1994

Way We Live Now: A Discussion of Contracts and Domestic Arrangements, The

Carol Weisbrod
University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers

Part of the Contracts Commons, Family Law Commons, and the Law and Economics Commons

Recommended Citation
Weisbrod, Carol, "Way We Live Now: A Discussion of Contracts and Domestic Arrangements, The" (1994). Faculty Articles and Papers. 89.
https://opencommons.uconn.edu/law_papers/89
The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*

Carol Weisbrod**

"Law means so pitifully little to life. Life is so terrifyingly dependent on the law."

Karl N. Llewellyn

What Price Contract?—An Essay in Perspective

I. INTRODUCTION

There is currently great interest in the subject of contracts and the family, particularly, although not exclusively, among those who apply principles of law and economics to marriage contracts.¹

* © 1994 by Carol Weisbrod.
** Ellen Ash Peters Professor of Law, University of Connecticut School of Law. An early version of this paper was given at the Grand Tetons meeting of the North American section of the International Society on Family Law, June 11, 1993 under the title "Default Principles in Family Contracting." The paper also was delivered at the Symposium, Twenty-Five Years of Divorce Revolution, sponsored by the University of Utah College of Law, held October 15-16, 1993, and at a Harvard Law School faculty workshop on December 17, 1993. I learned from the discussions at each of these sessions. Some of this paper expands on material in a forthcoming casebook, Family Law, co-authored by Lee Teitelbaum, Leslie Harris, and myself. I am, in general, indebted to that work. The material on Llewellyn draws in part on an unpublished paper called "Article Two as a Framework for Groups," a comment on the presentation by Zipporah Wiseman at the 1986 meeting of the Law and Society Association. The discussion of Nathan Isaacs uses material from a paper given at the Conference on Jews and Law in the United States, Madison, Wisconsin, November 1990. At various points in connection with this work I have received generous support from the University of Connecticut School of Law. I would also like to acknowledge help received from the following individuals: Allen Kamp, Richard Kay, Leon Lipson, Martha Minow, Carl Schneider, Pamela Sheingorn, Aviam Soifer, and Lee Teitelbaum.

1. For an overview of many of the complex themes involved in the question of contracts and the family, see CARL E. SCHNEIDER, FAMILY LAW ch.5 (forthcoming). For a discussion of the application of contract principles to family law, see Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803, 1828-33 (1985).

One normative orientation was suggested by Professor Macaulay in 1977. See Stewart Macaulay, Elegant Models, Empirical Pictures and the Complexities of Contract, 11 LAW & SOC'Y REV. 507, 508–10 (1977). Noting that his students viewed the specificity of contractual rights and duties in a marriage contract as inconsistent with long term commitments to marriage, Macaulay said: "Of course, my students may be wrong, at least insofar as persons do not wish to play the traditional roles of husband and wife." Id. at 508 n.1. In general, Macaulay said that there are costs to
Works discussing marriage and contracts sometimes treat contracts issues generally as they relate to the creation of lives-in-common and sometimes target specific contractual solutions to problems of family law, such as support after divorce or surrogacy contracts.

There is also great skepticism about contracts and family law, particularly as the contracts involve long-term, on-going, typically marital, relationships. The skeptical view resists the "commercial" version of marriage such as that described by George Bernard Shaw in 1903: "[N]othing is more certain," Shaw wrote, "than that in both [England and America] the progressive modification of the marriage contract will be continued until it is no more onerous nor irrevocable than any ordinary commercial deed of partnership." Under one standard Anglo-American view, marriage must be more than an ordinary commercial arrangement, and is weakened by comparison with such arrangements.

A broad version of the skeptical position rests in part on a view which associates contract law with individualism in the sense of selfishness, and with the well-known idea that one party has the right to break a contract so long as that breaching party pays damages. This approach—perform or pay damages, it does not matter

---


3. For one critique, see Ira M. Ellman, The Theory of Alimony, 77 CAL. L. Rev. 1, 13–33 (1989). Some writing on mandatory planning for divorce stresses that the idea of a pre-marital contract governing the economics of divorce would have no application to behavior during the marriage. See, e.g., Banks McDowell, Contracts in the Family, 45 B.U. L. Rev. 43, 47–54 (1965).


5. This view is perhaps derived from the well-known comment of Oliver Wendell Holmes: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.” Oliver W.
which—is not, it is thought, an appropriate one to use in the domestic and particularly marital context, in which there is so much reliance on the idea of a permanent association. In the end, the proposition of the skeptics is that there are radical and finally insurmountable tensions between the ideas represented by contract and family, both in the state of mind necessary to enter the structures, and in the sorts of values which the two are said to encourage.

The tensions between the ideas of contract and the ideas invoked by the words “marriage” and “family” can be stated in different vocabularies. Toennies’ distinction between gemeinschaft and gesellschaf̈t and Hegel’s comment that rights in the family do not exist until the family dissolves both suggest the current idiom. The contrast is often between a liberal individualistic rights emphasis and a communitarian emphasis, or between “contract” representing individual wills and “status” representing a collective judgment and a limit on individual choice. We know that the state of mind which the law of contracts generally requires focuses on arms-length bargaining, and an economic exchange relationship. How could we even imagine that this would work within family relationships?

Indeed, there is a long history of opposition to the idea of marriage as a contract, even when its contractual aspects are noted. The late nineteenth-century Supreme Court, in Maynard v. Hill, stressed how different marriage is from ordinary contracts. The Court noted, in regularly quoted language, that “whilst marriage is often termed [a civil contract]—to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract.” There were many ways in which the marriage contract was different from other contracts. To begin with, “[t]he consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation

Holmes, The Path of the Law, 10 HARV. L. REV. 457, 462 (1897).
6. This reliance interest is not limited to domestic arrangements. See, for example, the discussion of plant closings in Joseph W. Singer, The Reliance Interest in Property, 40 STAN. L. REV. 611, 701–06 (1988).
8. Georg W.F. Hegel, Philosophy of Right (Thomas M. Knox trans., 1949). “The right which the individual enjoys on the strength of the family unity and which is in the first place simply the individual’s life within this unity, takes on the form of right (as the abstract moment of determinate individuality) only when the family begins to dissolve.” Id. at 58.
10. Id. at 210–11.
between the parties is created which they cannot change."\textsuperscript{11} By contrast, "[o]ther contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties."\textsuperscript{12} In the end, the focus was on the larger social meaning of marriage. Marriage, the Court said, "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."\textsuperscript{13}

The largest issue here would seem to be the relation between the family and the state, and the role of the state in marriage and other domestic arrangements. Traditionally, the issue of law and the collective decision represented by law, is conceded to be very large in the context of the regulation of marriage—despite the paradoxical point that the family is often said to be "autonomous" and in the "private" sphere.\textsuperscript{13} The state, it has been said, is the third party to the marriage contract. Yet of course, from one point of view, the state is a kind of third party to all contracts. The role of the state is, finally, what distinguishes contracts from unenforceable understandings or agreements. Thus the different role of the state in relation to marriage and ordinary contracts is a difference in degree and not in kind. It remains true, however, that one way of talking about this difference in degree is to insist that it is, finally, a difference in kind. And one can also say that while marriage itself is a contract, the contract is executed with the marriage, and after that marriage is a status in which the judgment of the community, through law, then controls the situation.\textsuperscript{14}

\begin{enumerate}
\item Id. at 211.
\item Id.
\item Id. The marriage contract was subject to variation even at the time the Supreme Court wrote its description.
\item It is also clear, as one looks at proposals for reform of marriage, that the facts underlying the word marriage can be enormously different from country to country and time to time. Thus, Leon Blum's Marriage suggests equal sexual experience as a remedy in a world in which, whatever the theory, the facts usually involved an experienced husband and an inexperienced wife. See LEON BLUM, MARRIAGE 102-64 (Warre B. Wells trans., 1937) (1907). Compare this to the American ideology of the romantic marriage of virgins for life, controlling in theory and perhaps in fact, until fairly recently.
\item See Lee E. Teitelbaum, Family History and Family Law, 1985 WIS. L. REV. 1135, 1144-58.
\item See 1 JOEL P. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 2, at 2 (Boston, Little, Brown 1881). Bishop concluded that the contract ended upon marriage: "Actual marriage, in any form which makes the parties in law husband and wife, is performance. Nothing short is." Id. At marriage, therefore, the contract ceased, and thereafter it was appropriate to think of marriage as a status. But the ideas of status and contract also involve issues of degree and not kind.
\end{enumerate}
An argument based on the special character of marriage might also stress that marital promises are too vague to be truly contractual. Alternatively, it might be argued that in longstanding relationships in which there are constant adjustments and readjustments to be made, there is no point in talking about enforceable contracts. Indeed, as a general matter, one might do better thinking in terms of obligations.

As to these observations, certain specific answers may be proposed. First, the traditional marriage contract may be more precise than is sometimes suggested. In 1939, Max Radin gave a clear outline of this view of the contractual aspects of marriage. He noted the unusual character of marriage as a contract. He stated that “[t]he contract of marriage, even as a consensual contract, is not treated in law as other contracts are treated.” But then Radin gave depth to the promises of mutual love and support. The reciprocal duties owed, he said, are these: “(1) cohabitation, (2) sexual access, (3) sexual fidelity, (4) conjugal kindness. In addition, (5) the husband owes the wife maintenance and support and (6) the wife owes the husband the duty of household management.”

As to long-range readjustment issues, we may note Ian Macneil’s work on relational contracts suggests that the emphasis in contract law on one-shot transactions mischaracterizes the many commercial transactions that are long term. This approach almost necessarily suggests an interest in problems of ongoing action and readjustment and thus, one might look for affinities between contract issues in family law and commercial law.

---

15. See Ellman, supra note 3, at 18, 28–32.
16. Note the difference between readjustments in a context assumed to be stable, on which there is considerable reliance, and readjustments which include the destruction of the context.
19. Id. at 161.
20. Id. at 169. These “are created by the status of being husband and wife. The contract of marriage does not establish them. That merely creates the status.” Id. The first four of these, Radin continues, “are so inseparably connected with the status of husband and wife that they cannot be altered by any agreement between the parties nor waived by non-insistence or disuse.” Id. The last two can however be “regulated to a limited extent by agreement.” Id.
On the issue of "rights" versus "obligations," one might remember that promises, including contractual promises, are a way of creating obligations.\textsuperscript{22} If a discussion insists on looking at contract in terms of rights rather than obligations, this seems to reflect a cultural overlay more than the contractual idea itself. One might also note that there are contracts (such as church covenants) which do not have economic transactions as their prime focus.\textsuperscript{23} There may be no legal difference between a contractual promise, a legal agreement, a covenant and a vow. The history of contracts is a history of different contracts in different contexts, and marriage is one of these. Thus it misconceives the issue to ask now whether marriage is appropriately part of a unified theory of contracts understood (at the moment) to be focused on economic relationships of one particular kind.

On the issue of hedonistic individualism, one might recall the quite different values associated with the individualism of Thoreau, who went to the woods because he wished to "live deliberately,"\textsuperscript{24} or the hasidic Rabbi who said that he would not be asked, in the coming world, why he had not been Moses but rather why he had not been himself.\textsuperscript{25} This, one might say, is the high ground of individualism, the "here I stand, I can do no other" sort of individualism\textsuperscript{26} which ordinarily commands a certain (but not limited) respect.

This Essay does not so much offer detailed responses to detailed questions, as suggest that an emphasis on the status or collective judgment aspect of marriage to the point of the rejection of contractual themes (or possible contractual solutions to certain problems) cuts us off from some interesting ideas in the traditional contract literature. These ideas are particularly important in a time

\textsuperscript{22} See Elizabeth Scott, Rehabilitating Liberalism in Modern Divorce Law, 1994 Utah L. Rev. 687.


\textsuperscript{24} Henry David Thoreau, Walden (Boston, Ticknor & Fields 1862).

\textsuperscript{25} Martin Buber, Tales of the Hasidim: Early Masters 251 (1947).

\textsuperscript{26} Note also a distinction between "personalism" and "individualism." Personalism and individualism must not be confused. Personalism gives priority to the person and not the individual self. To give priority to the person means respecting the unique and inalienable value of the other person, as well as one's own, for a respect that is centered only on one's individual self to the exclusion of others proves itself to be fraudulent.

of significant social uncertainty, much of it arising out of the impact of the current changes in the situation of women. The skeptical position on the use of contracts tends to a conclusion that an official state attitude towards such contracts must begin with a presumptive negative, based on the view that the law and theory of contract is most likely to be irrelevant. Analysis of these issues from within the field of contracts suggests that the state stance can often be more open to individual variation without sacrifice of collective judgment.

This discussion returns to some ideas about contract common in the first half of the twentieth century. Scholarship of that era sometimes viewed contracts in relation to general questions of law and society, and did not restrict its inquiry to the incentive-based bargaining of individuals. Contracts material was founded on issues of law and social change, although the change was often in commercial practice rather than, for example, social relations.

This Essay adopts a stance in which everything is discussable in contract terms. This is done not because everything is contracts, but because this particular exercise is useful in bringing to the surface a variety of interactions between individual and official behavior. The paper addresses in this manner some arguments rejecting connections between contracts and family law and supports some material suggesting that there are in fact certain connections between these fields.

Part II of this Essay considers the idea of domestic contracts within the contract theory of another generation, discussing Karl Llewellyn’s views of contracts and group life, including his comments on marriage and divorce. As background to the Llewellyn discussion, there is an exposition, following some suggestions in the work of Nathan Isaacs, of the relationship of standardized or default contracts to status/contract questions in a time of social change.

Addressing the argument that there is some fundamental incompatibility between the exchange ideas underlying contracts and the substance of domestic arrangements, Part III offers fictional examples of negotiation in domestic relationships. These fictional

27. At times the law (for example, the Uniform Commercial Code) provides a presumptive contract, or a default contract, for parties in particular conventional relationships. The parties may vary the terms of the contract—“unless otherwise agreed” is one typical formula suggesting the possibility—but contract terms will be supplied if the parties fail to do so. In certain situations, the parties are assumed to have intended a contract of some sort.

28. Domestic arrangement is used here rather than “marriage” because some of the examples relate to non-marital negotiations. In general, the issues raised in the
contracts often relate not merely to issues of economic arrangements on dissolution of the relationship, but also to the substance of the arrangement itself. Within the context of particular ideas about the role of women, specific contracting for domestic arrangements was apparently not foreign to, for example, the nineteenth-century English mentality, and may not be as foreign to our own as is sometimes suggested.

Part IV discusses domestic agreements as legally enforceable contracts, using the general framework of Article Two of the Uniform Commercial Code ("U.C.C.") as a point of departure. Article Two was developed to solve a problem in the field of sales which has an analogue in the present discussion of domestic arrangements. The problem was that the law recognized one model while the social fact revealed many models. This is our situation as to domestic arrangements. It seems clear that one answer will not do for everyone. Some, for example, still want "traditional marriages," while others insist that only economic independence can give anyone a basis for equality in any domestic relationship. As to each group, there will be some who want to apply their understandings universally, and some who, while believing that their mode is in some sense more valid, will be concerned about the methods available which will allow others to live out their versions of the good life.

The relationship of this discussion to general issues of pluralism and tolerance is obvious. While many methods are available in different contexts to achieve a pluralist goal, in the context of domestic arrangements, it seems clear that explicit contracts are a possible way of both achieving individualized solutions and, ultimately, of perhaps changing the substance of the default contract or contractual options. The limits on the idea of contract—limits found in the law of contracts itself, in policing doctrines, and in non-variable default provisions—are ways of accommodating the various state interests involved.

II. MARRIAGE AS AN INSTITUTION: SOME OLDER THEORY ON PRIVATE ORDERING MARRIAGE AND DIVORCE

"The nub of the situation is the persistence of old patterns side by side with new. . . . This side-by-sideness is found inside single marriages, and as between different couples. Here, as in business and

---

29. The point applies with particular force to women in relationships with men.
30. See, e.g., Shultz, supra note 2, at 248.
industry, the old is far from dying because, or as soon as, the new has come. While law still purports to seek a single way for all.}\(^{31}\)

In *The Death of Contract*, Grant Gilmore indicated that if asked to "locate the law of contract on the legal spectrum," most people would place it in the field of commercial law.\(^{32}\) It is true, he wrote, "that our unitary contract theory has always had an uncomfortable way of spilling over into distinctly non-commercial situations."\(^{33}\) Thus, he wrote, "what may be good for General Motors does not always make sense when applied to charitable subscriptions, antenuptial agreements and promises to convey the family farm provided the children will support the old people for life."\(^{34}\) Still, he concluded, "we feel instinctively that commercial law is the heart of the matter and that, the need arising, the commercial rules can be applied over, with whatever degree of disingenuity may be required, to fit, for example, the case of King Lear and his unruly daughters."\(^{35}\)

Not surprisingly, the present contractual discussion in the field of family law focuses on the problem of marriage and, more particularly, marital dissolution in an era of no-fault divorce. The contracts discussion has been approached with various objectives. Sometimes the idea has been to provide a new wife with contractual incentives (promises to support on divorce) to live within a traditional model.\(^{36}\) Sometimes the idea has been that alternative models could be developed through contract. As to both, it would seem that the older

---


32. GRANT GILMORE, *THE DEATH OF CONTRACT* 8 (1974). The commercial law and family law approaches may not be as removed from one another as we think. There is, for example, a similarity between the fraud ground for annullment in early English law (fraud as to the person involved, later fraud in the essentials of the marriage) and the idea of a real defense based on fraud (fraud in the factum, not knowing the nature of the document signed) available even against a holder in due course in the field of negotiable instruments. The conclusion here is not somehow that marriage "is" a negotiable instrument. Rather marriage and negotiable instruments both involve contracts viewed as more binding than ordinary contracts. Everyday fraud is not enough to avoid the contract. So too Hochster v. De La Tour, 118 Eng. Rep. 922 (1853), discusses the idea of anticipatory repudiation in the context of marriage contracts, leases, and the sale of goods. See also Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863).

33. GILMORE, supra note 33, at 8.

34. Id.

35. Id.

36. While questions can be raised concerning the wisdom of such contracts in times of economic uncertainty, and their relation to particular feminist objectives, I assume that such contracts could be made within a broad scheme of pluralist contracting.
work in commercial law may have some relevance.

As already noted, the current discussion of contracts and the family, like much of the writing on contracts generally, uses the insights of an economic discussion and focuses on incentives and individual bargaining behavior. An earlier literature dealt with different questions. Some of it, understood broadly, considered the problem of the law of contracts and "life," "society," or "social change." As to such issues, one view of contracts and social life might stress issues of inequality of bargaining power. Legal realists presented another, more positive view, stressing the potential of the law of contracts for autonomy and the structuring of institutions.37

While law and social change is a subject of continuing interest, it is frequently addressed today, and for some time, in terms of public law and legislation, clearly a major mechanism through which law addresses the world. It is also, of course, implicated in the discussion—the preoccupation of American legal theory for decades—of judicial decision-making, and was addressed in the 1920s and 1930s by Llewellyn, in his work on contracts and sales. Karl Llewellyn worked in the fields of contracts and commercial law. He was interested in the "role of contract in the social order, the part that contract plays in the life of men."38 He produced writing which related these areas to more general issues of group theory, and, at least once, directly wrote on issues of the family in the context of divorce.39 Related questions were addressed somewhat earlier by Nathan Isaacs,40 again often using contracts as the basic material. When Llewellyn used an idea like the "standardized contract" of marriage, he invoked a contracts literature on the subject which can be represented by Isaacs,41 who worked both on issues of standard-

40. Nathan Isaacs (1886–1941) made his career as a legal academic, albeit one who spent most of his life on the faculty of Harvard Business School rather than on the faculty of a law school.
41. Isaacs’s first professional work, entitled The Merchant and His Law, was first published in the Journal of Political Economy in 1915. It was a subject he worked on until his death. His early work also was heavily focused on legal history.
42. Isaacs’s work on commercial law was cited with approval, and even enthusiasm, by Karl Llewellyn in the 1930s, and his 1917 piece on adhesion contracts is still the first citation on the subject in the Kessler, Gilmore casebook of the 1970s. See FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS: CASES AND MATERIALS 11.
ization and on status to contract ideas, well known in their formulation by Sir Henry Maine. The stance adopted here as to both Llewellyn and Isaacs stresses connections between their perceptions of family law and contract law. Of course, neither devoted primary intellectual attention to issues of family law.

In The Standardizing of Contracts, Isaacs proposed that “status-to-contract” was about differences in degree rather than kind and that these differences were reflected in cycles of change.\(^2\) An adhesion contract which was now a status relation might once have been an individualized contract relation.\(^3\) He saw an advantage to adhesion contracts as they related to issues of oppression in bargaining, suggesting that there was much to be gained by standardization in freeing people from the “accident of power in individual bargaining.”\(^4\)

Isaacs entered the conversation on adhesion contracts through a discussion of the soundness and universality of Sir Henry Maine’s familiar sentence to the effect that “the movement of progressive societies [was] a movement from status to contract.” Roscoe Pound had responded in part by noting that whatever may have been true of Roman law, this was not an accurate statement as to Anglo-American law. Isaacs suggested that perhaps we might think about the whole thing somewhat differently. “After all,” he wrote, “the question is not so much one of status and contract as it is of a broader classification that embraces these concepts: standardized relations and individualized relations.”\(^5\) Maine, he said, labeled as Status those relations, including “ancient family relations, or caste,”

\(^{2}\) Isaacs, supra note 41, at 39-40.
\(^{3}\) Id. at 40.
\(^{4}\) Id. at 47. Isaacs’s papers are at the Baker Library, Harvard Business School. I thank the library for its courtesy in permitting use of these materials.

Isaacs’s doctrinal writing through the 1920s and 1930s considered various aspects of business and commercial law. Throughout his work there is a descriptive or analytic rather than prescriptive quality.

One of the marks of Isaacs’ writing is his historical point of view. Another is his insistence on seeing problems from the point of view of the businessman or the layman. LINCOLN F. SCHAUB & NATHAN ISAACS, THE LAW OF BUSINESS PROBLEMS (1925).

\(^{5}\) ISAACS, supra note 41, at 34 (citing HENRY MAINE, ANCIENT LAW (1861)).
\(^{6}\) Id. at 39.
which were "thoroughly standardized."\textsuperscript{47} In such relations, the "peculiarities of the individual agreement of individual members of society were irrelevant."\textsuperscript{48} But this was true, he continued, "of [many] peculiarities of . . . agreement . . . in later stages of society, where a formal contract of this or that type results in a more or less standardized relation."\textsuperscript{49} Among these relations, of standardized contract, he included not only early Roman forms of sale and English conveyances of land, but also marriage.\textsuperscript{50} For Isaacs, it is worth noting, "[i]n origin, these relations are . . . contractual."\textsuperscript{51} It is in their workings that they "recall the régime of status."\textsuperscript{52} Status-to-contract is a difference of degree, not of kind,\textsuperscript{53} and Isaacs saw in his own time a distinct "veering back to status"\textsuperscript{54} via standardized contracts.

Taking the view of a legal historian writing very broadly about cycles of legal history over millennia, Isaacs noted that it might be that "if we were able to go back to what we accept as standard family relations, we should find their basis, too, in the hardening of individual practices into rules."\textsuperscript{55} It might even be that behind the idea of caste, "there was a progress from the individual non-standardized conduct to the standardized."\textsuperscript{56} The point was that one should get away from an idea of legal history progress as movement on this point in one direction or another, and see "a kind of pendulum movement back and forth between periods of standardization and periods of individualization."\textsuperscript{57} Codification, Isaacs suggested, was associated with the freezing of patterns and equity with the individualized contract.\textsuperscript{58}

Isaacs commented on adhesion contracts again in 1939 in a way which included the idea of standard default contracts and the problem of non-standardized categories of transactions.\textsuperscript{59} He first considered transactions at the bank, post office, department store, doc-

\begin{footnotesize}
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 39-40.
\textsuperscript{54} Id. at 40.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 45-46.
\textsuperscript{59} Nathan Isaacs, \emph{Contracts, Torts and Trusts}, in 6 \textsc{Legal Relations} 1, 34 (Roscoe Pound et al. eds., 1939).
\end{footnotesize}
tor, and insurance company. The standardized categories and relations "are not necessarily simple, but they are standardized to such a degree that, when nothing is said, the law is able to supply the necessary details." There would, however, be a problem when the social situation was changing. "It is only when one uses the method of silence in such odd and outlandish relations as hiring a personal publicity man, campaign manager, travel companion, or ghost writer, that the whole scheme breaks down because the law has no guide for filling in the blanks.

Two points are important here. First, the idea of the law filling in contract terms from a presumed intent based on a standard transaction is very different from an idea in which law tells people what to do based on an imposed norm. Second, in a time of radical social change, the method of silence in which an underlying default contract is assumed by both parties will often be inadequate. If there was a judicially approved default pattern, a problem would arise where a recognized form no longer fit diverse facts.

For present purposes, the significance of Isaacs' historical perspective is not his version of the great cycles of legal history, but the suggestion that the social rule has its ultimate origin in the practice of individuals. The individualized contract might historically—and, by extrapolation, for the future—be itself the source of the legal norm.

Related ideas in contracts and variation of rules of contract—whether or not Isaacs is the precise source—were discussed by Karl Llewellyn, in his work on contracts and, with particular application to the family, in the articles on divorce.

60. Id.
61. Id.
62. Id. Surrogacy contracts provide an example of the odd—if not outlandish—relation for which there is no single clear legal analog, although several are possible.
64. See Zipporah B. Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 HARV. L. REV. 465, 477 n.43 (1987). Wiseman suggests that Llewellyn's two 1939 articles on sales and society (Across Sales on Horseback and The First Struggle to Unhorse Sales) were titled to acknowledge Isaacs' criticism of the Sales Act of 1906, in which a commercial transaction was typified by a horseman purchasing a saddle. Id.
65. See Llewellyn, Divorce I, supra note 31, at 1281–84; Llewellyn, Divorce II, supra note 39, at 249–51.

The unpublished third part of the divorce study is a 17-page typed manuscript in the Llewellyn papers at the University of Chicago. Karl Llewellyn, Behind the Law of Divorce: III (Dated 1932–34, and typed in 1965). I am grateful to the University of Chicago law library for making this material available to me.
Llewellyn’s work on divorce, as he indicated in the first of his articles, was not well received by his colleagues, one of whom suggested that its defects of style were exceeded only by its defects of substance. Still, the work is of continuing interest.

Llewellyn sees not only the “main story” of the history of marriage but also the variant patterns and finally the individual stories and the individually negotiated arrangements within the general patterns. “[T]oo much is thought and written,” he said, “as if we had a pattern of ways that made up marriage.” Recently divorced, and distressed to some degree about the speed with which it was possible to be divorced, Llewellyn nonetheless emphasized the critical point that, in the divorce crisis of the 1930s, only one form of marriage was actually in decay, the pre-industrial limited expectation form, and that “[n]ew institutions of marriage, adjusted to new times, are in the building.” The motives and concerns of those entering were, of course, not the same. For example, as Llewellyn pointed out, “[t]hose who marry at twenty search in the main with other and less economic eyes than suitors ten or twenty years their seniors.”

Llewellyn indicated that this work on divorce related to his other work on law and society and on contracts. He was throughout the essay concerned with the relations between law and society: “Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into; but law is a changing something we help remodel. Law decides cases, but cases

Llewellyn began the third part of the study by reviewing what he had already said: Pair marriage would continue; the desire for relatively permanent relationships was at the base of it, interlocked with matters of sex, child rearing, and economics; expectations of the institution were rising and experiments being made; and divorce was simply the next step in this process. He spoke also of the “neglect-in-action,” of the official theories which called for state participation in divorce proceedings, and for strict attention to defenses in order to demonstrate a practice of consent divorce. Id. at 2.

66. Llewellyn, Divorce I, supra note 31, at 1281 n.*; see also WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 194 (1973) (“[I]nstead of confining himself to testing rigorously and in detail some precisely formulated hypotheses, Llewellyn ended up with a general disquisition on marriage and divorce, a pot-pourri of general theory, statistical data and personal impressions.”).


68. Llewellyn, Divorce I, supra note 31, at 1285.
69. Llewellyn, Divorce II, supra note 39, at 260.
70. Llewellyn, Divorce I, supra note 31, at 1291.
71. Id. at 1281 n.*.
make law. Law deflects society, but society is reflected in the law."

Llewellyn was, as Gilmore noted, a particularizer rather than an abstractor. These details, however, were not simply laid out, but were reconfigured, juxtaposed with constant footnote asides, unsystematically, and to many people irritatingly without order or clarity. But Llewellyn’s descriptions of the human situation generally, whether in the context of family law or contracts or commercial law, have a striking richness and immediacy. He saw, for example, that the issue of marital stability, in which he was interested, had more fundamentally to do with marriage than with divorce itself. “[D]iscussion of divorce has too often started from the premise that divorce was an evil in itself, as if it was divorce that mattered. Whereas what matters is wedlock.” He saw the extreme diversity of institutions which even the United States of his time revealed. “Our society shows not a marriage institution, but a goodly number of such, overlapping, contradictory, both in needs and in effects.” He saw the impact of parents on children, as well as a more general social pressure on young couples. “Not all folk are born parents” he wrote, “indeed I suspect that considerably less than half of the existing stock would accept that job, and that even of women not so hugely many would ‘want children’ if social patterns had not taught them that children were a thing to want.” He saw that marriage norms might vary by region, class, and culture, and stressed that he was dealing with bourgeois marriage.

While is it sometimes suggested that his interest in the family, and particularly his articles on divorce, have their origin in his particular biography—and especially his divorce from his first wife—it is equally important to see that Llewellyn’s intellectual

---

72. Id. at 1283.
74. See Ansaldi, supra note 67, at 717 n.44, (describing Llewellyn’s What Price Contract? as “fantasmagorical” and “wildly undisciplined”).
76. Llewellyn, Divorce II, supra note 39, at 262.
77. Llewellyn, Divorce I, supra note 31, at 1287.
78. Id. at 1290.
79. Id. at 1292 n.26.
80. Id. at 1281.
map included families as among the significant groups in society. The transactions he saw included family transactions. Among these transactions was use of an engagement ring as one of the unambiguous tokens of a "definitive intent to change the existing situation—and to be relied on, the overt sign of utter intent to assume obligation."81

In the context of divorce, Llewellyn had specific institutional concerns and was, by present standards, moderate or even conservative in his proposals, as was also true of his work on Article Two of the U.C.C.82 In the commercial context, what concerned Llewellyn was the way in which the law sometimes dealt with commercial life, and "commercial men." The problem was not merely the abstractions A and B of the Restatements.83 The bloodlessness of those hypotheticals, and the abstract reading of laws with which they are associated, are still criticized by some concerned with individual personality.84 He seemed concerned with protecting individuals85 and creating a system which would permit the growth of various forms of the marital institution. For if the underlying idea was "[n]ew institutions adjusted to new times,"86 it was not likely that the process would somehow end.

In general, Llewellyn wrote on marriage and the family against the background of his understanding that social life was based on groups, not individuals.87 The marriage contract built an institu-

81. Llewellyn, supra note 38, at 711–12; see Margaret F. Brinig, Rings and Promises, 6 J.L. ECON. & ORG. 203, 204 (1990) (suggesting a possible relation between use of engagement ring and abandonment of actions for breach of promise to marry).
82. This is particularly evident in the neglect of issues relating to consumers.
83. Karl N. Llewellyn, Our Case Law of Contract: Offer and Acceptance II, 48 YALE L.J. 779, 781, 785 (1938). The critique of offer-and-acceptance rules in those articles also found their way into the Article Two provisions on formation of contracts.
85. See, for example, references to aging women in Llewellyn, Divorce II, supra note 39, at 280.
86. Id. at 260.
87. Llewellyn was, by this time, generally interested in questions of groups. In 1925, he published an article which contained material on group control. Karl N. Llewellyn, The Effect of Legal Institutions Upon Economics, 15 AM. ECON. REV. 665, 672 (1925). Llewellyn asserted that "[i]ncreasingly, associations are forming which adopt their own rules of action and even settle their own disputes." Id. This was not limited to an observation about sales, and the buyers and sellers of goods. Corporation, labor union, manufacturers' association, farmers' cooperative—their number, size and experience increase. And the rules which, by permission of the state, and within limits which the state prescribes, such associations lay down and apply, are part of the body of our
tion, not a relationship. The domestic arrangement—the family and the household—was in some ways a group like other groups.

But "group" ideas were not to be seen abstractly, and specificity marks Llewellyn's work on divorce as well as his work in contracts. When Llewellyn attempted to redo Williston's Sales Act, he was sensitive to the problems of internal differentiation. The common example of this is the distinction in the U.C.C. between merchants and non-merchants. For present purposes, the important thing is that Llewellyn's idea was not that there was a single mercantile community distinct from the rest of society. Rather, the merchant community was made up of many kinds of merchants, and transactions took many different forms. Llewellyn admired the English Judge Scrutton because he really knew the timber trade. Llewellyn's casebook on sales had an index of commodities. So too, in his work on divorce, the point was that there were many kinds of marriages. Here, just as in the Sales Act, the law recognized only one. The interest in the social side of the law, the underlying human pattern, is a constant in Llewellyn's work. "I love the law of sales," he wrote, "the material grows in fascination for me from year to year; nowhere does one come closer to life or to the observable impact of lawmen on laymen and of laymen on law's ways." Nowhere except, perhaps, the law of divorce. "[D]ivorce," he wrote, "is the major area of interaction between the social institution and the legal. . . ."

---

Id. By analogy, these rules, in the context of marriage, could be seen as the ways of family life or the ways of wedlock. Llewellyn's ideas about groups are explored in Allen Kamp, Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context (unpublished manuscript on file with author).

88. Williston's Uniform Sales Act (1906) was ultimately adopted by 37 states.
89. U.C.C. § 2-104, cmt. 1. (1989) ("This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer.").
91. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 1073–77 (1930).
92. Llewellyn, supra note 87, at 706.
93. Llewellyn, Divorce I, supra note 31, at 1307. For Llewellyn, the family exists as an image in the background of other discussions of other institutions. Llewellyn saw the family and family issues as connected to the central inquiries of law, including contract law, and society. The family was also in his mind when he thought about public law. Llewellyn began his discussion of the Constitution with a section called "the private law background." Karl N. Llewellyn, The Constitution as an Insti-
In relation to contract law, family cases appeared to Llewellyn as trouble spots in a field largely focused on the problems of business. But the area of family contract law did exist. "[I]t includes the promise made and relied on, but which did not bargain for reliance, and in the case of promises to provide it laps over into the third party beneficiary problems."\(^9\) Still, he cautioned, precedents on consideration, for example, could not be carried over unthinkingly from family cases to professional dealing among commercial parties.\(^9\) Llewellyn included marriage and family as two among many of society's "going concerns." Presumably in all cases, going concerns "are not apples to be plucked from trees."\(^9\) Despite attacks on the idea of viewing parties to contracts as individuals,\(^7\) in the context of the on-going concern of marriage, perhaps inevitably, he stressed the role of individual work and individual action.\(^9\)

In his work on divorce, Llewellyn was perhaps more explicitly normative than we expect from the writer who insisted on at least the temporary separation of is and ought.\(^9\) He saw as a particular concern the older woman.\(^10\) He feared that divorce was too easy,

---

\(^9\) Llewellyn, supra note 38, at 742.
\(^9\) Llewellyn, supra note 87, at 748-49.
\(^9\) Llewellyn, Divorce II, supra note 39, at 278.
\(^9\) Llewellyn, supra note 38, at 734 (referring to "the vicious heritage" of regularly viewing the parties to a deal as single individuals); see infra text accompanying 185.
\(^9\) Llewellyn, Divorce II, supra note 39, at 260. Llewellyn stressed that "[t]he work of building marriages, whatever the conditions, is individual work." Id. Also, "[t]o generalize existent ways into such a pattern, or even into a fixed number of typical patterns, is to lose sight precisely of that rôle of individual action which we are seeking to explore." Divorce I, supra note 31, at 1285.
\(^9\) See HORWITZ, supra note 37, at 210-12; see also Karl N. Llewellyn, On What Is Wrong With Legal Education, 35 COLUM. L. REV. 651, 662 (1935).
\(^10\) Llewellyn, Divorce I, supra note 31, at 1290, 1306; Divorce II, supra note 39, at 280.
already in his generation, and thought that there might be special rules for marriages of long standing.\textsuperscript{101} He was doubtful about special rules for marriages with children, largely because he believed that whatever binding force the children have would already have operated.\textsuperscript{102} Throughout, he worried about the question whether law had any useful role in maintaining some particular value or whether the social sanctions could stand on their own.\textsuperscript{103} But he did not seem prepared to simply follow society, or facilitate existing practice. Writing in 1931, Llewellyn addressed two kinds of law, one mandatory and based on public policy, the other "yielding."\textsuperscript{104} Both of these are "law,"\textsuperscript{105} and both have something to do with law's channelling of human behavior.\textsuperscript{106} Default contracts, or presumptive contracts, also channel behavior and expectations.

The application of these ideas to the present situation in domestic arrangements would look something like this. Our sense of the relative rights and obligations of married couples, nonmarried couples, and roommates—all arguably kinds of families—typically differ substantially. This fact suggests that social context dictates different kinds of default contracts to which the individuals in these relationships may be presumed to have adhered. Recognition of this point is concealed first by an emphasis on romantic love and second by what are taken to be the individualistic aspects of romantic love. These default ideas seem to exist, however, and are available to the legal system as the basis for implied terms in a contract and are also available in dealing with the issue of whether it is likely that in fact a certain sort of contract was made.

Of course, one would have to define the relevant community to see what expectations might be in fact at any time. In general, however, we seem often to have such expectations, some of which may be uncomfortable for us to acknowledge. This is why, when a woman we believe to have been a "mistress," rather than a "wife," indicates that a man promised her lifetime support, we may consider his promise mere pillow talk. It seems to be an analog of seller's

---

\textsuperscript{101} See the discussions of "earned and vested rights" and "sense of security" on partners in Llewellyn, \textit{Divorce II}, supra note 39, at 279–80. See also \textit{id.} at 284 ("There is some point in making the established concern more difficult to dissolve.").

\textsuperscript{102} \textit{Id.} at 284.

\textsuperscript{103} \textit{See} Llewellyn, \textit{Divorce I}, supra note 31, at 1296.

\textsuperscript{104} Llewellyn, \textit{supra} note 38, at 729; \textit{cf.} U.C.C. \S\ 1-102(lb), (3) & cmt.2 (1989) (discussing freedom of contract and U.C.C.).

\textsuperscript{105} Llewellyn, \textit{Divorce I}, supra note 31, at 729 n.54.

puffing, something which is not seriously understood as contractual
talk. Thus, when Llewellyn thought that non-marital sexual ar-
rangements were "specialized" and did not involve property or in-
heritance,\textsuperscript{107} he was simply reflecting a general social view. We
may not think the same way about a relationship we consider a
"trial marriage," or a "pre-marital" or "non-marital" partnership. A
"star boarder" may not be involved in the same sort of deal as a
non-marital domestic partner.\textsuperscript{108} The descriptive language com-
unicates our outside sense of the "deal" when we distinguish be-
 tween a "live-in companion"—the apartment belongs to the one whose
companion he or she is—and two people living together under a
more egalitarian arrangement, whose property implications are less
certain.

Of course, the contract can be express or implied, but this does
not free us from the underlying problem of knowing what a contract
"means" or when or how to imply a contract. The classic formulation
of the doctrine of implied contracts is that of Holmes: "You always
can imply a term in a contract.\textsuperscript{109} The question is why you do it.
It might be, "because of some belief as to the practice of the commu-
nity or of a class, or because of some opinion as to policy."\textsuperscript{110}
Whether contracts are express or implied, the policies involved
relate to the appropriate relations between men and women gener-
ally. These policies were rooted in the ideal of marriage, at a time
when people had a relatively clear sense of what marriage and non
marriage meant. Some of these traditional meanings, and the con-
tracting around them, are the subject of the next section.

III. DOMESTIC ARRANGEMENTS: FICTIONAL NEGOTIATIONS,
TRADITIONAL UNDERSTANDINGS, AND THE
IDEA OF A DEFAULT CONTRACT

"It takes years to make a friendship: but a marriage may be settled
in a week—in an hour."\textsuperscript{111}

This section invokes some fictional agreements to illustrate the
idea of the default contract and to point out that domestic ar-

\textsuperscript{107} Llewellyn, Divorce: I, supra note 31, at 1298. Llewellyn also commented on
problems of duration in this context. "Chance passions do not so often outlast a year.
Passions which do outlast that period raise claims of their own." Llewellyn, Divorce:
II, supra note 39, at 283.

\textsuperscript{108} See infra note 161 and accompanying text.

\textsuperscript{109} Holmes, supra note 5, at 466.

\textsuperscript{110} Id.

\textsuperscript{111} 2 ANTHONY TROLLOPE, RALPH THE HEIR 328 (John Sutherland ed., Oxford
Univ. Press 1990) (1871).
rangements, marital and non-marital, have often been understood as involving an explicit bargain in fact. That bargain may be reached by the softer term "negotiation," but it is a bargain nonetheless. This section does not treat the issue of enforceability as a "contract" but only argues that a focus on the emotional or sentimental or sexual aspects of personal relationships does not tell the whole story and may even mislead. The idea is that undertakings to live a joint life on a permanent or semi-permanent basis are not made without serious consideration of what that joint life might entail in terms of what might be called the actual daily and material base of the relationship. Such undertakings involve bargains and exchanges in fact. Sometimes, as will be argued, that bargain is largely assumed in the idea of marriage (or not). The proposal to marry contains all the terms. As already noted, the marriage contract, as understood by the people proposing and accepting, is more specific regarding mutual obligations than is sometimes suggested.

Although Anthony Trollope was perhaps not thinking about it this way, the point that the standard default contract both exists and is specific underlies his comment that marriage can be settled quickly. This is because the broad outlines of "marriage" and the contract of marriage, are generally understood in terms of the

---

112. The U.C.C. defines agreement as the "bargain in fact" as found in language or by implication. U.C.C. § 1-201(3) (1989). Whether the "agreement" is a "contract" is separately determined. Id.

In the commercial law discussion, it is plain that "law" and "practice" relate to each other. Thus Llewellyn emphasized the issues of custom, leeways, tolerances, and the like, all tending to the point that the contract itself was only the beginning of the inquiry of what a contract meant. Many factors went into what a contract meant. Some implied terms, for example, would be assumed from the situation and in other cases custom or trade usage. Flexibility and readjustments were assumed as desirable and normal, and dispute settlement outside the courts was also considered normal.

These are not necessarily the views of present writers on family and contract, who may assume, for example, a rigidity in the contractual arrangement and a necessary emphasis on litigation as a remedy which Llewellyn would not have assumed. See generally Llewellyn, supra note 38.

113. See, e.g., EDWARD GIBBON, MEMOIRS OF MY LIFE (Betty Radice ed., 1990) (1796)

A matrimonial alliance, has ever been the object of my terror rather than of my wishes. I was not very strongly pressed by my family or my passions to propagate the name and race of the Gibbons, and if some reasonable temptations occurred in the neighborhood, the vague idea never proceeded to the length of a serious negotiation.

Id. at 146.

114. See supra note 15 and accompanying text.

115. Jesse Bernard suggests that a marriage contract is actually two contracts:
obligations assumed in an ongoing relationship. Sometimes, however, the bargain in a marriage contract is rather more explicit on terms in addition to, or different from, the standard default contract.

In dealing with the history of the family in England, historian Lawrence Stone has urged a focus on three modern western assumptions about domestic life. The first of these assumptions is that "there is a clear dichotomy between marriage for interest, meaning money, status or power, and marriage for affect, meaning love, friendship or sexual attraction; and that the first is morally reprehensible." The second is that "sexual intercourse unaccompanied by an emotional relationship is immoral, and that marriage for interest is therefore a form of prostitution." The third assumption is that personal autonomy "is paramount."

Stone's argument is that the history of marriage and the family is not one uniformly based on these assumptions. Whatever we conclude about the historical issues which Stone addresses, it seems that we must, in discussing our own institutions, understand that older ideas are not dead. Our world is one in which newer ideas are superimposed on older ones, but the older ones survive nonetheless. Society's older ideas included not only ideas suggested by Stone's discussion, but also ideas relating to the permanence and stability of marriage, as well as ideas of strong interests, connections, and affections which are not marital.

Our present cultural assumption is that marriages, to be respectable, must be for love. As Georg Simmel suggested, there is a "disparagement of personal dignity that nowadays arises in every marriage that is not based on personal affection." A "sense of decency," he continued, "requires the concealment of economic motives." This, he noted, is not the case "in simpler cultures."

Whether or not nineteenth-century England was a simpler culture, it seems to have been a culture in which the love and money issues of marriage were much discussed. And while an English

---


117. Id.
118. Id. at 87.
119. Id.
120. Id. at 87–88.
122. Id.
123. Id.
sense of decency might have required discussion of "love," English values also allowed Trollope to paint a nonjudgmental picture of a man who proposed to four women in one year, finally marrying the last. 124

It is reported that Trollope composed hundreds of marriage proposals in his roughly fifty novels. A few of them will be referred to here, including the one that apparently was his own. It seems legitimate to focus on a nineteenth-century English writer here. Even today, discussion of marriage and family typically begins with the traditional views expressed in Maynard v. Hill 125 or the definition of Hyde v. Hyde. 126 While some variation exists between American and English marriage relationships, the basics are substantially similar; at any rate, they are similar enough for the purposes of this discussion. 127

There are, of course, differences between our situation and the social situations Trollope describes. One difference is the role of the father in the marital negotiations of the children. For example, in Is He Popenjoy?, the father "stipulates" for his engaged daughter a house of her own in London. A married woman, he believes, "should always have some home of her own." 128 Here, both the Father's role and the substance of his demand do not accord with middle-class expectations. The role of the father is again strikingly illustrated in a sentence from Ralph the Heir: "He engaged hisself to me to marry her." 129

A second issue is the perception of marital control. In Trollope's era, marital control often meant the direct regulation by the husband of the hourly activity of his often child-wife, including her reading and domestic concerns. 130 Finally, more generally on the question of the status of women, the work of Trollope, which pre-

124. See 2 TROLLOPE, supra note 111. Trollope simply portrayed the man as ordinary and not particularly sensitive. Note also the contrast between revocable and irrevocable love in Orley Farm. ANTHONY TROLLOPE, ORLEY FARM 270 (David Skilton, ed. Oxford Univ. Press 1985) (1862) [hereinafter TROLLOPE, ORLEY FARM].

125. 125 U.S. 190, 205–16 (1888).


129. 2 TROLLOPE, supra note 111, at 101.

130. In the modern American context, this type of control is not what we mean by male dominance within a marriage. Instead, the modern idea of marital control has more to do with subordination of a wife's independent interest to her husband's career and comfort. The husband's life ultimately defines family life. Additionally, there is sometimes an issue of physical abuse.
dates women's suffrage in England and largely ridicules women's political rights, contrasts sharply with contemporary views of women's rights.131

While not realistic in the sense of naturalistic fiction or socialist realism, Trollope's work is usually understood to have a profound realism. Nathaniel Hawthorne asked: "Have you ever read the novels of Anthony Trollope? . . . [They are] just as real as if some giant had hewn a great lump out of the earth and put it under a glass case, with all its inhabitants going about their daily business. . . ."132

Trollope's various marriage proposals represent a set of typical conversations about marriage. One editor has suggested that the classic problem in Trollope, is that of marriage for love or money.133 Trollope's view of marriage—or perhaps ultimately his questions about marriage—intensified over time. In the end, he seems to have had many questions and doubts about the institution of marriage. While Trollope thought it necessary that love be stressed in novels, particularly the love of young people, he seemed very clear about the complexity of the motivations of those about to set up joint lives together.134 This seemed particularly true when his characters were no longer young. Trollope's general view of marriage is found in Phineas Finn, in the voice of a woman:

I shall take the first that comes after I have quite made up my mind. You'll think it very horrible, but that is really what I shall do. After all, a husband is very much like a house or a horse. You don't take your house because it's the best house in the world, but because just then you want a house. You go and see a house, and if its very nasty you don't take it. But if you think it will suit pretty well, and if you are tired of looking about for houses, you do take it.135

134. Trollope described his own marriage as essentially happy and successful. He wrote in his autobiography "My marriage was like the marriage of other people, and of no special interest to any one except my wife and me." Trollope, supra note 132, at 64-65. In fact, his marriage has been of considerable interest to biographers and the subject of some speculation though very little is actually known about his marriage or his wife. See, e.g., Victoria Glendinning, Anthony Trollope 143-53 (1991) (describing Trollope's marriage). Also see Trollope, supra note 132, at 288, in which he records the significance in his life of his friendship with an unidentified American woman (Kate Field, whom he met in 1860).
135. Trollope, Phineas Finn, supra note 133, at 132. Also see Trollope, Orley
Marriage for Trollope is a solution to problems which vary with
the situation of the individuals involved. Marriage resolves the
issue of leaving the parental nest while simultaneously producing,
hopefully, a situation of which parents can approve. Marriage also
solves the problem of who shall be the coparent of desired offspring,
or who shall fill up a life in other ways when offspring are not seen
as part of the future. Marriage provides a co-income producer when
that is needed or cook-housekeeper-companion when that is needed.
The problem comes first, the model solution second and the individ-
ual third. Trollope often discusses love in terms of something which
one hopes to achieve after marriage. To learn to love someone is an
enterprise for certain young women after the man has been accept-
ed.

In some of Trollope's work, the explicit individual motivations
for marriage are apparent, and it is clear that the search for a
spouse is a means to particular ends. For example, in one of his
later works, Mr. Scarborough's Family, Trollope offered a long
negotiation over the marriage contract between a man who wants
an heir and a woman who wants a good establishment with a resi-
dence for her friend and companion.

A. The Proposal and Some Contracts Issues

Trollope's proposal in Dr. Thorne (apparently his own proposal
to Rose Hazeltine) suggests that the offer-and-acceptance aspect of
the marriage contract may be very elliptical as to details.

Gentleman: Well miss, the long and short of it is this: here I am.
Take me or leave me.

FARM, supra note 124, which contrasts the method of "moulding a wife" with the
"ordinary plan": "Dance with the girl three times and if you like the light of her eye
and the tone if her voice with which she, breathless, answers your little questions
about horseflesh and music—about affairs masculine and feminine—then take the
leap in the dark." Id. at 328–29.

On certain models of marriage, the spousal relationship involves economic
cooperation and the raising of children. In relation to each other, spouses may have
secondary roles. A familiar expression of this view of marriage (if not a worse one) is
found in Plato's description of the penultimate encounter of Socrates and Xanthippe.
PLATO, PHAEDO (Frederick J. Church ed., 1951). For discussion of changing concep-
tions of, and demands on, marriage, see Barbara Ehrenreich, Burt, Loni and Our
Way of Life, TIME, Sept. 20, 1993, at 92; Margaret Mead, What Does the American
Man Expect of a Wife?, REDBOOK MAG., May 1962, at 28, 30. See also Carol
Weisbrod, Divorce Stories: Readings, Comments and Questions on Law and Narrative,

136. ANTHONY TROLLOPE, MR. SCARBOROUGH'S FAMILY 240–60 (Geoffrey Harvey
137. Id.
Lady: scratching a gutter in the sand with her parasol . . . Of course I know that's all nonsense.
Gentleman: nonsense. By Jove it isn't nonsense at all. come, Jane, here I am. come, at any rate you can say something.
Lady: yes, I suppose I can say something.
Gentleman: well, which is it to be take me or leave me.
Lady: . . . well I don’t exactly want to leave you . . . . And so it was settled.¹³⁸

The fact that the parties are “polite lovers,”—a “gentleman” and a “lady”—assumes something about the context of the transaction. The indirection of the acceptance says something also. A lady’s acceptance may be hesitant, tremulous, and weak, but is nonetheless enough. Even if there had been a certain amount of pressure put on the lady, duress would likely not be found.

Bishop notes that “[p]ersons are nowhere compelled to marry.”¹³⁹ This is true in the sense that fraud and duress will void a marriage and that in the modern world direct compulsion is viewed as an evil.¹⁴⁰ But, as a Trollope novel has it, a girl is “taught to presume that it was her destiny to be married.”¹⁴¹ A man, by contrast, generally “regards it as his destiny either to succeed or fail in the world.”¹⁴² Marriage is assumed as desirable, for both, but quite differently in Trollope’s world.

Capacity to consent is also an issue. An old French argument on parental consent had it that the consent of elders was necessary because when a man was under the influence of the most imperious of the passions, he was not exercising free will.¹⁴³ So perhaps “love,” of itself, disqualifies men and women about to marry from an appropriately contractual state of mind.¹⁴⁴ (The issue of the emotional state undercutting consent in those ordinarily capable of contracting is familiar in contracts and often quite difficult. Nonetheless men and women equally enter into contracts, and it should

¹³⁸. ANTHONY TROLLOPE, DOCTOR THORNE 87–88 (Ruth Kendell ed., Penguin Books 1991) (1858); see HALL, supra note 131, at 88–89, 167–68 (concluding that Trollope was recounting his own history).
¹³⁹. 1 BISHOP, supra note 14, § 1.
¹⁴⁰. Id. §§ 210–13.
¹⁴¹. HALL, supra note 131, at 89 (quoting ANTHONY TROLLOPE, AN EYE FOR AN EYE).
¹⁴². Id.
¹⁴⁴. See Stake, supra note 2, at 441 (discussing “romantic intoxication”). But in other contexts there may be a demand for prudence. See generally Harry W. Vanneman, Annulment of Marriage for Fraud, 9 MINN. L. REV. 497, 500–17 (1925). A quite deliberate and rational approach to marital decision-making, to the extent that it involves children, is suggested by the idea that genetic counselling is useful premaritally as a factor influencing the decision whether or not to marry.
The real point, as Llewellyn noted, is that "[a]greement does not even today carry any necessary connotation of real willingness."\textsuperscript{146} Indeed, "acquiescence in the lesser evil is all that need be understood."; it is essentially a factual question.\textsuperscript{146} "The problem of 'reality of consent' is essentially one of determining what types of pressure or other stimuli are sufficiently out of line with our general presuppositions of dealing to open the expression of agreement to attack."\textsuperscript{147} We assume that the pressure on women particularly to marry is given, and is no more of a problem than the pressure to buy food.\textsuperscript{148}

The language of Trollope's proposal assumes that a great deal about the details of the arrangement is known by both parties, as would be the case in any specific social context.\textsuperscript{149} (Or to the extent not known, as contractual material is not known, not important until some disaster strikes.) The deal itself is standard. The dickered terms, as Llewellyn would have put it, relate largely to the individuals in the deal. At this point, the parties might have wanted to discuss major deviations from the standard arrangement. Projecting the story forward some decades, one can imagine that conventional deviations might have involved the childless marriage; a career (as against a job, or a domestic life) for the wife; the presence of resident in-laws, all quite possibly "dickered" in fact. Beyond this, in the background, the other terms are provided by the situation. Societies indicate the responsibilities of a wife, a doctor's wife, a farmer's wife. The roles are what is being assumed by the agreement to marry. And in one sense the whole matter is, as Trollope says, a "leap in the dark."\textsuperscript{150}

In these terms, an arranged marriage is a standardized contract largely mandatory in its terms in which the parties do not select each other.\textsuperscript{151} In some cases, nothing much is said by the

\textsuperscript{145} Llewellyn, \textit{supra} note 38, at 728 n.49.
\textsuperscript{146} Id.
\textsuperscript{148} Despite the familiar comment that "necessitous men are not, truly speaking, free men." Vernon v. Bethell, 28 Eng. Rep. 838, 839 (1762).
\textsuperscript{149} See \textit{supra} note 138 and accompanying text.
\textsuperscript{150} Both \textit{Ralph the Heir} and \textit{Orley Farm} use this language. \textit{TROLOPE, ORLEY FARM}, \textit{supra} note 124, at 329; 2 \textit{TROLOPE}, \textit{supra} note 111, at 329.
\textsuperscript{151} In some contexts, however, they may have met through arrangement, an
individual parties because nothing has to be said. The context provides the terms as between the individuals, and the families have done the bargaining which had to be done.\footnote{152} Some marital negotiation may involve ideas contrary to the official ideal of the marriage contract.\footnote{153} Consider the following proposal, from Anita Brookner’s \textit{Hotel du Lac}:

“I am proposing a partnership of the most enlightened kind. A partnership based on esteem, if you like. Also out of fashion, by the way. If you wish to take a lover, that is your concern, so long as you arrange it in a civilized manner.”

“And if you . . . ”

“The same applies, of course. For me, now, that would always be a trivial matter. You would not hear of it nor need you care about it. The union between us would be one of shared interests, of truthful discourse. Of companionship. To me, now, these are the important things. And for you they should be important. Think, Edith. Have you not, at some time in your well-behaved life, desired vindication? Are you not tired of being polite to rude people?”\footnote{154}

This bargain, which does not end at the altar, stresses the social realities of marriage and the importance placed on marriage for women, especially, in terms of respectability and status. The arrangement\footnote{155} fails because, in effect, there was too much compromise and not enough love in the deal.\footnote{156}

Some contracts, of course, are for nonmarital sex-money arrangements. In Trollope, these are seen as traditional in Europe, and also in fact in England.\footnote{157} Far from being expressions of individual form.

\footnote{152} Trollope makes clear the generally powerful role of families in arranging marriages. \textit{See}, \textit{e.g.}, \textsc{Anthony Trollope, Can You Forgive Her?} 13–34 (Andrew Swarbricke ed., Oxford Univ. Press 1982) (1864) (describing the arranged marriage between Glencora and Duke).

\footnote{153} For example, an agreed-upon childless marriage would have been such a case before the public acceptance and legalization of contraception.\footnote{155} Trollope, \supra note 2, at 221–23.

\footnote{154} \textsc{Anita Brookner, Hotel du Lac} 166–67 (1984). A marriage similar to this is described by Trollope, but it looks more like a modification of the contract than the original contract. 2 \textsc{Trollope, supra} note 128, at 20–33. On open marriage contracts, see Schultz, \supra note 2, at 221–23.

\footnote{156} The proposal, with its agreed-upon tolerances explicitly on the table, also is suggestive of a comment of Trollope’s to the effect that when he was a child a distinction was made between games in which cheating was allowed, agreed upon in advance, and games in which cheating was not allowed. 1 \textsc{Anthony Trollope, North America} 144 (St. Martins Press 1986) (1862).

\footnote{157} \textsc{Brookner supra} note 154, at 167. Historically, love-based deals have also fallen through because of parental refusal to give consent. For example, Edward Gibbon recounts his early love, his father’s refusal to approve, and his subsequent life as an unmarried man of letters. \textit{Gibbon}, \supra note 113, at 104–05.
vidual bohemianism, they are understood as entirely conventional in nature.\textsuperscript{158}

Some nonmarital arrangements\textsuperscript{159} can involve fairly explicit contracting. For example, in \textit{Comeback} by Dick Francis the following brief encounter is described:

Into a long smiling silence, lolling back in the armchair, I said casually, “How about a bonk, then?”

She laughed. “Is that Foreign Office standard phraseology?”

“Heard all the time in embassies.”

She’d long had the intention and I hadn’t misread her.

“No strings,” she said. “Passing ships.”

I nodded.

“Upstairs,” she said economically, taking my glass.\textsuperscript{160}

Ross Thomas describes another non-marital situation: “We had one of those oh so modern arrangements, he lived here and we split expenses. He gave me a check every month for seven hundred and fifty dollars and I paid the bills—food the mortgage utilities things like that. He was sort of a star boarder, I guess.”\textsuperscript{161} These examples involve language. The language is a clue to transactional patterns which may well be standard and subject to analysis as default contracts.

Some feminist issues involved in the question of marriage and other domestic contracts are obvious. One is status after marriage, summarized in 1700 by the wife-to-be in a play by Congreve, who suggested that even after she had negotiated as fully as possible for what she wanted, it would still be necessary to “dwindle into a wife.”\textsuperscript{162}

The wife is inferior to the husband in marriage because, for some, the female is inferior to the male in general. Trollope, for example, believed in the hierarchy of male and female\textsuperscript{153} and sug-

\textsuperscript{158} “The baron knows what is expected of him,” Collette wrote in \textit{Gigi}.

\textsuperscript{159} While nonmarital arrangements may vary widely, all might be called cohabitation and be analyzed in terms of contract. These would include cases in which marriage is desired but not possible and also cases in which marriage is not desired and not necessarily relevant as a model (for example, sibling domestic arrangements).


\textsuperscript{161} ROSS THOMAS, \textit{NO QUESTIONS ASKED} 112 (1976) (written under pseudonym Oliver Bleeck).

\textsuperscript{162} WILLIAM CONGREVE, \textit{THE WAY OF THE WORLD} (Henry T.E. Perry ed., Appleton-Century-Crofts 1951) (1796); see also Katha Pollitt, \textit{Bothered and Bewildered}, N.Y. TIMES, July 22, 1993, at A23. Pollitt notes that when women are economically self-sufficient, they are willing to take care of children, but not willing to care for husbands, although “most men still seem to expect it.” \textit{Id}.

\textsuperscript{163} \textit{See supra} note 131 and accompanying text.
gested that Eve would not have tempted Adam had she not accepted him as her Lord.\textsuperscript{164} The link to marriage is made plain in a comment in which one of Trollope's characters defines marriage as the “manner in which the all-wise Creator has thought fit to make the weaker vessel subject to the stronger one.”\textsuperscript{165} While the statement is rejected by the woman to whom it is addressed, it is rejected on the narrow point that the particular man under discussion is not fit to dominate her.\textsuperscript{166}

When Lord Tennyson wrote, in \textit{Locksley Hall}, of the husband to whom the wife was “something better than his dog, a little dearer than his horse” he described a boorish master in a relationship in which there would always be a master.\textsuperscript{167} When, in \textit{Mr. Scarborough's Family}, Trollope describes a father urging a daughter to marry a man who will not mis-treat her, he is thinking along similar lines though describing a kinder individual.\textsuperscript{168}

Inequality traditionally underlies the idea of husband and wife, even when there is no direct reference to it. In the United States, Justice Bradley’s late nineteenth-century concurrence in \textit{Bradwell v. Illinois}\textsuperscript{169} remains a classic statement of the conventional understanding.\textsuperscript{170} Justice Bradley wrote: “The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”\textsuperscript{171} Wife and mother,

\footnotesize

\textsuperscript{164} 2 TROLLOPE, supra note 155, at 96. The combination of marriage for interest and conventional feminine behavior can be presented as comic. Thus in a novel by Wodehouse, a father insists on a show of sentiment and enthusiasm from his daughter who is more direct about the central aspect of the (ultimately failed) arrangement. PELHAM G. WODEHOUSE, \textit{If I Were You} 17–19 (1931).

The daughter tells her father “you know and I know that it's simply a business deal. I provide the money, Tony supplies the title. . . . You brought me down here to land Tony. And I've landed him.” \textit{Id.} at 17. Finally, she responds to her father’s insistence on affect and role-playing and displays some appropriate enthusiasm: “Oh, Father dear,’ said Violet girlishly, ‘when Tony asked me to be his wife, I was so taken aback and so completely flabbergasted to think that he should feel that way about me that I simply gasped.” \textit{Id.} at 18.

\textsuperscript{165} ANTHONY TROLLOPE, LINDA TRESSEL 253 (Robert Tracy ed., Oxford Univ. Press 1991) (1868).

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} ALFRED TENNYSON, \textit{Locksley Hall, in LOCKSLEY HALL, DAYDREAM AND OTHER POEMS} 34, 38 (New York, T.Y. Crowell & Co. 1892). Trollope, too, invoked the dog image in a speech by Laura. “You cannot make a woman subject to you as a dog is so. You may have all the outside and as much of the inside as you can master. With a dog you may be sure of both.” TROLLOPE, PHINEAS FINN, supra note 133, at 398.

\textsuperscript{168} TROLLOPE, supra note 136, at 498.

\textsuperscript{169} 83 U.S. (16 Wall.) 130 (1872). The Court held that the Fourteenth Amendment does not prevent the state from limiting admission to the bar to men. \textit{Id.} at 138–39.

\textsuperscript{170} \textit{Id.} at 139 (Bradley, Swain & Field, JJ., concurring).

\textsuperscript{171} \textit{Id.} at 141–42 (Bradley, Swain & Field, JJ., concurring); see SIMMEL, supra
without economic independence or political rights. The law of the creator was to be applied universally, despite the fact that women might not marry, since “the rules of civil society must be adapted to the general constitution of things and cannot be based on exceptional cases.” The idea of individualized contract is exactly about the possibility of making room for exceptional cases, within or outside of the framework of marriage.

The discussion in this Essay to this point has been intended to illustrate exchanges and bargains in-fact and to raise certain contracts issues relating largely to issues of entry into domestic contracts. Whether we want to consider these bargain-in-fact “legal contracts” will turn in part on problems of enforcement. These issues require a separate discussion, and are the subject of part IV.

IV. SOME ISSUES OF REMEDIES AND ENFORCEMENT

We have long indulged in the presumption that no amount of effort or agreement on the part of individuals can result in a contract unless there is a law ready to give that effect to the acts of the parties. Hence we must argue in a circle: the law will recognize and enforce as contracts such agreements as it chooses to recognize and enforce.

Nathan Isaacs
*Contracts, Torts and Trusts*

To some degree, the perspective used here assumes a world in which law is ubiquitous, floating over and capable of creating a context for all relationships and all behavior. Subject to the self-restraint of constitutions or conventions, everything is, in theory, within the law’s reach.

All relationships can also be seen through the law of contracts—some more comfortably than others. By bending and twisting the idea of choice, most relationships can be understood as chosen, even if the choice is the refusal of an association. Even the

---

note 121, at 378 (“The significance and the consequences that society attaches to the sexual relations between man and woman are correspondingly based on the presupposition that the woman gives her total self, with all its worth, whereas the man gives only a part of his personality in the exchange.”); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 16–17 (1988).

172. Bradwell, 83 U.S. at 141–42 (Bradley, Swain & Field, JJ., concurring).

173. See, e.g., Diana T. Meyers, *Introduction to KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 14 (Diana T. Myers et al. eds., 1993) (suggesting child’s acceptance of benefits as possibly creating contractual relationship). Perhaps even involuntary relationships—for example, in-laws—can be understood as ancillary to the primary choice to marry.
idea that we cannot choose our parents is modified as we see children choosing new parents not only “spiritually”—as they used to say—but legally. Within the law of contracts, some bargains are not contracts but are mere agreements, to be left without State intervention in whatever situation may then exist.174 One issue in determining the answer to the question of which bargains become contracts relates to issues of enforcement.

The contractual view focuses on individual autonomy in a way that denies much reality in the world. It is true in the same sense that stone walls do not a prison make, and that what matters is not the thing but our response to the thing. The contractual emphasis would cut against an observation to the effect that, for example, women do not “choose” their traditional roles.175 Rather, the argument assumes that one can choose the path of least resistance, and that in fact most people do.176 In the end, the contractual emphasis is not a truth or a rule of law but a possibility, to be accepted or rejected in particular circumstances.

The problem which some of the Realists saw was that contract law had a single set of rules, which applied to all cases. In the context of sales,177 rather than attempting to define and then impose a perfect model, they developed the Uniform Commercial Code as a framework for different models, different forms, now and in the future. As the statute was a framework for commercial models, the contract was a framework for human behavior. Thus Llewellyn wrote that “the major importance of legal contract is to provide a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups, up to and including states.”178

174. This section does not deny the point that, in general, there is an over emphasis on the legal and remedial aspects of contract law, and inadequate stress on contract as on-going framework. See Macaulay, supra note 1, at 512–25.

175. See Shultz, supra note 2, at 226–28.

176. Thus people choose to marry rather than to negotiate special or individualized contracts covering some of the same ground. There are overriding issues of knowledge of the law are involved here.

Lynn Baker argues that people should know more about the economic aspects relating to the law of marriage. Lynn A. Baker, Promulgating The Marriage Contract, 23 U. Mich. J.L. Ref. 217, 224–37 (1990). For example, people may be particularly ignorant of the tax consequences of the marriage contract or the economic issues of divorce. The argument for default contracts assumes that the central expectations of marriage are generally known.

177. See supra notes 88–93 and accompanying text (discussing promulgation of Uniform Sales Act). But see Isaacs, supra note 63, at 667.

178. Llewellyn, supra note 38, at 736–37. The framework was not rigid. Llewellyn observed as to contracts that they are so overlaid with unrecorded adjustments and further factual agreements that in the end “the initial contract [is] a
The marriage contract was itself such a framework for the individuals and a variation in that contract—whether or not litigated—would, for those individuals, adjust the framework. Even when a court might say, as in the well known case of Balfour v. Balfour,\textsuperscript{179} that a contract between husband and wife could not stand, this was because such a contract was thought to be not intended in fact.\textsuperscript{180} It might, then, have been intended on some other facts, including a changed conventional understanding about the legitimacy of such contracts.

Of course any contract may still be "unconscionable" or "unfair," and thus unenforceable.\textsuperscript{181} The problem for us is not so much judicial power to police domestic contracts for fairness and the like as our judicial standard. What are the objectives of the state in these contexts? What is fair? How do we know it? Where do we look for state policy on the question? Here the perspective interior to contract law offers certain assistance.

Once we knew—or felt—when a contract was unconscionable or unfair under the assumptions about the nature of marriage, the family, and men and women on which the traditional arrangements were based. Once state policy on marriage referred to an answerable question. We knew that the traditional family was the goal. That family had a certain shape, and people within it had certain roles.\textsuperscript{182} Without elaborating the point again here, it is clear enough that the family was not egalitarian either as to adults and children or husband and wife. This point about roles and hierarchy has consequences for the idea of fairness. If a woman is a breeder or entertainer or housekeeper, and is generally viewed as replaceable, if not disposable, then a small pension on divorce may be "fair." It may be "fair" that most of the money should remain with the one who had earned it through activity in the market. This would be true, no matter how great the wife's reliance on the idea and even the representation that marriage meant sharing, each bringing

\textsuperscript{179} 2 K.B. 571 (1919).
\textsuperscript{180} Id. at 579–80. The court believed that the parties "never intended to make a bargain which could be enforced in law." Id. at 575. On intention in Balfour, see KESSLER & GILMORE, supra note 41, at 100.
\textsuperscript{181} See U.C.C. § 2-302. Even aside from such a direct policing doctrine, results can be achieved by manipulation of technical doctrines, although "[c]overt tools are never reliable tools." Karl N. Llewellyn, Book Review, 52 Harv. L. Rev. 700, 703 (1939).
\textsuperscript{182} For examples of the law reinforcing traditional societal views of marriage, see Maynard v. Hill, 125 U.S. 190, 203–16 (1888); Reynolds v. United States, 98 U.S. 145, 161–68 (1878); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 137–39 (1872); id. at 139–42 (Bradley, Swain, Field, JJ., concurring).
what he or she could to the marriage without withholding and without specific valuation. How, after all, could she have "reasonably relied," considering the general cultural stance which insisted that money "really" belonged to those who "earned" it? If charity, goodness, or guilt indicated transfer payments to the ex-wife, then honor to the man who made generous payments. The matter had little to do with her entitlement. And of course her lost opportunity was understood not as lost market-income but as a different spouse. If she, divorced, lacked money or status, the solution was re-marriage.

These assumptions are to a considerable degree rejected today as they relate to the marriages and domestic arrangements of young people. Women are formally, and sometimes actually, as free as men to seek opportunities in the market, in the home, in public and private life. This means that domestic arrangements will take many forms, not merely the traditional or conventional one. Here, an explicit agreement-in-fact could be used today as a reference point when the legal system addressed the issues of fairness or unconscionability if the arrangement came into litigation as a contract, or as general background if the issue of fault arises in other ways, since the model of the marriage chosen and a statement of entitlements may well have some relevance to our judicial assessment of equities. Whether or not a legal contract, the agreement-in-fact could be a source of information, establishing the expectations of the parties in a way not relevant only to official enforcement but to issues of fault or good faith which might arise in various contexts.

One way to think about a diversity of marital arrangements is to focus on individual contracts. Another is to think about structured menus, state offered options, to which individuals give their consent. Perhaps the simplest way to think about the issues created by a system of alternative domestic models, including issues of state enforcement of contracts, is to remember the examples we actually have of the different forms of marriage, within the rules of various

---

183. See John K. Galbraith, Economics and the Public Purpose 30–37, 59–60 (1973) (describing wives as "crypto-servants" doing menial labor even where husband is highly paid).

184. The idea that the parties provided information about the standards by which performance is judged is one of the ideas of Article Two. "Article 2, then, judges performance, and provides remedies, principally by standards within the control of the parties. Indeed, the Code recurrently invites the parties to state in the contract of sale who shall do what, where and how, and with what consequences, subject only to an inhibition against unconscionability." Ellen A. Peters, Remedies, for Breach of Contracts Relating to the Sale of Goods Under The Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 202 (1963).
CONTRACTS AND MARRIAGE

religious communities. Llewellyn once referred to the “vicious heritage” of viewing the parties to a contract as individuals. The use of religious law helps us recall that point, especially because religious law remains particularly strong with reference to the family. Religious groups are often in the background, behind the individuals who are, working through the contractual framework, creating the new family group. Religious law can be used as illustrative of contract terms to suggest the sort of substantive regulation we might be thinking about.

We might think of a contractual menu for domestic arrangements, including marriage and divorce according to different religious rules as well as marital and non-marital partnerships. This menu might include conventions of Muslim divorce. Another menu option might be a traditional Catholic rule, forbidding birth control and divorce. The menu might include an option for Jewish marriage and divorce, attempting somehow to deal with the “get” issue. The menu would allow a couple to choose an option (then: to modify it? waive provisions? and in fact do all the things that make contract law itself flexible and thus uncertain?). If the couple did not choose, a default option would come into play, which again could possibly be subject to revision and modification.

Remedies discussions in the context of divorce ordinarily focus on the remedies to be given a spouse (typically assumed to be a wife) disadvantaged by the departure of a partner, and 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.

The range of choices which the framework might include

---

185. Llewellyn, supra note 38, at 734 n.63.


187. Under Jewish law, Rabbis do not grant the divorce. The husband must supply the document of divorce called a “get.” At present, the state will be reluctant to use physical sanctions against a recalcitrant husband, although historically the religious authorities were not so reluctant. See generally Leo Pfeffer & Alan Pfeffer, The Agunah in American Secular Law, 31 J. CHURCH & ST. 487, 487-525 (1989).

188. Default options could be fact specific. Examples include divorce for marriages with minor children, summary divorce for short, no assets-no debts marriages, and special rules on divorce for older couples without children of the marriage.

189. See Scott, supra note 2, at 38-70; Stake, supra note 2, at 429-44 (suggest-
becomes clear if we think broadly about remedies for breach, and recall that the contractual options—following the UCC—might include agreed-upon remedies, as well as statutory remedies.

It is clear that remedies are a cultural institution, and that in this culture, certain remedies are assumed to be inappropriate. We do not hang people for violating the sanctity of contract. Our sense of the appropriate remedy for breach of contracts starts, conventionally, with money damages. When our thinking moves to what the law of contracts considers the atypical remedy, some sort of specific performance, we run into serious difficulty in the domestic context. To begin with, it is clear that in many family cases, money is not an adequate remedy and our thinking does have to turn to other possibilities. Thus, surrogacy contracts (in which one wants the child), promises to give a get (a Jewish religious divorce), and promises for the religious upbringing of children all present instances in which money is not really the desired remedy. Yet other more direct remedies may be barred, because, for example, personal services contracts are not specifically enforceable and the Constitution guarantees the free exercise of religion.

But we should not conclude from this that no legal system can ever attempt specific performance in this context. And, for the sake of perspective, we might usefully recall the writ for the restitution of conjugal rights. Although the remedy has in fact never been part of American law, restitution of conjugal rights should be remembered as a measure focused on reconciliation and as an example of serious specific performance ideas in the domestic context. (The most that the law could have claimed—and sometimes did—was

190. By contrast, in the support-after-divorce context, it is a monetary award that is desired.

191. Sometimes, in family cases, the point seems to be something about de minimis, not the difficulty of finding a suitable remedy. For example, Bishop trivialized the problem of the enforceable contract between husband and wife. See 2 Bishop, supra note 14, § 192. Classic examples of cases which did not create enforceable obligations (the broken date; the babysitter who didn’t follow instructions) are now in fact litigated.

192. Id. § 29 (“Over England, but not over this country, walks also that other spawn of a dark age, whose mission it was to keep unconjugal sinners in the strait performance of holy matrimonial duties.”). Bishop explained that restitution of conjugal rights was an action in which an individual was “thrust back again to the bliss which had been too lightly prized.” Id.

193. Some writers use specific performance to mean performance of the obligations of marriage; for example, enforcement of the support obligation assumed at marriage. Specific performance could also mean continuance of the marital status by denying a divorce. Of course, the perpetuation of a marital relationship in law says little about the existence of a domestic relationship in fact.
that enforced proximity would result in increased tolerance and compassion which might ultimate translate into something called conjugal affection. But if we will reject restitution of conjugal rights perhaps we go too far in the other direction if we say that enforceable contracts must be limited to the economics of the dissolution of the marriage. Possibly we could see a list of enforcement possibilities develop over time as courts consider such theoretical, contractually-agreed upon remedies as waiting periods for divorce itself, or contractual adoption of (for example) penalties for initiating divorce except for fault.

Issues of enforcement focused on particular enforcement measures deal, of course, with an assumption about entitlement. That is, we speak of a remedy for someone who is entitled to that remedy. Often our discussions focus on the reintroduction of categories of fault. To begin with, fault and breach are not identical. But perhaps more fundamentally, while there are such things as guilt and innocence, they are perhaps less easily known than our discussions sometimes assume. The analogue would be to limit discussion of custody problems to conflicts between a fit and a grossly unfit parent where the difficult case—and possibly the typical one—is the conflict between two fit parents.

The following describes a commercial case: “The actual situation is complicated and confused, there are mutual recriminations, each party accuses the other of bad faith, misconduct and faulty performance; until the judicial dice have been rolled, no one has the least idea of which side is in breach and which is not.” If this is the truth of a commercial case, it is likely to be even more deeply the truth of many domestic relations cases. Indeed, it was this problem that provided one of the original arguments for the move to no-fault divorce. It was not that there was no fault, but rather that the system could not usefully expend energy identifying it.

194. Conjugal affection, Llewellyn notes, can only develop “out of lasting life together.” Llewellyn, Divorce I, supra note 31, at 1293. Note that the romantic drive is not itself conjugal affection, though it produces it. “The romantic ideal is itself the most potent drive conceivable toward producing conjugal affection, if it can be freed from its even greater drive toward impatience, and from mankind’s yearning for magic: that things which need work, self-restraint, thought, shall just happen of themselves.” Id. at 1293 n.29. See generally Raj Kumari Agarwala, Restitution of Conjugal Rights under Hindu Law: A Plea for the Abolition of the Remedy, 12 J. INDIAN L. INST. 257, 257–68 (1970). See also Kaur v. Harmander Singh, 1984 A.I.R. (S.C.) 66, 66 (India) (upholding restitution of conjugal rights action).

195. KESSLER & GILMORE, supra note 41, at 1060 n.4.

196. For a discussion of the no-fault idiom as one conveying the message that marital breakdown is never anyone’s fault, see MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 107–08 (1987).
A contracts approach will not eliminate this problem, but will allow us to consider the issue by including the understandings of the particular parties. The ideas of breach, or good faith, or fault applied to the controversies of the parties could be individual, subject to some over-riding policing ideas. These policing ideas, with such ideas as presumptive contracts and non-variable terms, permit the articulation of state interests. The contracts approach permits the development of both state and individual interests in a way, it seems, that would be worth our time to explore. An individual agreements/contracts approach does not minimize issues of state interest, to the extent that the ideas of presumptive contracts or non-variable terms or judicial policing provide ways to accommodate collective interests.

V. CONCLUSION

This paper argues for a stance towards contracting derived from perspectives interior to contract law. It does not argue for any specific contract. Moreover, it concedes in relation to some bargains that the contractual/commercial optic on domestic arrangements would give rise to farce. For example, consider Chekhov's version of the romance of the future in which a broker carries out a marriage negotiation.

When the young woman agrees to marry the man the agent asks for a deposit.

The young lady gives the agent ten or twenty rubles. He takes the money, bows obsequiously, and goes to the door.

"The receipt?" She stops him.

"Mille pardons, Madam. I completely forgot! Ha-ha!"

Balalaikin writes the receipt, bows again, and leaves. The young lady covers her face with her hands and falls onto the divan.

"How happy I am!" she exclaims, seized by an emotion she has never before experienced. "How happy I am! I love—and am loved!"

But Chekhov's treatment of the contractual aspects of domestic arrangements is not the only version possible.

The present article has suggested the utility of an analysis in which all domestic arrangements are (thinly speaking) contractual. The utility derives from an openness to the idea of individual varia-

197. The most difficult agreed-upon remedies seem to be those which provide for an automatic award, or shift, of custody as a remedy for breach of a contractual promise. In this situation, however, a review of the child's interest is necessary, as it is with all other bargaining concerning children.


199. Id. at 76-77.
tion, an idea elaborated in realist work on contracts. This approach allows a distinction between negotiated and default aspects of particular relationships, "default" understood as state-defined contractual relationships in the absence of agreement to the contrary. Traditional domestic arrangements were described in terms of these distinctions. For example, conventional marriages would be viewed as resting on a choice of the default position while less conventional marriages would represent a contract arrangement of a different kind. The "method of silence," or the adhesion aspect of the default position, could work—regardless of whether the default position relates to traditional marriages or to roommate relationships—if the underlying social understandings were stable. Problems arise because individuals are attempting to structure and institutionalize new relationships which are not clearly established in the society. Further problems arise because the details of the several default positions are not as clear as they once were. This suggests a role for explicit agreements to clarify the expectations and intentions of the parties and to communicate those expectations to the legal system, should that system ever be invoked. Whether these agreements in-fact should be directly enforced will depend, as it has always depended, on a policy judgment itself heavily influenced by underlying social factors, including the behavior, intentions and reliance of the individuals involved, and the judicial reading of those factors.200

200. Corbin made the central point in the context of a discussion of offer and acceptance:

The legal relations consequent upon offer and acceptance are not wholly dependent, even upon the reasonable meaning of the words and acts of the parties. The law determines these relations in the light of subsequent circumstances, these often being totally unforeseen by the parties. In such cases it is sometimes said that the law will create that relation which the parties would have intended had they foreseen. The fact is, however, that the decision will depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions often being inarticulate and subconscious. (footnotes omitted).

Arthur Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L.J. 169, 206 (1917).