17 Marriage contracts

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1. Introduction

The growth of divorce, reduction in rates of marriage, growth of cohabitation, delaying marriage to a later age, and similar trends in many societies have all caused concern in recent years. Families are less stable and this has implications for the welfare of children.

From an economic perspective, a major issue is the incentive structure set up by the law of marriage and divorce. The dependency and vulnerability of one marriage partner to opportunistic behavior by the other is foreseeable under current laws, opportunism being defined as self-seeking with guile (definition of Williamson, 1985, p. 47). This chapter is specifically concerned with the extent to which laws may have set up incentives encouraging divorces that would otherwise be avoided and discouraging marriages that might otherwise have occurred.

Two adverse incentives are of particular interest. Ill-considered financial obligations may create incentives for a high-earning partner to divorce a low-earning, or possibly simply ageing, spouse if the law does not require full compensation of lost benefits. Elsewhere, I have called this the ‘greener-grass’ effect (Dnes, 1998; Dnes and Rowthorn, 2002). Under current social conditions and present marital law in most countries, the greener-grass effect will typically induce wealthy men to abandon poorer wives. There could also be an incentive for a dependent spouse to divorce if settlement payments, based on dependency, allow the serial collection of marital benefits without regard to the costs imposed on the other party. I call the second adverse incentive the ‘Black-Widow’ effect (Dnes, 1998.). The husband need not be wealthy: under current conditions, Black Widows could be women with relatively poor husbands in marriages where he cannot transfer benefits to deter her exit.

2. Marriage as a Long-term Contract Controlling Opportunism

A useful starting point is to think of marriage as a standardized, state-sanctioned, long-term contract between two parties. Divorce can then be seen as breach of contract, although it should be noted that marriage predated the development of contract, and that fault-based divorce is not exactly the same as breach of contract since no-fault divorce is consistent with legally sanctioning one spouse’s effective desertion. A
purely contractual starting point would be modern, although contractual elements are present in the case law (Lloyd Cohen, 1987, p. 270). A contractual approach is also capable of considerable sophistication and it is unhelpful to dismiss it out of hand, particularly where inherently economic issues like asset division are at stake. A good collection of contract-influenced articles on marriage and related issues is in Dnes and Rowthorn (2002). Critiques of the law and economics approach, from the perspectives of socio-legal studies and traditional family lawyers, can be found in Probert and Miles (2009).

Becker was a pioneer among economic theorists of marriage and is often regarded as a bête noir by writers hostile to economics-based approaches to the family. Becker’s work is admirable, but was not focused on opportunism. It has led to more recent bargaining theories of the family. The interested reader may see Becker (1974a) and Becker (1991) to inspect the origins of economic analysis of the family. Becker’s theory, which is based on specialization and the division of labor within the household, really concerns cohabitation and does not give a clear reason for the emergence of a state-sanctioned standardized marriage contract. One could, for example, cohabit with a grandparent and achieve economies of specialism. The theory is based on a neoclassical approach to rational decision making (Dnes, 2009), and it is possible that some of the disagreement of sociological writers might be reduced by moving to a context-dependent, ecological view of rationality (Smith, 2008), in which individuals latch their behavior onto socialized structures to economize on decision-making capacity.

Lloyd Cohen (2002; also 1987) describes marriage as an unusual contract in which the parties exchange promises of spousal support, where the value of the support is crucially dependent on the attitude with which it is delivered. In a traditional marriage, many of the domestic services provided by the wife occur early in the marriage, and permit the husband to concentrate on employment such that the support offered by the male will grow in value over the longer term. The opportunities of the parties may change so that one of them has an incentive to breach the contract. Divorce imposes costs on both parties, equal to at least the cost of finding a replacement spouse of equivalent value (in contract terms, this cost is technically a measure of expectation damages, that is the replacement cost of the anticipated spousal support). Lloyd Cohen argues that the risks and costs of being an unwilling party to divorce are asymmetrically distributed: the husband might be tempted to take the wife’s early services and dump her to enjoy his later income without her (the ‘greener-grass’ effect), and she will tend to be worth less on the remarriage market than a male of similar age (Lloyd Cohen, 1987, p. 278).

Why do people marry? There are both psychic and instrumental benefits
to marriage. The willingness of someone to commit themselves to another is evidence of worthiness of such love, and marriage gives a means of protecting long-term investments in marital assets. According to Cohen, the spouses may be regarded as ‘unique capital inputs in the production of a new capital asset, namely “the family”’. In particular, children are shared marital outputs. Another instrumental gain is the provision of insurance: parties give up their freedom to seek new partners, if their prospects improve, for a similar commitment from a spouse, which is rational if the gains from marriage exceed the cost of losing freedom to separate (see Posner, 1992). The gains from marriage reflect surpluses that can be seen as appropriable and may tempt a spouse to opportunistic behavior, comparable to the incentives in more regular long-term contracts (see Klein et al., 1978).

Cohen also draws attention to the role of marriage-specific investments like the effort expended on raising children, or the prospect of losing association with one’s children, as ‘hostages’ that may suppress opportunistic exit from the marriage. Cohen favors the preservation of restraints on opportunistic divorce, which he sees as requiring understanding that marriage is a long-term contractual relationship. The ‘wrong’ judicial approach to obligations like long-term support can lead to too much or too little divorce. This observation brings in the idea of an optimal level of divorce, which might be encapsulated in a rule like ‘let them divorce when the breaching party (the one who wants to leave, or who has committed a “marital offence”) can compensate the victim of breach’. (I pursue the idea of optimal breach further below.)

A contractual focus on marriage is of value, but the underlying view of the marriage contract needs to be sophisticated. Marriage contracts revolve around direct and instrumental benefits, bargaining influences (Lundberg and Pollak, 1996), shared goods, long-term marriage-specific investments, incentives for due performance and incentives for opportunism. These factors are of considerable consequence. If the law covering the financial obligations attached to divorce fails to suppress opportunism, then people will be hurt: fewer marriages will occur than otherwise and there may be less investment in activities like child raising (Stevenson, 2007). People will not be certain of obtaining predictable returns on marital investments.

In addition, the preservation of a very clear signal of commitment may be particularly important in marriage (Rowthorn, 2002). If promises over long-term support are largely illusionary, owing to legal reform that decouples obligations from fault in divorce cases, economically weaker parties would alter their behavior, for example increasing the time spent searching for a reliable spouse. Such an effect has been observed in empirical work (Mechoulan, 2006; Matouschek and Rasul, 2008), as introducing no-fault
Marriage contracts 363

divorce settlements into a jurisdiction appears to be linked to increases in the age of first marriage. Some US states, such as Louisiana, have deliberately adopted ‘covenant marriage’, in which the exit rules are tougher, to increase the signal of commitment attached to marriage promises.

3. Efficient Marital Breach
In a commercial setting, breach of contract may be optimal, providing compensation is paid to the breached-against party for lost expectation. Awarding ‘expectation damages’ is indeed the standard remedy for breach among commercial parties, and has the characteristic of requiring the breaching party to pay compensation that places the victim of breach in the position that would have obtained had the contract been completed (see Dnes, 2005, p. 97). This requirement for expectations damages meets the Kaldor-Hicks criterion for a welfare change, in that the gainer must gain more than the loser loses because he was still willing to go ahead with the change notwithstanding having to compensate the loser, who is as well off as before. Subject to certain requirements concerning market structures, mitigating avoidable losses and related matters, the common law may be considered efficient (wealth maximizing for the parties) in awarding expectation damages for breach of contract. Generally, we would not insist on specific performance of a commercial contract, owing to difficulties of supervision and constitutional issues of individual freedom. We could impose a specific performance requirement if the parties could bargain at low cost, as the party wishing to breach could offer to pay expectations damages to escape the contract (using a property rule in the terminology of Calabresi and Melamed, 1972 – one of several entitlements options summarized in Ayres, 2005).

The argument for compensation rather than coercion is even stronger in the case of intimate human relationships. In this sense, economists are in favor of freedom to divorce, but are also focused on the need for compensation that avoids setting up adverse incentive structures. Even Parkman’s (1992, 2002) arguments favoring a specific-performance basis for divorce law, seek to establish entitlements that would be a basis for bargaining to a settlement based on expectations damages.

Later I shall examine arguments that a sophisticated view of the marriage contract, drawing on modern ideas of long-term relational contracting could give a useful direction to policy. For the moment, I examine a more limited, classical form of contract in which marriage vows would be taken quite literally and promises would be seen as binding. For example, a traditionalist view of the marriage contract is as an exchange of lifetime support for the wife, in which she shares the standard of living (‘output’) of the marriage, for domestic services such as housekeeping and child
rearing. The classical-contract view could easily include less traditionalist frameworks. Breach of contract by one party would allow the other to reclaim lost expectation subject to an obligation to mitigate losses. All the traditional marital offences, such as adultery, unreasonable behavior and abandonment, would be relevant to a divorce system based on classical breach of contract, in determining who had breached. Equally, no-fault divorce would be consistent with the notion of efficient breach as it would simply represent either (i) a decision by one party to breach the marital contract and pay damages, or (ii) a mutual decision to end the contract with a negotiated settlement.

Consider a lengthy marriage that ends in divorce. The parties met when they left university. After working for some years, the wife gave up work to have children and care for them. When the youngest child started school, she returned to work, but at a lower wage than previously. After 20 years of marriage, the husband petitions for divorce on the grounds of separation. Their housing and other assets have always been held jointly.

The husband would be expected to share property and income to maintain the standard of living his ex-wife would have enjoyed for the remainder of the marriage. Expectation damages are identical to the minimum sum that he would have to pay to buy from her the right to divorce her, if divorce were only available by consent. (He might have to pay up to his net benefit from divorcing if this were higher and his ex-wife were able to hold out.)

The court would assess what that standard of living was and determine who had breached the contract. The breaching partner would not generally be difficult to detect if attention is focused, as is common across the law, on proximate causes. The fact that the divorced wife gave up work for a while or now earns less than might have been the case without child-care responsibilities is immaterial in finding expectation damages: broadly, if it can be judged that she would have enjoyed the use of a large house and of other assets, she would be awarded the assets and income to support that lifestyle. Her own income would contribute to that expectation, as would her own share of the house and other assets. The divorcing husband would be expected to contribute from his income and his share of the assets to provide that support for his ex-wife, regardless of the impact on his own lifestyle or on any subsequent marriage partner. Any common-law or statutory requirement to maintain the standard of living of the children of the marriage could be dealt with separately by the court, although the requirement would be met by maintaining expectation in the example.

Following the principle of loss mitigation, if separation allows the former wife to increase her income or assets in some way, or there are opportunities to avoid losses (including opportunities for remarriage),
those amounts should be deducted from the settlement. In addition, if she contrived an apparent breach, for example by pursuing oppressive forms of behavior, the husband could excuse his breach under the doctrine of duress (other classical contract doctrines would also be needed, for example misrepresentation, but are not central to the issues at this point). Without such safeguards, couples might be careless in preserving the marriage. With these qualifications, expectation damages would ensure that only efficient breach occurred, that is, when someone’s gain from the divorce exceeded the compensation needed to put the other party, as far as money could, in the same position as before. From a traditionalist perspective, the approach would give security to a woman contemplating an investment in home-making rather than labor-market activities – although it is actually supportive of a wide range of possible marriages.

Under a classical-contracting approach, the courts would recreate the expected living standard of the victim of breach of the marital contract by adjusting the property rights and incomes of the parties at divorce. Fault would matter to the extent that the court would need to establish who was the breaching party, but this would not rule out no-fault divorce (actually, unilateral breach where one party wishes to leave the marriage without citing marital offences and can divorce the other party against his or her will). It would only be irrelevant in a system of mutual consent, where both parties negotiated a settlement stating that neither was at fault; where bargaining would safeguard expectations. The classical-contracting approach preserves incentives for the formation of traditional families, if that were considered important. Any costs incurred by the victim of breach in raising children would be more than compensated since expectation normally exceeds such costs. The parties would only enter the marriage and incur costs (possibly as opportunities forgone, which we discuss further below) if they expected their personal welfare to be higher – hence, expectation typically exceeds (reliance) costs.

Classical contracting is also consistent with the simultaneous existence of separate legal obligations for the maintenance of children. However, it would only be consistent with a literal interpretation of the clean-break principle favored in much recent family law if sufficient property rights can be transferred to avoid the need for subsequent periodical payments. A classical-contract view would not be consistent with ultra-traditional views emphasizing the sanctity of marriage, requiring specific performance, and creating inalienability of rights.

No more difficulty should arise in family law than in complex commercial law in carrying out calculations of expectation damages. Typically, both parties will be at a mature stage of their lives where their lifestyles are reasonably foreseeable. It would be harder to calculate alternatives like
reliance damages (see below). The courts might well discover they faced a great deal of argument over who had caused the breach. There might also be a tendency to apply rigid views of what constituted a party’s reasonable expectation in a marriage, although, in common-law countries, there has been more of a problem of inconsistent discretion in the case law on long-term support of ex-wives.

Other criticisms of an expectation-damages approach tend to be based on sectional views of social welfare. Thus, the arguments of feminists may be used to reject the idea of divorce rules that reinforce the dependency of women on men. Some liberals (for example, Kay, 1987) argue for measures to increase equality between males and females in their social roles. Others (for example, Gilligan, 1982) argue that men and women are different (women’s art, women’s ways of seeing, women’s writing, and so on). Recent moves in divorce law to compensate spousal career sacrifice have been sympathetically received by these groups. Such moves focus on opportunity cost and amount to using reliance standards of compensation. Arguments recognizing the reliance interest have been influential in case law developments and proposals for reform of the laws governing financial settlements between ex-spouses, notably those emanating from the UK House of Lords and the American Law Institute (Ellman, 2007).

4. The Reliance Approach
In *The Limits of Freedom of Contract*, Michael Trebilcock (1993) contrasts an analysis of the financial consequences of divorce based on classical-contract ideas with contemporary trends toward compensating opportunity costs. Trebilcock argues strongly for an expectation-damages approach to marital breakdown, particularly because this will suppress opportunistic abandonment of dependent spouses. According to Trebilcock, the feminist dilemma is that divorce laws that are protective of women legitimize the subordinate role of women in society, whereas treating the divorcing couple as equals ignores the labor-market disadvantages that domestic specialization confers on many divorcing women.

What would happen if we compensated the abandoned spouse (usually the woman) or the woman choosing to leave the marriage, for the opportunity cost of marrying? Opportunity cost comprises the value of alternative prospects she gave up. In contract terms, this amounts to awarding reliance damages: the opportunity cost has become akin to wasted expenditure and the suggested rule seeks to put her in the position she would have been in had the marriage never taken place (the *status quo ante*). Reliance draws attention to the loss of career opportunities for many women either on entering marriage or in stopping work to have
Marriage contracts

children. An economically strong woman leaving a marriage might receive nothing under this approach, if she could be shown to have lost nothing through marriage.

This form of compensation should strictly provide the difference between what has been obtained up to the point of divorce and what the lost opportunity might reasonably be expected to have provided over some targeted period of time. The court would be required to examine and adjust the property rights of the divorcing spouses to put the divorcing woman in the financial position she could claim marriage prevented her from attaining. The suggested operation of this standard is not strictly equivalent to the use of reliance damages, either in contract (when this occurs) or in tort, because there is no suggestion that the payment of reliance damages should be linked to breach of contract: the adjustment is usually simply to be made for the benefit of an economically weakened divorcing woman (or comparable male cases if they emerged, for example where he had given up work to carry out child care). Equally, there is no reason in principle why reliance damages could not be linked to breach of contract, either in the sense of marital offences (substantial breach) or simply as a decision by one party to leave the marriage.

Trebilcock points out that the reliance approach is harsh in its treatment of divorcing women with poor pre-marriage career prospects, for example, the waitress who marries a millionaire. Such cases would receive very little compensation for marital breakdown. Reliance calculations also often require speculation about the position of the weaker party in the distant past. In comparison, expectation damages require less speculation: comparisons are not in the distant past and it is usually reasonably clear by the time of divorce how the standard of living would have developed. Nonetheless, reliance does have its supporters among some economics of law practitioners, notably in the valuation of the loss of a housewife’s services in fatal-accident cases and in establishing a bare incentive for investment in household production. (On accident valuation, see Knetsch, 1984.) In the case of a fatal accident, the wife is lost and in some jurisdictions the husband claims her opportunity cost of participating in the marriage as an alternative to the replacement cost of hiring a housekeeper. The reasoning is that the benefits to them both of her forgoing that opportunity must have been at least equal to the opportunity cost (for example, wage in paid employment) or she would not have given up the opportunity. The advantage to the professional-class bereaved husband is that compensation will typically be higher.

Although reliance damages would tend to be lower than expectation damages, assuming the marriage increased each party’s expected welfare, incentives for investments in domestic services would be preserved.
A woman contemplating marriage-specific investments in child care by giving up labor-market opportunities (the reliance), for example, is better off in the marriage with those investments and is at least as well off if it all goes wrong. Therefore, the incentive remains for traditional marriages in which the woman exchanges domestic services for long-term support. The reliance approach could therefore easily support a public-policy objective of preserving traditional family lifestyles, which may not be appreciated by some of its supporters. Equally, one could support investments by males in child care by establishing their right to reliance damages upon divorce.

Generally, reliance damages will not be associated with efficient breach. Taking a contractual view first, if reliance damages are owed for breach of contract, a party may breach when the net benefit to them before damages is exceeded by the loss to the other party (opportunistic breach). This is because they only have to pay for reliance, which is normally less than expectation, so the socially suboptimal breach confers a private net advantage upon the breaching party. In a system awarding reliance damages for breach of contract, we would expect additional, opportunistic divorces compared with an expectation standard. Women’s marriage-specific investments tend to be made early in marriage, and their remarriage opportunities are poorer than men’s owing to the different operation of ageing processes, demographic factors and the fact that the children of an earlier marriage will be a financial burden on a new husband. Men therefore would be more likely to divorce their wives (the ‘greener-grass effect’) and the increase in opportunistic divorces would tend to harm the interests of women on balance.

Under a system awarding reliance damages for breach, we could expect a great deal of judicial effort to go into establishing fault (in the sense of who breached the marriage contract) just as under an expectation standard. If less were at stake because reliance is normally less than expectation, there would be a lower incentive to pursue disputes and there might be fewer resources devoted to such conflict. However, the main driving force is that a finding of fault will result in a large bill under both standards so the difference is unlikely to be great.

In a system that awarded reliance damages of right to a divorcing party regardless of the cause of breach (typically an award to a wife who has specialized in child care), there may also be an incentive for opportunism of a different kind. The problem is not peculiar to the reliance standard but affects all non-fault standards. For example, consider an award from a spouse divorced against his or her will under legal rules emphasizing meeting needs in the majority of everyday cases. The apparently vulnerable wife (or husband) might decide to divorce when the net gain from divorce, including the reliance award, exceeds her (or his) expected net
benefit from the marriage continuing, which is a form of inefficient breach. This problem could not happen under a more contractual approach, because a decision to end the marriage would be breach of contract and would attract a damages penalty rather than an award. The practical problem here is that the woman in the example will either not care (on financial grounds) whether the marriage survives, or may feel she will be better off without it. The law will have effectively written an insurance contract that perversely influences behavior: a case of moral hazard. This type of opportunism (the ‘Black-Widow’ effect) would lead to the prediction that divorces initiated by women would increase whenever such specified damages were introduced.

The reliance approach could encourage opportunistic behavior and would encounter problems of definition and calculation of the *status quo ante*. It is not kind to divorced women who start out with poor career prospects. Like the expectation standard, reliance implies no special status for any particular family asset: houses, pensions, and anything else, are all candidates for trading off with the aim of achieving the targeted level of support for a party. Reliance could be criticized for introducing a tort focus into the financial obligations of divorce, treating decisions to invest in domestic services as like sustaining injury, and carrying the implication that home building and child raising are activities with no benefits for the domesticated provider. As with expectation damages, a reliance approach could be operated around a separate system of child-support obligations.

### 5. Restitution

Carbone and Brinig (1991) identify a modern development in divorce law that they describe as a restitution approach. In a US context, they argue that academic analysis has been led by developments in the courts, which have increasingly emphasized settlements that repay lost career opportunities, particularly in the context of a wife’s domestic support of her husband and children during periods that allowed for the development of business capital, and other contributions to a spouse’s career.¹ Restitution might be considered appropriate when a wife supports her husband through college: if they later divorce, the question is whether it is right that he should keep all the returns on this human-capital investment. The canonical example would be where the wife undertakes the child care so that her husband can develop his professional or business life. Restitution is often cited as an

¹ See, for example, *Jamison v. Churchill Truck Lines*, 632 SW 2d. 34, 3536, Missouri Ct. App. 1982, awarding part of a business for domestic contributions; see also Carbone (1990); Krauskopf (1980, 1989), and O’Connell (1988).
appropriate remedy in contract law when not returning money paid out by the victim of breach would lead to unjust enrichment of the breaching party. Restitution is ideologically acceptable to cultural feminists who wish to emphasize the repayment of sacrifices.

A restitution approach is distinct from a reliance approach, although both often emphasize the same life choices, for example the opportunity forgone for a separate career. Under a restitution approach, compensation is in the form of a share in the market gain supported by the (typically) wife’s supportive career choice, for example a share in the returns to a medical degree, or a share of the business. Restitution is therefore only possible where measurable market gains have resulted from the ‘sacrifice’. The reliance approach, in contrast, is based on measuring the value of the opportunity forgone, for example estimating the value of continuing with a career instead of leaving work to raise children – an input rather than output measure. Reliance puts the victim of breach in the same position as if the contract had not been made, whereas restitution puts the breaching party in the same position as if the contract had not been made (Farnsworth, 1990, p. 947).

Restitution damages may be difficult to calculate. Who can really say how much a wife’s contribution was to a husband’s obtaining professional training? Under a tort-style ‘but-for’ test, perhaps a case could be made that all of his earnings (and assets bought with income) belong to her. Yet, the ex-wife must have got something from the marriage, that is, was not supporting him purely for the later return on his income. How much should we offset? Another problem might be negative restitution, where a party can show that the other spouse held them back and was a drain rather than an asset. In practice, interest in restitution awards arises in US states with no-fault divorce and community-property rules, as a basis for obtaining alimony for an abandoned wife. Restitution will probably be kinder to divorcing women who had poor career prospects before entering the marriage.

From an efficiency angle, restitution damages suffer from all of the problems already cited for reliance: the difficulties are logically identical. In a contractual setting (using restitution as a remedy for breach), restitution damages will lead to inefficient breach as liability for damages will again be too low. There will be too much breach (divorce) compared with expectation damages as restitution will normally be less than expectation damages (as long as the victim of breach expected more from the marriage than the returns reflected in the victim’s investment in the breaching party’s career). The higher level of opportunistic divorce will be to the disadvantage of women, if earlier comments about the differential effects of age on remarriage prospects for males and females hold true. Outside of a contractual
setting, if support payments are set by statute for ex-spouses regardless of fault, there will be an incentive for opportunistic breach by the party for whom the restitution payment plus other expected benefits from divorce exceed the expectation within the marriage (the Black-Widow effect exactly as above, with restitution substituted for reliance).

Compared with reliance damages, the level of divorce could be higher or lower under a restitution standard. This is because there is no necessary connection between the value of investment in the other spouse’s career and a person’s own alternative career prospects. Therefore, reliance can be greater or less than restitution (measured as the market return on the investment in the other spouse’s career).

The restitution standard will give the incentive necessary to bring forth investments in domestic activities, particularly raising children. This would operate a little differently from the reliance standard. A person contemplating marriage-specific investments in child care by giving up labor-market opportunities would be entitled to compensation for each such investment decision. Therefore, the incentive remains for traditional marriages. As with expectation damages, a restitution approach could be operated around a separate system of child-support obligations.

6. Partnership, Property Rights and Rehabilitation
There is a trend toward the use of a partnership model in some jurisdictions, notably where community-property is the norm in marriage. Singer (1989) argues that post-divorce income disparity between ex-spouses is the result of joint decisions and that the higher income is strictly joint income (which could carry over to property bought from income). Singer also points out that the equal division of property and income would meet demands for compensation for lost career opportunities, and could further the aims of ‘rehabilitating’ an abandoned spouse. According to Carbone and Brinig (1991), Singer’s analysis uses conventional justifications for post-divorce support without identifying the links between them, fails to determine initial property rights and does not achieve a precise calculation. Singer actually has a spuriously precise system of sharing the joint income for a number of years (she suggests one year of post-marriage support for each year of marriage).

A partnership model is possibly consistent with an updated contractual model of marriage, and anyway could be used as a basis for setting entitlements to meet a mix of social-policy and bargaining objectives (Ayres, 2005). There is some evidence that divorcing couples do see themselves as jointly owning at least their assets, that is, their expectations are built around partnership. Weitzman (1981a) found that 68 percent of women and 54 percent of men in her sample of divorcees in Los Angeles County,
California believed ‘a woman deserved alimony if she helped her husband get ahead because they are really partners in his work’. This was similar to the proportion supporting alimony on the grounds of the need to maintain small children. Davis et al. (1994) note the prevalence of the presumption of an equal split in their discussion of ‘folk myths’ associated with divorce.

It is not necessary to repeat the detailed analysis of earlier sections to note that, unless labor-market rehabilitation, or equal shares, are the parties’ expectations from marriage, the model could lead to inefficient breach. In turn, this can give rise to incentives for opportunistic behavior, including the greener-grass and the Black-Widow effects, which reflect the adverse incentive effects from using less-than-expectation damages. If the true expectation of the dependent party went beyond equal shares or temporary support plus rehabilitation, then a move from expectation damages to rehabilitation would encourage breach of contract by the non-dependent party.

7. Need

A focus on meeting post-divorce housing and other needs, particularly of the spouse with childcare responsibilities, has been the dominant element operating in several jurisdictions (for example, England and equitable-distribution US states such as New York). With such laws, need is the starting point, and the majority of cases do not reveal sufficient family resources to go much beyond the allocation of housing to the spouse with responsibility for care of the children, particularly as the clean-break principle favors transferring assets in lieu of periodical payments.

There is no necessary inconsistency between a contractual view and needs-based awards, as meeting the needs of the children of the marriage and a breached-against spouse could be the remedy for breach of the marriage contract. However, the welfare consequences of the standard are not encouraging. If we assume that meeting need is a minimal expectation in marriage, need awards for breach would be less than or equal to expectation damages and excessive breach would occur: the by now familiar greener-grass effect as (most likely) husbands find they are not expected fully to compensate abandoned wives for removing the husband’s high, late career earnings. Also, if, as is the case, need awards are not linked to substantial breach, the Black-Widow effect can follow, if the value of a need award plus the expectation from the changed situation (possibly, remarriage, cohabitation, or single status) exceeds the expectation from the current marriage. There is a direct analogy with the fourth condition above.

Needs-based awards of spousal support do meet a concern that people
should not be trapped in unhappy marriages. ‘Fault served to restrain men from leaving or flouting their marital obligations too egregiously, but it also left women with little bargaining power within the relationship. Women . . . could not leave . . . without facing financial ruin’ (Carbone and Brinig, 1991, p. 997). However, on (utilitarian) welfare grounds alone, it is impossible to justify the removal of costs for one person when this will impose similar or greater costs upon another. Furthermore, the possibility of inducing the Black-Widow effect might encourage some men to avoid marriage altogether, which is generally a problem when contracts cannot be secured against opportunism: a form of long-term, dynamic inefficiency (see Dnes, 2005, p. 90). The argument that public policy requires men rather than women to bear the financial costs of divorce is vulnerable to the observation that it is difficult to distinguish between the unhappy divorcing wife and the opportunistically divorcing wife. The weight of the criticism in this paragraph could be undermined by finding that there is typically a heavy spillover effect (externality) from the unhappiness of one marriage partner to the welfare of other parties, for example onto children.

8. Revising the Contract Approach to Marriage

The problems following from avoiding the use of expectation damages, or of separating awards from the issue of breach of contract are that (i) generally, breach will be inefficient, and (ii) breach may be opportunistic (exploitative). However, the problems with expectation damages in marriage contracts are that implications of lifetime support appear to militate against a modern emphasis on independence in life, and protracted arguments over the identification of breach would be costly, which is particularly relevant when the court system is run largely from public funds. The problems of identifying breach are at least as severe if non-expectation standards (for example reliance) are used. Would a more sophisticated view of the marriage contract resolve these issues?

The movement away from highly restrictive divorce laws coupled with lifetime support obligations toward wives was followed by the evolution of liberal laws characterized often by needs-based, discretionary systems of property adjustment and spousal support. The social norms surrounding marriage have clearly changed over time, in particular toward favoring serial marriages and unmarried cohabitation (Almond, 2006). A number of points stand out. One is that marriage rates are falling, cohabitation rates are rising, and divorce rates are rising in many countries, which suggests that the current legal view of marriage does not correspond with the wishes of the population at large. Secondly, legal liberalization allows people to change their minds as circumstances change and to revise the
Contract law and economics

marriage contract. Consequently, we need to explore the possible claim that a more flexible view of marriage is useful and what the limits to flexibility would be. The history of marital law, showing an evolving view of the nature of the marriage contract that has been heavily shaped by surrounding social norms, is consistent with modern legal scholarship on ‘relational’ contracts that are shaped by a surrounding mini-society of norms (Macneil, 1978; Williamson, 1985 and Macaulay, 1991). Brinig (2000) has developed the idea of a socially wider governance of the family into an approach emphasizing marriage as a covenant with wider society, in which family ties do not end with events like divorce, but become modified as an ongoing franchise.

One view of flexibility might be to encourage the use of clearer marriage contracts, with the possibility of enforceable modifications that could be substitutes for divorce. The literature on contract modifications is extremely pessimistic over the prospect of welfare gain from enforcing mutually agreed and compensated modifications (Jolls, 1997; Dnes, 1998; Miceli, 2002). This is simply because of the difficulty of distinguishing between genuinely beneficial revisions and those resulting from opportunistic behavior, which can amount to duress. Consider the difficulty in marriage contracts in distinguishing between a genuine modification (because a party now has improved prospects) and the case where a party threatens to make their spouse’s life hell unless certain terms are agreed. Contract modifications will not set up incentives for opportunism if, in the context of unforeseen events, (i) it is not clear who is the lowest-cost bearer of the risk, (ii) the events were judged of too low a value to be worth considering in the contract, or (iii) it was infeasible for either party to bear the risk (as explained fully in Dnes, 1995, p. 232). Generally, the view that supporting all modifications is desirable because there appears to be a short-term gain is unsound: there may be undesirable long-term instability as a result, since fewer people will make contracts that cannot be protected from opportunism.

The idea that modifications can be legally supported when events unfold for which it would not have been clear early on who should have benefited or borne a fresh cost does give a clue to a rôle for the court. It can determine whether some change was foreseeable and whether the attendant risk would have been clearly allocated: for example, one’s spouse’s ageing is not a reason for scooting off without compensating him or her. On the other hand, mutually tiring of each other would have been hard to allocate to one party. Generally, the main focus of the law can be expected to remain the division of benefits and obligations on divorce, that is, the ending of a contract and move to new circumstances for the parties. A more appropriate fundamental model of the marriage contract would be
as a relational contract (Scott and Scott, 1998). Macneil (1978) has suggested that complex long-term contracts are best regarded ‘in terms of the entire relation, as it has developed [over] time’. Special emphasis is placed on the surrounding social norms rather than on the ability of even well-informed courts to govern the relationship (Macneil calls governance that emphasizes third-party interpretation ‘neoclassical’ contracting). An original contract document (for example, marriage vows) is not necessarily of more importance in the resolution of disputes than later events or altered norms. Courts are likely to lag behind the parties’ practices in trying to interpret relational contracts.

A relational contract is an excellent vehicle for thinking of the fundamental nature of marriage but it may be of limited help in designing practical solutions to divorce issues unless it is possible to fashion legal support for the relational contracting process. Crucially, though, the idea emphasizes flexibility. It is a fascinating mental experiment to put the idea of flexibility together with the persistent caution of this chapter over the dangers of creating incentives for opportunistic behavior. Many of the problems associated with the division of marital assets arise because social norms change (for example, the wife has no entitlement to lifetime support), but the individual marriage partners fail to match the emerging marital norm (for example, a homely wife married in 1966 is much more likely to have specialized in domestic activities). Therefore, a possible approach to divorce law is to use expectation damages to guard against opportunism but to allow the interpretation of expectation to be governed by differing ‘vintages’ of social norms. As an example, the courts could take a retrospective view of the expectations associated with each decade. Consideration could also be given to making pre-nuptial, and post-nuptial, agreements between spouses legally binding. Modern marriages might be allowed to choose between several alternative forms of marital contract (for example, traditional, partnership, or implying restitutionary damages on divorce). Providing expectations are clarified, inefficient and opportunistic breach could be broadly suppressed. Such a system could operate around a statutory obligation to meet the needs of children, which providing it does not overcompensate the parent with care, should be neutral toward incentives.

9. Cohabitation and Marriage
Growth in cohabitation compared with marriage is noticeable in many societies (Almond, 2006). It is still early days in relation to explaining this switch, but one line of inquiry emphasizes the lower risk of heavy loss of lifetime welfare following out-of-wedlock pregnancy from the 1950s onwards, as birth control improved (Akerlof et al., 1996). This may have
caused dominant female behavior to have switched over to risking unmarried intimate relationships with men, and life-cycle asymmetries may have become less marked. Consistent with the possibility of life-cycle changes, increased labor-market participation would tend to lower the benefits from being insured within a traditional marriage. Women are possibly better placed to self-insure through labor markets in current conditions. We note a need to explain cohabitation trends more thoroughly, but move on to consider contractual issues concerning cohabitation.

Cohabitation is everywhere treated quite distinctly from marriage, and this is true even in modern proposals, for example from the American Law Institute, to increase the protection afforded to unmarried partners. The traditional position in the US is captured in *Marvin v. Marvin*,\(^2\) affirming that property settlements after cohabitation depend on discernible contracts and explicit or implied trusts. The position is similar in England and some Commonwealth countries, although statutory intervention in Canada, Australia and New Zealand has edged the common-law world toward the continental European position of extending elements of family-law jurisdiction to the post-dissolution property settlements of unmarried cohabitants. Such jurisdiction always has a lesser scope, in terms of assets and income, than in the case of marriage.

A major question concerns the appropriateness of intervening in cohabitation arrangements that have been freely entered into by apparently rational adults (Probert and Miles, 2009). Questions can be raised about how informed the parties are, and there is some evidence that many cohabitants have an erroneous view that cohabitation over a period of time leads to similar rights in law as those enjoyed by married couples, which is untrue outside of US jurisdictions recognizing common-law marriage (Brinig, 2000). Even if ignorance were the problem, rather than intervene in arrangements, the state might reasonably limit its efforts to providing better information flows – as in a pilot scheme operating in 2007 in the UK. One possible argument for intervening in private arrangements might be that, comparable to, say, banning child labor in industry, there could be a general and widespread revulsion at the characteristics of the relationship trends resulting in the growth in cohabitation. Externalities may arise. A possibility for such a concern could be the impacts on children that follow from less stable relationships, as cohabitation typically ends more frequently than marriage. Suppose that cohabitation has grown because men can be held to marriage less easily by women, given all the social changes since the 1950s. Then choices are freely made, but subject, as ever,

\(^2\) 122 Cal. Rptr. 815 [App. 1981].
to constraints that alter the results of choice. It is legitimate to ask whether the characteristics of the resulting equilibrium are acceptable (Dnes, 2009). Scholars such as Popenhoe (1996) and more general commentators such as Bartholomew (2006, p. 249) argue that some of the characteristics, particularly the results of growing fatherlessness for children, are not.

10. Same-sex Marriage
Another recent trend has been toward recognition of same-sex marriage in many jurisdictions. In a sense, the discussion surrounding heterosexual marriage and cohabitation can be extended to same-sex marriage and cohabitation. One important difference is that, whereas the heterosexual can choose to marry or cohabit, the same-sex couple has not had a choice in the past and could only cohabit. There must be some probability that sunk domestic investments are made asymmetrically by one partner in some same-sex unions, just as in heterosexual union, which would suggest extending something like marriage rights to same-sex couples (Dnes, 2007).

It may be objected that there are very few same-sex couples with life-cycle asymmetries comparable to those of heterosexual couples in traditional marriages, which are anyway in decline. Same-sex relationships are suggestive of greater equality between partners, although there is a possibility of ones that are deliberately structured to leave one partner in the situation of a traditional wife. In jurisprudence, an argument that few people are affected by a condition is not persuasive. We would still wish to protect even a small number of possible victims of opportunistic behavior, and the possibility of opportunism sets up a need for extra search by partners or for other mechanisms aimed at affording protection, which would tend to waste resources.

A strong argument for caution over extending marriage rights to same-sex couples is given by Allen (2006), who notes the possible externalities involved. The welfare of large sections of the heterosexual population may be lowered by the state signaling that their marriages are comparable to relationships practiced by minorities of whom they do not approve. There is a genuine difficulty here if we ignore the externality across social groups, certainly from the utilitarian perspective that most closely matches economic analysis, although not necessarily from other jurisprudential viewpoints such as an imperative to protect minorities. It is notable that most jurisdictions maintain some distinctions between heterosexual and same-sex marriages. Typically, a different terminology is used, such as the domestic partnerships introduced in the UK, and there often remain several differences in the grounds for dissolution. In the UK, domestic partnerships cannot be dissolved on fault grounds on the basis of adultery, which applies only to heterosexual marriage. It is possible that the distinctions recognize the externality issues raised by Allen (2006).
11. Conclusions and Summary

Contract thinking suggests a case for seriously considering expectation damages as a basis for post-divorce support obligations and asset division. The foundation for this conclusion is controlling the incentive for opportunistic behavior set up by the use of reliance, restitution, partnership, rehabilitation and need approaches to post-divorce liabilities. The current focus of marital law is vulnerable to the charge that behavior is encouraged in both males and females that is predatory in nature. The contractual uncertainty that follows from this may well deter some good quality marriages that might otherwise occur.

The contractual view of marriage ultimately explored in this chapter is different from commercial contract law, and is really a perspective that proceeds by useful analogy. Different vintages and varieties of marriage need to be recognized. In particular, partners in traditional and non-traditional marriages could be contractually protected against exploitation by recognizing the variety of promises they received. The approach is also consistent with a separate system of liability for support for children and with avoiding having the state pick up the bill for failed marriages. Contract thinking also illuminates recent trends toward unmarried cohabitation of all kinds.

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Marriage contracts


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Marriage contracts


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