

## Marriage: the long-term contract

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Although far more than a contract from religious, cultural, biological, psychological, and the philosophical perspectives, marriage is also a contract, the essence of which is transparent in the marriage vows.<sup>1</sup> The man promises that he will be a husband, the woman that she will be a wife. Each promises that whatever changes are wrought by the winds of time they will continue to perform their respective duties in a spirit of “loving,” “honouring,” and “cherishing” for the remainder of their lives. In reliance on these assurances, each spouse invests in this marriage, thereby sacrificing current and future love interests and other life choices.

The promise to perform duties in a particular spirit is not merely hortatory; it is a material requirement of the contract. In marriage, more than in any other contract, the spirit counts, and counts a lot. Both the value to the recipient of spousal services and their cost, or value, to the provider are crucially dependent on the attitude with which they are delivered and received.

Some might object to the characterization of marriage as a contract. They observe that marriage seems more like status than contract. That is, it is the state that defines and specifies most of the explicit rights, duties, and privileges of marriage, rather than the parties.<sup>2</sup> They also note the absence of substantial specific obligations

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<sup>1</sup> This chapter reflects the most current statement of my thought on the subject of marriage and divorce. My earliest and somewhat more complete statement on the subject appears in Cohen (1987). See also Cohen (1998, p. 618) and Cohen (1995).

<sup>2</sup> There has been much discussion in the legal literature of whether marriage is best understood as a contract relation or, alternatively, as a status relation. Some commentators have argued that, “because the law, not the parties, defines the

voiced at the time of formation. How could this be a contract if there are virtually no specific, explicit duties?

These objections are not fatal to the concept of marriage as contract. They do no more than highlight the peculiarities of this contract. The contractual essence of this institution is that it is a voluntary agreement between two consenting adults, albeit an agreement in which the obligations, rights, and privileges are left largely implicit and defined, if at all, principally by the state rather than the parties. That the specific acts required of each spouse are not specified at the time of marriage is hardly unique to marriage. Employment contracts are another large class of agreements that generally do not enumerate duties with any specificity. A marriage contract that strove for specificity and detail would make for a clever plot for a Monty Python farce, not a marriage. The complexity, subtlety, and exigent quality of the almost infinite set of duties that each party must perform make it inefficient, if not impossible, to specify them with any precision. The meaning of “husband” and “wife” and the specific rights and duties that attach to each role are normally inferred from the subculture and social class in which the parties were raised, and most importantly from their prenuptial relationship.

Another, more fundamental, objection to the contractual view of marriage is that the state of loving (or perhaps being in love) with another is not a volitional act. Thus the promise to love could be neither intended by the promisor nor believed by the promisee to constitute an enforceable commitment.

There are two responses to this objection. First, we might reinterpret the marriage vow as a promise to assume risk and pay damages. That is, each party is promising the other that they will assume the risk that their love for their spouse dissolves. If that should happen, they accept legal responsibility for the loss to their spouse. Such risk-assuming contracts are not at all unusual. Life insurance, for example, is such a contract. Much in the spirit of a marriage contract, a life insurance contract

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obligations of each spouse,” the relationship is truly one of status rather than contract (Barcock, 1978, p.564). See generally, Clark (1968), esp. section 6.1 pp.181-2.

could be alternatively worded and interpreted as a promise to keep the insured alive for the year, or pay damages for the failure to do so.

A plainer and more basic response to the objection of the non-volitional nature of love is to aver that this is a misinterpretation of the meaning of love in the context of marriage vow. The vow is a promise not to be in love with one's spouse but rather to act toward them in a manner that displays love, honor, and respect. Thus it is behavior that is being promised not emotion.

Marriage can clearly be regarded as a contract, but what sort of contract is it? What does it offer the parties? What are the difficulties of enforcement? What results from the failure of effective enforcement?

## **1 The economics of marriage and divorce**

Although most of the heart of marriage is not expressed in the wedding vows, at least one expectation is nearly universal and expressly voiced. All marriages are entered into with the promise that the relationship should endure for the joint lives of the parties. Often, however, that promise is broken, and one or both parties seek to dissolve the agreement. Because marriage is a species of contract, many of the problems inherent in fashioning an efficient and equitable law of divorce, alimony, and property division are variations and special cases of the difficulties that surface in the enforcement of commercial contracts.

Marriage, despite being the culmination of romantic love, can be fruitfully analyzed employing the tools of rational choice. It is a voluntary commitment usually undertaken following considerable, albeit imperfect, reflection. The decision to marry a particular woman, even based on so emotional a motive as physical beauty, is at bottom economic – it entails trade offs and sacrifices.

In the analysis that follows no consideration is given to externalities generated by dissolving a marriage. The principal such externality results from, and is experienced by and through, children. Most observers believe that children themselves experience a massive negative externality from their parents' divorce. The rest of society suffers negative externalities directly from each particular divorce and indirectly from the existence of the option of divorce – with the imperfect remedies to the breach that divorce constitutes or recognizes – on the institution of marriage. These externalities are immense significance. That said, in this chapter I will analyze marriage assuming an absence of externalities. The theory of marriage as contract is challenging enough to explicate without addressing such externalities, and I can offer no systematic theoretical integration of the externalities of marriage and divorce into a theory of marriage as contract. I will note that marriage is but one path to procreation; it has substitutes. Or, to put it another way, marriage, divorce, child siring, child bearing, and child rearing are all pieces of a jointly endogenous mosaic. The more attractive and secure is marriage, the less the demand for out-of-wedlock birth, and vice versa. Thus the assessment of the external effects of any marriage and divorce regime must include the effect not merely in children of once married couples but also on the children of never married parents as well.

## **2. Why marry? Specific assets!**

We begin with the question of why people choose to marry at all. Given the profound restriction on personal freedom demanded by marriage, and the obvious difficulty of predicting the continuation of one's ardor, the popularity of the long-term contractual commitment of marriage requires an explanation. In most commercial contracts the gains of contracting are purely instrumental, the only joy generated at the formation of the contract arises from the anticipation of its performance. In marriage, by

contrast, two significant gains are garnered from the mere formation of the contract. First, the entrance into a consecrated state entailing a spiritual joining of two souls strikes a religious/psychological chord deep in the human soul. Second, the willingness of another to offer one a lifetime commitment indicates a deep and abiding love and is valued as evidence that one is worthy of such love.

That said, it is the instrumental gains from marriage that are central. By far the most important gain from marriage is that it allows for investment in assets of peculiar value to this relationship. Allow me to elaborate.

The analogy to a long-term contract between a factory owner and a prospective tenant captures some of the flavor of the dilemma faced by a couple seeking to form a union, and especially to procreate. Neither the landlord nor the tenant would desire a long-term contract if no investment by either were to be undertaken that would be of peculiar value to the use of this factory by this tenant. Each would prefer to be free to take advantage of as-yet unknown opportunities to employ their resources more profitably. Even if the parties anticipate that they will be making “specific asset” investments in this project, as long as (1) those investments are relatively modest and (2) each party knows that the other will make an approximately equal specific investment in this project, although each might desire the protection of a long-term contract they may well be willing to proceed with the project without such protection, relying on the other’s self-interest to assure continuing performance. If, however, both parties expect to make major investments in the factory then both would seek the protection of a long-term contract. And *a fortiori*, if one party expects to make significantly greater specific investments in this factory than the other, then that party would be foolish not to insist on a long-term contract to protect the value of their investment from opportunistic appropriation or destruction as a result of the self-interested behavior of their co-venturer.

Imagine that the prospective tenant wishes to employ the factory space to manufacture instrument pads for woodwind instruments made out of pigs' bladders. Let us assume that the renovations required for this operation are unique to this particular manufacturing activity and the market for such renovated facilities is virtually non-existent. Thus, whichever party undertakes the renovations – landlords or tenant - will lose the value of the investment if the relationship comes to premature end. And so that party would seek the protection of a long-term contract.

So how does marriage present a similar dilemma? Why should men and women wish to make a long-term contract with one another? Why should they marry? What investments in “specific assets” does marriage entail?

Men and women have much that they can exchange with one another. Each has sex to offer, although men as a rule value it more. Each has procreation to offer, and women as a rule value that more, at least at the specific junctures at which negotiation takes place – their biological clock has a shorter spring. Then there is physical protection and income, of which men typically provide the lion's share, whereas homemaking and child rearing are usually more the province of the lioness. I could go on, but to do so would merely clutter the field. The central point is that men and women each desire the other as providers of vital services. Although in part their joining together yields each with a bit of insurance in the form of a source of *substitute* (symmetrical) services, the most vital part of the relationship centers on the provision of *complementary* (reciprocal) services.

But noting that men and women will seek to exchange does not explain why they should form a contract and certainly not a long-term contract. As suggested above, the drive to form a long-term contract must rest on some meaningful investment in a “specific” asset, that is an asset whose value is substantially diminished if the mutual project comes to a premature end. In the conjugal relationship between a man and a

woman, by far the most significant, though not the only, investment in a specific asset is the consequence of procreation – children.

Investing in every good – children included – presents prospective costs and benefits. It is the distinctive character and pattern of those costs and benefits that make children such a peculiar and “specific” asset, and that in turn create the demand for the institution of marriage. What is special about children? More precisely what is it about children that makes them a specific asset that subjects an investor to severe risk of loss if the conjugal relationship terminates prematurely?

First, and most fundamentally, both the cost of, and return from, children span a lifetime. This long-lived quality of the investment is central to its specificity, for it permits its costs and benefits to be altered by the termination of the relationship. Second, whereas in the past (and even in the present in more economically primitive lands) children were something of an investment good, in the sense that the parents could expect a financial or at least a material return on their investment, in modern industrial countries children are principally a costly consumption good. As an investment good the presence of children would serve to hold the marriage together and mitigate damages if one party abandoned the other. The party who left would usually lose the return from the asset. This segues into the third and fourth peculiarities of children. Third, caring for a child may be an onerous burden (cost) to one person but a highly valued consumption activity to another, and neither may have correctly anticipated which it turns out to be. And fourth, the consumption of children can take a variety of forms that differ systematically across individuals, between sexes, and over lifetimes. These differing forms may or may not require having the child in close proximity for extended periods of time – or at all. For example, a father may gain great pleasure merely from knowing that he has children or that they are successful, but actually find the children’s presence a burden, whereas the mother may be relatively indifferent to the

success of her children but cherish their presence close to her. These two considerations combine to remove the reliability that the self-interest of one's mate will ensure their performance of the contract. Simply put, they may find having children a burden rather than a benefit or they may find them a benefit without requiring their presence, and so they may suffer no loss from leaving their home. Fifth, and finally, the existence of children and more importantly their presence in close proximity (if valued at all) are valued particularly by their natural parents; the presence of other people's children will often be a cost to strangers, especially prospective new mates.

Therefore, when a conjugal relationship between a mother and father terminates, each parent may still have significant costs to bear. But much of the anticipated gain of the procreation may be lost – or not. The loss can take a variety of forms. Access to the children may be reduced or eliminated. Or the reciprocal parenting function may be lost; for example, a mother may find it more difficult to supply “motherly” love. Or financial support for the custodial parent by the non-custodial parent will be lost. Or homemaking services will be withdrawn; or companionship; or sexual services. More importantly, the children – not merely the expected future sacrifice of time and resources on them, but their very presence - and the mere passage of time since the commencement of the marriage, bringing in its wake changes in one's standing in the market for romantic partners, may make it difficult, if not impossible, substantially to mitigate damages by finding a replacement mate.

Thus a fundamental reason to marry is to allow for optimal investment in assets peculiar to the relationship, primarily, but not exclusively, children. If no long-term contract were available – or enforceable – the parties would not invest as much in the specific assets of the marriage as otherwise. This concern with children as specific assets, the investment in which exposes one to substantial risks, varies across individuals and differs systematically between the sexes. Women as a group have a

greater concern for and desire to raise their children than do men. This is almost certainly a result of evolutionary adaptation. It is common to virtually all mammals and certainly to our near relatives – the simians. Further, it is consistent with the relative potential fecundity of men and women. One man could potentially impregnate tens of thousands of women and so has less stake in the outcome of each effort. A woman's stake in each egg and each pregnancy is infinitely greater.

It is not a myth, or an accident, or socially constructed norm that it is women who are most anxious to obtain the contractual guaranty of marriage before engaging in sex, especially unprotected sex. They typically do not wish to undertake the investment of bearing the children of a particular man unless, and until, they have the promise of lifetime support, commitment, protection, or whatever else they take to be the services that a husband would provide. The significance of children as a specific asset that results in a massive loss at the premature termination of the conjugal relationship is the driving force of marriage. Were it not for the prospect of procreation it is doubtful that the lifetime pledge of the traditional marriage would be anything other than anomalous high-risk adventure entered into by a few benighted souls.

Although children are the central reason for marriage they are not the only reason. The vow to fulfill one's duty "for richer or for poorer, in sickness and in health" reflects that marriage is also a species of insurance contract. Risk aversion may induce one to give up the opportunity to find a new companion in the event that one's own prospects have improved, in exchange for the other party making a symmetrical sacrifice.

### **3. The danger of breach**

So there are substantial reasons to marry. Over a lifetime, however, the

utility functions, information, and opportunities of both marriage partners change, and frequently one or the other will have an incentive to breach the contract. When the marriage contract is breached and terminates in divorce the wronged party loses a lifetime stream of spousal services.

In marriage, as in commercial contracts, examining the costs and difficulties of mitigating damages reveals the magnitude of the loss. The loss that the wronged spouse suffers from divorce is at least the transaction cost of finding a spouse of equivalent *ex ante* "value" the second time around. Often, however, the loss will be much greater, for that equivalent match may no longer be available. Indeed, the very reason that one marries, that is, that one enters into a long-term contract, is that some of the investments one wishes to undertake in a sexual relationship will lose substantial value if the relationship comes to an end. Were it generally possible to successfully mitigate damages by acquiring a substitute mate there would be little reason to marry in the first place.

#### 4. Sharing the risk: reducing opportunism

No long-term contract will ever be formed unless at least one of the parties desires the guaranty provided by such a contract. And no party would insist on such guarantees unless they intended to undertake substantial investment in a specific asset. In commercial contracts it is almost never the case that the hostage investment need be specific to only one part to the agreement. Although the investment must lose value and therefore the owners of the investment must suffer that loss if the relationship is prematurely abandoned, which participant will be the owner and therefore suffer the loss is subject to the contractual relationship between the parties. Rather than the entire risk of the investment falling on but one of the parties, often the parties contractually share the risk.

Consider once more the instrument pad factory. Alice owns a vacant factory; Benjamin would like to rent the factory to manufacture instrument pads made from pig bladders for woodwind instruments. Because of the specialized nature of the production process the factory will require substantial renovations unique to this tiny industry – renovations that would be worthless if the project were abandoned. Benjamin might lease the factory from Alice at the market rate for a vacant space and pay for the renovations himself. If he did so Alice could hold his investments hostage; after he completed them she could threaten to terminate the relationship unless he paid a substantially higher rent. Alternatively, she could agree to undertake the renovations in exchange for his promise to pay a lease rate that capitalized the value of the improvements. In this case it would be Alice who would be vulnerable to appropriation by Benjamin. After she made the renovations, he could threaten to terminate the relationship unless she reduced the rent. The party making the investment in the specific asset is subject to appropriation of their expected quasi-rents by the other.

A long-term contract, if reliably enforceable, would protect the party making the investment. However, we live in an imperfect world and, rather than rely on legal protections alone to provide a negative sanction for breach, each party would prefer that the other party be motivated by positive self-interest as well. They can achieve this goal by sharing in the cost of the investment. Thus, Alice and Benjamin could each pay half the price of the renovations, with Benjamin agreeing to a lease rate that capitalized Alice's share of the renovation. Then, neither party's threat to abandon the contract opportunistically would be fully credible; were they to carry through on it they would suffer a substantial loss.

Marriage is different. It offers only the most minimal prospect for a contractual rearrangement that would leave both parties approximately equally vulnerable. This proposition is true not as a theoretical matter, but only as a practical

one. Money is fungible. Its transfer from one party to the other could, in theory, make all parties to a contract equally vulnerable. So, in marriage, the party making the smaller real investment in the conjugal relationship could transfer a substantial sum to his or her spouse. These funds could be held as an asset to be passed on to their joint offspring if the marriage lasts, and if it does not then the asset would become the private property of the transferee. The institution of the “bride price” can be understood as a manifestation of this phenomenon. In the modern world the use of a bride price is impracticable. The bride’s investment in potential procreation requires such an enormous investment on the part of most brides, in relation to the financial resources of most grooms, that no meaningful transfer is possible to place the parties on an equal footing with respect to the risk of the undertaking and the threat of appropriation of quasi-rents.

##### 5. The market for husbands and wives

As we noted above, men and women are different, and the package of services they offer on the marriage market – husband and wife – differ even more sharply. For a variety of reasons, but principally because of women’s more substantial role in the procreation and child-rearing process, it is women who generally make the more substantial investment in a conjugal relationship, and therefore it is they who more often seek the protection of the long-term contract of marriage. And so it is they who suffer most from the failure to enforce such contracts effectively.

Returning to the question of mitigation of damages, women as a rule face far greater difficulties in mitigating damages than do men. Their prospects of replacing a husband with one of equivalent *ex ante* value after an extended marriage punctuated by child bearing are slim. The harsh truth is that women are generally less highly valued in the remarriage market than they were prior to their first marriage. It is not quite, though

almost, a corollary to note that men frequently rise substantially in relative value in the remarriage market.

The market for spouses is monopolistically competitive. All men are potential husbands; all women potential wives. Although some men are close substitutes for one another, most others are very imperfect substitutes. Nonetheless, there is substantial choice and competition in this market. Therefore, it is reasonable to view the archetypal party to a marriage as having forgone alternative spouses of nearly equivalent *ex ante* value to the one they actually married.

The loss from breach and divorce - the cost of acquiring a new spouse of equivalent *ex ante* value - is comprised of several distinct parts. We begin with transaction costs. A highly developed market usually results in low transactions costs. The marriage market is indeed highly developed; it offers a rich variety of competing paths to finding a spouse. But, in the case of marriage, the highly developed market, rather than resulting in low transactions costs, is itself the result of the extraordinary difficulty of satisfactorily completing the transaction, i.e. finding a good match.

Why are the costs so high? It is principally because this is a barter market. Men not only face the daunting task of finding a woman to whom they are willing to make a promise of a lifetime conjugal relationship, but also must find a woman who is willing to make the reciprocal promise to them. A careful search is vital for both parties because neither men nor women are fungible.

The participants may see dating, and other such search activities, like many in life, as either consumption or investment. The anecdotal evidence, as well as economic theory, suggests that for most participants dating begins as consumption and frequently mutates into a psychically costly investment with the passage of time and repetition of the experience. Although there is no systematic evidence on the question of

how these costs vary between the sexes, there is also no *a priori* reason to assume that they are identical.

But even before one reaches the dating stage of the search process one must overcome two significant barriers. First, there is the problem of signaling one's availability to a sufficient number and appropriate set of market participants on the other side, and/or of acquiring their signals. Second, one must find a means to move from the status of stranger to that of at least acquaintance. To the proverbial Martian these tasks may seem quite straightforward and of minimal cost. But Earthlings who have lived the search know that there is more here than the outward description can capture. The inner sense of these activities is often one of turmoil, uncertainty, embarrassment, and pain. In primitive societies the signaling process is often singular, well known, and highly ritualized. In modern Western countries by contrast one can signal both to the market as a whole and to particular candidates in essentially any manner one wishes. Paradoxically, rather than lowering the cost, this abundance frequently raises it to an astonishing degree. Subtle signals are often lost in the cacophony or are misinterpreted, and grosser "signals" will often lead the recipients to infer a lack of the appropriate social graces or worse. Acting on inferred signals is hazardous on a variety of scores. The most common is leaving oneself open to severe embarrassment. When I seek to purchase an automobile I feel no shame that my offer is rejected because it is of insufficient value. But if my offer of romance is rejected it is a judgment that I am unworthy.

In general, the best environment in which to overcome these barriers is one in which the initial socialization does not suffer the search for mates as its principal purpose. Thus it is at school or at work, environments in which the activities of education and production are in the forefront, that men can get the ball rolling in some safety. But the recent rise of the legal category of sexual harassment is both the cause and

reflection that all is not perfect even in this environment. Moreover, many people do not find themselves in the appropriate work or school environment when they need to engage in the search for mates. This is particularly true of women – especially mothers – seeking mates in the remarriage market.

Even if transactions costs were zero, it is likely that one party, or both, will not be able to do as well the second time around. Why? First, one spouse may have suffered the stochastic change in value that the marriage vows expressly insured against, for example the great athlete who has been crippled by disease or accident. Second, predictable changes often result from an investment in assets specific to this marriage. Children, being the most significant investment in a specific marital asset, representing the greatest consequent cost in the search for a potential replacement spouse. Women, because they generally gain custody of their children, suffer this cost most heavily. Third, and perhaps most importantly, women usually lose value in the marriage market relative to men solely as a result of ageing.

## **6. Woman's loss of value on the marriage market**

Demonstrating the loss of value of women in the remarriage market analytically or empirically is extremely difficult because of the peculiar barter nature of this market. Men and women bear no price tags that state their value, nor are they exchange for things that can be priced. The only measure of their value is the “quality” of spouses they can acquire, who similarly bear no price tags. The prospective bride is simultaneously the commodity purchased, the currency used to purchase a husband, and the purchaser of the husband. Likewise, the prospective groom is simultaneously the purchased, the currency, and the purchaser. Thus, we are faced with an intractable identification problem. In addition, the lack of transitivity of tastes across purchasers further obscures the issue; Ms. Jones prefers Mr. Smith to Mr. Brown, while Ms. Burns

prefers Browns to Smith. Because of these problems, observations from the marriage market are open to multiple interpretations.

Despite these handicaps and qualifications, the available statistical evidence suggests that, with marriage, child bearing, and the passage of time, women lose value on the marriage market relative to men. Four facts stand out: (1) men have higher mortality rates than women at all ages;<sup>3</sup> (2) divorced men remarry at a faster rate than do divorced women for every age group except 14-24;<sup>4</sup> (3) divorced women with children remarry at a slower rate than do those without ; and (4) women tend to marry men who are older than themselves, and as they age the gap increases.<sup>5</sup>

Let us consider the impact of different mortality rates. This empirical observation is of a different character than the other three. Whereas the others all suggest that the remarriage market *is* less friendly to women (especially with children), this first observation is powerful evidence of at least one substantial reason of *why* that is the case. It is the hoary notion of supply and demand. One's value on the market is in large part a function of the ratio of the number of men seeking wives to women seeking husbands. In a monogamous culture the numbers of wives and husbands are identically equal. But the numbers of men and women are not usually equal. Although there are slightly more male than female live births, a higher mortality rate for males of all ages

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<sup>3</sup> *Statistical Abstract of the United States*, table 29 (1981).

<sup>4</sup> U.S. Bur. Census, Current Population Reports 55, table 8 (Ser. P-20, No. 223, 1971); and U.S. Public Health Service, Vital Statistics 10, Table J (Ser. 21, No. 20, Increases in Divorces, United States, 1967, 1970).

<sup>5</sup> U.S. Bur. Census, U.S. Census of Population: 1960, table 1 (subject Reports, Marital Status Final Report PC (2)-4E, 1966) cited in Carter and Glick (1976, p. 88). See also Brossard (1933) Glick & Landau (1950).

(even prenatal) creates an ever-widening abundance of women over men of the same age as age increases.<sup>6</sup>

The gap between the number of men and women is only part of the story. The percentage of men who are married rises steadily as a function of age to age 65. Therefore, the ratio of unmarried men rises faster than the overall sex ratio. The ratio of unmarried women to unmarried men is less than 1:1 for 20 year olds and over 2:1 for 55 year olds.<sup>7</sup>

These numbers also fail fully to capture the difficulties that men's higher mortality rates place on women's effort to find a mate as they age. A subset of the unmarried is the relatively unmarriageable. Because of physical handicaps, mental disabilities, imprisonment, etc., they do not have enough to offer to attract a spouse. As the cohort ages, the unmarriageable become an ever-increasing proportion of the age cohort, and a still larger proportion of the unmarried. Further, because of imprisonment and other forms of institutionalization and various disabilities, the unmarriageable become disproportionately more male as the cohort ages. Therefore, the female/male ratio of the marriageable unmarried is considerably greater than 2:1 by age 55. Assuming that people generally marry those near their own age (we shall shortly examine this assumption more closely), women have a great deal more competition for potential spouses the second time around than the first.

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<sup>6</sup> The life expectancy of American men was 53.6 and of women 54.6 in 1920. In 1983, the respective figures were 71.0 and 78.3. *Statistical Abstract of the United States*, table 102 (1981).

<sup>7</sup> *Statistical Abstract of the United States*, table 49 (1981).

A sub-issue related to the notion of the unmarriageable is the more general question of the quality of potential spouses left in the market. Those women who have never married tend to be of higher employment status and education level than those who do marry. And so some sociologists have argued that whereas the never-married men tend to be “bottom of the barrel” the women are the “cream of the crop” (Bernard, 1982, p.158). But this seems implausible. Why should the cream not be skimmed? An alternative explanation is that employment status and education are not the relevant dimensions for measuring the quality of the women as prospective spouses. Beauty, charm, and femininity are particularly pertinent variables for women’s success on the marriage market. But why should marital status be negatively correlated with employment and education? Marriage and career are each investment/consumption activities that require substantial commitments of time. They are therefore substitutes. So, it is likely that sexually attractive feminine qualities are negatively correlated with education and occupational status. Women who invest in career invest less in making themselves attractive to men and in searching for men, and women who are less attractive have an incentive to invest more in a career.

Returning to the question of women’s fall in value on the marriage market as they age, the relative morality figures provide evidence that women should fare worse than men as they age, simply as an almost mathematical reflection of the changing supply of and demand for each sex in each age cohort. The remaining three empirical observations may all be taken as evidence that women indeed do fare worse following divorce than men. They marry more slowly, they marry still more slowly if they have children, and they marry older and older men.

There are of course commonsense explanations for each of these phenomena that parallel and reinforce the hypothesis that women lose value in the marriage market as they age and bear children. For example, at the time of divorce,

women obtain *de facto* even if no longer *de jure* custody of the children in the large majority of cases.<sup>8</sup> Caring for children imposes two significant costs on women in the marriage market. First, it makes it more difficult for them to search and advertise. Second, men usually prefer to marry childless women.<sup>9</sup> And so it is no surprise that the remarriage rate of divorce women with children is significantly lower for the five-year period following divorce than that of divorced women without children.

Although the natural explanation might seem to be men's lesser demand for mothers as marriage partners, we cannot be sure, owing to the identification problem referred to earlier. From the data per se we cannot definitely determine whether we are seeing men's preference for younger childless women or women's preference as they age and have children for (1) older men, (2) a more thorough search of the market, or (3) remaining unmarried.

Differing mortality rates and child custody patterns are not the only, and may not be the most important, reason women lose value in the marriage market as they age. What else can we point to as evidence of and explanation for women's relative loss of value on the marriage market? The different mortality rates mean, if we assume that people search only among their immediate contemporaries, that the odds get

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<sup>8</sup> The percentage of times the mother receives custody has been estimated variously from a low of 80 percent (Jacobson, 1959, p. 131) to a high of 95 percent (Goode, 1965, p. 311). According to US census figures, 89.7 percent of the children of divorced parents live with their mother. U.S. Bur. Census, Current Population Reports 5, table E (Ser. P-20, No. 380, Marital Status and Family Status: March 1982).

<sup>9</sup> Socio-biologist Richard Dawkins argues that no strategy of family planning that is indifferent to whether offspring raised by a parent are genetically their own can be evolutionarily stable (Dawkins, 1976, p.117).

progressively better for men and worse for women as they age. However, the average age gap between brides and grooms, and more particularly its increase as people age, illustrate that people are not constrained in their search. Why are husbands generally older than wives, and why does the gap increase with age at marriage? This age gap has one explanation with regard to the first marriage of the young, but the gap and its increase require different explanation for older brides and grooms.

Men and women become marriageable at different ages. Being a husband of wife requires certain skills and capacities that do not come to fruition at the same age for men as for women. Sufficient emotional maturity, domestic skills, and fertility can all be well established and apparent in a woman by her middle to late teens. For a man it is different. Even now, a man is expected to support his wife and children. That ability takes more time to establish than the domestic skills required of a wife.

The disparity in the proportion of men versus women who have acquired sufficient human capital to be marriageable at a given age disappears rather quickly once both parties enter their twenties. Why then does the median excess of husbands' ages over wives' increase as the age of the groom increases? If the goal is a joint lifetime of marriage then, given that women tend to outlive men, one would think that the gap would not only shrink but reverse itself, so men would marry women older than themselves.

This increasing age gap of grooms over brides as well as the greater frequency of remarriage of men are best explained by the differing rates and directions of change of attractiveness of men and women to their opposites as they age. The data suggest that older men need not restrict their search to their own direct contemporaries but may instead fish in the likely more attractive pool of younger women. Thus older women have a yet smaller pool of their own contemporaries who are interested in them. Wives and husbands are reciprocal, not symmetrical, roles performed by spouses.

Since what a man wants in a wife is different from what a woman wants in a husband, the ability to satisfy these requirements need not, and does not, vary with age at the same rate for wives as for husbands. Women fall in value quite simply because men prefer younger women, whereas women do not have as strong or even a similar age preference with regard to men.<sup>10</sup>

Although this proposition is consistent with the data, it is not proved by them. It is a proposition about tastes and so is not directly observable. That said, the footprints of this common human trait are visible in every byway of the culture. First, we may note that the cultural icons of feminine attractiveness are all young or young looking. Movie starlets, models, showgirls, and dancers are all most admired or desired when young. Women's magazines constantly offer suggestions on how to maintain one's youthful appearance. Much popular music reflects men's preference for younger women; for example, from the country and western genre we have "Younger Women, Faster Horses, Older Whiskey" and folk-rock offers "A Young Girl Keeps Rolling Past My Mind." On the other side of equation, youth does not carry the same positive connotation when applied to men. Consider the many older actors who successfully played male leads opposite much younger women – Cary Grant, Paul Newman, Robert Redford – or

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<sup>10</sup> Judge Richard Neely has observed that "[h]istorically it has been recognized that men are attracted to women of childbearing years. One finds few examples in literature of a man romantically attached to a woman over forty, with a notable exception of Collette's *Cheri*. Anyone who has practiced family law is aware that younger women are in general attracted to rich, powerful and necessarily older men, whilst men are attracted to young, beautiful and adoring women. Domestically, the young, unassertive and impecunious man and the older, homely or overly independent woman are usually the last hired and the first to be fired" (Neely, 1979; see also Posner, 1992).

the notion that gray hair makes a man look distinguished. This is little more than a sampling of the multitude of cultural representations of the different age profiles of attractiveness of men and women to those on the other side.<sup>11</sup>

The phenomenon of different age preferences for mates between sexes is not an idiosyncratic short-lived American cultural peculiarity. The extraordinary attractiveness of young females to males of all ages compared with the more accepting tastes of women with respect to the age of a man is cross-cultural and historically consistent. For example, in polygamous cultures men almost exclusively add younger wives rather than other ones to their harem and, if powerful enough, trade in older ones for younger.

Why do men and women have such markedly different tastes? A powerful evolutionary explanation is available that is also consistent with the ordinary reasons that people give for marriage. Young women are fertile, whereas old women are not. The same is not true for men. Moreover, with age men are generally in a better financial position to support a wife and her offspring. So it would hardly be surprising if men have

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<sup>11</sup> Although ordinary language and its analysis may seem a somewhat odd form of argument for either an economist or a lawyer to use, such argument has a reputable intellectual pedigree. As a branch and school of philosophy, “ordinary language analysis” is used to derive and discover definitions of philosophical terms. See, for example, Austin (1979, p. 75). Austin “believe that in general a clear insight into the many subtle distinctions that are enshrined in ordinary language and have survived in a lengthy struggle for existence with competing distinctions could hardly fail to be also an insight into important distinctions to be observed in the world around us” (Edwards, 1967, p.211).

literally evolved a strong preference for young fertile women and that women's preference have not evolved in a symmetrical fashion.

### 7 Breach and appropriable quasi-rents

At the time of formation, the marriage contract promises gains to both parties. Yet the period of time over which these gains are realized is not symmetrical. As a rule, men obtain gains early in the relationship, and women late. This follows from women's relative loss in value. Young women are valued as mates by both old and young men. When they choose to marry a particular man they give up all their alternatives. And over those early years, as women are wont to complain, they give that man "the best years of their lives." At the back end, when their value on the marriage market falls relative to their husbands, they expect to be repaid for their sacrifice. The creation of this long-term imbalance provides the opportunity for strategic behavior whereby one of the parties, generally the man, will perform his obligations under the marriage contract only so long as he is receiving a net positive marginal benefit and will breach the contract unless otherwise constrained once the marginal benefit falls below his opportunity cost.

This problem is well understood in long-term commercial contracts as one of appropriable quasi-rents. A quasi-rent is a return to one party to a contract above what the party would receive if the contract could be dissolved at will at that moment. Much of the law of contract is an effort to design rules and institutions that prevent this kind of strategic behavior, whose control is in the mutual interest of both parties at the time of contract formation.

In a commercial contract the uncompensated breach by one party will usually not affect the *ex post* allocation of resources, but result only in a wealth transfer to the breacher of a large portion of the other's quasi-rents. Reasoning by analogy and

*wrongly* assuming negotiation between spouses to be a low transactions cost encounter, one would conclude that, if continuing breach and termination of the contract were more costly to the wife (the wronged spouse) than its value to the husband (the breaching spouse), the parties would reach a Coasean bargain in which the wife offers the husband compensation intermediate between the value of breaching to him and the value of continuing the marriage to her.

On occasion, something that bears a passing resemblance to a Coasean bargain is struck: for example, rather than terminate a marriage a wife may accept a husband who is periodically unfaithful or occasionally violent. Even if we could assume that such post-contractual opportunistic adjustments were the norm, breach would not be without its consequences. First, there is the inequity of uncompensated breach. And inequities, when anticipated, will be partially transformed into inefficiencies. That is, even if making post-contractual opportunistic adjustments or declining to renegotiate the contract to forestall breach and rescission were *ex post* efficient, their anticipation would generate severe *ex ante* inefficiencies. Women who expect that much of the benefit of the bargain of marriage will not be forthcoming will adjust their behaviour *ex ante*. They will: marry less frequently; choose to marry a different sort of man; and invest less in their marriages.

More often than not, however, not even a pale imitation of a Coasean bargain can be reached, and not because breaching is worth more to the husband than it costs the wife. The problems in continuing the marriage under a new arrangement are of two sorts: transactions costs and wealth effects. Normally in a two-person negotiation transactions costs are minimal, but marriage is different. Returning to the second paragraph of this chapter, I remind you that in marriage the spirit counts for a lot. The performance of marital duties loses much value if it is perceived to be in the wrong spirit. Threatening breach and renegotiating the contract will usually poison the relationship.

So even if a woman had substantial independent wealth or income and could offer her husband financial compensation to refrain from terminating the marriage, and the marriage, as it had been, was more valuable than the compensation she would have to offer, she likely would not offer to compensate him for refraining from breach and continuing the marriage. For now that negotiations have opened, the marriage can no longer be as it was. Marital duties performed in exchange for financial compensation would have only shadows of their former values. The transactions costs of renegotiating the contract will often be prohibitive, because the very act of renegotiation destroys the value of the services performed.

Even were this not the case, the wife typically lacks the resources with which to bribe her husband to stay in the marriage even if she wished to do so. The problem is a variation on the wealth-effect version of the Coase Theorem. That is, if he must compensate her for breaching he will be unwilling to do so, and if she must compensate him for refraining from breaching she will be unwilling to do so. Her willingness to suffer more in the marriage, that she might thereby suffer less than she would by its termination, will usually be no compensation at all to him; the currency of loss to her does not convert into a currency benefit to him.

The possibility for substantial breaches of the marriage contract has always existed. Until recent times, though, there were greater costs associated with such breaches. The religious consciousness of the people who participated in and sanctioned the institution placed substantial internal psychological and external social costs on the parties in the event of breach. Rather than the formal legal constraints, which prove to be tenuous and imperfect, it was the informal social and psychological constraints that by and large protected marriages. As those institutions have declined, the probably inherent inadequacies of the legal structures have come to the fore.

Before considering legal responses to the problems of marital breach, let us briefly catalog the private responses to the problem. In many commercial contexts post-contractual opportunism can be anticipated and averted by vertical integration. If the owner of one of the capital assets could purchase the capital asset of the other, the incentive to appropriate the quasi-rents of that capital asset is eliminated. Once more consider the instrument pad factory. The man who wants to produce instrument pads could – and likely would – purchase the factory from its current owner (see Klein, Crawford, and Alchian, 1978).

This solution is not feasible in the context of marriage. The crux of the problem is not the legal prohibition of a person selling him- or herself to another. It is that the man (or woman) cannot in any meaningful way purchase the person who can be a wife (or husband). He cannot purchase her in such a way that he will have the same stake in her welfare that she has, as a tenant could purchase a building and have the same stake in its condition as the former owner had.

Another contractual device sometimes employed in the commercial sphere is hostage taking (see Williamson, 1983; also Klein and Leffler, 1981, p.615). This would require the wife to hold something of value of the husband's until she is assured of his performance of the contract. The institution of "bride price" is a form of hostage taking.<sup>12</sup> The shortcomings of instituting a bride price as a form of hostage taking are several. First, the parties may be too young and immature to foresee the possibility of future breach. Second, bridegrooms in our economy are generally far better endowed with human capital than with physical or money capital. Since they cannot transfer their

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<sup>12</sup> For a brief discussion of the economics of bride price in primitive societies, see Posner (1981, pp.186-9).

human capital to their wife, they have very little to give as a hostage. Third, couples are likely to spend all their incomes in the early years of their marriage; therefore, the holding of a substantial amount of property by the wife as a hostage would inefficiently constrain the consumption of the family. Fourth, the need to guarantee performance is partially symmetric. A wife as well as a husband can breach and destroy the quasi-rents of her mate. Finally, bride price is a cultural phenomenon that evolves over many centuries. The institution of bride price grounded in efficiency concerns unconnected to cultural or religious roots would run into the fundamental problem that marriage is not principally a commercial relationship. If one of the parties were to treat it as a commercial contract by insisting on a bride price (or a dowry), this would likely damage the relationship.

But cash is not the only hostage. Children can sometimes serve as hostages. Wives usually receive custody of the children following a divorce. If the husband fears the loss of close contact with his children he may refrain from breach. But, there are severe limitations to effectiveness of employing children as hostages. They are useless to the childless wife and of only limited value to the wife whose children are adults. Moreover, in order to serve effectively as hostages, the husband must feel their absence as a severe deprivation. If he does not, or if his expected visitation rights following a divorce are liberal enough to mitigate his loss significantly, he may not suffer much cost. And, although it is in the wife's *ex ante* interest to threaten to deprive her husband of access to his children, it is frequently in her *ex post* interest that he should maintain close contact with them. She is more likely to receive child support and maintenance payments if her ex-husband has an on going relationship with his children. Also she may believe and give weight to the idea that it is better for her children that they maintain contact with their father.

Another strategy women can adopt is to marry an older man than they otherwise would. If a man and a woman are of equal value on the marriage market at age 20 and the woman's value as the capital asset "wife" declines fairly steadily, whereas the man's value as the capital asset "husband" rises initially before declining, then over a large span of the marriage the man's value on the market will exceed the wife's and he will have an incentive to terminate the marriage. By marrying an older man, a woman can protect herself from this relative loss of value. In doing so she in effect is acquiring more current consumption and less investment in a future relationship. This greater consumption may, but need not exclusively, be in the form of higher money income. This strategic choice of a husband by a woman is a species of constrained maximization and thus represents some net social loss. A woman who strategically marries an older man is choosing a man whose market value is higher than his value to her in comparison with other men *in a world in which the marriage contract is secure*. Her choice among men not only reflects her desires but also includes his expected future alternatives.

Finally, there is the default solution. If you cannot protect the quasi-rents that you believe you will receive from investing in assets specific to marriage, then invest less in this marriage or in being married.<sup>13</sup> The tendency of middle-class families to have fewer children and the tendency for women to acquire more marketable skills are of

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<sup>13</sup> Elisabeth Landes (1978) found that in states that prohibit alimony there is a statistically significantly lower rate of marriage and a reduced marital fertility rate compared with states that do not restrict alimony awards. She also found a lower rate of marriage in states that exclude considerations of fault in determining alimony awards. See also Becker, Landes, and Michael (1977).

course consistent with an explainable by one another as well as by a variety of other variables of our changing culture. Nonetheless, both phenomena are also consistent with women investing fewer resources in being wives in general and in being one man's wife in particular out of fear of uncompensated breach. Considering the enormous magnitude of the consequence of breach on the value of the specific assets of marriage, it is inconceivable that the greater likelihood of breach has not significantly affected the level of those investments.

Informal devices and state-imposed legal remedies are substitute methods to protect women from the appropriation of quasi-rents. If the informal social mechanisms are insufficient to protect marriage partners, then legal methods of protection increase in importance. The question is: which forms of legal arrangements best prevent the destruction and appropriation of the quasi-rents in marriage? Here it is possible to consider both voluntary prenuptial agreements and the standard-form marriage contract that is provided by the state in large measure through its divorce laws.

## **8. Prenuptial marriage contracts**

The use of prenuptial marriage contracts has increased in recent years. These contracts take a variety of forms and are motivated by a variety of forces. The polar forms of these contracts may be characterized as the traditional, the remarriage, the counterculture, and the feminist.

The traditional prenuptial marriage contract was motivated by a desire to protect assets accumulated prior to a marriage from appropriation by the spouse following a divorce. Most often, though not always, it is the groom who seeks such a contract when he has accumulated a great deal of wealth or expects a high income. On occasion the family of one of the marriage partners seeks such a contract.

A variant of this traditional prenuptial agreement frequently arises when one of the parties has offspring from a prior marriage. The blush of romance has faded, and both parties recognize the necessity to protect the future welfare of pre-existing family members. To forestall anxiety and uncertainty, the marriage partners will often negotiate how their property will be divided in the event of both divorce and death.<sup>14</sup>

Counterculture marriage contracts seem to arise out of distaste for traditional marital roles. The panoply of traditional duties that the community implied but did not expressly state in sanctioning marriage is replaced by an express and sometimes detailed statement of duties that the parties agree to. The law, having been unwilling to enforce traditional duties, in the sense of requiring specific performance has also been chary of enforcing the terms of these contracts.

The feminist marriage contract is at least in part motivated by the concerns voiced in this chapter, namely, that women often do not receive a fair shake in a divorce; that is, it recognizes that divorce deprives them of quasi-rents that represent a return to sacrificed opportunities. These contracts seek to shift the weight of post-marital rights, duties, and property division in favor of the wife. Ironically, those women who are most likely to be victimized by the divorce laws - those who embrace the role of the traditional wife - are least likely to negotiate a feminist marriage contract.

These formal prenuptial contracts offer some opportunity to the parties to protect themselves, and, especially with second marriages, they can do quite well in specifying the devolution of property to children after death. Nonetheless, these contracts are of limited use in the case of ordinary marriage, largely because of the

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<sup>14</sup> The creation of a trust prior to remarriage is generally a superior and more secure method of addressing this concern.

difficulties they face in specifying the appropriate level of damage payments, if any, to be paid in the event of breach. Any such marriage contract must specify a variety of damage amounts, each reflecting the stage in the marriage when the breach occurs, the circumstances of the parties at the time of marriage, and the circumstances at the time of breach. Further, they will still have to contend with the question of whether or not fault should be taken into account and how it is to be determined. The imperfect knowledge of the future cannot be overcome.

### 9. Public law remedies for breach

What can we make of the legislative approaches to the question of divorce? There are four polar legal structures available for handling the problem of divorce: (1) unilateral divorce with no property settlement, (2) mutual consent divorce with mutually agreed property settlement, (3) indissoluble marriage, and (4) judge-determined divorce and property settlements. These four structures represent the polar forms of which all actual divorce laws are combinations.

Where the law provides for unilateral divorce without property settlement, each party is simply free to walk away from the marriage. As such, the unilateral divorce is the marital analogy to the contract at will. In commercial contexts the at-will contract tends not to be used when either party must make massive investments in specific assets or when the parties must make differential investments, for then the risks of opportunistic behavior or a simple miscalculation of the other party's interest are simply too great.<sup>15</sup> This simple regime of divorce is generally unsuitable for long-term contracts, precisely because usually both parties, but certainly the wife who bears children, must make a massive investment in specific assets, and because it allows one spouse

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<sup>15</sup> For a discussion of this point, see generally Epstein (1984).

(typically the husband) freely to abandon the marriage after the wife has made her disproportionate contributions to the relationship. The unilateral divorce without property adjustment is therefore the problem that marriage contracts must overcome, rather than the solution.<sup>16</sup>

Mutual consent divorce is the family law analogy to the contractual remedy of specific performance because it requires performance of the contract unless a release is granted. At first blush this solution seems powerful because it appears that no inefficient breaches could occur. Much of the initial attractiveness of mutual consent divorce fades under closer examination. The essential problem is that specific performance is not really available as an enforceable remedy. First, many of the acts that a spouse has implicitly contracted to perform cannot be specified or their performance monitored. Second, as emphasized earlier, the marital duties are to be performed in a certain spirit, and no court can succeed in forcing an unwilling spouse to perform marital duties in a spirit of love and devotion. Therefore, although the law may not permit the party who wishes to breach the marriage agreement to obtain a divorce without the permission of their spouse, nor can it make them meaningfully perform the duties of the contract.

This raises two related problems: breach without divorce, and the destruction of quasi-rents. Because the law can do little to enforce the most meaningful and possibly onerous obligations of a marriage, it is possible for a party to breach the

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<sup>16</sup> Unilateral divorce more or less corresponds to the modern institution of “no-fault,” divorce which was first enacted in California in 1970, and has since swept through the United States and much of the western world, albeit in less radical form. See Foster and Freed (1971, chapter 1); Lichtenstein (1985).

contract while remaining nominally married. If this strategy necessarily imposed substantial costs specifically on the breaching party, an incentive would still remain for the breacher to obtain the consent to divorce from the wronged party. However, the reality is often that a party can breach without obtaining a divorce while simultaneously reaping many of the gains of divorce. In our era of relaxed sexual mores and community values a married man can live separate from, or with, his wife for an indefinite period of time without either party being inordinately restricted in their social and sexual activities.

There is no strong reason for believing that the costs of not obtaining a divorce will bear more heavily on one spouse or the other – breacher or victim, wife or husband. Thus, rather than placing a cost on breachers, inducing a reduction in inefficient breaches of the marriage contract, a requirement for mutual consent for divorce is likely to result in fewer breaches terminating in divorce.

Although the possibility of breach without divorce implies that the costs to not obtaining a divorce are neither specific to the breacher nor excessive, the destructibility of quasi-rents implies that the benefits of not consenting to a divorce are minimal for the party who was suffered a breach. Because marital breach destroys much of the value of the remainder of the contract to the wronged party, often when a marriage is breached neither party wants it to continue. If the marriage is no longer highly valued by either party, it is likely that a property settlement can be worked out that is *ex post* satisfactory. Such an agreement is likely to be far different from what would have been specified *ex ante*.

The breaching spouse often does not merely appropriate the quasi-rents being earned by their partner but actually destroys those rents. This destruction will occur naturally as a result of the breach and need not be the purposeful intent of the breaching spouse. Moreover, such destruction will also occur under a unilateral divorce regime. The problem is exacerbated in the case of mutual consent, however, in that the

breaching party gains by destroying the quasi-rents of their partner. The requirement of mutual consent creates an incentive for breaching party to act more egregiously and thereby destroy more of the rents of their spouse. As the quasi-rents are destroyed, the marriage falls in value to the innocent party, whose consent to a divorce can then be obtained at a lower price.<sup>17</sup>

In the light of the shortcomings of unilateral and mutual consent standards of divorce, indissoluble marriages appear to have many virtues. First, the possibility of inefficient divorces is eliminated. Second, extreme incentives are created for the exercise of greater care in choosing a spouse. Third, since the very act of seeking a divorce destroys the quasi-rent being earned by the satisfied spouse in the marriage, making the marriage indissoluble appears to eliminate much of this loss. Fourth, neither party has an incentive to destroy rents solely for the purpose of obtaining the consent of the other to a divorce.

On the other side of the ledger, there are two very substantial costs of indissoluble marriage. First, there indeed are efficient terminations of contract. If the law were to require the parties to carry out the marriage contract in spite of their desire to dissolve it, efficient dissolution of marriages would be sacrificed. In addition to the direct

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<sup>17</sup> As a leading jurist in this area, Judge Neely has put it, “[a]though an energetic man tied to a woman he married when he was young may find himself bored, fenced in, and unhappy, his wife may be perfectly content with the lifestyle she was encourage as a child to consider her destiny. Under the liberal grounds for divorce which are becoming acceptable in most states, a man in these circumstances is capable of starting out again with a minimum of either alimony or child support liability. While the woman who had relied to her detriment on society’s promise of stable family life can easily find herself in desperate emotional and financial circumstances” (Neely, 1979).

losses to the parties forced to carry out such contracts, some couples at the margin will avoid marrying because these indissoluble contracts are not as valuable to them as dissoluble ones. Because it is possible to breach without obtaining a divorce, some of the costs discussed in the paragraph above and much of the virtue of indissoluble marriage may prove illusory. Although the law can prevent divorce, it is unable to require and enforce performance of the marriage contract in all but a perfunctory sense.<sup>18</sup> Therefore, as in the case of mutual consent divorces, indissoluble marriage allows someone to breach without providing an effective remedy for the wronged party.

The final legislative alternative is to allow the court to grant divorce at its discretion and to determine the property settlement independently of the agreement of the parties. The court would be called on to determine who had breached and the future stream of quasi-rents that the non-breaching party had a right to expect prior to the breach and award them the present value of that future stream. Only *ex ante* efficient divorces would take place, and the demands of both justice and efficiency would be satisfied.

Interestingly, the relationship between this remedy and mutual consent divorce represents a reversal of the usual dichotomy between the liability rule and property rule. In the typical commercial case a liability rule is a less generous vehicle than a property rule for vindicating the rights of the wronged party. The property rule normally permits the wronged party to take a portion of the gain that the breaching party would reap from breach. In the case of marriage, however, because of the personal

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<sup>18</sup> In the entire Marriage section of Am. Jur. 2d (section 52) there is not a single reference to the substantive duties of the parties to a marriage. The only place where spousal duties surface is in the discussion of Divorce and Separation (section 24).

nature of the duties and the destructibility of quasi-rents, a property rule (i.e. mutual consent divorce) will often leave the wronged party worse off than a liability rule (Dnes, 1998).

There is only one shortcoming to judge-determined divorce: it is much easier to say than to do. In order to implement this regime effectively, courts must determine who breached and the value of the loss to the non-breaching party. The determination of breach is a substantial hurdle but is dwarfed by the difficulties of specifying the loss in quasi-rents occasioned by marital breach. Furthermore, the damages will often be so great that the breacher is in effect judgment proof.

## 10 Conclusion

The application of the general theory of long-term contracts to the contract of marriage does not yield any obvious or optimistic conclusions as to the proper way to structure the marriage arrangement. The nature of the underlying duties assumed by the marriage partners is not capable of precise definition, much less effective legal enforcement. Yet the success of the marriage often requires the two partners to invest heavily in the relationship even though they may be able to salvage little of their original investment should the marriage turn bad. To make matters more difficult, the roles of men and women are not symmetrical. It is typically the wife who has more to lose by divorce. What, if anything, can be done to insure the integrity of the long-term marriage arrangement, which redounds *ex ante* to the benefit of both marriage partners? Neither antenuptial marriage contracts nor the various legal regimes of divorce and property settlement offer much hope for the general population. It is difficult, therefore, to suggest with any conviction a definitive solution to the marriage problem. There is much to be said for the older view that relies on informal and social sanctions and the good moral sense of the parties for the greatest protection of the marriage relationship.