A. Mitchell Polinsky, An Introduction to Law and Economics 11-14 (Little, Brown, 2d ed 1989); Zelder, 22 J Legal Stud at 504 n 3 (cited in note 5).

79. Peters, 76 Am Econ Rev at 438. In some arguments, including Becker’s, these distributional consequences are the basis for the perception that inefficient divorce is a significant social problem. See text accompanying notes 121-23.

80. A number of writers have elaborated factors that may lead to inefficient divorce decisions under the present law, such as the presence of transactions costs and externalities and the impossibility of transferring public goods. See, for example, Zelder, 22 J Legal Stud 503; Allen, 82 Am Econ Rev at 683-84. Both Allen and Zelder challenge Peters’s empirical finding that levels of divorce were not affected by the shift to no-fault rules. Allen argues that there are necessarily transaction costs whenever property rights at issue cannot be perfectly defined: “If property rights are not perfect, then resources are devoted toward their protection and capture, and transaction costs are positive.” Id at 683. He also argues that Peters’s finding that divorce results in systematic wealth transfers from wives to husbands implies the same conclusion. Id at 683-84. Zelder’s arguments are discussed in the text accompanying notes 101-18.

81. In general, the practical legal aspects of these transactions are not well considered in the literature, which is prone to broad generalizations about the details of divorce process. One notable exception is Brinig and Crafton, 23 J Legal Stud 869 (cited in note 5) (discussing implications of different legal regimes for divorce in the context of spousal abuse). See generally text accompanying notes 351-55 and 409-17.


83. Becker, Bus Wk 22 (Dec 7, 1992) (cited in note 4). Becker apparently would authorize “binding private divorce arbitration” if there had been a failure to agree on terms after several years of separation. See note 72.

84. He made this claim in a column in Business Week magazine, published shortly
mutual consent offers two apparent advantages. First, these writers believe that forcing bargaining between the parties will improve the outcomes of individual divorce cases, moving them closer to an optimum result. Second, they stress that it privatizes the process of divorce, eliminating the courts and, by implication, acrimony, expense, and delay.

1. Efficient divorce.

As noted above, the test of efficient divorce is whether the parties' combined gain from marriage is less than their combined gain from divorce.\textsuperscript{85} The expected gain or "wealth" referred to here is not conceived in narrowly financial terms; it includes all of the personal satisfactions and dissatisfactions of family life. Becker and his colleagues argue that if mutual consent were required, the parties would agree to separate only if the party who expected to be less well off after divorce was compensated by the other.\textsuperscript{86} Moreover, because each partner is presumptively best suited to determine his or her own preferences and utility, a mutual consent system seems ideal to take all of the intangible benefits of marriage or divorce into account. Allen Parkman argues that mutual consent would lead to compensation for many factors that the current system discounts, including human capital issues, lost companionship, search costs of finding a new spouse, and disruption in the lives of children.\textsuperscript{87}

By this definition, an "inefficient divorce" is one that occurs even though husband and wife together enjoy a greater gain from marriage than they would from divorce. Conversely, although this term is never used, an inefficient marriage must be one in which the husband and wife would have a greater combined gain from divorce than they enjoy within marriage. Under a unilateral no-fault divorce law, these inefficient marriages would be relatively rare; under mutual consent rules, they could be quite common.

The argument for requiring mutual consent for divorce reflects a judgment that preventing inefficient divorces is more important than allowing inefficient marriages to continue. But this conclusion must necessarily be derived from some argument beyond the scope of efficiency principles. Some accounts seek to eliminate any subsidiary normative judgment by basing the preference for one regime on the conclusion that efficiency goals are more readily achieved in one context than the other.\textsuperscript{88}

\textsuperscript{85} Becker, Landes, and Michael, 85 J Pol Econ at 1144 (cited in note 5) ("[A] couple would separate if, and only if, their combined wealth from remaining married were expected to be less than their combined wealth when separated.").

\textsuperscript{86} Id. Conversely, "if all compensations between spouses were feasible and costless," a rule allowing unilateral divorce would have the same result, as the parties would agree to stay married only if the party who expected to be better off in the marriage compensated his or her partner. Id.

\textsuperscript{87} Parkman, \textit{No-Fault Divorce} at 138 (cited in note 6). For discussions of human capital, see Becker, 101 J Pol Econ at 392-93 (cited in note 1); Estin, 36 Wm & Mary at 1006 (cited in note 9).

\textsuperscript{88} See, for example, the discussion of Zelder in text accompanying notes 101-18.
Significantly, economic analyses of divorce have not distinguished between the problems of achieving efficiency in marriage and efficiency in divorce. Most often, this failure follows from the assumption that these two do not conflict. That is, commentators have implied that a legal framework fostering efficient divorce decisions will lead couples to make efficient marital decisions as well. There are, however, two distinct groupings among theorists who advocate an emphasis on efficient divorce. One concentrates on the exchange aspect of divorce, with the goal of fostering bargaining between husband and wife. Another group focuses on the outcomes of marriage and divorce bargaining, with the express goal of remedying the social problems that result from present divorce practices.

a) *Exchange models.* Bargaining models of divorce are premised on the goal of reducing divorce levels to an optimum, defined as what would result if negotiations occurred under the ideal conditions, including perfect and symmetric information, no public goods, no transaction costs, and willing participants. This ideal is far removed from the actual circumstances of divorce bargaining, but it serves as a theoretical base from which to explore the effects of the factors that complicate divorce decisions.

Some studies investigate different transaction costs involved in divorce, ranging from long-term financial and psychological costs for husband and wife9 to social stigma and the time and money spent on litigation or bargaining.90 Other work models this question in a broader fashion by exploring costs that may prevent parties from reaching optimal allocations of resources within marriage.91

Informational constraints may create another barrier to efficient divorces. Elizabeth Peters describes the problem: "Each spouse may not be able to determine the value of opportunities at divorce that face the other spouse. Incentives then exist for each spouse to misrepresent the value of alternatives that he or she faces and engage in costly strategic bargaining."92

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89. See, for example, Parkman, *No-Fault Divorce* at 122-23 (cited in note 6) (discussing "costs of lost companionship, searching for an alternative spouse or companion, and disrupting the lives of children").

90. See, for example, id at 77-78; Brinig and Alexeev, 8 Ohio St J Dispute Res at 287, 291 (cited in note 5); Zelder, 16 Harv J L & Pub Pol at 250 (cited in note 5).

91. Douglas Allen argues that the purpose of state intervention in marriage and divorce is to increase the gain to marriage by reducing a variety of transaction costs. Allen, 13 J Econ Beh & Org at 190-21 (cited in note 5). He argues that mutual consent and fault-based divorce rules reduce transaction costs by allocating "property rights over the duration of the marriage" to the spouse with fewer assets. Id at 184 (citing *Gallaspy v Gallaspy*, 459 S2d 283 (Miss 1984)). In the absence of this protection, state laws have responded with new devices to mitigate these costs, such as equitable distribution rules and rules that permit consideration of fault in determining financial remedies. Allen, 13 J Econ Beh & Org at 184.

92. Peters, 76 Am Econ Rev at 438, 442 (cited in note 5). Professor Peters's empirical data tend to support a model based on symmetric information, id at 450, leading her to
Some writers have discussed the external effects of divorce decisions, including in particular the effects of divorce on children. Children have been understood as another obstacle to efficient divorce: like other intangible benefits of marriage, children are “public goods” which cannot be readily exchanged or divided between husband and wife. As Elisabeth Landes writes, “if a large component of marital income for both spouses comes from the enjoyment of children, it would be impossible to transfer this income from one spouse to the other.”

This problem has also been explored by Yoram Weiss and Robert Willis, and by Martin Zelder.

Arguments for exchange models often assume that present levels of divorce are too high, and formulate the central policy question as whether different legal structures would cause divorce rates to go down. There is particular interest in whether no-fault divorce rules are in some manner correlated with higher divorce rates observed in recent years. Many authors have claimed that the fault-based divorce laws in existence prior to the 1970s operated as a mutual consent system, and that divorce rates from that era indicate what would occur under a mutual consent system. Some writers conclude that a shift to mutual consent rules would reduce the incidence of divorce.

From the perspective of legal policy and history, the simple equation between fault-based and mutual consent divorce is a surprising one. Certainly the two conclude that divorces do occur under no-fault rules when they are efficient, id at 453. See, for example, Posner, Economic Analysis of Law at 143-45 (cited in note 2); Zelder, 16 Harv J L & Pub Pol at 259 n 32 (cited in note 5).

Landes, 7 J Legal Stud at 39 (cited in note 5). She adds this insight:

This may help to explain the commonly held notion that poor families tend to experience a greater rate of desertion than middle and upper income families. The smaller the amount of money wealth held by a couple, the greater may be the proportion of total marital wealth that is derived from public goods such as children. Since transfers would be more difficult under these conditions, one would expect to find a greater incidence of desertion among low income families, unrelated to the legal costs of obtaining a divorce.

Id.

Weiss and Willis, 3 Labor Econ 268 (cited in note 5).

Zelder, 16 Harv J L & Pub Pol at 252. According to Zelder, other such public goods include home heating and love. Id at 254 n 21. See also Zelder, 22 J Legal Stud at 505-06 (cited in note 5).

See, for example, Zelder, 16 Harv J L & Pub Pol 24; Allen, 82 Am Econ Rev 679 (cited in note 5); Peters, 76 Am Econ Rev 437.

See, for example, Zelder, 22 J Legal Stud at 504; Allen, 13 J Econ Beh & Org at 182-83 (cited in note 5); Peters, 76 Am Econ Rev at 446. All of the empirical work in the literature appears to assume that data taken from states with fault-based rules for divorce can be relied upon to indicate how mutual consent rules would affect divorce rates. The data also focus almost exclusively on grounds for divorce, without much consideration of the effects of specific alimony, property division, and custody rules. But see Brinig and Crafton, 23 J Legal Stud at 892-94 (cited in note 6); Peters, 76 Am Econ Rev at 441. For an empirical analysis suggesting that these rules are more significant than the change in grounds for divorce, see Marsha Garrison, The Economics of Divorce: Changing Rules, Changing Results, in Sugarman and Kay, eds, Divorce Reform at the Crossroads 75, 90-93 (cited in note 51).
systems possess importantly distinct moral contents and generate very different practical consequences. While divorce agreements were regularly negotiated under fault-based divorce rules, this process involved substantial financial expense and inflicted significant social and personal costs. These costs might well have reduced divorce rates to inefficient levels. None of the theoretical or empirical work has developed a method that allows us to test in an individual case whether divorce would be efficient, or in the aggregate whether divorce is occurring at an optimal level.

With a pure exchange model, the only normative goal is to increase the scope of exchange. This is most explicit in an analysis by Martin Zelder, who argues that divorce rules should be structured in order to expand the scope of bargaining over the allocation of gains from marriage or divorce. Zelder views bargaining over divorce terms as preferable to bargaining over terms for continuation of a marriage, because some of the gain from marriage is in the form of public goods which cannot be traded between the parties. He presents empirical evidence that divorce rates have increased under no-fault rules and that the reason for this increase is "the nontransferability of children within marriage." Zelder makes the normative judgment that these additional divorces are economically inefficient, that they would not occur in a system of fault-based divorce. Therefore, he says, no-fault divorce should be eliminated "so that marriage will be preserved when it is economically efficient."

Although Zelder's recommendation is couched in the neutral and mathematical language of efficiency, his discussion implicitly depends on prior normative judgments. Zelder argues that under a mutual consent or fault system, the partner who wants a divorce must offer favorable terms in order to induce consent. Under no-fault rules, however, the partner who wants to remain married must offer a greater benefit within marriage. Zelder posits that this is significantly harder to do, at least where a couple devotes much of their financial resources to their children. That is, it is more difficult for one spouse to purchase the other's continued commitment to a marriage than to purchase consent to a divorce. Thus, the transaction is less likely to take place. Without a deal, divorce will result.

But why is this a problem? In Zelder's analysis, divorce on these facts is "inefficient"; that is, there are gains to one party from the marriage that would

100. See text accompanying notes 111-12.
102. Id at 507-09; Zelder, 16 Harv J L & Pub Pol at 252-54 (cited in note 5).
103. Zelder, 16 Harv J L & Pub Pol at 257.
104. Id at 258-59.
105. Id at 262.
106. Zelder, 22 J Legal Stud 504-05 ("[F]or example, a wife may agree to be less critical of her husband in order to induce him to remain married.").
107. Id at 505-06. See also note 94.
be lost in divorce. By definition, however, the problem only occurs when these gains consist of shared goods, such as love or children, which are unequally valued by the partners to the marriage.\textsuperscript{108} Zelder's model ignores that requiring the unhappy partner to buy out of a marriage in these circumstances is not a simple matter: it requires that the parties put a price on precisely those aspects of marriage that are most difficult to value, most at risk from commodification, and to which they have attributed widely different valuations during the marriage.\textsuperscript{109} If valuation or compensation is not feasible, divorce will not occur, suggesting an important question: are these marriages that should continue?\textsuperscript{110}

Since we cannot test or compare parties' individual evaluations of their gains or losses from their marriages,\textsuperscript{111} we cannot confirm Zelder's hypothesis that divorce in this setting involves greater losses to one party than the gains to another.\textsuperscript{112} Without this information, the efficiency analysis collapses into a deep and troubling problem of the nature of marriage and love. This is a subject that Zelder, at least, is unwilling or unable to tackle.

Zelder points out, as have other economists, that mutual consent rules may be seen as creating a property right in the continuation of marriage, while unilateral no-fault rules create a property right in divorce.\textsuperscript{113} Finding no eco-

\textsuperscript{108} That is, not valued enough to offset the other perceived losses from marriage, or perhaps not valued as highly by one partner as by the other.

\textsuperscript{109} See generally Margaret Jane Radin, \textit{Commodification and Commensurability}, 43 Duke L J 56 (1993); Margaret Jane Radin, \textit{Market Inalienability}, 100 Harv L Rev 1848 (1987); see also Estin, 36 Wm & Mary L Rev 1062-65 (cited in note 9). Cass Sunstein describes the anticommodification position as one which understands that people value "goods, things, relationships and states of affairs" not simply in different amounts, but in different ways. Cass R. Sunstein, \textit{Incommensurability and Valuation in Law}, 92 Mich L Rev 779, 782-85 (1994). To describe goods as incommensurable is to recognize that no single metric of value can adequately address the range of different valuations that people make of those goods. Id at 795. In the context of marital bargaining, although mutual consent proposals allow each party to make his or her own judgments as to the value (in quantitative terms) of marriage and divorce and all of the goods of family life, the proposals require that individuals treat these goods as commensurable. Moreover, it is hard to imagine what metric other than dollars the individuals could use in making these judgments.

\textsuperscript{110} Zelder does not consider the possibility that relatively lower divorce rates in this category under fault rules may reflect the particular difficulties of negotiating divorce in these circumstances. It is at least possible that the increase in divorce rates reflects a move to a more "optimal" level.

\textsuperscript{111} In economics, of course, there is no methodology that permits interpersonal comparisons of utility, or even measurement of utility, except in willingness to pay. See text accompanying note 25.

\textsuperscript{112} Although Zelder suggests that he is applying a Kaldor-Hicks standard of efficiency, see Zelder, 22 J Legal Stud at 510 (cited in note 5), the premise of his model is that the parties act alone to assess their gains or losses from marriage and divorce, with no legal rules other than those creating a property right in marital status. This has much more in common with a Pareto standard, which recognizes an allocation as efficient only when it is based on consent. A Kaldor-Hicks standard would allow an external assessment of the costs and benefits to each party from divorce. See text accompanying notes 25-36 and 69.

\textsuperscript{113} Zelder, 22 J Legal Stud at 504 (cited in note 5); Zelder, 16 Harv J L & Pub Pol
nomic distinction between enforced marriage and enforced divorce, he dismisses the possibility that other values may be worthy of serious discussion. Apparent-
ently, his preference for a property right in marriage is based solely on his conclusion that this rule facilitates transferability of rights between husbands and wives. He does not address the arguments concerning the specification of property rights, or the difference between property and liability rules.

What is perhaps most remarkable is that this analysis claims to be a sufficient argument for sweeping and radical divorce policy reform. Although he casually acknowledges that this approach to divorce might require a system to "regulate the allocation of resources within marriage," he offers no consideration of what this regulation would mean for families or for law. Other economic writers have confronted this problem, noting that mutual consent divorce is the equivalent of orders for specific performance of marriage.

b) Outcome models. Some proponents of mutual consent divorce move beyond abstract bargaining models to a consideration of specific policy goals. Gary Becker, for one, argues that mutual consent divorce would reduce the role of judges, "for couples would be required to work out their own terms as part of the consent process." In addition, he asserts that a change to mutual

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114. Zelder supplies this analysis in a footnote:
[S]ome might quibble with the basic normative conclusion of this article, and note that eliminating no-fault and thus, requiring fault, traps within marriage those . . . who are made worse off by marriage. There are two responses to this contention. One is that if no-fault is the rule, not only do inefficient divorces occur, but some people are trapped in divorce, even though it makes them worse off. There is no reason to endorse one form of ensnarement over another. Second, if one accepts this problem . . . , one remedy is to regulate the allocation of resources within marriage so that . . . [the partner who benefits] shares his gains with [the partner who loses] (to the extent possible given that some of his gains are in the form of public goods) so that she is made better off during marriage (or at least loses less). Such a practice would, of course, be inconsistent with the state's traditional protection of family autonomy. Nevertheless, such a rule might be economically efficient if it pre-
vented trapped spouses . . . from wasting resources or harming their better-off mates in order to induce divorce.

Zelder, 16 Harv J L & Pub Pol at 259 n 32.

115. Zelder never discusses such questions as how a property right in marriage could be specified in order to avoid negative externalities and overutilization of such rights. See Trebilcock, The Limits of Freedom of Contract at 10 (cited in note 60) (The goal is to "internalize as fully as possible to a property rights holder all the costs and benefits associated with utilization of the property rights in question."); see also text accompanying note 320.

116. Although Zelder notes the distinction between property rights and liability rules drawn by Calabresi and Melamed, he does not appear to consider their arguments in his analysis. Zelder, 16 Harv J L & Pub Pol at 246 n 11; see generally text accompanying notes 62-68.

117. Zelder, 16 Harv J L & Pub Pol at 259 n 32.

118. See text accompanying notes 151-72.

119. Becker, Bus Wk at 22 (Dec 7, 1992) (cited in note 4). Becker writes:

Judges now have a large part in divorce proceedings, even though they may not
consent would "greatly improve the bargaining power of the many married persons, especially women, who are hurt by no-fault." Professor Becker argues that this would have important consequences: "women would be more able to stay home for a spell after having children, if they wanted to, because they would have much less reason to fear being left in a financial bind."

These two aspects of his proposal have a different normative ground: rather than focusing on bargaining as a goal in itself, they seek to shift current distributions of wealth after divorce to encourage certain choices within marriage. Although the argument for private ordering reflects a preference for bargaining and Pareto efficiency norms, Becker's other arguments expand on the exchange model significantly.

The most surprising of these is the argument that mutual consent rules would improve women's bargaining power in divorce. Conventionally, economics is not concerned with the endowments of power or wealth that parties bring to a transaction. Becker's argument implies, however, that these should be important concerns in the design of divorce rules, and further that there are often important differences between the situations of the parties prior to their divorce negotiations that the law should take into account. He has an implicit distributive goal: to shift a greater share of family financial resources to divorced women and children. In the context of Professor Becker's recommendations for reform, this concern appears closely connected to the broader social problem caused by single-parent households.

Similarly, Becker's recommendation that new divorce rules would better allow for the costs and risks of women's investment in childrearing reflects a broader concern, which is made clearer by his positive economic analysis of marriage and childrearing. Becker evidently believes that divorce law can serve as a lever to shift the incentives and penalties that now discourage traditional divisions of labor within marriage. This argument also moves beyond the focus on efficient divorce to include a normative vision of marriage.

These three arguments place Becker's recommendations somewhere between the exchange model and the enforcement proposals discussed below. Although

have enough knowledge to fit custody and support provisions to individual circumstances. . . . There is every reason to expect that privatizing divorce proceedings—taking the judiciary out of them—would make them work much better, just as privatizing other activities has brought improvement.

120. Id. The particular scenario he develops is described in the text accompanying note 134.

121. Id. "No-fault divorce laws discourage married women from leaving the workforce for several years to care for their young children, because they realize that they will need good jobs if their husbands ditch them." Id.

122. See, for example, Posner, The Economics of Justice at 79 (cited in note 29) ("The 'interpersonal comparison of utilities' is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison.").

123. See text accompanying note 136.

124. See text accompanying notes 43-50.
his argument for reduction of the importance of "the judiciary" in divorce reflects a characteristic economic preference for private rather than collective decisionmaking, and a preference for Pareto rather than Kaldor-Hicks norms, it contradicts his other two arguments, which suggest the need for more complex models of family regulation.

Allen Parkman argues that mutual consent divorce rules would further "efficiency, fairness and equality by recognizing all the costs of divorce." In his view, mutual consent rules would give the party who does not want to divorce "an incentive to ask for compensation for these costs as a basis for agreeing to the divorce," which would assure that divorces occur "only when the collective benefits exceeded the costs." Moreover, "the dissolution of marriage would be based on the parties' criteria rather than those of the state." Parkman's argument for mutual consent rules, like Gary Becker's, describes the problem of divorce in distributive terms. He adopts the view that fault-based divorce gave women a "veto power" that made it possible for them to negotiate better financial settlements. Parkman also asserts that no-fault divorce rules have discouraged traditional divisions of labor in marriage. Although he also gives serious consideration to legal reforms that would implement a contract enforcement approach to divorce, Parkman argues that the mutual consent solution is preferable, because it permits a wife opposed to a divorce to demand compensation for all of the nonfinancial losses that result from divorce.

Becker and Parkman's recommendations imply that mutual consent rules can achieve efficiency goals in marriage and both distributive and efficiency goals in divorce. The claim is very ambitious, perhaps because it is based on a rad-

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125. Parkman, No-Fault Divorce at 123 (cited in note 6). Although Parkman advocates a mutual consent system, id at 138, he would also allow a long-term separation as an additional ground for divorce, id at 139, and permit no-fault divorce "during the first year of marriage or until the wife becomes pregnant," id at 139-40.
126. Id at 138.
127. Id at 137.
128. Id at 140.
129. Id at 44-46, 79-88, and 112.
130. Id at 65-66, 101-03.
131. Parkman states that a no-fault divorce rule would be the best (most efficient) solution to the demand for marital freedom if there were "an appropriate definition of property" which could be used to "divide the financial repercussions of the dissolution between the spouses," and if divorce rules "recognize[d] the full costs of divorce." Id at 46; see also id at 63. He reasons that fault-based divorce rules with provisions for negotiated settlements are a "second best" solution. Id. Parkman views the divorce laws, as presently structured, as a third best alternative, concluding that they lead to inefficient divorces because they do not "accurately reflect the reliance costs incurred by parties who do not want the dissolutions." Id at 64; see also id at 111 ("The primary problem with no fault divorce is that it ignores some costs of divorce."). Parkman concludes that mutual consent is better than no-fault because it is impossible to draft legal rules which account for all the costs of divorce. Id at 122-23 and 137-39.
132. In his Business Week column, Professor Becker does not argue that mutual consent
ically oversimplified view of divorce. It seems designed to address the case in which a “married woman with young children cannot stop her husband from divorcing her” under the present rules. The husband “very much wants a divorce and cares little about the harmful effects on his wife and children. The goal of mutual consent is to give her “leverage” to demand generous property division and adequate assurances that he will visit and support the children. Certainly, this hypothetical mother is in a difficult situation, and the law should do better by her. As Becker implies, hers is a problem with significant consequences for the larger society, as well.

But there are many other compelling divorce stories which may be less compatible with this type of regime.

Perhaps Professor Becker’s proposal is best understood as an argument for privatization, not just in the divorce process but in funding the social costs of divorce in families with young children. This would be consistent with the

will reduce divorce rates to an “efficient” level but rather that it would permit one spouse to demand more substantial financial redistribution. Becker, Bus Wk at 22 (Dec 7, 1992) (cited in note 4). Other analysis suggests that the goals of private ordering and redistribution may be incompatible. According to Professor Polinsky:

[It] is frequently difficult, if not impossible, to use legal rules to redistribute income in contractual disputes. In general, the parties will take any distributional effects of breach of contract remedies into account when they negotiate the contract price; thus, how the joint benefits are shared between the parties depends primarily, if not exclusively, on their relative bargaining strengths, not on the remedies available to them.

Polinsky, An Introduction to Law & Economics at 122 (cited in note 78).

133. Becker, Bus Wk at 22 (Dec 7, 1992).

134. Id. Like Becker, Parkman describes divorce as though it were primarily a problem with a single fact pattern, in which a husband with a promising career walks out on his wife, who has specialized in household work. Parkman, No-Fault Divorce at 113-14, 122 (cited in note 6); but see id at 142. This paradigm case pervades the literature; as Professor Weisbrod points out, the discussion ordinarily focuses on “the remedies to be given a spouse (typically assumed to be a wife) disadvantaged by the departure of a partner, [who is] often assumed to have the money but unwilling to give it up. The disadvantage is seen to arise from the fact that the wife either never seriously entered the market or left it early.” Weisbrod, 1994 Utah L Rev at 811 (cited in note 21).


136. Becker, Bus Wk at 22 (Dec 7, 1992) (“The plight of these divorced women and their children—who now constitute almost 20% of all households—is among the most serious family problems in Britain, Canada, the U.S., and many other countries.”).

137. What if the wife is seeking a divorce because of the husband’s infidelity or her own? What if the parties have no children, but one partner has religious objections to divorce? What if one of the spouses is violent or abusive with the other? How generous a property division can the unwilling spouse demand? Everything? What if she in fact cares very little about the children’s welfare, and bargains only for a larger share of assets for herself? Is a mutual consent rule really fair or sufficient for all these circumstances?

138. This reading is consistent with other policy recommendations from Professor Becker, such as his suggestion that the use of private collection companies would increase the rate of child support payment compliance. Gary S. Becker, Unleash the Bill Collectors on Deadbeat Dads, Bus Wk 18 (July 18, 1994). Both the objective of increased enforcement and the use of private collectors reflect a preference for non-governmental approaches
trend toward greater private ordering in family law over the past two decades.39 Seen in this light, a mutual consent approach might reduce the external costs of marriage and divorce in a number of ways. First, if it assures custodial parents a greater share of family financial resources after divorce, it obviously reduces the need for public subsidy. Second, proponents of this view expect it would prevent some divorces altogether.40 Third, the rules could encourage parents, particularly mothers, to engage in household caregiving work rather than market labor.41 This last point suggests a concern with a different type of externality, the wider social effects of increasing divorce rates.42

Although the argument for privatizing the costs of divorce has obvious appeal, there is very little theoretical or empirical evidence that mutual consent divorce laws can remove courts from the divorce process and divorced women with children from welfare rolls.43 Whether or not this model works in theory, it is unrealistic to suppose that law can be so readily eliminated from the processes of marriage and divorce. Even in market settings, the process of exchange is not self-executing or self-enforcing.44 At a minimum, some process must control the risks of exploitation inevitably created by power differentials within marriage relationships.45 The problem of unequal bargaining power, which Becker describes, might be more effectively addressed with better procedural rules and protections than with further privatization. Bargaining theorists demonstrate that the bargaining power of different parties is determined by bargaining endowments created by legal rules.46 Similarly, Becker's normative concerns with marriage suggest the importance of an adequate set of background

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139. See Singer, 1992 Wis L Rev at 1444 (cited in note 16) ("In virtually all doctrinal areas, private norm creation and private decision-making have supplanted state-imposed rules and structures for governing family-related behavior.").

140. Parkman argues that mutual consent divorce would "force parents to address the costs incurred by their children due to a divorce," and he suggests that this could lead some parents to choose not to divorce. Parkman, No-Fault Divorce at 123, 128 (cited in note 6).

141. See id at 78, 94-103.

142. See text accompanying notes 423-28.

143. There is growing academic debate on the question whether family issues of this sort are adequately conceived as a matter of purely "private" responsibility. See, for example, Deborah Rhode and Martha Minow, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law, in Sugarman and Kay, eds, Divorce Reform at the Crossroads 191, 192-94 (cited in note 51); Harry D. Krause, Child Support Reassessed: Limits of Private Responsibility and the Public Interest, 24 Fam L Q 1 (1990).

144. See, for example, Trebilcock, The Limits of Freedom of Contract at 15-17 (cited in note 60); Robert H. Mnookin, Divorce Bargaining: The Limits of Private Ordering, 18 J L Reform 1015 (1985).


146. Mnookin, 18 J L Reform at 1024 (cited in note 144). As Mnookin points out, the obvious response to this problem is for the state to consider changes in the bargaining endowments of parties to divorce. This is what the "enforcement" approach attempts to do. See text accompanying notes 191-311.
legal norms against which private agreements could be tested. Indeed, it is difficult to imagine how private bargaining could proceed at all without legal rules that define and protect the entitlements which parties have available to exchange.

Another troubling aspect of the mutual consent proposals is that they would, by definition, force some unhappy individuals to remain in marriages against their will. The set of legal and practical problems that this poses have not been seriously discussed by authors in this area. As several of these writers have acknowledged, a mutual consent rule would shift the need for a public or judicial role in family life from the point of divorce into the midst of family life itself.

2. Specific relief.

Of the advocates of mutual consent divorce, Allen Parkman most explicitly recognizes that it is the equivalent of a rule requiring "specific performance" of marriage contracts. As Parkman notes, the ordinary remedial rules in contract dictate that specific relief is extraordinary, available only when monetary damages would be inadequate to compensate for a breach. In his view,

147. See text accompanying note 399.
148. See, for example, Trebilcock, The Limits of Freedom of Contract at 44-48 (cited in note 60); Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L J 950 (1979). Parkman sees the scope of these norms as critically important under a no-fault regime, but he treats them as relatively insignificant under fault-based or mutual consent divorce. Compare Parkman, No-Fault Divorce at 111-37 (cited in note 6), with id at 63 ("Under fault divorce, the legally defined financial arrangements served a minor role compared with the agreements worked out by the parties privately.").
149. For Zelder's assessment of the problem, see the quotation in note 114. Parkman is almost equally cavalier. After he notes the problem of a spouse trapped in an unhappy marriage, he dismisses it with this observation: "None of the alternative approaches to divorce produces perfect outcomes." Parkman, No-Fault Divorce at 139 (cited in note 6).
150. In legal traditions, this sort of intervention is prevented by a range of rules protecting the privacy and autonomy of family life. See generally Estin, 36 Wm & Mary L Rev at 1039-53 (cited in note 9). Brinig and Crafton argue for greater attention to opportunistic behavior within marriage, and not simply at the time of divorce. Brinig and Crafton, 23 J Legal Stud at 883-92 (cited in note 5); see also text accompanying notes 163-79.
151. He writes: "One of the major attractions of specific performance is its ability to force the parties to estimate their costs—psychological as well as financial—due to the breach." Parkman, No-Fault Divorce at 126-27 (cited in note 6). See also the quotation from Zelder in note 114.
152. Restatement (Second) of Contracts § 359(1) (1981); see also Parkman, No-Fault
however, this is the appropriate remedial analogue for divorce.\textsuperscript{153} In our culture, of course, husbands and wives are not generally viewed as fungible. Substitutes may be hard to acquire. As the situation of parties to a marriage is unique, ordinary damages remedies would be extremely difficult to compute.\textsuperscript{154}

Another benefit of specific remedies in contract is that they can force parties to negotiate a financial resolution, in which one party pays the other for a release from the obligation to perform.\textsuperscript{155} In theory, this leads to a sharing of the benefit from an efficient breach and increases the likelihood that the transaction will satisfy Pareto standards.\textsuperscript{156} Parkman relies heavily on this aspect of specific performance in arguing for a mutual consent divorce rule; although he describes the rule as one which creates a right to continuation of the marriage,\textsuperscript{157} he also asserts that “the courts would not normally become involved in the quality of the performance during the marriage.”\textsuperscript{158}

\textit{Divorce} at 126. The finding of inadequacy usually requires that the promised performance is in some way unique. If the performance is unique, it will be difficult to value, Restatement (Second) of Contracts § 360(a) and comment b. Conversely, if the performance is not unique, the nonbreaching party can be awarded damages to purchase a substitute performance in the market. Id § 360(b) and comment c; see also Posner, \textit{Economic Analysis of Law} at 130-32 (cited in note 2) (damages are the only remedy unless there is no good market substitute for the promised performance). As Judge Posner notes, there is an extensive literature on the economics of specific performance. Id at 130 n 1.

153. Parkman makes the “uniqueness” argument in favor of the specific performance approach to divorce. Parkman, \textit{No-Fault Divorce} at 137.

154. Lloyd Cohen describes the measure as “the replacement cost of a spouse of equivalent ex ante value.” Cohen, 16 J Legal Stud at 298 (cited in note 6); see also text accompanying notes 191-311.

155. As a number of contract theorists have argued, the issue has more to do with how the gain from the breach will be shared between the parties. See, for example, Macneil, 68 Va L Rev at 950-52 (cited in note 35). Macneil’s argument for specific performance remedies in the business setting stresses two important goals: encouraging a process of consultation prior to breach, and bringing all of the losses from breach into the parties’ decision-making process. Id at 958-60. He describes the “simple efficient breach” theory as biased in favor of uncooperative behavior (and litigation) rather than negotiation between the parties. Id at 968-69. On this front, however, the analogy between business deals and marriage relationships may not be very strong. Most divorces are not undertaken lightly, and in most marriages, including those already in deep trouble, there is a continual process of communication, which is very different than what the simple breach scenario suggests.

156. The economic arguments are particularly compelling where the breach is opportunistic. Posner, \textit{Economic Analysis of Law} at 131 (With opportunistic breach, by definition, completion of the contract is not impossible or uneconomical.). Other theorists argue that specific performance should be ordered where breach is “willful.” See Patricia Marschall, \textit{Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract}, 24 Ariz L Rev 733, 760-61 (1982).


158. Parkman, 8 BYU J Pub L at 95 n 11 (cited in note 6); see also Parkman, No-
But specific performance is not an order to negotiate damages: sometimes, perhaps commonly, the remedy means that the parties will be compelled to perform their contractual obligations. Because of the extraordinary coercion this implies, contract law includes old and well-elaborated reasons for proceeding cautiously with specific remedies. Courts hesitate to order specific performance where it would require extensive supervision, or where it would order continuation of performances viewed as personal. The economic literature also elaborates serious problems with specific relief, including its creation of a bilateral monopoly with high transaction costs and the third party costs when courts are required to supervise and monitor performance. Parkman acknowledges that these problems apply in the divorce setting, but apparently he does not regard them as serious enough to counsel against specific relief.

In an article published prior to Parkman's work, Lloyd Cohen criticized mutual consent rules precisely because they are equivalent to a specific performance regime. Professor Cohen observed that the law cannot make the parties perform the obligations of a marriage contract, since "many of the acts that a spouse has implicitly contracted to perform cannot be specified nor their performance monitored." Moreover, "marital duties are to be performed in a certain spirit, and no court can succeed in forcing an unwilling spouse to perform marital duties in a spirit of love and devotion." These concerns are familiar in the setting of commercial contracts. Because of problems of supervision and coercion, specific relief is not generally granted where the terms of the contract are uncertain, or where performance requires the promisor's cooperation. This is particularly true where a promise involves a personal relationship. Courts may attempt to compel performance by enjoining the contract breacher from performing for another party, but strong

Fault Divorce at 139.

160. Parkman, No-Fault Divorce at 127, 139-40. Unfortunately, Parkman also does not discuss the fact that Lloyd Cohen, in an article cited elsewhere in Parkman's book, concludes that these issues render a mutual consent/specific performance approach to divorce unworkable. See Cohen, 16 J Legal Stud at 300-01 (cited in note 6). See also Weisbrod, 1994 Utah L Rev at 812 (cited in note 21) (discussing the writ or restitution of conjugal rights). Curiously, Parkman suggests that "strict enforcement" of marital contracts would not be desirable. Parkman, No-Fault Divorce at 63. Although this would seem to be necessary in his mutual consent regime, he apparently assumes that all couples will in fact reach agreements to end their marriages, dispensing with the problem of enforcement.

162. Id at 300.
163. Id at 300. Peg Brinig and June Carbone argue that no-fault divorce "represented, as much as anything else, rebellion against the propriety of specific performance of marital obligations." Margaret F. Brinig and June Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul L Rev 855, 883 (1988).
165. Id § 366.
166. Id § 367.
policy arguments counsel against this sort of restraint.\textsuperscript{167}

Cohen also observes that a mutual consent rule would only limit divorce, not breach.\textsuperscript{168} The possibility that one party will breach a marital contract without seeking a divorce raises serious administrative problems under a mutual consent rule.\textsuperscript{169} The familiar scenarios of adultery, desertion, and cruelty from the era of fault divorce have surely not disappeared.\textsuperscript{170} If the party in breach does not seek a divorce, the nonbreaching spouse is at a serious disadvantage. Although such misbehavior can destroy the value of the marriage for the wronged party, that partner likely will not be able to bargain for compensation.\textsuperscript{171} Still worse, if the party in breach refuses to consent to divorce, the victim may be forced to pay for freedom when the breach becomes sufficiently intolerable.\textsuperscript{172}

As noted above, where mutual consent is the only escape from an unhappy marriage, the risks of overreaching and other contracting failures become much more serious. Even in our present system, where much less of consequence rides on obtaining consent, divorce settlements often entail significant coercion.\textsuperscript{173} For victims of marital battering, who should not have to purchase their freedom from violence, these are serious issues.\textsuperscript{174} They also pose a problem for parties to a marriage who do not have sufficient resources to purchase their partners' 

\textsuperscript{167} Id §§ 357(2), 367(2), and comment c. This approach is reminiscent of the former practice in some states of granting divorces but prohibiting remarriage. See Clark, \textit{The Law of Domestic Relations} § 12.1 at 409 (cited in note 99).

\textsuperscript{168} Cohen, 16 J Legal Stud at 300-01 (cited in note 6). Parkman admits this as well. Parkman, \textit{No-Fault Divorce} at 139 (cited in note 6) ("Mutual consent would not provide a solution for the situation in which one spouse is the victim of acts such as cruelty or adultery, but the 'guilty' spouse does not want a divorce. Courts during the fault divorce era showed little skill, however, at making determinations in these cases. . . . Therefore, mutual consent would be no worse than fault divorce was in dealing with these situations.").

\textsuperscript{169} Cohen, 16 J Legal Stud at 300-01. As Cohen argues, relaxed mores in our era allow individuals to reap many of the gains of divorce without need for a formal decree. Id at 300.

\textsuperscript{170} Civil and criminal penalties for adultery have been significantly reduced over the past twenty years. See Clark, \textit{Law of Domestic Relations} at 498. Given this shift, this type of misconduct may be more prevalent today.

\textsuperscript{171} Cohen describes this problem as the destruction of quasi rents generated by the marriage. See Cohen, 16 J Legal Stud at 301; see also text accompanying notes 205-16. Once there is a serious breach, often neither party wants the marriage to continue. Settlements worked out in these circumstances are "likely to be far different from what would have been specified ex ante as part of a liquidated-damage clause of the original marriage agreement." Id.

\textsuperscript{172} But see text accompanying notes 175 and 182.

\textsuperscript{173} Sally Burnett Sharp, \textit{Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom}, 132 U Pa L Rev 1399 (1984). See also Posner, \textit{The Economics of Justice} at 190 n 35 (cited in note 29) ("The husband could make the wife's life unbearable in an effort to force her to 'agree' to a divorce.").

\textsuperscript{174} See Brinig, 26 Fam L Q at 455 (cited in note 51); Linda J. Lacey, \textit{Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott}, 66 Tul L Rev 1435, 1443-46 (1992) (describing the need for divorce when one spouse is abusive).
consent to a divorce. Yet Parkman's proposal does not admit that judicial oversight of divorce bargaining might be appropriate, let alone necessary, to assure some level of fairness in results.

Ultimately, the greatest failing of mutual consent proposals results from the formulation of divorce as an efficiency problem. The goal of achieving optimal levels of divorce places too much concern with divorce and too little concern with marriage. Because of this narrow vision, the proposals never seriously note or address the immense problems such a system could create on other fronts.

In order for a specific relief/mutual consent approach to work as writers like Parkman anticipate, the courts would have to take seriously an obligation to regulate both the negotiation and performance of marital and divorce contracts. Without such a framework, many of those the system is intended to protect would be made much more vulnerable. But the difficulties of this project are immense. Even in the commercial setting, specific remedies are extraordinary rather than exclusive. Our legal system has never sought to assert this control over family life, and a system that attempted to do so would conflict dramatically with our norms of privacy and autonomy. In addition, the direct financial costs of such a project would be enormous.

The mutual consent proposals regularly ignore these issues, largely because the economic models severely abstract the reality of family life. By deferring absolutely to decisions based on the subjectively valued utility functions of husband and wife, these rules deny any broader social interest in ongoing family life or divorce. The abstraction of divorce as exchange eliminates any understanding of the contexts in which "bargaining" occurs. Yet context becomes much more important under rules which lead to enforced marriage. And, because the efficiency model ignores market and contracting failures, it cannot address the myriad distortions of the fairness and efficiency of divorce bargains. As a result, these models do not provide for the effects of violence and spite, poverty or wealth, and strategic behavior of every variety.

175. Parkman concedes that it may be appropriate to loosen his scheme to allow "separation for a long period" as an additional ground for divorce. Parkman, No-Fault Divorce at 139 (cited in note 6).


177. While proponents argue that mutual consent would give more protection and power to women who now suffer financially in divorce, there is very little to suggest that most women could take advantage of their power to deny consent to achieve the results these theorists imagine possible. See generally Penelope E. Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 Buff L Rev 441 (1992) (reviewing literature and describing problems with mediated divorce agreements).

178. None of these theorists suggests any inclination to begin regulating family behavior, however. See, for example, Zelder, 16 Harv J L & Pub Pol at 259 n 32 (cited in note 5 and quoted in note 114) (noting that the regulation of the allocation of resources within marriage might be economically efficient but nonetheless is inconsistent with the traditional notions of family autonomy).

179. These issues are much more central to a "transaction cost" analysis of marriage and divorce, which emphasizes the difficulties of "using contracts to structure complex,
The efficient divorce approach is also difficult to reconcile with the positive
economic explanation of increasing divorce rates. These models do not
explain why the legal response to such realities as imperfect information, chang-
ing tastes, and reduced gain from specialization should rigidify marital status and
make change more difficult. These issues are profound, and they are extremely
important in the formation of divorce policies. Paradoxically, these economists'
recommendations contradict the economic paradigm that rational individuals
maximizing their own utility produce the best social outcomes. Thus, although
the positive analysis of family behavior is founded on rational choice, the
normative analysis apparently concludes that individually self-interested decisions
should not remain the foundation of marriage and divorce.

Economists are certainly not the only advocates of making divorce more
difficult, particularly for couples with children. But these proposals seem
surprising when they emerge from a tradition which has always stressed the
importance of individual freedom to enter into and exit from relationships. In the
new economic theories of the family, it is a deep and often unacknowledged
problem how far the paradigm of individual consent should extend. One can cer-
tainly develop economic arguments as to why the protective functions of family
law justify a more pervasive regulation of consent and exchange. These surely
include the significant third-party effects of divorce decisions on children and
society, and market and contracting failures. Economic theory offers a vo-
cabulary and analysis that are useful in explaining some of these issues. But to
toss aside the premise that each individual should be free to assess and act on his
or her own best interests is a radical break with the economic model, and one
that has not been well explained.

ongoing relationships.” Pollak, 23 J Econ Lit at 595-96 (cited in note 5). In this
approach, bargaining between husband and wife extends not only to divorce decisions but
also to allocations within the family over long periods of time. This analysis of law is
concerned with its role in facilitating long-term relationships by reducing the possibilities
for exploitation and opportunism they create. See generally id at 581-608.
180. See text accompanying notes 37-45.
181. This paradigm is the premise of the economists' move into positive analysis of non-
market behavior. See text accompanying notes 7-8. Given the central position of this
paradigm, some explanation of why it fades from view in these policy recommendations
seems essential.
182. It would be very useful to learn how Professor Becker combines his insights about
the various non-altruistic motivations of family behavior, see Becker, 101 J Pol Econ 385
(cited in note 1), with his mutual consent approach to divorce. In his Business Week
article, he does suggest the possibility that a spouse would refuse consent out of spite and
proposes dealing with that by “allowing a person to seek binding private divorce arbita-

183. Among others, see Judith T. Younger, Light Thoughts and Night Thoughts on the
American Family, 76 Minn L Rev 891, 900-11 (1992); Elizabeth S. Scott, Rational
184. See text accompanying notes 356-444.
185. As Becker argues, economists have not fully developed methods for analysis of
The solutions proposed by writers like Becker and Parkman seem to be based on a very narrow image of divorce: divorce is a problem caused by men with substantial resources who seek to escape from family responsibilities to marry new wives.\(^1\) This implies a correspondingly narrow view of marriage, based on an ideal of the rational and efficient nuclear family with clearly established gender roles that reached its zenith in the golden age before no-fault divorce.\(^2\) Yet as Becker himself has described, family forms have evolved significantly in the last few generations,\(^3\) and it is neither possible nor desirable to try to "turn back the clock."\(^4\) By hypothesis, new forms and structures of marriage are also rational; economic efficiency may dictate different divisions of labor in the home.\(^5\)

B. CONTRACT ENFORCEMENT PROPOSALS

A different set of economic approaches to divorce places greater emphasis on the norms of marriage and envisions a more significant role for law in facilitating choices based on a wider spectrum of values than self-interest. See Becker, *A Treatise on the Family* at 277-78 (cited in note 3) (noting the role of altruism in family life); Becker, 101 J Pol Econ at 386, 398-400 (cited in note 1) (noting the role of anger, loyalty, spite, guilt, obligation, sense of duty, and masochism); see also text accompanying notes 463-64. The eclipse of consent in the writing on the family may result from the shadow cast by all of the varied factors, many of which, though potentially a basis for "rational" choice, are values we as a society prefer to suppress.\(^6\)

186. See text accompanying notes 133-37.

187. In this respect, the economists' description of marriage and its virtues echoes the functionalist sociology of the 1950s and 1960s, particularly the work of Talcott Parsons. See generally Talcott Parsons, *The Kinship System of the Contemporary United States*, in *Essays in Sociological Theory* 177, 177-96 (Free Press, revised ed 1954); Talcott Parsons and Robert F. Bales, *Family, Socialization and Interaction Process* 3-26 (Free Press, 1955). Even the ideal of efficient, rational divorce is reflected here. See id at 19-20, 24-25.


190. It is increasingly difficult to sustain the traditional image of a family as neatly divided between household and market producers. Many families now delegate many aspects of child care, house cleaning, yard work, and other household services. Margaret Brinig has argued that it is not sensible to assume that all specialization occurs between two members of a household without regard to third parties. Brinig, 26 Fam L Q at 457 (cited in note 51); see also June Carbone and Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tul L Rev 953, 990 n 168 (1991); Brinig and Carbone, 62 Tul L Rev at 866 (cited in note 163). Following in the evolutionary tradition of social science analysis, it might be argued that the family is now shedding its nurturing functions as it once cast off its economic and political roles. Parsonian sociology defended the process by which the family's functions were absorbed by the state and institutions such as schools, hospitals, and asylums. See Parsons and Bales, *Family, Socialization and Interaction Process* at 3; Becker, *A Treatise on the Family* at 342-61. For criticism, see Christopher Lasch, *Haven in a Heartless World: The Family Beseiged* (Basic Books, 1977); Eli Zaretsky, *The Place of the Family in the Origins of the Welfare State*, in Barrie Thorne and Marilyn Yalom, eds, *Rethinking the Family: Some Feminist Questions* 188 (Longman, 1982).
family relations. These approaches also build directly on positive economic models of marriage, with particular attention to specialization of labor in the household. Elisabeth Landes, in an article published in 1978, developed a theoretical bridge between this explanation of marriage and the entitlements of divorce. Landes demonstrated that alimony rules can be understood as a means to achieve efficient allocations of property rights upon divorce and that “the award and enforcement of alimony payments by the courts encourage optimal resource allocation within marriage, increase the gain from marriage, and encourage the formation, productivity and stability of marriage.”

Landes’s theory assumes that divorce bargaining does not occur under the ideal conditions required for efficient outcomes. In her analysis, another device, such as alimony, is necessary to promote efficiency both during the marital relationship and at its end.

Since Landes’s article, other writers have elaborated on the role that financial awards on divorce play in regulating marital behavior. The economic model explains divorce remedies with a set of analogies to commercial contract law. Law is understood to facilitate complex and long-term relationships in a variety of ways: by providing “background” or “default” rules that control if parties fail to negotiate all details of their relationship, by defining the parties’ property rights and other legal entitlements as a condition for establishment of market or exchange relationships, and by establishing mechanisms for enforcement or excuse of contractual obligations.

191. Landes, 7 J Legal Stud 35 (cited in note 5).
192. Id at 35-36. Landes’s empirical analysis suggested that in the period prior to the no-fault divorce reforms, alimony awards were “directly related to measures of the wife’s household specialization, such as children and (inversely) the wife’s earning capacity, and to measures of the gain from marriage such as husband’s income and duration of marriage prior to divorce.” Id at 62.
193. She writes:

If all marital income were perfectly divisible (i.e., not public goods) and if spouses could negotiate with each other and transfer income between themselves costlessly, a legal rule requiring mutual consent for divorce would be equivalent (in most respects) to one permitting unilateral divorce by either spouse.

In the absence of these conditions, alimony serves as an efficient means of redistributing the property rights and assets of the marriage partnership between the spouses, enabling them to reach an “optimal” end—the dissolution of their marriage.

Id at 35.
194. Id at 35-36.
195. Trebilcock, The Limits of Freedom of Contract at 17 (cited in note 60). There is an enormous literature on default rules in contract. See, for example, Symposium on Default Rules and Contractual Consent, 3 Law & 1 (1993). Fully specified agreements may not be feasible for a wide range of reasons: high transaction costs, problems of uncertainty and imperfect information, incapacity (for example, of infants), or problems of externalities. See generally Posner, Economic Analysis of Law at 92-93 (cited in note 2); Polinsky, Law and Economics at 29-32 (cited in note 78).
196. Trebilcock, The Limits of Freedom of Contract at 9-10 (cited in note 60); see also Trebilcock and Keshvani, 41 U Toronto L J at 551 (cited in note 6).
This model is rooted in Kaldor-Hicks efficiency principles. It draws its normative force from a broad social cost-benefit analysis, rather than the actual consent of the parties. Economists have attempted to link the analysis into Pareto norms, however, arguing that the background rights established by the legal system should "represent the entitlements that rational parties would have chosen ex ante (that is, at the time of marriage) had they negotiated a fully specified contingent claims contract." Or, as Professor Becker argues, the state regulation of divorce seems (or once seemed) designed "to mimic the terms of contracts between husbands and wives and parents and children that are not feasible." Moreover, they argue that the regime should be contractual, so that parties may choose instead to negotiate their own terms in the place of those supplied by the law.

Economists tend to assume that the terms a husband and wife would negotiate are terms that maximize the return from their investment in marriage. Building on the positive economic analysis of families and households, this suggests that parties would prefer a relatively traditional household division of labor. This implies in turn that a husband and wife, negotiating at the outset of their relationship, would choose terms that best make possible and protect this type of arrangement.

Building on the contract metaphor, this model implies that marriage and divorce law must include both substantive terms and a set of remedial provisions, analogous to rules governing damage awards in contract. The fact that remedies in contract are premised on breach has forced proponents of enforcement models to reconsider the merits of fault-based divorce. Many reach the troublesome conclusion that some type of fault rule may need to be returned to the divorce process in order to allow determination of liability for breach. In addition, the proposals devote substantial energy to the question of how "damages" could be determined.

198. Trebilcock and Keshvani, 41 U Toronto L J at 551. See also Cohen, 16 J Legal Stud at 287-89 (cited in note 6). Cohen argues that such rules are justified, in divorce as in contract, because they are in the interest of both parties at the time the relationship is formed. Id.
199. Becker and Murphy, 31 J L & Econ at 14 (cited in note 6).
200. Trebilcock, The Limits of Freedom of Contract at 47-48 ("In constructing an appropriate background or default rule, I would, of course, allow parties to displace it by agreement if they so wished."). But see Regan, 1994 Utah L Rev at 645-47 (cited in note 190) (arguing for a view of marriage as a social institution that imposes obligations that "cannot always be reconstructed as voluntarily assumed by self-interested actors").
201. See generally Becker, 101 J Pol Econ 385 (cited in note 1); see also text accompanying notes 233-37 and 243-45.
202. Carbene and Brinig describe this more broadly as a problem in "civil obligation." Carbene and Brinig, 65 Tul L Rev at 957-61 (cited in note 190); see also text accompanying notes 283-311. Other writers who advocate contractual approaches to regulating marriage appear less interested in wrestling with the issues of breach and remedy. See, for example, Scott, 1994 Utah L Rev at 722 (cited in note 22).
203. See text accompanying notes 247-69. See, for example, Cohen, 16 J Legal Stud at 303 (cited in note 6); but see Ellman, 77 Cal L Rev at 23-24 (cited in note 6).
204. See text accompanying notes 270-98. Brinig and Crafton point out that fault could...
1. Efficient marriage.

In the contract enforcement approach to divorce, the central concern is to encourage efficient behavior within marriage rather than to protect disadvantaged spouses at the time of divorce. That marital agreements are largely indeterminate and unenforceable seems to discourage reliance on marriage and thus to undermine the goal of efficiency in marriage. Several writers have described how traditional arrangements put wives at an economic disadvantage and have discussed methods to reduce the "risk and uncertainty of marriage," and limit the parties' ability to engage in opportunistic behavior, to protect the sphere of household production. This is recognized as especially important for marriages which "produce" children.

With the advent of the new home economics and household production be used in setting alimony awards even if is not resurrected in the grounds for divorce, and of course, this is the practice in a number of states. Brinig and Crafton, 23 J Legal Stud at 892-93 (cited in note 5). All of this is, of course, easier said than done, and most economic and legal theorists recognize the enormity of the project of computing damages. 205. See Brinig and Crafton, 23 J Legal Stud at 892; Ellman, 77 Cal L Rev at 49-50.

206. In particular, the approaches are based on these policy goals: encouraging marriage, see, for example, Cohen, 16 J Legal Stud at 303; Cornell, 26 Fam L Q at 123-24 (cited in note 6), discouraging divorce, see Ellman, 77 Cal L Rev at 41 ("The first goal is to encourage the durability of the relationship."); encouraging economically efficient (wealth maximizing) family organization and behavior, see id at 49-50, Landes, 7 J Legal Stud at 49 (cited in note 5), Cohen, 16 J Legal Stud at 295, 303, encouraging investment in children, see Ellman, 77 Cal L Rev at 71-73, and encouraging spouses to invest in the marriage and each other, see generally Brinig and Crafton, 23 J Legal Stud 869.

207. See Estin, 36 Wm & Mary L Rev at 1002-04 (cited in note 9) (reviewing law and economics treatment of parent-child relations). According to Becker and Murphy, "[l]aws punish child abuse, the sale of children, and unauthorized abortions. They provide compulsory schooling, welfare payments to families with dependent children, stringent rules about divorce when young children are involved, and minimum ages of marriage." Becker and Murphy, 31 J L & Econ at 1 (cited in note 6). See also Posner, Economic Analysis of Law at 149-50 (cited in note 2) (describing the role of the state in relation to children).

Further, economists posit that state involvement in the family substitutes for the contractual arrangements children would make with their caretakers if they were cognitively and financially capable of entering into contracts. Becker and Murphy, 31 J L & Econ at 1, 15. State intervention seeks to raise investment in children to socially efficient levels, and to offer adults in return the promise of support in old age. Id at 5-12. See generally Lynn A. Stout, Some Thoughts on Poverty and Failure in the Market for Children's Human Capital, 81 Georgetown L J 1945 (1993). See also text accompanying notes 430-39.

Posner suggests that traditional marriage and divorce regulation reflect the importance of child rearing, by permitting divorce in situations where "a husband's misconduct was likely to hurt the children as well as the wife." Posner, Economic Analysis of Law at 145 (cited in note 2) (citing grounds of insanity, extreme cruelty, and criminality). Posner notes adultery as a different case, defending the double standard that traditionally punished a wife's adultery more seriously on the basis that it protected husbands against the obligation of rearing children that were not their own, and granting annulments where there was fraud concerning a party's reproductive circumstances. Id at 141-45.
theory, economists began to explain marriage in terms of the specialization and division of labor between household and market activities. In theory, this specialization generates gains even absent the overlay of traditional gender roles, but economists are quick to note that those roles may be explained by women's comparative advantage in production of children and perhaps other household commodities. Economists explain the risks that go with specialization in household rather than market work in terms of investment in human capital. A homemaker invests in marriage-specific capital, which increases the productivity of the household but which is virtually worthless if the marriage dissolves. By contrast, a married person who works in the market sector develops human capital which has value independent of marriage. This difference leaves a homemaker particularly vulnerable in the face of divorce. Her economic alternatives to marriage are bleaker, her opportunities for remarriage fewer, and, without financial transfers from her husband, she is left to bear the full burden of long-term opportunity costs of household production.

Changes in women's economic opportunities and in the social institutions of marriage have reduced the benefits of specialization within the family and increased the homemaker's risks from divorce. Many economic analyses seek to stem this tide, by measures intended to protect women who have invested in marriage-specific capital. Given the asymmetric positions of husband and wife, many commentators are concerned particularly with exploitation and opportunism in divorce bargaining.


210. See Pollak, 23 J Econ Lit at 602 n 53 (cited in note 5), for a discussion of the difference between marriage-specific and household-specific capital.

211. This is especially true if her household work comes at the cost of developing skills and experience that are valued outside a particular family. And, given her less attractive alternatives, she has correspondingly less bargaining power in negotiations over divorce. See Lundberg and Pollak, 101 J Pol Econ 988 (cited in note 145).

212. Many economists are particularly concerned with this point. See text accompanying note 449.


214. See text accompanying notes 43-45.

215. The literature on bargaining suggests that a housewife's alternatives are affected during and after marriage by her specialization in household work. Allocations between husband and wife depend not just on the total resources of the household but on their individual wealth, income, and earning power. Pollak, 23 J Econ Lit at 602; Lundberg and Pollak, 101 J Pol Econ at 992. The housewife's work increases the gains from marriage for both partners and decreases the gains she could expect from divorce. With less attractive alternatives, she has less to bargain with at both stages. These effects are often amplified by the different experiences of women and men in the remarriage "market." See Posner, Economic Analysis of Law at 148 (cited in note 2); Cohen, 16 J Legal Stud at 288 (cited in note 6).

216. In Posner's description, "the fundamental function of contract law . . . is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and . . . obviate costly self-protective
The specialization that occurs during marriage is regularly compared to specialization in business and employment contexts. As Judge Posner points out, risks of layoff or termination in commercial settings are often compensated by contract terms providing for severance pay, or for higher payments during the term of employment. He describes alimony as a type of compensation for a homemaker in the event of a similar loss.

Taking a slightly different approach, Lloyd Cohen emphasizes that both parties enjoy gains from their relationship. He frames the issue in terms of quasi-rents generated during a contractual relationship, and points to the particular risks of relationships in which the parties obtain benefits from the contract at different stages of performance. He points out that this long-term imbalance provides the opportunity for strategic behavior, most notably breach by the party who has already received these gains. Professor Cohen argues that informal methods of protecting quasi-rents have become inadequate, making legal structures more important. He concludes that protection of quasi-rents in marriage measures." Posner, *Economic Analysis of Law* at 91.

217. See id at 148; Cohen, 16 J Legal Stud at 287-89.

218. Posner suggests that this explains the function of alimony payments: Because the search for a suitable spouse is often protracted and because age may depreciate a person’s ability (especially if a woman) to form a new marriage that will yield her as much real income as the previous marriage did, it makes sense to include as a standard term in the implicit marriage contract a form of severance pay or unemployment compensation that will maintain the divorced wife at her previous standard of living during the search for a new husband.

Posner, *Economic Analysis of Law* at 148. Posner also writes: [I]n the case of marriage, the husband may be incapable of making the necessary transfer payments to the wife, especially during the early years of the marriage, when the household may not have substantial liquid assets. Also, to calculate in advance the appropriate compensation for a risk as difficult to quantify as that of divorce would be costly, especially since the relevant probability is really a schedule of probabilities in each year of the marriage. This is a reason for awarding alimony on a periodic basis even when it is awarded as a form of damages.

Id.

219. Cohen defines quasi-rents as “a return to one party to a contract above what the party would receive if the contract could be dissolved at will at that moment.” Cohen, 16 J Legal Stud at 287.

220. Cohen writes: As a rule, men tend to obtain gains early in the relationship when their own contributions to the marriage are relatively low and that of their wives relatively great. Similarly, later on in marriage women tend as a general rule to obtain more from the contract than do men.

Id.

221. Id. On the difference between appropriation and destruction of quasi-rents, see also Trebilcock and Keshvani, 41 U Toronto L J at 556 (cited in note 6).

222. See Cohen, 16 J Legal Stud at 289-91 (cited in note 6), for discussion of these informal methods. Cohen argues that one gain from marriage is its insurance function, stated explicitly in traditional wedding vows. Id at 270, 288. Laws protecting quasi-rents offer another layer of insurance; this raises another economic issue, discussed as the problem of moral hazard. See Trebilcock, *The Limits of Freedom of Contract* at 46-47 (cited in note 60); Peters, 76 Am Econ Rev at 443-44 (cited in note 5).
riage will promote greater investment in marriage.\textsuperscript{223}

In one sense, this is positive economic analysis—a set of predictions as to the behavioral effects that can be expected from a certain set of public policies.\textsuperscript{224} But the analysis extends to a normative efficiency question: whether the behaviors that result will either make the individuals affected feel they are better off, or increase the net social welfare.\textsuperscript{225} The writers primarily concerned with fostering efficient behavior in marriage generally do not argue that divorce grounds should be limited to mutual consent.\textsuperscript{226} Rather, they recommend changes in the rules that define the financial entitlements in divorce, to redistribute the economic costs and benefits of specialization during marriage.\textsuperscript{227} These rules are intended to reverse present disincentives for spouses—particularly wives—to invest in family life. The argument runs that because this investment is socially valuable and economically efficient, it should be encouraged, or at least not discouraged, by the legal regime.\textsuperscript{228} In theory, however, rules that provide these protections will also result in efficient decisions to divorce.\textsuperscript{229}

\begin{enumerate}
\item Cohen, 16 J Legal Stud at 296. Cohen argues that without legal or informal protections in place, long-term investments in marriage have become a very risky venture. Economic analysis suggests that one response to increased risk would be a decreased level of investment, and Cohen and others argue that this has occurred in the context of marriage. Id at 295. This is an area in which economists have attempted some empirical proofs. See, for example, Parkman, 82 Am Econ Rev 671 (cited in note 5) (showing increased labor force participation rates for some married women in unilateral divorce states); Peters, 76 Am Econ Rev at 451-52 (arguing that differences in divorce law are associated with differences in labor force behavior but not fertility behavior).
\item Trebilcock, The Limits of Freedom of Contract at 3. Here, the assumption that individuals act as rational maximizers of their self interest leads to the corollary assumption that individuals will respond to these incentives. See id at 6; Posner, Economic Analysis of Law at 3-4 (cited in note 2).
\item Trebilcock, The Limits of Freedom of Contract at 7-8.
\item Compare the discussion of Allen Parkman's arguments in note 131. Of those who advocate a contract enforcement approach, only Lloyd Cohen deals expressly with mutual consent divorce proposals. See generally Cohen, 16 J Legal Stud 267, and text accompanying notes 82-190.
\item This might be explained in terms of either property or liability rules. See text accompanying notes 58-71. According to Trebilcock:
\begin{quote}
In defining and specifying property rights, an economic perspective would seek definitions and specifications that internalize as fully as possible to a property rights holder all costs and benefits associated with utilization of the property rights in question. Failure to internalize costs may create negative externalities, leading to over-utilization of the resource in question from a social perspective. . . . Failure to internalize benefits may create positive externalities, leading to under-utilization of the resource in question from a social perspective.
\end{quote}
\item Some writers dispute the claim that traditional divisions of labor in the family are efficient. See Jana B. Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony, 82 Georgetown L J 2423 (1994); Margaret F. Brinig, Comment on Jana Singer's Alimony and Efficiency, 82 Georgetown L J 2461 (1994); Gillian K. Hadfield, Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap, 82 Georgetown L J 89 (1993).
\item Cohen, 16 J Legal Stud at 296-303 (cited in note 6).
\end{enumerate}
The link between efficient marriage and efficient divorce requires that divorce bargaining be viewed within the larger perspective of marriage. Thus, Cohen and others argue that a system of divorce payments for homemakers would satisfy efficiency norms by fostering behavior that is beneficial to both parties when viewed from their perspective at the beginning of their marriage,230 whether or not the parties would otherwise agree to such compensation at the time of divorce. Because of the enormous difficulty of negotiating these issues ex ante, the "agreement" is almost always hypothetical,231 but if the legal rules can be properly structured they will have the same positive effects on behavior.232

The difficulty, of course, is that these hypothetical optimum terms must be collectively elaborated through a set of rules designed to structure the private negotiations around marriage and divorce, and to be applied by courts where parties are unable to reach private agreement.233 Moreover, it is essential that policymakers "get it right," or they will create the wrong sorts of incentives.234 In proposing specific default terms for the marital contract, economists tend to assume that efficiency, in the sense of achieving maximum output or production, is an uncontroversial goal within marriage.235 This normative step is a precarious one, especially given the need to postulate hypothetical consent to these

230. Id at 303.
231. Cohen concludes that "market alternatives," such as prenuptial contracts, are not "an effective means of protecting spouses from inefficient breaches of the marriage contract." Id at 268, 297-99. This is not to suggest that Cohen or other writers would deny enforcement of prenuptial agreements, but rather that they see fully specified long-term marital agreements as impractical. See Trebilcock and Keshvani, 41 U Toronto L J at 556 (cited in note 6); Pollak, 23 J Econ Lit at 596 (cited in note 5) (Agreements are "costly or impossible to write, a reflection of bounded rationality and asymmetric information."). See text accompanying notes 362-82.
232. Carl Schneider raises the issue whether in fact divorce law has much effect on marital behavior particularly when compared to short-term incentives and disincentives for particular decisions. See Carl E. Schneider, Rethinking Alimony: Marital Decisions and Moral Discourse, 1991 BYU L Rev 197, 204-07, 211-14, 216; see also Ellman, 1991 BYU L Rev at 266-68 (cited in note 82). There is empirical evidence that individuals are unrealistically optimistic about the likelihood their own marriages will succeed. See Lynn A. Baker and Robert E. Emery, When Every Relationship Is above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 L & Human Beh 439 (1993).
233. As Trebilcock notes, neoclassical economics is typically skeptical of collective decisionmaking, in part because of a failure to recognize that state elaboration of "background legal entitlements" is a prerequisite for private bargaining. Trebilcock, The Limits of Freedom of Contract at 2-8, 15-17, 44, 56-57 (cited in note 60).
234. The literature notes the risk that generous alimony rules may create incentives for economic dependence. See, for example, Trebilcock and Keshvani, 41 U Toronto L J at 539 (cited in note 6). This is typically described, in insurance terms, as a problem of moral hazard. See id at 557; Ellman, 77 Cal L Rev at 3 (cited in note 6).
235. Based on the assumption that the parties act rationally, and that rational actors would seek to maximize their utility, the argument asserts that the hypothetical marriage/divorce contract terms should be those which lead to the highest levels of production in the household. See Cohen, 16 J Legal Stud at 268-71 (cited in note 6).
terms.

Whatever the explanatory power of positive economic analysis of family life, it is an entirely different matter to claim that this model provides a sufficient normative basis for legal regulation of family life. The claim that individuals would choose marriage contract terms in order to maximize their returns is extremely difficult to evaluate and probably impossible to quantify.\(^{236}\) This is true even though "utility," while understood broadly in theory, is usually reduced to a readily measurable financial core in practice.\(^{237}\)

Transaction cost economists defend the rules around marriage and divorce somewhat differently. Starting from the premise that it is not sensible to imagine that parties negotiate at the outset about all aspects of their family or household relationships,\(^{238}\) Douglas Allen argues that all varieties of state involvement in marriage are means of avoiding the large transaction costs required to enter into and enforce private agreements concerning marriage.\(^{239}\) In this literature, marriage is viewed "as a governance structure, which permits some flexibility while protecting the parties against the hazards of unconstrained bilateral bargaining."\(^{240}\) In effect, the law creates a standardized contract, saving significant transaction costs, particularly when the costs of enforcement are taken into account.\(^{241}\) This approach avoids the need to argue from hypothetical consents, but it maintains the central normative role of efficiency principles.

Viewing marriage as a type of long-term contract, the losses from divorce can be substantial. But developing a means for legal protection against these losses has proven to be a complex and difficult project.\(^{242}\) To the extent that unilateral no-fault divorce permits an individual to end his or her marriage without compensation of a spouse’s losses, it does not sort efficient from

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\(^{236}\) As Pollak notes, “[b]ecause of the central role of unobservable variables (e.g., preferences, household technology, genetic endowments), the new home economics view of the family does not lead simply or directly to a model capable of empirical implementation.” Pollak, 23 J Econ Lit at 584 (cited in note 5) (citations omitted); see also Robert A. Pollak and Michael L. Wachter, The Relevance of the Household Production Function and Its Implications for the Allocation of Time, 83 J Pol Econ 255-77 (1975).

\(^{237}\) See Estin, 36 Wm & Mary L Rev at 1001-02, 1062-66, 1086 (cited in note 9), for a more general discussion of this phenomenon.

\(^{238}\) Robert Pollak contends that fully specified, long-term marital agreements are “costly or impossible to write, a reflection of bounded rationality and asymmetric information.” Pollak, 23 J Econ Lit at 596.

\(^{239}\) Allen, 13 J Econ Beh & Org 171 (cited in note 5).

\(^{240}\) Pollak, 23 J Econ Lit at 603; see also Allen, 13 J Econ Beh at 173-75.

\(^{241}\) Allen, 13 J Econ Beh & Org at 176. Allen argues that detailed private agreements “are costly because each partner tries to bias the specific rules in his or her favor.” Id at 177-78.

\(^{242}\) Cohen’s theory starts from the premise that as social controls on divorce have abated, legal mechanisms have become more important to protect against the appropriation or destruction of quasi rents. As Cohen points out, the costs associated with breach have declined as divorce becomes more socially acceptable. At the same time, these changes have undermined the informal enforcement mechanisms that once helped prevent breach. Cohen, 16 J Legal Stud at 289-90 (cited in note 6).
inefficient transactions. But, by the same token, a rule forbidding divorce or requiring mutual consent would prevent divorce in many circumstances in which it would be efficient. Proponents of a contract enforcement regime seek the solution to this problem in a framework for determining breach and damages.

2. Breach and damages.

Outside the realm of theory, regulating marriage and divorce to increase household efficiency is an enormously complex undertaking. Economic theory has barely begun to specify the commodities that are produced within the family, the range of relevant inputs, and the mechanisms by which these are distributed among family members, and it seems unimaginably beyond the realm of economic expertise to expect a blueprint or even a menu of choices for the ideal efficient family. Given that current writers are not concerned with the specifics of individual preferences, developing terms for the hypothetical marriage contract would require drastic changes in technique. Yet without more detail along these lines, how can policymakers determine what it is they are seeking to optimize? The choices seem endless, and they are constantly shifting in the face of varying opportunities and life circumstances.

To the extent its terms are elaborated in law, the marriage contract is a general agreement, which recognizes a wide variety of legitimate preferences concerning such questions as the bearing and raising of children, attachment to the labor force, or moral and spiritual commitments. This means that the incentives and protections in the law will be less than perfect. For efficiency arguments, there are two critical components of contract-based regulation: rules that define when a breach may be said to have occurred, and rules that define

243. The difficulty of making these theories concrete is suggested by the high level of abstraction used in this literature. See, for example, Becker, A Treatise on the Family at 23-25 (cited in note 3); Allen, 13 J Econ Beh & Org at 176 (cited in note 5); Pollak, 23 J Econ Lit at 598 (cited in note 5). For an example of the effort required to quantify these fundamental issues, see Andrea H. Beller and John W. Graham, Small Change: The Economics of Child Support (Yale, 1993).

244. Marital duration? Fertility? Labor market participation? Autonomy? Love? Some of the many questions will be philosophical: how much of the gain from family life is material, and how much spiritual? What common currency can family members use to measure these benefits and costs? How do the different wants of different family members compare? What should be the effect of changes over the life course? Other questions are more pragmatic: should the hypothetical marriage contract protect a new mother who leaves the paid labor force entirely for fifteen years, or only six years, or only two years? And, for how many children? Should the contract promote or penalize a midlife career change off the fast track? Should the homemaking partner in a childless couple have the same financial protection in the event of a divorce as one who cared for children?

245. See, for example, Pollak, 23 J Econ Lit at 601. Allen argues that “the state has a comparative advantage in delineating rights only to the extent that marriages are fairly standard, a condition met in the hierarchical and patriarchal marriages of the past.” Allen, 13 J Econ Beh & Org at 180 (cited in note 5). Certainly there are many reoccurring patterns in marriage and divorce, but it is hard to argue that marriages are still “fairly standard.”
the remedies available in that event.246

Determinations of breach are difficult when the duties spouses owe each other have not been clearly specified.247 Before the no-fault reforms, a finding of marital fault stood somewhat in the place of a finding of breach in contract adjudication.248 However, the only types of fault judicially and legislatively recognized as grounds were quite substantial. Even adultery, cruelty, or desertion were not grounds for divorce unless they were sufficiently severe.249 In a system which depends on divorce rules to create incentives for economically efficient behavior in marriage, this list appears to be radically incomplete.

Moreover, traditional fault rules would only have the effects economists seek if there is a correlation between economic losses from specialization and the likelihood of a spouse committing substantial acts of adultery, cruelty, or desertion. The only connection made between these two traits that has been articulated is based on gender, with the assertion that women are more likely both to have economic losses from divorce and to be the victims of spousal misconduct.250 This connection is problematic on a number of grounds, and it is especially hard to accept as a basis for divorce policy without better empirical evidence than the literature offers.251

Margaret Brinig and June Carbone argue that the benefits of fault determina-

246. See, for example, Restatement (Second) of Contracts § 33(2) (In order for a bargain to be enforced as a contract, terms must be reasonably certain. Terms “are reasonably certain if they provide a basis for determining existence of a breach and for giving an appropriate remedy.”).
249. Clark, The Law of Domestic Relations §§ 13.2-13.4 at 497-510 (cited in note 99). Many states also allowed divorce on grounds that do not correspond well to the idea of breach. See id at 510-12 (incompatibility) and 517-21 (living separate and apart).
250. It is routine in this literature to address divorce as a problem that primarily harms women. See, for example, Trebilcock, The Limits of Freedom of Contract at 44-46 (cited in note 60); Becker, 101 J Pol Econ 385 (cited in note 1); Cohen, 16 J Legal Stud at 277. Among the reasons given are the greater likelihood that women will invest in marital rather than market capital, Trebilcock and Keshvani, 41 U Toronto L J at 553-58 (cited in note 6), and the greater likelihood that women will lose value in the remarriage market as a function of time, Cohen, 16 J Legal Stud at 273.
251. The problem with equating fault grounds with the causes of marriage breakdown were debated at length at the time no-fault divorce reforms were adopted. Clark, The Law of Domestic Relations § 12.1 at 410-12 (cited in note 99); but see Harvey L. Golden and J. Michael Taylor, Misconduct as a Viable Consideration in Marital Dissolution, in Alimony: New Strategies for Pursuit and Defense (ABA, 1988) (providing arguments in favor of returning fault notions to divorce law.) For the argument that traditional fault-based divorce was not generally beneficial for women, see Jana B. Singer, Divorce Reform and Gender Justice, 67 NC L Rev 1103 (1989). Viewed historically, one problem was the sexual double standard in the treatment of adultery. Id at 1110-11; Cohen, 16 J Legal Stud at 274-75, 278-87 (cited in note 6). A more contemporary concern is the difficulty of reconciling protections for women in economically dependent relationships with ideals of gender fairness and neutrality. See Trebilcock and Keshvani, 41 U Toronto L J at 533-37 (cited in note 6).
tions “are those traditionally associated with civil obligation—deterring breach and encouraging reliance,” and they suggest that current rules “discourage rather than protect economic reliance on marriage.” Although they recognize the potential benefits of breach rules, their work also identifies significant problems with returning fault concepts to the divorce process. Professors Brinig and Carbone point out that fault rules and an expectation measure of damages served in the past to protect particular reliance interests in marriage, namely the lost opportunity to marry differently. They point out, however, that while this type of loss may still be a factor, particularly for women, reliance interests in marriage are now more varied, with the loss of career opportunities taking on relatively much greater importance. This shift is significant because to the extent that legal protections for these different types of interests diverge, fault-based divorce grounds will have limited usefulness in protecting against economic losses.

In a system premised on findings of traditional marital fault, such as adultery, cruelty, or desertion, there is no general protection against the risks of divorce. Financial remedies are only available to a spouse if her partner has

252. Carbone and Brinig, 65 Tul L Rev at 959 (cited in note 190). These authors have developed their analysis of divorce remedies in a number of articles, written together and separately. See also Brinig and Crafton, 23 J Legal Stud 869 (cited in note 5); Brinig, 26 Fam L Q 453 (cited in note 51); Brinig and Carbone, 62 Tul L Rev 855 (cited in note 163); Carbone, 43 Vand L Rev 1463 (cited in note 36).

253. Carbone and Brinig, 65 Tul L Rev at 987. Their work draws distinctions between expectation-, reliance-, and restitution-based theories of recovery and highlights the policy choices implied in each. They characterize compensation for opportunity losses that result from marriage as a reliance measure of recovery, and they note that where once the reliance loss in divorce was primarily the lost opportunity to “marry well,” it now consists more significantly of lost career opportunities. Brinig and Carbone, 62 Tul L Rev at 870-82, 894-96.


255. They argue that traditional alimony payments served as expectation damages, giving the nonbreaching wife the financial equivalent of the support she would have enjoyed had the marriage continued for her lifetime. Carbone, 43 Vand L Rev at 1474-75. In effect, fault rules were the basis on which the law chose between men’s and women’s competing claims at the time of a divorce. Brinig and Carbone, 62 Tul L Rev at 875.

256. They write:

[D]ue to the expansion of employment opportunities for women, wives are less likely to be completely dependent on their husbands’ income for support upon divorce. With women contributing to the family income, the husband’s ability to re-marry no longer depends to the same degree on his [post-divorce] financial resources. Moreover, for both men and women, the expectation value of marriage (and of any foregone opportunities to marry) must be discounted by higher rates of divorce. Accordingly, while many women continue to rely on marriage to secure a standard of living greater than they could provide on their own, and many men continue to rely on wealth in securing more favorable marriages, the value of marriage is less than in societies where divorce is rare, and divorcing couples are better able to mitigate their losses than they were in more traditional societies.


257. Id at 895-96 (“A fault based system cannot adequately protect lost career opportunities or other contributions to their marriage.”).
violated a set of behavioral norms which have almost nothing to do with the factors that have put her at economic risk. From this perspective, advocating the return of traditional fault grounds is disconcertingly close to recommending that the entire package of traditional gender roles within marriage should be not only encouraged but enforced.  

By limiting the circumstances in which a homemaker spouse (read: wife) could hope to recover any financial award in divorce, the law would effectively make her responsible to insure the happiness of the parties’ life together. She would have no recourse for an incompatibility short of violence, any disagreement over allocation of spending or leisure time short of complete desertion, or any loss of love short of provable adultery by her spouse. To provide incentives for optimal behavior within marriage, these norms are not adequate.

Adjudication of fault in divorce also imposes substantial costs on the parties and the system. Divorce cases already represent a substantial portion of the civil litigation in state courts, and in most of these cases one or both parties

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258. Professors Carbone and Brinig refer to those who wish to retain or return fault concepts to divorce as “traditionalists,” who favor differentiated roles for men and women in marriage. This category includes Becker, Landes, and in some respects Cohen. Carbone and Brinig, 65 Tul L Rev at 988-90 (cited in note 190).

259. Brinig and Crafton, 23 J Legal Stud at 887-88 (cited in note 5). Margaret Brinig and Steven Crafton argue that opportunistic behavior during marriage, including spousal violence, is a more significant problem under no-fault divorce. They argue that even if marriages remained terminable at will, there should be financial remedies available for significant breaches that occur during the marriage. Id at 880-81. Without these remedies, they argue that marriage is an “illusory contract,” and they offer empirical evidence suggesting that unilateral no-fault divorce has had negative effects on behavior within marriage. Id at 883-92. As they put it: “[t]he puzzle becomes how to provide incentives so that once again the majority of behavior clusters around what most people conceive of as ‘marriage.’” Id at 892.

On the question of how the terms of marriage contracts would be determined, Professors Brinig and Crafton suggest this requires looking to the “expectations of the parties,” and they argue that the words used in most marriage ceremonies give some content to their agreement:

At the very least they mean that the parties intend their relationship to last permanently, that they plan to live together, care for each other, and give each other support. They anticipate changes and adversity and pledge to work through them. In some ceremonies, the couple also make promises to “love and cherish” and to “forsake all others.” Whether or not these words are used, the state will assume that the spouses will be civil to each other, respecting bodily integrity. In most states, there is the further assumption that the parties will be sexually faithful to each other.

Id at 873-74 (citations omitted). See also Cohen, 16 J Legal Stud at 272-73 (cited in note 6).

260. Although Brinig and Carbone recognize this point, they advocate a dual system that permits findings of fault “only after termination of a relatively long term marriage,” if there is a showing of “conduct sufficiently egregious to be clearly responsible for the divorce.” Brinig and Carbone, 62 Tul L Rev at 897 (cited in note 163) (citations omitted). In economic terms, this includes both transaction costs that are borne by the parties (time, legal and other fees, stress, humiliation) and costs that are externalized and subsidized in public funding for the legal system.

261. In 1992, domestic relations cases were a third of all civil filings in state courts of
have no counsel. The expense and difficulty of these proceedings under fault-based divorce rules was one of the central reasons that they were abandoned.\footnote{265} Even in a dual system, in which the law permitted but did not require findings of fault in divorce, many of these problems would continue. After discussing the benefits and drawbacks of several legal approaches to protecting quasi-rents in divorce and property settlements, Professor Cohen concludes that none of these approaches is satisfactory. Recognizing the drawbacks of a system in which courts award compensation to the nonbreaching party, he states that only the shortcomings of the other approaches make this alternative plausible.\footnote{265}

The debate over rules for breach puts in tension the difficulties involved in defining and enforcing codes of marital behavior on the one hand and finding a principled basis for financial liability without fault on the other. Some commentators do not advocate restoring fault. Ira Ellman has developed a theory of alimony to allow more room for private ordering of family relationships without returning to a regime based on fault. Professor Ellman rejects the “contract analogy” in divorce, largely because he sees determinations of breach as inconsistent with the no-fault reforms.\footnote{267} Professor Ellman argues that there are no

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\footnote{262}{See note 413.}
\footnote{263}{Herbert Jacob, The Silent Revolution: The Transformation of Divorce Law in the United States 91-92 (Chicago, 1988). Allen Parkman recognizes this point when he describes fault divorce laws as a “second best” solution to the demand for easier divorce. Parkman, No-Fault Divorce at 63-64 (cited in note 6).}
\footnote{264}{Richard Neely, The Divorce Decision 44-53 (McGraw-Hill, 1984) (providing hypothetical illustrating practical difficulties of mixed fault/nonfault divorce grounds).}
\footnote{265}{Cohen, 16 J Legal Stud at 299-303 (cited in note 6). The approaches he discusses are unilateral divorce, mutual consent divorce, indissoluble marriage, and court-determined divorce settlements. Id. In a letter to me, Cohen states that he intended to write a piece favoring mutual consent divorce, but that as he wrote it he “came to see the important ways in which this contract was different from commercial contracts and therefore why mutual consent would do a very poor job of solving this problem of compensating the victim of a breach of contract.” He describes his position in the piece as “that of the nihilist who criticized all the legal alternatives” and that he sees the article as “a depressing conservative paper in which both economics and the law were helpless to make things work out well.” Letter from Cohen to Estin (cited in note 74).}
\footnote{266}{There is now an extensive literature on the problem of justification of alimony in non-fault divorce systems. See, for example, Mary E. O’Connell, Alimony After No-Fault: A Practice in Search of a Theory, 23 New Eng L Rev 437 (1988). Various approaches suggested include a model based on strict liability in tort, see Twila L. Perry, No-Fault Divorce and Liability without Fault: Can Family Law Learn from Torts?, 52 Ohio St L J 55 (1991), and income-splitting methods, see Singer, 82 Georgetown L J at 2454-60 (cited in note 228).}
\footnote{267}{Ellman, 77 Cal L Rev at 16-24 (cited in note 6). Professor Ellman points out that
longer the shared social and economic understandings about the nature of marriage which are necessary for contract-based regulation of marriage.\textsuperscript{268} For Ellman, divorce entitlements should therefore be defined to compensate for certain types of economic losses from marriage, independent of the question of breach or fault, rather than to provide a remedy for all losses from a failed marriage.\textsuperscript{269}

Building on the theories developed by Elisabeth Landes and Lloyd Cohen, Professor Ellman argues that alimony awards should be redesigned to compensate losses in earning capacity that result from efficient allocations of roles during a marriage.\textsuperscript{270} Professor Ellman describes his method as one which "emulates a conventional economic analysis of law" by asking "what would happen if we had no alimony remedy at all, but instead left the losses where they fell at the time of divorce."\textsuperscript{271} He argues that without alimony, there are financial disincentives for allocations of family roles that might otherwise be optimal. His argument is that the legal environment should be modified to eliminate "distorting incentives," with the goal of maximizing the parties' freedom to "shape their marriage in accordance with their nonfinancial preferences."\textsuperscript{272} For Ellman, the law should be neutral; that is, it also should not reward any particular set of marital roles.\textsuperscript{273} He believes this is most likely if the law protects the parties against the risk that one spouse would suffer a much greater financial loss than the other in the event of divorce.\textsuperscript{274}

Although Professor Ellman articulates as a policy goal encouragement of "the durability of the [marital] relationship,"\textsuperscript{275} he clearly is more concerned with encouraging optimal marital roles than with restricting divorce.\textsuperscript{276} He uses reasoning in divorce cases from fault jurisdictions "often has a contract flavor." Id at 23. He argues, however, that "contract" is only a metaphor in family law. Id at 13-14. In his view, use of contract remedies requires that terms of marital agreements be defined with some specificity, id at 18-23, and that breaches be identifiable, id at 17-19. Ellman implies that he views the move away from fault as a wise one. Id at 7, 24; Ellman, 1991 BYU L Rev at 304 (cited in note 82); but see Schneider, 1991 BYU L Rev at 250-54 (cited in note 232) (arguing for incorporating moral concerns in no-fault divorce).

268. He rejects restitution and partnership analogies on the same basis, see Ellman, 77 Cal L Rev at 13-24, and also argues that there are no external performance standards of the sort that operate in commercial contract settings, id at 28-29.

269. See id at 53-73.

270. Id at 41 n 128, 42 n 130.


273. Ellman, 1991 BYU L Rev at 265. As he notes, where creation of positive incentives is involved, there are additional problems of moral hazard and adverse selection. Id at 293 n 69. Because of his effort to avoid creating incentives, he rejects Professor Carbone's characterization of his proposal as one designed to channel women into household work. Id at 288 n 63.

274. Ellman, 77 Cal L Rev at 50-51 (cited in note 6).

275. Id at 41.

276. See id at 56 ("Some marriages should be dissolved."). Ellman asserts that some divorces that now occur would not take place if laws reallocated the parties' financial losses. Id at 50. By the same token, however, other divorces might occur under a new
efficiency norms to ensure the highest total income for the household.\textsuperscript{277} His disclaimer that his theory would create positive incentives for particular arrangements suggests that he believes that husband and wife will naturally agree on efficient arrangements once the distorting influence of divorce laws is swept away.\textsuperscript{278} Professor Ellman defines very specifically the losses that he believes should be recognized and adjusted upon divorce in the obvious belief that finding a balance between encouraging and discouraging certain behavior is complex and important.\textsuperscript{279}

Professor Ellman builds his model on the assumption that husbands and wives behave as rational, self-interested bargainers and that they will avoid arrangements that entail serious financial risks.\textsuperscript{280} He advocates alimony rules that provide compensation for economic losses from “economically rational sharing behavior,”\textsuperscript{281} and specifically rejects the prospect of alimony based on a wife’s long-term financial “expectation” from marriage.\textsuperscript{282}

The homemaker’s financial losses from specialization in the household are

\textsuperscript{277} Id at 46-47. Ellman’s proposal has been criticized on the basis that it only optimizes money income. See, for example, Carbone, 43 Vand L Rev at 1468-69 (cited in note 36); Schneider, 1991 BYU L Rev at 235-43 (cited in note 232); see generally Cornell, 26 Fam L Q 103 (cited in note 6). But see Ellman, 77 Cal L Rev at 47-48 n 140. Ellman is specifically not concerned with developing a set of external legal or moral norms for marriage. See id at 49-50. This has also been criticized in the literature. See Schneider, 1991 BYU L Rev at 218-19.

\textsuperscript{278} This is apparent in his assertion that under present rules governing divorce, marital conduct is distorted in an economic sense, away from the most efficient outcome. Ellman, 77 Cal L Rev at 13-14.

\textsuperscript{279} Ellman argues that alimony should be awarded only upon proof of three elements: (1) that a spouse has made a “marital investment,” id at 53-65; (2) that the spouse has suffered a post-marriage reduction in earning capacity, id at 53-56, 65; and (3) either (a) that the spouse's marital investment resulted in an increase in marital income, id at 65-71, or (b) that the marital investment included primary responsibility for the care of children, id at 71-73. Ellman’s approach seems to require that “compensable losses” from marriage be carefully measured. See id at 49, 78-80. However, he also argues that precise measurements are not necessary. See text accompanying notes 290-91.

\textsuperscript{280} Id at 42, 50 (cited in note 6).

\textsuperscript{281} Id at 47. The paradigm case for which Professor Ellman’s formula provides compensation is one in which the “lower earning spouse,” usually the wife, makes economic sacrifices to take care of children or to increase the couple’s combined income. Typically, these sacrifices might include assuming a larger share of domestic responsibilities and yielding career interests when there is a conflict between their jobs. Id at 46-49; see also Schneider, 1991 BYU L Rev at 246-47 (cited in note 232). June Carbone points out that under Professor Ellman’s formula,

the prototypical award will go to a woman who interrupts a promising career to care for her children. The woman who fails to develop her earning potential before the children are born or her husband’s transfer takes effect, the woman without children who marries a man with an established career, and the man who marries a higher earning woman will remain financially at risk from divorce.

Carbone, 43 Vand L Rev at 1493 (cited in note 36) (citations omitted).

\textsuperscript{282} See Ellman, 77 Cal L Rev at 19-20, 74-76.
usually presented as the measure of her damages in the event of a breach. Lloyd Cohen describes the marriage contract as a contract for a stream of future services, noting that the specifics of these services depend on the social class and cultural norms of the individual husband and wife as well as the exigencies of their shared life.\textsuperscript{283} When a marriage ends in breach or divorce, these streams of services are lost.\textsuperscript{284} Cohen states: “[t]he value of this loss is the cost of finding a replacement spouse of equivalent value.”\textsuperscript{285} Cohen describes these specific components of the loss: transactions costs of the search for a new partner; stochastic changes in a party’s value in the marriage market; changes that result from investment in the prior marriage, such as having children; and the effects of time on the value of services each spouse has to offer.\textsuperscript{286}

Professor Cohen and other economic theorists recognize that there is a wide gap between describing this loss and measuring it.\textsuperscript{287} Cohen describes the computation of damages as a more difficult task than the determination of breach; as he puts it, the court must “determine the future steam of quasi-rents that the nonbreaching party had a right to expect prior to the breach and award the present value of that future stream to the nonbreaching party.”\textsuperscript{92}\textsuperscript{288} Michael Trebilcock and Rosemin Keshvani prescribe this formula for compensation of the opportunity costs of a wife’s investment in household production:

\[
\text{the present value of the reduction in earnings she has experienced up to the date of divorce because of her investments in household production (both because she has not worked or has accepted jobs with below opportunity-cost levels of earnings or because she has already suffered a loss in her full-time earnings because of her reduced investment in her own human capital) plus the present value of her future loss of earnings resulting from her reduced investments in human capital minus any gain in consumption benefits that she has obtained, up to the date of divorce, from the incremental income earned by her husband (because she has freed his time to concentrate on his career).} \textsuperscript{289}
\]

\textsuperscript{283} Cohen, 16 J Legal Stud at 273 (cited in note 6).
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} See, for example, id at 298 (“On a theoretical level, the value of the loss is fairly straightforward—it is the replacement cost of a spouse of equivalent ex ante value. It is operationalizing this theoretical measure that is intractable.”); Cornell, 26 Fam L Q at 134-35 (cited in note 6) (arguing that attempting to evaluate the cumulative effect of these adaptations on earning capacity may be difficult); Ellman, 77 Cal L Rev at 78-80 (“The difficulties involved ... are significant but not fatal.”); Parkman, No-Fault Divorce at 140-41 (cited in note 6) (“Wouldn’t it be difficult to estimate the effect of marriage on human capital?”).
\textsuperscript{288} Cohen, 16 J Legal Stud at 302. He also states that “the damages may be so great that the one who breaches the contract is effectively judgment proof.” Id at 303. Cohen concludes, “[o]nly the shortcomings of all other ways of treating divorce make this alternative at all plausible.” Id.
\textsuperscript{289} Trebilcock and Keshvani, 41 U Toronto L J at 556 (cited in note 6).
Ira Ellman advocates a different formula, which is similar to the opportunity cost approach but which does not attempt to reduce an award to reflect the level of consumption during marriage. Ellman describes the losses he would compensate:

- it is a reliance loss, it is the residual loss a spouse is left with after the marriage has ended (without credits or debits from inequities in the exchange during marriage), it is a financial loss, and it is a loss arising from marital sharing behavior, which is in turn defined as either child care or behavior that allows one's spouse to realize a financial gain.

The problem of imbalances in the parties' exchanges during marriage is especially difficult to resolve. Two other issues have also proved problematic. One is the problem of whether damages should extend to nonfinancial losses, such as a claim arising from declining marriageability. Another recurring...
issue in the literature is described in terms of moral hazard: remedies should not be overly generous, lest the homemaker be rendered indifferent to whether the marriage succeeds or fails.  

These issues play a significant part in determining the correct measure of damages for a marital breach. In some accounts, the debate is characterized in terms of reliance and expectation measures of recovery. In effect, Lloyd Cohen argues for expectation recovery, following a determination of breach. Ira Ellman, on the other hand, argues against attempts to resolve the breach question and therefore for a limitation to financial losses from reliance. Michael Trebilcock argues that if fault determinations are not a part of the process, the optimal measure would be one that falls between expectation and reliance recoveries. He notes that reliance measures suggest a spouse should be left no worse off than if the marriage had never occurred, and expectation measures suggest that the spouse should share fully in the other's economic returns.

June Carbone argues that the debate demonstrates a tension between the risks of underperformance and overreliance. Drawing a parallel between the economic analyses on divorce and contract remedies, she points out that there is no single “efficient” solution to the problem of contract remedies. Similarly, the law of marriage and divorce pulls in two different directions. On one

at 80-81 (cited in note 6), he rejects other types of nonfinancial claims, id at 56-58 (nonfinancial losses not included in his formula) and 58-65 (only financially rational sharing behavior included). Compare Cornell, 26 Fam L Q at 130-35 (cited in note 6).

294. See, for example, Trebilcock and Keshvani, 41 U Toronto L J at 557 (cited in note 6). Trebilcock and Keshvani write:

In constructing the hypothetical contract at the time of marriage, would the two parties agree that the wife should share in the husband's economic returns both where there is no marriage dissolution and where there is? . . . [N]o insurer would write such a policy because the wife may well be rendered largely indifferent to sustaining or terminating the marriage, given the assumption that her entitlements on divorce are not contingent on proof of absence of fault on her part for the marriage dissolution. This is the standard problem of moral hazard in insurance markets, or in the present context reciprocal opportunism.

Id. See also Peters, 76 Am Econ Rev at 438, 443-44 (cited in note 5).


296. Id at 47. With less, the lower-earning spouse will not agree to specialize in household production; with more, the spouse will no longer be committed to making the marriage succeed.

297. Carbone, 43 Vand L Rev at 1485-90 (cited in note 36); see also Carbone and Brinig, 65 Tulane L Rev at 959 (cited in note 190).

298. Carbone, 43 Vand L Rev at 1487-88. Where the greater policy concern is to deter divorce, expectation-based remedies will be preferable. Id at 1499-1500; see also note 278. If the goal is to discourage economic reliance on marriage, it is sensible to limit postmarital support to cases of need. This is the effect of most current alimony statutes. Carbone and Brinig describe the “liberal feminist” position as one that stands opposed to rules that encourage women's economic dependence on marriage. Carbone and Brinig, 65 Tulane L Rev at 992-96. Carbone also argues that where the goal is to encourage divisions of labor in marriage, a more effective approach is to use sharing principles that do not require complex individualized proof, such as income splitting or “partnership” approaches. See id at 1001.
side is the concern with divorce as a social problem, expressed as the concern that unilateral no-fault divorce allows inefficient breaches of the marital contract, which leads to inefficient arrangements in marriage. On the other, there are the opposite problems that result from economic dependence, and a concern for other values that are also at stake in the process of divorce, expressed in the argument that lifetime alimony awards go too far toward encouraging traditional divisions of labor.

This tension highlights a problem that economic analysis tends to repress: it is quite difficult to implement an entirely neutral set of liability rules. Most of the proposals offered are not neutral. Explicitly or implicitly, they choose sides in a policy debate that juxtaposes contradictory concerns.

These types of implicit policy judgments are also apparent in the ongoing debates over other aspects of divorce remedies. For example, there are economic arguments for property division rules in divorce, designed to encourage optimal levels of human capital investment during a marriage. Taking as given the contemporary rule that “marital property” should be equitably or equally divided, various writers describe complex methods for valuation of human capital or “career assets” accumulated during marriage. The concern here is for the case in which one spouse leaves the marriage with substantial new education or training. Although the remedy is typically described in neutral terms as a reimbursement, the theory behind it incorporates a range of normative judgments that go well beyond economic efficiency. These judgments are reflected in the way in which Alan Parkman and others use the human capital metaphor when they compare the relationship of husband and wife to a commercial loan transaction. When they characterize the supporting spouse’s interest in her partner’s career or education in terms of debt rather than equity, they

299. See, for example, Severin Borenstein and Paul N. Courant, How to Carve a Medical Degree: Human Capital Assets in Divorce Settlements, 79 Am Econ Rev 992 (1989); Parkman, No-Fault Divorce (cited in note 6).

300. This analysis builds on a body of judicial decisions, which often characterize the remedy as a restitutionary one. See generally Estin, 71 NC L Rev at 757-67 (cited in note 135).

301. As Ira Ellman argues, this is true of all restitution-based theories, which imply a judgment that there has been unjust enrichment. Necessarily, this implies an understanding of “the social and economic conventions that ordinarily govern the relationship between the parties.” Ellman, 77 Cal L Rev at 27 (cited in note 6).

302. The analysis constructs the decision of the nonstudent spouse whether to support the other as based on the potential financial returns from this investment, compared to the return that would be available on other investments. Parkman proposes that once the amounts of marital contribution are determined, the support amount from each year “should be brought forward to the present at an interest rate which reflects the return that the non-student spouse could have recovered if the funds had been invested.” Parkman, 40 Ark L Rev at 455 (cited in note 6). See also Borenstein and Courant, 79 Am Econ Rev at 1000 (cited in note 299) (proposing a “marginal interest rate rule,” in which the “investing spouse” reimburses the supporting spouse’s support “compounded at the investing spouse’s period-one [educational period] marginal interest rate”).

303. Parkman, No-Fault Divorce at 134 (cited in note 6).
are making a significant normative judgment about the meaning of marriage. When they depict the remedial problem as a technical matter of finding the correct interest rate, they are missing—or hiding—these issues, and their apparent neutrality hides the implication of their proposals, which is to limit significantly the scope of the “investor’s” recovery.\(^\text{304}\)

The weakness of normative arguments from Kaldor-Hicks efficiency principles is that they require postulating hypothetical consent, which has less compelling normative implications than the actual consent in the Pareto model. Michael Trebilcock notes that it is hard to determine the actual welfare implications of alternative rules under Kaldor-Hicks norms, and it is not clear that efficiency would be the basis on which real parties would consent.\(^\text{305}\) Nonetheless, he defends the economic preference for private ordering of family relationships, in the belief that this advances both individual autonomy and social welfare.\(^\text{306}\) He rejects both the application of “across-the-board legal norms” for marriage and divorce and the use of “expansive ad hoc judicial discretion” in deciding cases, although he stipulates that private ordering requires an appropriate set of background legal norms.\(^\text{307}\) How can appropriate norms be determined? Trebilcock notes that “economics conventionally takes prior endowments and entitlements as givens,” and, from this perspective, it “has limited insights to offer on the crucial question of fashioning an appropriate set” of entitlements.\(^\text{308}\) His own answer is revealed in his description of these entitlements as default rules,\(^\text{309}\) and the suggestion that they are justified based

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\(^{304}\) An equity investor in a career “is entitled to a share of the profits” it generates, whereas a debt lender “is entitled only to a market rate of return on the investment.” Parkman, No-Fault Divorce at 134. But see Polsby and Zelder, 23 J Legal Stud at 275 (cited in note 292) (“In practice, the O'Brien equity solution and the much more prevalent ‘debt’ solution are unlikely to work out very differently. Both will yield equivalently fair outcomes and both will be equivalently efficient if the right interest rate is assigned. But courts do not seem to have adopted an interest rate that is realistic, on a risk-adjusted basis, to compensate the [non-degree spouse] adequately for her investment and the risk associated with it.”).

\(^{305}\) Trebilcock, The Limits of Freedom of Contract at 246 (cited in note 60). Nevertheless, he posits a “hypothetical contract” based on efficiency criteria in his recommendations for divorce entitlements. As Professor Trebilcock notes, the Pareto efficiency frameworks applied in economic theory shift almost inevitably toward a Kaldor-Hicks approach in practice. Id. In some situations, the normative basis for exchange is sufficiently weak that it is no longer a useful method of regulation. Faced with these difficulties, Trebilcock argues for a legal approach that recognizes a range of values and seeks to identify which legal processes can best be used to vindicate the different values at stake. Id at 248. He argues that courts are best situated to inquire into the choices and preferences of particular parties, to vindicate autonomy values rather than broad questions of efficiency or distributive justice. Id at 249. Where more pervasive issues of market failure are concerned—such as monopoly, information failure, externalities, coordination and collective action problems—Trebilcock advocates regulatory approaches. Id.

\(^{306}\) Trebilcock refers to this as the “convergence claim.” Id at 21-22.

\(^{307}\) Id at 56.

\(^{308}\) Id at 57.

\(^{309}\) Trebilcock believes that parties should be free to agree to different terms, em-
on a hypothetical consent. "[W]e may find it useful conceptually to construct a hypothetical contract at the time that marriage is entered into, when the parties decide on a specialization of functions involving one partner's devoting time to household production and the other to market production." Constructing the hypothetical contract which Trebilcock postulates clearly requires policy judgments from beyond the domain of microeconomic theory.

C. THE LIMITATIONS OF PROPERTY RULES

Some law and economics analysis recognizes the complexity of the normative problems that any efficiency analysis implies. Writing more than two decades ago, Guido Calabresi and A. Douglas Melamed argued:

The first issue which must be faced by any legal system is one we call the problem of "entitlement." Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of "might makes right"—whoever is stronger or shrewder will win. Hence, the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.

Following Calabresi and Melamed, any meaningful discussion of legal rules should begin with a discussion of entitlements. The question of what forms of rules can best protect those entitlements comes as a secondary matter.

Economists have useful input on both of the central legal questions that Calabresi and Melamed identify. On the question of what entitlements family law should recognize, economic theory would dictate that the entitlements should generate optimal allocations of resources. But the theory does not indicate which resources matter. Are we seeking to optimize marital relations, human happiness, emphasizing however the need to "be sensitive to various forms of transaction-specific failures that parties may be particularly vulnerable to in times of extreme stress, guilt, remorse, and emotional turmoil." Id at 47.

310. Id at 46.
311. Professor Scott's use of the "hypothetical bargain heuristic" assumes that parties would choose terms that reflect a "commitment to a relationship of reciprocal obligation and sharing" by making divorce more difficult than current laws provide. Scott, 1994 Utah L Rev at 723-25 (cited in note 22).
312. Calabresi and Melamed, 85 Harv L Rev at 1090 (cited in note 61). Although the vocabulary Calabresi and Melamed develop is sometimes applied in the economic literature on divorce, see, for example, Zelder, 16 Harv J L & Pub Pol at 246 n 11 (cited in note 5), the subtlety of their insight is not.
313. Calabresi and Melamed discuss the problem of setting entitlements at some length, Calabresi and Melamed, 85 Harv L Rev at 1093, 1105 (cited in note 61), although their larger concern extends to the types of rules applied to protect different types of entitlements. See text accompanying notes 60-69. See also Macneil, 68 Va L Rev at 961-64 (cited in note 35) (discussing legal entitlements as part of the "underlying relational structure" which allows deal-making).
or divorce? Do we care about the allocation of fertility, beauty, wealth, loyalty, and intelligence?

The theory also suggests that we should be concerned with reducing transaction costs. This is also not a straightforward question, as the relevant “costs” come in many different varieties, and many are not monetary. Further, as Calabresi and Melamed point out, some of these considerations are not readily reduced to the terms an efficiency analysis requires. What of the effects of a given allocation or set of costs on distributions of “wealth”? What of the effects of these allocations of costs on third parties? Which third parties, and which effects, should we take into account? Are a paramour’s interests to be factored into the calculus?

On the question whether rights should be protected with property rules, liability rules, or inalienability rules, economic theory similarly offers only a partial response. Property rules are normally more efficient when one party is better situated to balance the costs and benefits of a particular entitlement. If, however, we are uncertain which party is the cheapest cost avoider, liability rules are better.314 Moreover, property rules appear more efficient whenever transaction costs are low enough to permit the parties to alter the initial allocation of a right by private agreement. Where this is not the case, liability rules are often preferable, because they allow “the economic efficiency of a proposed transfer of entitlements to be tested” through the mechanism of damages awards.315 Here as well, we need a more detailed analysis of what transaction costs exist, and a framework in which they can be measured and compared.

The literature on mutual consent divorce does pose the question whether an entitlement to marriage for life or marriage at will is preferable. The argument is made that an entitlement to marriage for life is preferable on efficiency grounds (it leads to an optimum level of divorce);316 on distributional grounds (it will shift resources toward those who oppose divorce, who are more likely to need them);317 and on other justice grounds, including protection of third parties (i.e., children) and the moralism that disfavors divorce.318 What the mutual consent argument neglects is the next step: Why should an entitlement to continue marriage for life be protected with a property rule?319

Where the concern is with how property rights are specified, efficiency arguments suggest that we should consider the possibility of negative externalities


315. Calabresi and Melamed, 85 Harv L Rev at 1127.

316. See text accompanying notes 85-87 and 101-05.


318. See text accompanying notes 97-98 and 133-37.

319. While Becker has not addressed this question, Zelder collapses the two steps together, asking whether a property right in marriage is preferable to a property right in divorce. See text accompanying notes 113-16. Parkman’s argument is that property rules are preferable in order to internalize the nonfinancial costs of divorce. See note 131.
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and a corresponding over-utilization of the rights. Economic criticisms of the "property right" in divorce are based on these effects. But a property right in marriage, which is in effect a right in one's partner's ability to enter a new relationship, might also be "overutilized," and this issue seems not to be considered.

In the contract enforcement literature, the discussion of entitlements in marriage is less explicit. There are references to protecting and encouraging marriage, but the specific entitlements that are debated tend to be more qualified. Not every spouse unhappy with the prospect of divorce can claim protection for opportunity losses or the destruction of quasi-rents. Here, the question of how a limited entitlement could be protected is the more central concern.

Following the Calabresi-Melamed approach, it is very important to discover differences in the costs of various rules and entitlements. This is a very complex project. In his prior writing, Judge Calabresi described different types of costs of accidents and pointed out that some rules might reduce one set of costs while increasing another. As with accidents, we may wish to reduce the incidence of divorce itself, as a type of primary cost. In addition, however, we may be concerned with the secondary or societal costs of divorce, and also the tertiary or administrative costs of the process. These costs are of significant concern in the context of divorce. The argument for mutual consent divorce addresses primarily the first cost: reducing the frequency of divorce.

In the case of marriage and divorce, there is no evidence that one party or the other is in a better position to value the gains and losses from marriage or divorce. There is also no reason to believe that we can identify, with a general rule, the party better situated to avoid the losses divorce entails. Because there is no market in which family relationships and personal freedom can be valued or compared, transactions that require valuation of these interests are likely to be difficult and expensive, and subject to many forms of market and contracting failure. There is also no evidence that these transactions are readily negotiated.

321. They use illustrations drawn from nuisance law and the law of accidents, as well as a discussion of criminal law rules. Macneil stresses this point in his analysis of contract remedies. Macneil, 68 Va L Rev at 957 (cited in note 35).
323. Id at 26-31.
324. Id. Twila Perry reviews Calabresi's analysis of the types of accidents costs in her argument for a "strict liability" tort approach to the losses from divorce. Perry, 52 Ohio St L J at 68-70 (cited in note 266).
325. One understanding of the abandonment of fault-based divorce litigation is as a judgment that the tertiary costs of the system were so great as to outweigh any benefit they might have in reducing the primary costs or level of divorce.
326. Professor Becker's argument, however, implies that a property rule in marriage would effectively minimize the other types of costs. This claim is not plausible, however. See text accompanying notes 119-150.
327. Indeed, most of the literature ignores the complex question of costs. See text
Liability rules also involve costs, primarily the cost of collectively valuing and enforcing damages awards for violations of an entitlement. Where these rules are well elaborated, however, they can facilitate the process of private negotiation and exchange. In areas of highly subjective preferences, we might see as an advantage that collective valuation “makes it easier to value the costs at what society thinks they should be valued by the victim instead of what the victim would value them in a free market if such a market were feasible.” In effect, the collective determinations authorized by liability rules substitute for the collective valuation processes of the marketplace.

There is no reason to believe that economists or lawyers can determine an efficient set of entitlements and rules without intensive comparisons of different systems and their comparative costs and effects. Moreover, unless reforms reduce these costs, changes to the present system will have primarily distributive effects. But there is an important structural difference between property rules and liability rules that suggests the latter may be much more useful in modulating the complex, non-market entitlements characteristic of family law.

One important advantage of liability rules is that they serve to define and limit the scope of particular entitlements. This is illustrated by the debate over what liability rules should be available to protect an entitlement in marriage. Under any version of these rules, an unhappy spouse is free to seek a divorce. But in the articulation of the details lie significantly different understandings of, and protections for, marriage. The entitlement is more precisely defined by the available grounds for divorce, what spousal support payments may be ordered, and how the process is conducted.

In the context of strongly competing goods, the greater flexibility of liability rules offers a strong advantage. Property admits only one owner, and in the

accompanying notes 406-17.

328. Calabresi and Melamed, 85 Harv L Rev at 1119 (cited in note 61).
329. Id at 1109.
330. Id at 1110 n 40. See also Linzer, 81 Colum L Rev at 119 (cited in note 156) (discussing the role of specific performance in assuring compensation for nonmarket or subjective values that are undercompensated by typical damages awards).
331. See Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 Yale L J 1211, 1227-28 (1991). And, although distributive concerns are clearly very important in family law, it is not apparent that efficiency norms have anything useful to offer on this front.
332. Ayres and Talley argue that liability rules facilitate a greater level of bargaining than property rules in situations in which the parties have private information about how much they value an entitlement. Ayres and Talley, 104 Yale L J at 1058-61 (cited in note 314).
333. See text accompanying notes 246-311.
334. This is well understood in tort, where both the polluter and the neighbor, or the driver and the pedestrian, have recognized interests and some means of vindicating their competing claims. As Judge Calabresi points out, “[o]ur society is not committed to preserving life at any cost.” Rather, we make a judgment about “how far we want to go to save lives and reduce accident costs.” Calabresi, The Costs of Accidents at 17-18 (cited in note 322).
context of family life, ownership is a problem. Liability rules seem far better suited to balancing contradictory interests.335 Property-based entitlements necessarily chose to protect one interest over another in a pair or series of competing claims. Once the entitlement is set, property rules accord complete deference and protection to that interest. This is the most serious drawback of mutual consent proposals: they give no play to the values of personal freedom that have come to occupy an increasing place in the social understanding of marriage and divorce.336

The tension between these values presents an extremely complex problem in contemporary society. Before the “divorce revolution” that led to no-fault laws, these competing values led to widespread evasions of the terms of divorce laws, creating significant pressure for change in the law.337 The claim to freedom and autonomy in one’s private life comes not from law, but from the culture we now inhabit.338 Michael Walzer describes the claims of personal freedom in market terms, contrasting this “sphere of private affairs” with the sphere of kinship, where older norms and constraints apply:

The sphere of private affairs can never be a stable place. The market in commodities works because the men and women who trade in commodities are connected elsewhere (most often to their families). But here men and women trade themselves, and they are radically disconnected, free-floating subjects. It is a way of life that most people will choose, if they have a choice, only for a time. . . . To say this is not by any means to defend political interventions in private affairs. ‘Because we freely love, as in our will to love or not,’ all such interventions are barred: they represent the exercise of power outside its sphere.339

Walzer’s analysis highlights the fact that our ideas of freedom have come to include goods once allocated on different principles.340

335. The complexity of this task is apparent in the literature on divorce. See text accompanying notes 243-311.


338. See, for example, Schneider, 1994 Utah L Rev at 522-32.


340. Id at 237 (“Thus the old laws against copulation, extramarital sex, are understood [today] as infringements of individual freedom. . . . [But] they become tyrannical only when physical love is publicly conceived as a good-in-itself. Or, when it is conceived as a good instrument to free choice in marriage. . . .”).
Rules that make divorce transactions more difficult to achieve would promote marriage at the expense of other, important, social goods. In a property rights approach to marriage, the policy choice is formulated as a choice between competing entitlements, in which either “marriage” or “personal freedom” must prevail, but any explanation of why one set of values need be subordinated completely to another. Certainly, stability in marriage is important in our society, but so is happiness in marriage. Karl Llewellyn argued sixty years ago that increasing divorce rates could be viewed as evidence of an improvement in the institution of marriage.\(^{341}\) While we may regret the decline of moral discourse and the waning ethic of responsibility,\(^{342}\) there is very little to suggest that many of us are willing to resume older attitudes toward intimate relationships.

To the extent that the shift from fault divorce to no-fault divorce represented a move from one property rule to its opposite,\(^{343}\) it is no wonder that both systems have seemed unstable. The history of family law rules over the centuries includes numerous examples of difficulties encountered by efforts to constrain personal autonomy. Informal marriage persisted despite efforts to prohibit it.\(^{344}\) If divorce was impossible in one jurisdiction, it was pursued in another;\(^{345}\) if divorce was difficult everywhere, abandonment and bigamy became significant problems.\(^{346}\) A move toward property-based rules intended to protect family life would be at least equally problematic today.\(^{347}\)

Liability rules have much greater potential in the setting of marriage and divorce regulation because they allow for greater attention to the complex normative dimensions of family life. Economics will more readily achieve its potential to assist in the design of useful legal rules if this wider framework is more fully investigated. Such a project also requires a more complete understanding of the many different levels at which present legal rules operate, both in regulating the processes of family interaction and in setting background entitlements of family life.\(^{348}\)

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341. Karl N. Llewellyn, *Behind the Law of Divorce: II*, 33 Colum L Rev 249, 262-63 (1933) (“It is urged here that all likelihood tells in favor of the rising divorce rate indicating not decay, but progress in marriage.”).


343. I have doubts whether fault-based divorce rules are appropriately characterized as creating a property interest in marriage. See text accompanying notes 97-100.


347. See text accompanying notes 168-76.

348. For illustration of the type of empirical study that would further this goal, see Brinig and Alexeev, 8 Ohio St J Dispute Resol 279 (cited in note 5).
III. The Work of Family Law

Section II of this Article argued that both of the economic approaches to the problem of divorce require significant normative input from beyond the realm of efficiency. This has been obscured in most economic analyses of marriage and divorce, which typically take for granted the larger framework of legal and social regulation of family life. Economic models would be a more useful basis for policy recommendations, however, if these aspects of law's work were more fully considered.

Economic analysis of the family depends on prior specification of a variety of types of legal rules. The economists' normative preference for private ordering assumes that agreements will be voluntary and fully informed, a standard difficult to attain in the marketplace and even more elusive in the family. Similarly, the economic model recognizes that efficiency goals may not be served if the private agreements of husband and wife have effects on those "outside" the exchange. The law plays an important role in setting conditions for consent and defining which external effects should be internalized.

Some family law principles, such as those governing marital property or child support, establish the framework of entitlements which shapes the bargains and behavior of individuals within families. Other rules, such as those governing prenuptial and separation agreements, regulate the processes of family interaction. In these respects, the work of law precedes any efficiency analysis of marriage and divorce. But the role of law should not be treated as limited to setting the stage for economic theorizing.

Part of the work of family law is practice, which mediates the generalities of theory and the particularities of peoples' lives. To the extent that economic work on divorce has considered the applications or specifics of legal rules, it has done so at a high level of abstraction. Mutual consent and fault-based divorce are lumped together; proposals for complex alimony and property division rules are developed with little consideration of the effects on divorce practice; and most of the literature focuses on two or three paradigm cases, usually without evidence to suggest either that these cases are a valid basis for generalization or that they present more serious problems than other fact patterns. If economics is to offer normative analysis, it cannot ignore these subtleties. This is particularly important in family law, which is widely viewed as the area of law

349. As Trebilcock argues, both of these conditions imply some baseline moral and legal understanding of consent. Trebilcock, The Limits of Freedom of Contract at 242 (cited in note 60).
350. Id.
351. See text accompanying note 98.
352. See text accompanying notes 283-94.
353. See text accompanying notes 133-37 and 186-90.
354. This seems particularly important to remember in view of the tendency in the economic literature to criticize the no-fault divorce reforms for their unintended effects. See, for example, Parkman, No-Fault Divorce at 1-2 (cited in note 6).
least capable of discipline, synthesis, theory, or principle.\textsuperscript{355} In order to generate constructive policy suggestions, economic models must marry the elegant and abstracted realm of theory with the messy realities of practice. Many of these issues can be described in economic terms as transaction costs or as problems of contracting or market failure. But there is another significant aspect of law's work in the family which is harder to translate into economic language.

Law is also the framework with which we regulate the tension between the economic and moral dimensions of family life. This tension is a longstanding problem in family law, and despite the aspirations behind no-fault divorce, it is not likely to go away. The tension exists because individuals construct their private relations within a variety of normative structures and with a wide range of motivations, not all of which are consistent with the norms of efficiency or rational maximization. The two economic solutions to the problem of divorce represent opposing approaches to this problem as well.

A. CONTRACTING FAILURES

In his writing on freedom of contract, Michael Trebilcock emphasizes that the private ordering paradigm depends upon law to correct for a variety of contracting and market failures. He defines market failures as those problems characteristic of "generic classes of exchange activity," and contracting failures as the problems that arise in specific disputes between two parties.\textsuperscript{356} In the family law setting, rules designed to address both contracting and market failures are common.\textsuperscript{357} There are relatively extensive sets of rules and principles de-


\textsuperscript{356} Trebilcock, \textit{The Limits of Freedom of Contract} at 22 (cited in note 60). He suggests that adjudication is best suited to vindicating exchange values in particular cases of market failure, while legislative or regulatory controls are more useful for correcting market failures. Id.

\textsuperscript{357} Problems of contracting and market failures are acknowledged in the economic literature on marriage and divorce. For discussion of contracting failures, see, for example, id at 47-48 ("W]e must be particularly sensitive to various forms of transaction-specific failures that parties may be particularly vulnerable to in times of extreme stress, guilt, remorse and emotional turmoil."); Becker, \textit{A Treatise on the Family} at 327-31 (cited in note 3) (information and uncertainty problems); Trebilcock and Keshvani, 41 U Toronto L J at 544-45 (cited in note 6) (fraud, duress, and overreaching); Cohen, 16 J Legal Stud at 272-73, 291, 298 (cited in note 6) (information and uncertainty). For discussion of market failures, see, for example, Posner, \textit{Economic Analysis of the Law} at 143-46 (cited in note 2) (effects on children as externality of divorce decision); Trebilcock and Keshvani, 41 U Toronto L J at 559 (externalities); Allen, 13 J Econ Beh & Org 171 (cited in note 5) (analyzing legal regulation of marriage as device for reducing transaction costs); Becker and Murphy, 1 J L & Econ at 13-14 (cited in note 6) (effects on children as externality of divorce); Weiss and Willis, 3 J Labor Econ at 278-79 (cited in note 5) ("public goods"
signed to address problems of consent, such as issues of capacity, duress, and undue influence; and problems of full information, such as fraud, disclosure, and mistake. These rules are particularly apparent in the laws regulating prenuptial and separation agreements, in the requirements for contracting a valid marriage, and in the provisions for annulment or declaration of invalidity. Additionally, various other portions of the legal framework of marriage and divorce compensate for a variety of market failure problems. Most notably, these provisions address external effects of family decisions on children and the public fisc, but they also extend to certain problems of transferability, bilateral monopoly, and high transaction costs.

1. Information and uncertainty.

The understanding of consent central to the law of contracts is generally consistent with the economic ideal that an exchange should be fully informed. Classically, this is reflected in defenses to contractual obligation based on fraud and mutual mistake. Over time, these defenses have become increasingly broad and have been joined by affirmative obligations of disclosure and rules directed to changes in circumstances after an agreement is struck. The disclosure rules for commercial transactions do not require full information, or even that all information in the possession of the parties be shared. Among the

or transferability problems concerning children); Cohen, 16 J Legal Stud at 273-98 (transaction costs in marriage market); id at 291 (transferability problems with human capital); Landes, 7 J Legal Stud at 36, 39-40 (cited in note 5) (transferability problems).

358. For limits on enforceability of prenuptial agreements, see, for example, Uniform Premarital Agreement Act § 6, 9B ULA 376 (West, 1987); see generally Clark, The Law of Domestic Relations at 3-5 and 7-10 (cited in note 99). For limits on the enforceability of separation agreements, see, for example, Uniform Marriage and Divorce Act § 208, 9A ULA 170 (West 1987); see also Clark, The Law of Domestic Relations at 759-63; Sharp, 132 U Pa L Rev at 1424-28 (cited in note 173).

359. In particular, age requirements and waiting periods are designed to assure that consent to a marriage is voluntary. See generally Clark, The Law of Domestic Relations at 36, 88-92.

360. See, for example, Uniform Marriage and Divorce Act § 208(a)(1), 9A ULA 170 (providing for declaration of invalidity in cases of incapacity, force or duress, or fraud involving "the essentials of marriage"); see also Clark, The Law of Domestic Relations at 99-120 (regarding grounds for annulment); Margaret F. Brinig and Michael V. Alexeev, Fraud in Courtship: Annulment and Divorce, 2 Eur J L & Econ 45 (1994).

361. See text accompanying notes 394-444.

362. See, for example, Restatement (Second) of Contracts § 152 ("When Mistake of Both Parties Makes a Contract Voidable"); id § 164 ("When a Misrepresentation Makes a Contract Voidable"); Posner, Economic Analysis of Law at 109-13 (cited in note 2). In marriage law, these are grounds for annulment, which is a type of rescission. See Clark, The Law of Domestic Relations at 143-48 (cited in note 99).

363. See, for example, Restatement (Second) of Contracts § 161 ("When Non-disclosure is Equivalent to an Assertion").

364. See, for example, id § 261 ("Discharge by Supervening Impracticability"); id § 265 ("Discharge by Supervening Frustration").

365. In contemporary theory, these rules are understood in the context of the risk
most problematic aspects of these excuse principles is the determination of what range of information, what varieties of risk, are subject to disclosure obligations. Economists debate the costs of acquiring information, of protecting against mistakes, or the possibilities of impossibility and frustration.

Although a somewhat higher standard for information-sharing is applied to negotiations around marriage and divorce, it is more difficult to determine how the universe of pertinent information should be defined. Some economic analysis looks especially at problems of asymmetric information, considering such issues as what each party knows about the likelihood of divorce or the other party's opportunities at divorce.

Our present legal rules do not require much information sharing before marriage; what is legally pertinent in prenuptial agreements is largely financial information, or, in the law governing annulments, certain key facts about the parties' reproductive capabilities. The relatively narrow scope of the information that must be disclosed between parties to a marriage or divorce reflects the fact that many relevant judgments are extremely difficult for individuals to make, and harder still to second guess with legal principles. Marriage is unavoidably uncertain. This is emphasized in the positive economic analysis of divorce, which describes divorce as a function of imperfect information at the beginning allocation or insurance function of contract. See Posner, Economic Analysis of Law at 102-09. This approach is reflected in various provisions of the Restatement (Second) of Contracts; for example, in § 154 ("When a Party Bears the Risk of a Mistake").

366. The terminology used in the Second Restatement of Contracts asks whether an event or fact was a "basic assumption on which the contract was made," Restatement (Second) of Contracts §§ 152 (mutual mistake), 153 (unilateral mistake), 161(b) (non-disclosure), 261 (impracticability), 265 (frustration).


368. This is sometimes explained in terms of the "confidential relationship" of husband and wife or a betrothed couple. See Sharp, 132 U Pa L Rev at 1414-24 (cited in note 173).

369. Peters, 76 Am Econ Rev at 438 (cited in note 5). Peters writes:

As the marriage continues over time, information about the value of alternatives, should divorce occur, become available. Examples of alternatives include the value of a potential new relationship, (i.e., remarriage after divorce), and the value of market opportunities which might be different at divorce for women who were homemakers during marriage.

Her theoretical and empirical analysis suggests that the extent of asymmetric information is one crucial factor in the efficiency of divorce outcomes. Id at 444. Professor Peters's empirical results suggest that divorce does occur when it is efficient, id at 452-53, but this result has been disputed by Douglas Allen. Allen, 82 Am Econ Rev 679 (cited in note 5).

370. See, for example, Uniform Premarital Agreement Act, § 6(a)(2), 9B ULA 376 (West 1987) (requiring fair and reasonable disclosure of "the property or financial obligations" of a party to a premarital agreement).


372. See, for example, Kober v Kober, 211 NE2d 817, 264 NYS2d 364 (NY Ct App 1965) (granting annulment to wife of Nazi sympathizer).
of a relationship and changing tastes over time. This uncertainty creates risks, particularly in view of the hope that the relationship will endure for a lifetime. Although some of the risks of marriage have been addressed in economic approaches, the central problems that remain are which risks matter and how these risks are best allocated between husbands and wives.

Melvin Eisenberg describes "limits of cognition" as a source of bargaining failure, pointing out that although rational choice theories assume strong cognitive abilities, there are a variety of important limits on cognition. He notes that parties are particularly likely to confront these limits when they attempt to contract for an intensive, long-term, "thick" relationship such as marriage. In the face of these limits, Eisenberg argues that law should not attempt to hold these relationships together when parties encounter unanticipated circumstances, but rather "to allow either party the right to easy exit on fair terms." Professor Eisenberg takes this approach to prenuptial agreements because it is impossible to predict at the outset the course the parties' lives will take and the impact the agreement will have if it comes into play. Eisenberg supports rules that permit a "second look" at the agreement at the time of divorce, even if there is no showing that it was unfair at the time it was executed.

Another type of uncertainty arises when the legal standards within which parties negotiate are highly discretionary. This is characteristic of contemporary divorce laws, and this fact is believed to affect divorce bargaining significantly. These effects are greatly complicated by the attitudes of the parties toward risk, including particularly the risks of divorce or custody litigation and the financial risks of life after divorce.

An additional problem for marital bargaining concerns the difficulties of valuation where the various gains and losses of marriage and divorce are concerned. Rather than relying on legal rules defining divorce entitlements and a judicial process in which these entitlements are translated into financial figures,

373. See text accompanying notes 39-42.
374. See text accompanying notes 210-23.
375. Melvin A. Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan L Rev 211 (1995). The limits he addresses include bounded rationality and rational ignorance, disposition (e.g., optimism), and certain systematic defects in capability. Id at 213-15.
376. Id at 251-54.
377. Id at 252-54.
378. Id at 254-58.
379. See Mnookin and Kornhauser, 88 Yale L J at 969-71 (cited in note 148). See also Parkman, No-Fault Divorce at 44-45 (cited in note 6).
380. In one empirical study, Margaret Brinig and Michael Alexeev examined divorce bargaining under different types of legal rules in Virginia and Wisconsin and concluded that a much higher portion of the cases went to trial in Virginia, where rules create much greater uncertainty. Brinig and Alexeev, 8 Ohio St J Dispute Resol 279 (cited in note 5). The results of divorce bargaining and litigation in the two jurisdictions also varied; in both states, wives received custody in three quarters of the cases, id at 283 n 27, but wives in Wisconsin received greater shares of marital property, id at 293 tbl 1.
the mutual consent approach depends upon the parties themselves to make these determinations. This is a complex problem when financial costs and benefits are in question, as the literature on human capital demonstrates. It is remarkable to expect that most individuals would have sufficient knowledge or information to put accurate prices on the financial aspects of their relationships, and it is even more difficult to imagine how valuation of the more intangible aspects of marriage would proceed. Because human relationships are not primarily viewed as monetary, individuals are unlikely to value the gains and losses of marriage and divorce in these terms. The problem is still worse when it comes to determining in advance the gains and losses to be expected from divorce.

2. Voluntariness.

Voluntariness issues present another area in which there may be transaction-specific failures of consent. Here as well, classical contract principles provided defenses. These include lack of capacity and duress, and in the context of fiduciary relationships, undue influence. Such principles have correlates in domestic relations law, forming grounds for annulment or declaration of invalidity of marriages, and a basis for setting aside prenuptial agreements, separation agreements, or divorce decrees.

More controversial modern expressions of these principles are the defenses based on “economic duress” and unconscionability. Economic duress arguments request that a party’s difficult economic circumstances be taken into account in the legal determination about the enforceability of an agreement, at least where those circumstances result from the other party’s misconduct. Similarly, arguments of unconscionability are sometimes premised on the “unequal bargaining power” of the parties to an agreement. These defenses are controversial, although they have sometimes been successful in commercial settings.

Calabresi and Melamed imply that questions of transaction costs are centrally significant in the definition and elaboration of entitlements. The work of

381. See text accompanying notes 283-94 and Estin, 36 Wm & Mary L Rev at 1058-61 (cited in note 9); see also text accompanying notes 409-17.

382. See note 109.


385. See, for example, Totem Marine Tug & Barge, Inc. v Alyeska Pipeline Service Co., 584 P2d 15, 22-23 (Alaska 1978).

386. See, for example, Restatement (Second) Contracts § 208 (“Unconscionable Contract or Term”).

387. Judge Posner rejects these defenses on economic grounds. Posner, Economic Analysis of Law at 116 (cited in note 2) (“Economic analysis reveals no grounds other than fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract.”).
“transaction cost” economists suggests that understanding these factors is especially important in the setting of complex, long-term relationships such as marriage.\(^{388}\) Transaction cost approaches to marital bargaining indicate that the parties' economic opportunities outside marriage are indeed powerful determinants of the substance of their bargains.\(^{389}\) This might be seen as a problem of market failure, the result of bilateral monopoly and corresponding opportunities for strategic behavior.\(^{390}\) However the problem is understood, it is an extremely troublesome one in economic and legal theory. In the literature, the question sometimes appears as one of causation: is it appropriate to use financial awards in divorce to remedy problems caused at least in part by the different opportunity structures for women in society?\(^{391}\) Or is this an arena in which different legal or regulatory approaches are more likely to succeed?\(^{392}\)

Transaction-specific failure is a particularly significant issue for a mutual consent/specific performance/property rights approach to divorce. By denying law a role in monitoring the process of exchange or enforcing standards of behavior in marriage, the proposals would mandate a process of bargaining but deny the possibility or significance of fraud, duress, or coercion. But this is precisely the area in which courts may best be equipped to intervene. Michael Trebilcock distinguishes the role of law in correcting for transaction specific failures of consent from its role in correcting for market failures. He argues that courts are institutionally best adapted to vindicating autonomy values or “the particular choices and preferences of the parties involved.” By contrast, more systemic market concerns are better suited to collective, corrective, regulatory action.\(^{393}\)

B. MARKET FAILURES

Common law principles are described in economic terms as operating to maximize economic welfare in society. Judge Posner argues that law often serves to bring a system closer to the results that would be produced if there were an effective market.\(^{394}\) On this theory, understanding the effects of externalities, monopoly, and information problems is centrally important to law's work. With the extension of market-based economic theories to non-market behavior, these

388. See Pollak, 23 J Econ Lit at 595-96 (cited in note 6); Allen, 13 J Econ Beh & Org at 199 (cited in note 6).
391. See, for example, authority cited in Estin, 71 NC L Rev at 752 n 110 (cited in note 135).
392. An interesting assessment of these issues is suggested in Lundberg and Pollak, 101 J Pol Econ at 1002-05. See also Rhode and Minow, Reforming the Questions at 191 (cited in note 143) (arguing that a commitment to substantive equality between the sexes requires attention to public policies as well as the law of divorce).
problems take on particular analytic importance. Here, the concern is not simply how a given market deviates from the ideal conditions which are the starting point for theory, but how far the concept of a market is an appropriate model to utilize. When economists speak of "markets" in marriage and divorce, the term is understood to be metaphoric. Still, in applying the metaphor, it is important to recognize that explicit markets in marriage and divorce would be rife with many types of market failures. In order for exchanges in such markets to have normative justification on efficiency grounds, these failures would require correction. Understanding the ways in which family behavior fits and does not fit the market metaphor becomes particularly important when economic theory is used as a basis for policy pronouncements.

1. Entitlements.

The allocation of entitlements is the foundation for contract. It establishes the status quo which market transactions are designed to shift. But this is a very complex process, and the specifics of these entitlements are closely tied into the process of exchange. As Macneil argues, even with simple contracts, the process of shifting an entitlement from one party to another is not instantaneous. He writes: "during that period of change, which in real life is complex both in behavior and law, legal entitlements are themselves changing in complex ways—various benefits and burdens of ownership and obligation are shifting, but not all at once." Michael Trebilcock argues that the absence of well-defined entitlements may be a significant source of market failure in the setting of marriage and divorce, arguing that "a private ordering regime must necessarily operate" in the shadow of an appropriate set of background legal entitlements. From this perspective, once divorce law has articulated the norms governing marriage, the parties can fairly bargain around them.

Legal rules affect bargaining in a variety of ways. The statutory and case law governing remedies in divorce state a baseline from which parties can start in constructing their marital or separation agreements. In addition, these rules

395. See, for example, Posner, Economic Analysis of Law at 142 (cited in note 2) (contending the marriage market is an apt metaphor for the search process prior to marriage). See Donald N. McCloskey, The Rhetoric of Economics 74-78 (Wisconsin, 1985). For uses of the metaphor, see Becker, A Treatise on the Family at 108-29 (cited in note 3); Cohen, 16 J Legal Stud at 278-87 (cited in note 6).

396. Trebilcock and Keshvani, 41 U Toronto L J at 534-35 (cited in note 6).

397. At any given point, the status quo is neither efficient nor inefficient; as Macneil writes, "[e]fficiency and inefficiency apply only to how the parties got where they are, relative to other ways they might have gotten somewhere else." Macneil, 68 Va L Rev at 963 (cited in note 35).

398. Id at 967. Allen Parkman seems to recognize this problem when he suggests that unilateral no-fault divorce could be permitted during the first year of marriage or until the wife becomes pregnant, whichever comes first." Parkman, No-Fault Divorce at 139-40 (cited in note 6).


400. In negotiation jargon, they offer "objective criteria" to rely upon in reaching
are default terms, which can be applied by courts if parties fail to reach agreement on particular issues. They may also serve an expressive or educational function, informing individuals about important aspects of family relationships, and a channeling function, encouraging certain socially preferable patterns of behavior. The particular allocations reflected in legal entitlements may also contribute to the preferences that individuals bring to the bargaining process.

These factors make the determination of the substantive content of entitlements extremely problematic. The law has no power to determine the distributions of love and efficiency norms are of small use on the fundamental questions of moral and financial entitlement in marriage. Once the questions of entitlement before, during, and after marriage and divorce are addressed, economic theory may be of substantially greater use in determining how these entitlements may best be shifted between the parties.

2. Transaction costs.

Among the most significant sources of potential “market” failure in the negotiations surrounding marriage and divorce is the issue of transaction costs. Many of these costs are relatively direct: bargaining has a cost, the enforcement of bargains has a cost, and policing bargains to prevent contracting failure has a cost. These might be readily measured, although there seems to be very little empirical data on the subject. In addition, there are less tangible costs from the process, including emotional injury, and loss of self esteem and community reputation. It is sometimes argued that changing social mores and the no-fault reforms have reduced these costs for individuals, but this is debated. Here


401. See text accompanying notes 195-97.


403. Theorists including Daniel Kahneman and Amos Tversky have demonstrated these effects. See Eisenberg, 47 Stan L Rev at 218-24 (cited in note 375).

404. This is Walzer's central point about the sphere of kinship. Walzer, Spheres of Justice at 228-29, 231-32 (cited in note 339).

405. See text accompanying notes 61-66, 227, and 308-11.

406. Occasional newspaper articles address the financial costs of divorce proceedings. See, for example, Jeffrey Leib, Specialists, Tough Economy Driving up Costs of Divorce, Denver Post 1-E (Aug 1, 1988). There are also many judicial decisions on the question of fee awards, and the most dramatic of these cases reach the mass media as well. See, for example, Ruth Marcus, "War of the Roses" in Supreme Court: Two Californians Fight $3 Million Legal Bill for Marathon Divorce Case, Wash Post A13 (Dec 16, 1991) (describing the fee dispute in the Stanley and Dorothy Diller divorce case, where fees exceeded three million dollars). Lawyers' fees are, of course, only a portion of the direct financial cost of divorce.

407. See generally Judith S. Wallerstein and Sandra Blakeslee, Second Chances: Men, Women, and Children a Decade after Divorce 7 (Ticknor & Fields, 1989) (“No-fault divorce is a legal concept that has gained acceptance in this country, but I have yet to meet one man, woman or child who emotionally accepts no-fault divorce. In their hearts, people
the evidence is largely anecdotal.\textsuperscript{408}

The details of how a system of financial awards for lost earning capacity could be administered has not appeared to concern these theorists greatly. To the extent this issue is acknowledged, it is generally dismissed with the observation that the practical difficulties are no greater than many others already managed in different legal contexts, particularly damages awards in tort.\textsuperscript{409} Though this may be true, there are many reasons to be dissatisfied with this answer. We have little experience with requiring proof of losses from a specialization of labor during marriage,\textsuperscript{410} and the data such computations would require is not well developed.\textsuperscript{411} It is certainly not clear that the legal system addresses these issues well in the context of tort claims for homemakers who are injured or killed.\textsuperscript{412} Most troublesome, if this is to become the only or primary basis for financial awards in divorce, it would add greatly to the expense and complexity of most divorce cases.

Divorce proceedings are structured very differently than tort litigation. Large proportions of divorcing individuals appear without counsel,\textsuperscript{413} in part because funding devices such as contingent fee agreements are neither permitted nor feasible in this setting.\textsuperscript{414} The costs of this litigation, including expert witness costs, are paid by individuals (largely in after-tax dollars)\textsuperscript{415} who can rarely believe in fault and in the loss associated with the decision to end a marriage.

\textsuperscript{408} See generally Mnookin and Kornhauser, 88 Yale L J at 971-72 (cited in note 148).

\textsuperscript{409} See, for example, Parkman, \textit{No-Fault Divorce} at 141 (cited in note 6) ("The techniques for estimating the effect of marriage on the parties' human capital are similar to those used by economists and financial analysts."); Ellman, 77 Cal L Rev at 78-80 (cited in note 6) ("[R]ules of law often call for speculative measurements and "the use of statistical data to approximate probable results... is commonly accepted in other fields of law.").

Although Professor Ellman does not minimize these issues, he seems to conclude that they are manageable. He notes:

There is no way to develop precise measures of the theoretically relevant criteria. But while theoretically defensible principles of alimony cannot be translated into self-executing adjudicative rules, they can give judges more guidance than they now have in following a coherent approach.

Id at 53.

\textsuperscript{410} See Estin, 71 NC L Rev at 750-54 (cited in note 135) (discussing Oregon and New York cases on this issue).

\textsuperscript{411} See Estin, 36 Wm & Mary L Rev at 1030-32 (cited in note 9).

\textsuperscript{412} See id at 1023-35 (concerning tort claims for injury or death of a homemaker).

\textsuperscript{413} See, for example, Robert B. Yegge, \textit{Divorce Litigants without Lawyers: This Crisis for Bench and Bar Needs Answers Now}, Judges J 8 (Spring, 1994) ("One of the major barriers to pro se litigants is the complexity of the law and its procedures."); ABA Standing Committee on the Delivery of Legal Services, \textit{Responding to the Needs of the Self-Represented Divorce Litigant} (Jan 1994).

\textsuperscript{414} ABA Model Rules of Professional Conduct Rule 1.5(d)(1) ("A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.").

\textsuperscript{415} In general, no income tax deductions are allowed for personal, living, or family expenses, which are defined to include most aspects of attorneys' fees and costs paid in
afford these expenses without significant sacrifice at a time when their financial resources are already strained. Every additional issue which requires the use of expert testimony imposes a serious burden on the parties and a corresponding risk that the analysis offered will simply be a pro forma, "quick and dirty," highly standardized product. Adjudication of breach and damages issues also burdens judicial resources, because of the need for particularized findings of fact and an opportunity for appellate review. Writers who recognize these problems endorse approaches which are far less dependent on precise quantification.\textsuperscript{416} And, significantly, the original economic analysis of alimony by Elisabeth Landes was not an argument for precise measurement of a homemaker's losses; her point was that the traditional criteria for alimony awards served as a reasonable proxy for a homemaker's opportunity losses.\textsuperscript{417}

3. Transferability.

The use of market language tends to mask the most important source of market failure, which is that this "market" is purely metaphoric. There is no competition in the market for divorce, and no currency for measuring and trans-
ferring values between the parties. The absence of a common currency means that exchanges are very difficult to transact, particularly on those questions that are subject to only "yes or no" choices. Marital status, for example, is an all-or-nothing proposition. In their important analysis of divorce bargaining, Mnookin and Kornhauser point out the difficulty of bargaining on any issue for which there is no middle ground. They suggest that the move toward a wider variety of custody options and a greater level of judicial discretion has the effect of facilitating negotiations. But many aspects of family relationships are fundamentally nontransferable, posing significant obstacles for an exchange-based theory of family life.

This is a problem that has received serious attention from academics and judges, who have asked how far parties are likely to "trade" money for greater shares of custody. Although there is disagreement as to how prevalent the practice has become, the commentators seem to agree that such exchanges are morally problematic. The possibility of custody trades also implies a more serious set of market failure issues for marriage and divorce bargaining: the problem of the external effects of decisions made by husbands and wives.

4. External effects.

The social costs and benefits of family life are of particular concern in family law. Two varieties of externalities are commonly identified: the positive and negative effects of family behavior on the larger society; and the effects of family decisions on individual third parties, particularly children. These effects appear with some regularity in legal analysis. Public policy restrictions on family bargaining are justified based on the public interest in marriage, put vividly by one court with the declaration that the state is a party to every marriage contract. The risk that a spouse or child will become a public charge is recited as a basis for support orders, or restrictions on contracts concerning support

419. Id at 977-80.
420. I suspect that this is one reason for the greater interest among academics in economic models of divorce. Martin Zelder, in the proposal discussed in the text accompanying notes 101-16, argues that bargaining over terms for divorce is more efficient than arguing over terms on which to remain married, largely because there are many "public goods" in marriage. Marital bargaining is evidently much more complex and less amenable to mathematical modeling. See Pollak, 23 J Econ Lit at 603-05 (cited in note 5). But deciding on this basis to focus on divorce seems a great deal like the old joke about the fellow looking under a streetlight for the keys he lost somewhere down the block.
422. Judge Posner describes the task of correcting externalities as "the most dramatic economic function of the common law." Posner, Economic Analysis of Law at 254 (cited in note 2).
423. Fricke v Fricke, 257 Wis 124, 126, 42 NW2d 500, 501 (Wis 1950) ("There are three parties to a marriage contract—the husband, the wife and the state.").
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obligations, or tougher child support enforcement laws. The scope of this problem is much greater than legal materials have recognized. Ideally, family life is a source of positive externalities for the wider society, through the investment in human capital of children and adults, and a range of other beneficial effects. In the contexts of family dissolution or dysfunction, however, the negative externalities may be enormous, posing impossibly difficult policy problems. The list includes the distressingly obvious—domestic violence, abuse and neglect of children and the elderly, the child support crisis—as well as a long list of more subtle and disputed social effects of our conduct of family life.

These issues have enormous policy implications. It is particularly difficult to assess how far family law should seek to impose community moral standards on family behavior, or to protect individuals against significant self-destructive behavior. As Michael Trebilcock points out, it is difficult to reconcile the idea that law should control this type of externality with ideals of individual autonomy and family privacy.

Even between two parties to a marriage, it is difficult to determine which types of costs should be borne separately by husband and wife and which are appropriately internalized to their marriage. Some economic arguments characterize alimony payments as a system for bringing into the divorce decision the costs of divorce that might otherwise be externalized.

424. This policy is reflected in rules denying enforcement of certain waivers of spousal support in premarital agreements. See, for example, Newman v Newman, 653 P2d 728, 735 (Colo 1982) (Health or employability may have so deteriorated in the course of marriage that enforcing prenuptial maintenance provisions might "result in the spouse becoming a public charge."); Uniform Premarital Agreement Act § 6(b), 9B ULA 376 (West 1983) ("If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.").

425. For descriptions in the economic literature of different externalities present in family interactions, see sources cited in note 357.


427. These effects are routinely invoked by the Supreme Court in its opinions on family issues. See, for example, Boddie v Connecticut, 401 US 371, 376 (1971) ("[M]arriage involves interests of basic importance in our society."); Maynard v Hill, 125 US 190, 205 (1888) (Marriage has "more to do with the morals and civilization of a people than any other institution.").

428. Trebilcock, The Limits of Freedom of Contract at 58-69 (cited in note 60). Another perplexing problem is that the range of individual third parties who claim an interest in particular family decisions has also begun to grow, extending now to grandparents, stepparents, and a bewildering array of biological parents. So far, none of the models of efficient divorce has incorporated the interests of these other parties. In the paradigm case, why is there no consideration of the utility function of a spouse's lover, who cannot marry that person until a divorce is secured?

429. See, for example, Parkman, No-Fault Divorce at 122-23 (cited in note 6). As Trebilcock's argument implies, the fact of such externalities is a problem of market failure best addressed through carefully defined legal entitlements. In contrast, mutual consent
A more significant aspect of this problem concerns the external effects of marriage and divorce on children. Bargaining models of marriage and divorce recognize that there is a problem here, but have not addressed it well. One approach simply assumes that the parents—or at least one parent—will behave sufficiently altruistically toward the parties' children to incorporate their interests into the agreement. This may often be more or less accurate, but it is certainly not always the case. A different model imagines children's support as a subject of negotiations between children and their parents. Another, which is implicit in some accounts of custody and support negotiations, treats parent-child relations as a commodity bargained over between husband and wife. Present legal rules require that those aspects of marriage and divorce bargaining directly affecting children be resolved in the best interests of the child, but this standard is notoriously difficult to pin down.

Proponents of both the mutual consent and enforcement proposals assert that their reforms would benefit children by making it financially safer for women to compromise career goals in order to devote their energies to their children. Implicit in this claim is a view that current divorce practices have significant negative external effects on children. For the most part, however, the correlation between women's interests and children's needs is asserted rather than analyzed. There is some interesting empirical data to suggest that despite relatively open-ended divorce statutes, families continue to adhere to a norm of mother-custody and father-support. But the literature on custody indicates proposals with no framework of rules to define which subjects are appropriate for bargaining would internalize these costs indiscriminately.

430. References in the economic literature to effects of divorce on children include Posner, *Economic Analysis of Law* at 143-45 (cited in note 2), and Becker and Murphy, 31 J L & Econ at 12-14 (cited in note 6).

431. See, for example, Landes, 7 J Legal Stud at 36 n 3 (cited in note 5).

432. One interesting study explored the motivations of parents of preschool age children who agreed to joint custody arrangements. In some cases, these arrangements reflected the parents' lack of a strong commitment to their child's well-being. Rosemary McKinnon and Judith S. Wallerstein, *Joint Custody and the Preschool Child*, in Jay Folberg, ed, *Joint Custody and Shared Parenting* 153 (Guilford, 1991).

433. This literature emphasizes the contracting and market failure problems these "transactions" imply; see Stout, 81 Georgetown L J at 1947-48 (cited in note 207); Becker and Murphy, 31 J L & Econ at 5-8 (cited in note 6).


435. See text accompanying notes 121-24 and 205-29. While I support the goal of making caregiving less financially risky, see Estin, 71 NC L Rev at 746-48 (cited in note 135), I think the economic analysis tends to reduce this problem too quickly to a question of traditional gender roles.

436. See, for example, Maccoby and Mnookin, *Dividing the Child* at 112-14, 130-31 (cited in note 421); Brinig and Alexeev, 8 Ohio St J Dispute Resol at 290-92 (cited in note 5).
that assuming a correlation between traditional gender roles and the demands of childrearing is enormously problematic.\textsuperscript{437}

In the context of divorce bargaining, some writers advocate principles that would "put children first," either by limiting access to divorce for parents of minor children, or by giving children a first call on their parents' financial resources.\textsuperscript{438} A growing number of cases consider whether children should be allowed to intervene in their parents' divorce proceedings or to retain independent counsel to represent their interests.\textsuperscript{439} It is far from clear, however, how far the interests of children should be allowed to override the interests of fathers and mothers. "Children-first" policy recommendations suggest a determination that external effects are so significant that bargaining approaches to divorce are not appropriate.

The issues of contracting and market failure are significant to both visions of efficiency in marriage and divorce. With a mutual consent divorce rule, based on a property right in the continuation of marriage, market and contracting failures may prevent transactions entirely or dramatically shift resource allocations away from an efficient outcome.\textsuperscript{440} Under an enforcement and damages model of divorce, an understanding of the effects of these types of problems seems essential to structuring incentives properly. Yet, although the economic literature on marriage and divorce makes reference to various types of contracting or market failures, they have not been systematically described or discussed.\textsuperscript{441} My argument here is that without a better understanding of these effects, both economic "solutions" to the problem of divorce remain highly theoretical, with limited practical significance.

Michael Trebilcock states the case for incorporating these issues even more strongly. Moreover, he argues that economic analysis may be particularly important in directing our inquiry to the varieties of factors that prevent privately bargained outcomes from satisfying our normative criteria.\textsuperscript{442} He argues that the chief areas of moral concern in contract law can be explained in terms of contracting and market failures.\textsuperscript{443} Thus, economics may be most useful to family law to the extent it develops vocabulary and analysis that can be used to explore the connections between economic and moral issues. To do this, howev-


\textsuperscript{438} See Mary Ann Glendon, Abortion and Divorce in Western Law 94-101 (Harvard, 1987).

\textsuperscript{439} See, for example, J. A. R. v Superior Court, 20 Fam L Rep 1417 (Ariz Ct App Jun 28, 1994) (holding seven-year-old entitled to attorney of his choice but not to intervention as a party in contested custody proceeding), and cases cited therein.

\textsuperscript{440} This is closely related to the more general criticisms of the property rights approach, discussed in the text accompanying notes 314-48.

\textsuperscript{441} But see note 357.

\textsuperscript{442} Trebilcock, The Limits of Freedom of Contract at 29 (cited in note 60).

\textsuperscript{443} Id.
er, will require elaboration of not only the parallels between family and market relationships, but also their divergences.\(^{444}\)

C. ECONOMIC AND MORAL CLAIMS

Given the range of issues that have not been fully addressed in the economic analysis of marriage and divorce, it seems at least premature to conclude that certain legal frameworks will increase the efficiency of family life. This is a question completely separate from the larger question whether, or to what extent, efficiency norms should set the agenda for family policy. One answer to this larger question may be that efficiency norms are more useful in resolving some particular problems, which we might characterize as those involving economic rather than moral claims.

In the present debates over the rules for divorce, economic and moral arguments are sometimes seen in competition, and sometimes collapsed together. In his writing on divorce, Michael Trebilcock only advocates one specific legal entitlement, which is designed to adjust the human capital consequences of specialization in the household.\(^{445}\) Despite his interest in contracting and market failures, he does not discuss the broader problems associated with household or divorce decisions. Professor Ellman's use of economic principles is intended to keep the law neutral on questions of family life. He argues that it is not possible “to devise a functional law of alimony that takes proper account of the nonrational and nonfinancial goals and motivations involved in marriage, while avoiding determinations of fault.”\(^{446}\) On the other hand, Professor Schneider criticizes Ellman's neutral stance, suggesting that the force of Ellman's paradigm case comes from its moral appeal.\(^{447}\) Similar criticisms are made by Arthur Cornell, who objects to Ellman's proposal to limit compensation to losses arising from “economically rational” choices.\(^{448}\)

In contrast to scholars such as Trebilcock and Ellman, the advocates of mutual consent divorce are interested in addressing a wide variety of non-financial losses from divorce. As described in the economic literature, these include the loss in marriageability of one spouse,\(^{449}\) the many effects of divorce on children,\(^{450}\) losses from misconduct during the marriage such as violent

\(^{444}\) Gary Becker has suggested concerns along these lines as well. See Becker, *A Treatise on the Family* at 303-04 (cited in note 3); Becker, 101 J Pol Econ at 400 (cited in note 1).


\(^{446}\) Ellman, 1991 BYU L Rev at 270 (cited in note 82).


\(^{448}\) Cornell, 26 Fam L Q at 133 (cited in note 6).

\(^{449}\) See, for example, Parkman, *No-Fault Divorce* at 135-36 (cited in note 6); Becker, *A Treatise on the Family* at 330-31 (cited in note 3); Ellman, 1991 BYU L Rev at 282-85 (cited in note 82); Cohen, 16 J Legal Stud at 278-87 (cited in note 6); Ellman, 77 Cal L Rev at 43-44, 80-81 (cited in note 6); Brinig and Carbone, 62 Tulane L Rev at 873-76, 894-95 (cited in note 163); Landes, 7 J Legal Stud at 51 (cited in note 5). See also Parkman, *No-Fault Divorce* at 7-8 (discussing search costs for a new mate).

\(^{450}\) See Carbone, 43 Vand L Rev at 1488-91 (cited in note 36) (The externalities of
behavior,\textsuperscript{451} and one partner's loss due to "the desire for a continuing relationship with the other."\textsuperscript{452} Parkman does not describe these as moral concerns, but he argues repeatedly that his goal for mutual consent divorce is to force the spouses to recognize all of these costs when considering divorce.\textsuperscript{453}

Why do scholars such as Trebilcock and Ellman limit their recommendations to the more financial aspects of marriage and divorce? Ellman recognizes the nonfinancial losses of divorce and suggests a range of different reasons for omitting these from his theory. He starts with the fact that "measuring nonfinancial gains and losses may be conceptually as well as practically impossible."\textsuperscript{454} In addition, he suggests that incentive structures may be less important where nonfinancial matters are concerned.\textsuperscript{455} Professor Ellman also argues that some losses from divorce are so different in character as to require a finding of fault before compensation would be appropriate.\textsuperscript{456} He writes: "[a]ny new theory one might develop to allow recovery for the emotional pain one spouse inflicts upon the other would surely require a finding that the claimant's emotional loss flowed from some conduct of the defendant's that one is prepared to label as blameworthy."\textsuperscript{457} In other words, these are moral claims which are not manageable within the parameters of an economic or legal system that attempts to be neutral on the conduct of marriage.

This difference between the enforcement and mutual consent solutions is the most significant. With the creation of a property right in marital status, the mutual consent approach allows the parties to incorporate "moral" consid-

\textsuperscript{451} Ellman suggests that these losses might be better treated with a tort approach. Ellman, 1991 BYU L Rev at 305-06.

\textsuperscript{452} Parkman, 8 BYU J Pub L at 104 (cited in note 5).

\textsuperscript{453} Parkman, \textit{No-Fault Divorce} at 8, 104, 123, 138.

\textsuperscript{454} Ellman, 1991 BYU L Rev at 282. He writes:

The problem is not just that measuring the joys of parenthood or the pain of estrangement are difficult, or that different people place different values on close bonds with their children, even though both observations are true. It is also that such a comparison requires a common scale upon which to measure the financial outcomes, the burdens and benefits the wife derives from the children, and the pain of estrangement suffered by the husband. Does the wife derive more pleasure from her children than the husband derives pain from his estrangement from them? Such questions may not even make sense, regardless of whether we ask them for the purpose of reallocating losses to insure a proper incentive structure or simply to achieve some kind of equity.

\textsuperscript{455} Id at 282-83.

\textsuperscript{456} Id at 283-84. Ellman's explanation for omitting the remarriage problem from his theory is that it "requires a different theoretical exercise" than the one he advances. Ellman, 77 Cal L Rev at 81 (cited in note 6). "Although some remedy is probably necessary, we may conclude that the obligation is society's and not the former husband's." Id. "Beyond that, there are difficult questions in establishing the amount of such claims, and in determining which wives should be entitled to them." Id.

\textsuperscript{457} Ellman, 1991 BYU L Rev at 283-84 (cited in note 82).
erations into their divorce decisions. In effect, the entitlement is defined to include any aspect of married life that a person feels strongly enough about to use as a basis for withholding consent to divorce. This permits a spouse to demand payment for loss of social status or self-esteem, or loss of a full relationship with children, or emotional pain. And, because the determination of which issues to bargain over is left to each individual, it leaves the state in a position of apparent neutrality with respect to the moral aspects of marriage. Thus, with its emphasis on private ordering, the mutual consent regime appears to maintain a morally neutral stance as well. But mutual consent proposals are not morally neutral. Their purpose is to reduce the incidence of divorce and change its perceived distributive effects. Mutual consent proposals in the literature represent a normative judgment that mothers and children are deserving of a greater share of family financial resources on divorce. They imply that divorce should be a great deal more costly than it is under present laws, and there is the obvious conclusion that if divorce is made more expensive it will become less common. But there is no obvious correlation between this goal and a property right in marriage; carefully drawn financial entitlements in divorce could achieve the same purposes more directly.

An advocate might argue that mutual consent rules reflect a moral obligation to keep one's promises. Although this is not the norm in commercial settings, the special nature of marital bargains may seem to call for a different rule. The question of moral obligation is an important one, but it is not a normative economic one. Moreover, a moral rule which admits of no qualification or exception would be seriously flawed. What are the arguments for an indirect approach to the distributive problems of divorce? Writers who consider specific performance remedies in business settings emphasize two goals: encouraging the parties to negotiate their differences, and incorporating various external costs into the parties' decisionmaking. This argument brings into focus two premises of a mutual consent theory which are very troubling. The first is the assumption that a couple undergoing intense marital conflict will bargain rationally, dispassionately, over their gains and losses. But the paradigm of rational

458. The assumption that there would be such effects, and that they would benefit mothers and children, is one of Professor Becker’s reasons to recommend change in the grounds for divorce. See text accompanying notes 119-24. These writers, by the way, do not offer theoretical or empirical proof that the change they propose would have these effects. And, once the distributive effects of the new system are recognized, we might predict that the law would begin to affect marital bargaining. Would it make men less willing to enter into traditionally structured marriages? 459. See text accompanying note 34.

460. What Peter Linzer has in mind when he challenges the “amoral” tradition of contract remedies is an efficiency problem, which results from the difficulty of incorporating nonmarket or subjective values into the usual damages formulas. Linzer, 81 Colum L Rev at 112-17 (cited in note 156).

461. The domestic violence problem most dramatically illustrates this point. See text accompanying notes 168-76.

462. See note 155.
behavior on which a bargaining theory depends may well be less applicable to divorce behavior than any other arena of human experience.\textsuperscript{463} It is particularly remarkable to expect that a husband and wife would engage in this type of negotiation and conclude that it is better to remain married on efficiency grounds.\textsuperscript{464} It is also remarkable to assume that a husband and wife going through this type of conflict will not attempt to negotiate their differences without the spur of a mutual consent divorce rule.

The second premise of a mutual consent theory is that couples can determine all the respective costs and benefits of marriage and divorce, and that they have some means of valuation which is relatively accurate and which allows them to measure and compare precisely those subjective, nonmarket goods which are not well handled by ordinary liability rules. How would any of us weigh the grief and humiliation of an unwanted divorce against the pain of an unhappy marriage? Accepting that these costs of divorce are significant, do we really believe that they can be compensated in money?\textsuperscript{465} And if monetary compensation is not feasible, why would it be rational to design divorce rules around the pretense that they will achieve compensation?

We all know that it is beyond the power of law to command the feeling and expression of love. There is no legal or economic expertise that can reveal or remedy the causes or cures for marital unhappiness. The argument to deny access to divorce is an argument which does not respect the importance of marriage. The argument that divorce remedies should attempt to compensate the many personal and emotional losses that go along with the failure of love brings law into a sphere where it does not belong.

With a contract enforcement approach to divorce, the question of moral and economic claims remains important. The entitlements of marriage and divorce can reflect important moral content, as the norms of fault-based divorce demonstrate. Financial obligations to a spouse or child after divorce also reflect a moral obligation, which is not merely a matter of internalizing the costs of divorce. Where nonfinancial losses are concerned, however, a system of liability rules also

\textsuperscript{463} Gary Becker has advocated expanding economic models of behavior to include other, less admirable motivations, including altruism, loyalty, spite, masochism, love, obligation, guilt, duty, and anger. See Becker, 101 J Pol Econ at 386, 398, 400, and 401-02 (cited in note 1).

\textsuperscript{464} But see, for example, Parkman, No-Fault Divorce at 139 (cited in note 6); Zelder, 16 Harv J L & Pub Pol at 247 (cited in note 5). Unlike the commercial situation, negotiations with a spouse over breach are a particularly costly type of conversation. This relates to Lloyd Cohen's point about destruction of quasi-rents. See text accompanying notes 163 and 219-23. It is far less destructive to the marriage to seek this kind of information from a stranger. As a lawyer in practice I regularly consulted with clients who were considering divorce and looking for information about the legal and financial consequences they could expect.

\textsuperscript{465} See note 109 and text accompanying notes 381-82. Presumably, it would take a great deal of money to compensate these costs. This suggests either that only the very wealthy would be able to divorce, or that some spouses would get only token compensation.
faces the immense problem of constructing entitlements that adequately address the moral dimensions of love.

Ultimately, it is much more important to focus divorce remedies on economic claims. Economic claims are only one category within a larger moral universe, but they have a unique character in our popular and legal culture. And, while economics cannot define the entire realm of justice principles, we as a society are more likely to find consensus on efficiency and private ordering norms than on many other moral questions in the context of family life. Law and economics have an important role to play in developing sharing norms for marriage and defining the financial responsibilities of parenthood. On the other hand, law and economics are not particularly helpful in addressing the nature of love and the problems of commitment in marriage.

IV. Conclusion

This Article has considered normative economic arguments about the problem of divorce from the perspective of family law and policy. The economic treatments of divorce share a concern to improve the efficiency of our present practices of marriage and divorce, and a belief that changes in the present "no-fault" law governing divorce can help achieve this goal. Despite this shared goal, economic theories of divorce law present two distinct approaches. Each reflects different understandings of efficiency norms and different concerns about marriage and divorce. These different visions lead to contradictory policy proposals, which I have characterized here as "mutual consent" and "enforcement" models of divorce.

In the first model, dissolution of marriage is depicted as a transaction in marital status, which can be made more efficient if husband and wife are required to bargain over the terms for their divorce. I describe this model as an application of Pareto efficiency norms, and a sort of free market ideal that seeks, as far as possible, to remove law from the processes of family life. The second model presents divorce as one aspect of the larger process of marriage, and law as part of the framework within which individuals establish and maintain household relationships. In this vision, Kaldor-Hicks efficiency norms are applied in a search for legal rules that allow parties freedom to optimize the terms for those relationships.

My criticism of these economic answers to the problem of divorce has two aspects. First, although both the mutual consent and enforcement models are presented and defended on efficiency grounds, the choice between the two requires a choice between different visions of efficiency. Moreover, each solution depends on criteria that are not based on efficiency. Thus, the mutual consent model requires an allocation of the initial property right in marriage, and the en-

Enforcement model requires a framework of liability rules, which may draw on economic insights but which also requires other normative judgments. In these issues lies a large part of the work of family law; by failing to address them, the economic analysis remains fatally incomplete.

The second failing of both sets of reform proposals is that they never bridge the gap between economic theory and the realities of family dissolution. Although economics provides a vocabulary for describing many of the factors that complicate these models in the real world—transaction costs, external effects, strategic behavior—these have not been seriously considered. A careful analysis of these problems highlights both the hard choices that policy reform efforts must confront and the enormous practical constraints on any system of family law.

In assessing the contributions that normative economics has made to family law, the most interesting question is whether efficiency norms provide a useful framework for addressing the important policy issues in marriage and divorce. To what extent is the project of family life, and its role in our society, a matter of rational choice, of allocating limited means to unlimited ends? 467

These questions are much more difficult to answer in the face of the apparent dissensus in contemporary society on norms of family life. In an earlier day, there was at least a greater coherence to the goals and policies of family law, making economic analysis of law and legal policy recommendations far easier projects. 468 The challenge for family law in these times is much more complex, in all aspects of its work. Given the often widely divergent norms and values expressed in contemporary debate, it is difficult to imagine an efficiency analysis comprehensive enough to resolve the important policy issues successfully.

467. See Coase, 7 J Legal Stud at 207-08 (cited in note 10) (questioning definition of economic expertise as consisting in the study of “human choice”).