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# Reform of the Divorce Provisions of the Marriage Contract

*Allen M. Parkman\**

## I. INTRODUCTION

When marriage was a life long commitment for most couples, the divorce statutes were of minor concern.<sup>1</sup> However, this situation changed during the Twentieth Century as the divorce rate rose dramatically.<sup>2</sup> Courts became more willing to accept perjured testimony to establish the fault grounds of adultery, desertion and cruelty. Those grounds were eventually replaced by no-fault divorce statutes. Between 1969 and 1985, all of the states passed no-fault divorce statutes that either made incompatibility or irretrievable breakdown the only grounds for divorce or added these grounds to the existing fault grounds. The change in the grounds for divorce from fault based to no-fault based has had broader ramifications than were anticipated.<sup>3</sup> Often, no-fault divorce shifted the basis for the dissolution of marriages from negotiated settlements based on mutual consent, to termination at will by either party

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1 For example, in England between 1800 and 1850 there were fewer than two divorces per year. Griselda Rowntree & Norman H. Carrier, *The Resort to Divorce in England and Wales, 1858-1957*, 11 POPULATION STUD. 188 (1958).

2 The divorce rate increased during most of the 20th Century. It rose from less than 1.0 per 1,000 population at the turn of the century to 2.2 in 1960, increasing rapidly to 5.2 in 1980. Since then, it has fallen back to 4.7 in 1989. U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES (1975); U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 62 (111th ed. 1991).

3 See generally ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? (1992).

subject to legally prescribed financial and custodial arrangements.

The initially positive response to the new grounds for divorce has been muted as the negative repercussions of the new grounds have been recognized. The most visible impact has been a deterioration in the financial condition of divorced women and their children.<sup>4</sup> A more subtle impact has been a reduction in the quality of life for many women and their families because no-fault divorce reduced the incentives for spouses to increase their specialization during marriage.<sup>5</sup> While the circumstances faced by divorced women and their children have been the basis of much consternation, the courts and legislatures have not developed a systematic program of reform. Few people advocate the reintroduction of fault-based divorce, but the other solutions that have been offered for improving the welfare of divorced women and their children have often been ad hoc. The courts and legislatures have attempted to help divorced women by awarding them interests in their husbands' degrees, licenses, and professional goodwill;<sup>6</sup> and by compensating them for having been housewives and mothers.<sup>7</sup>

The fault grounds for divorce essentially required the innocent spouse to be the plaintiff so that it was almost impossible for spouses who wanted a divorce to win a contested lawsuit. Usually, the divorce resulted from a negotiated settlement that left both parties in a better position than if they had remained married. On the other hand, no-fault divorce reduced the negotiating power of the party who did not want a divorce by shifting the outcome to the legally prescribed financial and custodial obligations. These obligations, which are similar to contract damages, underestimate the cost of divorce to many divorced spouses and their children. Under the no-fault system, a divorce can often occur when the net benefits

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4 This trend was documented in LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985); see also H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 *AM. ECON. REV.* 437 (1986). Because women tend to be more adversely affected by divorce, this article assumes for simplicity that the person asking for a divorce, the divorcing spouse, is the husband and the other party, the divorced spouse, is the wife.

5 PARKMAN, *supra* note 3, at 100.

6 Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 *ARK. L. REV.* 439, 459-66 (1987).

7 Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 *FAM. L.Q.* 253, 263 (1989).

are negative. The laws that controlled the financial and custodial arrangements at divorce had not been subjected to scrutiny during the fault era because most divorces with substantial assets were negotiated rather than litigated.

The contention of this paper is that the no-fault divorce laws tend to produce undesirable outcomes because divorcing spouses are not confronted with the true costs of divorce. Social welfare would be improved by a more systematic approach to the divorce arrangements if based on principles from contract law.<sup>8</sup> While the recent change in the divorce laws has altered the grounds for divorce, the change can also be viewed as a shift from a marriage contract for the joint lives of the parties with specific performance the remedy for a breach, to a contract terminable at will subject to liquidated damages generally prescribed by statute.

Section II of this paper discusses the shift from fault to no-fault divorce. Section III addresses whether it is appropriate to view marriage as a contract. Then, section IV analyzes the remedies for a contract breach—damages and specific performance. Economic analysis is used to identify the circumstances under which these remedies should be applied. Finally, section V uses the above analysis to argue that social welfare would be improved by a presumption that marriage is for the joint lives of the parties, with the remedy for a breach being specific performance. A marriage could be dissolved at will subject to damages when the potential costs of divorce are likely to be low and predictable as they tend to be early in a marriage and when there are no children.

## II. THE SHIFT FROM FAULT TO NO-FAULT DIVORCE

For most of the history of the United States, divorce—when permitted—was based on fault. One spouse was required to prove that the other spouse was responsible for the failure of the marriage based on grounds such as adultery,

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8 For discussions of the reform of no-fault divorce based on contract principles, see generally June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207 (1982); Jeffrey E. Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992). For a discussion of the reform of no-fault divorce based on tort principles, see generally Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55 (1991).

cruelty, or desertion. The legal grounds for divorce and the legal standards for the accompanying property division, alimony, child support and custody penalized the party who was at fault. As divorce became more common, the likelihood increased that the parties fabricated the evidence to establish fault.<sup>9</sup> Under those circumstances, the divorce was often based on mutual consent with the parties agreeing to their own financial and custodial arrangements. When both parties wanted a divorce, the couple agreed to a settlement and the evidence necessary to establish the grounds. Then, one party accepted the responsibility for the failure of the marriage.

This process became more complicated, however, when only one party initially wanted a divorce, because the plaintiff in a divorce action had to be the "innocent party." The divorcing spouse had to have evidence of fault by her spouse or persuade him to be the plaintiff in the divorce case. The spouse who wanted the divorce usually had to make substantial concessions to the other party to obtain cooperation. The spouse who initially opposed the divorce was often the wife because of her increased specialization in household activities during marriage.<sup>10</sup> As a result, the concessions at divorce could be an increase in the property settlement, alimony, child support and even custody of the children. In reaching these agreements, the parties could essentially ignore the applicable laws. In a community property state, for example, wives were entitled by law to one-half of the property acquired by the couple during the marriage. Consequently, if the husband asked for a divorce, the wife could respond by demanding more than one-half of the community property. For the fabricated divorces under the fault standards, the mutual consent of each spouse was far more important than the fault-based grounds and the legal standards for the arrangements at divorce. In essence, each

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9 Donald Schiller, Note, *Legislation Notes: Domestic Relations—A Survey of Mental Cruelty as a Ground for Divorce*, 15 DEPAUL L. REV. 159, 163 (1965) (citing *Neu v. Neu*, 298 N.W. 318 (Mich. 1941) (parents fabricated evidence in divorce proceeding)).

10 There often can be an asymmetry of the timing of the contributions of men and women to marriage. The contributions of the wife can occur earlier in the marriage than the contributions of the husband. For example, child rearing usually occurs early in the marriage, while the benefits from additional earnings generally occur later. This creates an incentive for the husband to divorce the wife later in the marriage. See generally Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, 'I Gave Him the Best Years of My Life.'* 16 J. LEGAL STUD. 267 (1987).

spouse had a right to specific performance of a continuation of the marriage that could be waived—for compensation.<sup>11</sup>

The introduction of no-fault divorce was a radical change in these procedures.<sup>12</sup> California adopted the first unequivocal no-fault divorce statute in 1969 when it established irreconcilable differences and incurable insanity as the only grounds for divorce. During the following sixteen years, the other forty-nine states, Puerto Rico and the District of Columbia passed statutes that either made incompatibility or irretrievable breakdown the only grounds for divorce or added them to the existing fault-based grounds. In most states, no-fault divorce meant that a divorce could be obtained by just one spouse.<sup>13</sup> However, the divorce settlement continued to be subject to the outdated legal standards for determining property division, alimony, child support and custody.

The shift from fault to no-fault divorce was commonly viewed as desirable, because the new laws removed the hypocritical fault-based grounds. However, no-fault divorce created its own frustrations due to the belated recognition of the power that the fault-based grounds gave the spouse who did not want a divorce. The no-fault grounds for divorce dramatically reduced the negotiating power of that person. The reduction in this negotiating power would be less important if neither party had altered their activities due to the marriage. However, that was usually not the case since marriage benefits from the increased specialization of the spouses.<sup>14</sup> This specialization can result in costs for at least one spouse if the marriage is dissolved. These costs are not accurately reflected in the legal arrangements required at divorce.

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11 Specific performance was a right to the continuation of the marriage. The courts would not normally become involved in the quality of the performance during the marriage.

12 For data on the current status of the divorce laws, see generally Timothy B. Walker & Linda D. Elrod, *Family Law in the Fifty States: An Overview*, 26 FAM. L.Q. 319 (1993).

13 In a few states, mutual consent is required for a no-fault divorce. See DANIEL SITARZ, *DIVORCE AND DISSOLUTION OF MARRIAGE LAWS OF THE UNITED STATES* (1990). In New York, for example, the no-fault grounds consist of (1) living separate and apart for one year under the terms of a separation agreement which is in writing and signed and notarized or (2) living separate and apart for one year under the terms of a judicial separation decree.

14 See, e.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981); FRANCINE D. BLAU & MARIANNE A. FERRER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* 36-41 (2d ed. 1992).

The impact of the shift from fault to no-fault divorce can be more clearly understood by examining the effect of a shift from specific performance to damages as the remedy for the breach of a contract. In the next section, the attributes of marriage that make it similar to a contract are discussed.

### III. THE MARRIAGE CONTRACT

While the term, "contract," has sometimes been associated with marriage, activities before and during marriage traditionally have not been covered by contract law. Marriage is created by an agreement similar to a contract, but once solemnized it becomes a status controlled more by law than by the preferences of the parties. Marriage also has been described as a civil contract to subordinate the role of religious denominations in its formation.<sup>15</sup> Nevertheless, the agreement by two people to marry includes all the elements of a contract: offer, acceptance and consideration. The offer and acceptance are obvious. Both the law and the marriage vows impose obligations on both parties that meet the standards for consideration.

Marriage also involves problems similar to those addressed by contract law. Contract law traditionally has served an important role in limiting two dangers when exchanges occur over time: opportunism and unforeseen contingencies.<sup>16</sup> A fundamental function of contract law is to deter people from behaving opportunistically to encourage long-term investments, for example, and to reduce the need for people to take costly steps to protect themselves.<sup>17</sup> The common law and recent statutes such as the Uniform Commercial Code deal with unforeseen contingencies by prescribing the elements of a commercial contract unless modified by the parties.<sup>18</sup>

The creation of the marriage agreement is similar to the requirements of a commercial contract, since the agreement must be voluntary and it can be annulled if the agreement of one party was obtained by fraud<sup>19</sup> or force.<sup>20</sup> Also, the parties

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15 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (2d ed. 1987).

16 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 79-126 (3d ed. 1986).

17 *Id.*

18 E. ALLEN FARNSWORTH, *CONTRACTS* 446 (1982).

19 U.C.C. § 2-721 (1977).

20 JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* 355 (3d ed. 1987).

must be competent based on age and mental capacity to make a socially acceptable choice.<sup>21</sup>

Marriage is often viewed as a status rather than a contract because of the government's role in establishing the terms of the marriage agreement. However, government plays a major role in determining permissible parties and subjects for most other contracts. For example, child labor laws limit the parties who can enter into labor contracts on the basis of age<sup>22</sup> and criminal laws limit the subject of contracts on the basis of health and public welfare.<sup>23</sup> Similar restrictions apply to marriage agreements. During most of the Christian era, marriage was an agreement that could not easily be dissolved or altered by the parties.<sup>24</sup> Government regulations also limit the rights of parties to contract when third parties are affected, such as in zoning.<sup>25</sup> The marriage laws have similar restrictions. For example, children are third party beneficiaries of a marriage agreement, so statutes define the parent's obligations to their children.<sup>26</sup> These obligations formerly occurred only if the father and mother were married, but have been extended to parents who are not married.<sup>27</sup>

In summary, because a marriage agreement is similar to other contracts, it is appropriate to consider the preferred duration of the marital contract and the remedies for a breach. Under fault-based divorce, each "innocent" party had a right to the continuation of the marriage similar to the right to specific performance under contract law.<sup>28</sup> However, no-fault divorce permits a divorce at will, subject only to the financial and custodial arrangements required by law.<sup>29</sup> This requirement is similar to the remedy of liquidated damages under contract law.<sup>30</sup> Much literature has developed that discusses the attributes of specific performance and damages as alternate remedies for the breach of contracts.<sup>31</sup>

21 E. ALLEN FARNSWORTH, *CONTRACTS* 213-14 (1982).

22 *See* CAL. LAB. CODE § 1290 (West 1989).

23 *See* CAL. HEALTH & SAFETY CODE § 11352 (West 1991 & Supp. 1993) (criminal violation for sale of controlled substances).

24 PARKMAN, *supra* note 3, at 14.

25 ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 527 (1984).

26 ARK. CODE ANN. § 28-65-310(b) (Michie 1987 & Supp. 1993).

27 ARK. CODE ANN. § 9-14-105 (Michie Supp. 1993).

28 ROBERT T. KIMBROUGH, *SUMMARY OF AMERICAN LAW* 92-93 (1974).

29 PARKMAN, *supra* note 3, at 112.

30 KIMBROUGH, *supra* note 28, at 196-197.

31 This literature is summarized in RICHARD POSNER, *ECONOMIC ANALYSIS OF*



### A. *Remedies for Breach of a Contract*

While damages are the usual remedy for the breach of a contract, they are not the only remedy, nor is there only one method for estimating damages. Richard Posner identifies seven remedies for the breach of a contract: the promisee's reliance loss, the expectation loss, liquidated damages, consequential damages, restitution, specific performance, and a money penalty specified in the contract or other punitive damages.<sup>32</sup> The two remedies that have been available in marriage dissolution cases have been liquidated damages and specific performance.<sup>33</sup> The desirability of these remedies for a contractual breach varies with the nature of the contract.

#### 1. *Damages*

Damages are the usual remedy for the breach of a contract and are based on compensating the non-breaching party for his loss.<sup>34</sup> It is not the policy of the law to compel the performance of contracts but only to require each party to choose between performing and compensating the other party for any injury resulting from a failure to perform.<sup>35</sup> A party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, to the extent this can be done by money, in the same financial position he would have occupied if the contract had been performed.<sup>36</sup> The usual standards for damages are the expected gain or the loss incurred due to reliance.<sup>37</sup> In marriage dissolution cases, the liquidated damages consist of the financial and custodial arrangements required by law or specified by the parties in pre-marital or post-marital contracts.

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LAW 117-32 (4th ed. 1992).

32 *Id.* at 117.

33 PARKMAN, *supra* note 3, at 64.

34 For a more detailed discussion of damages, see generally COMMERCIAL DAMAGES (Charles L. Knapp ed., 1988).

35 Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

36 KIMBROUGH, *supra* note 28, at 199-202.

37 FARNSWORTH, *supra* note 21, at 839-40.

## 2. *Specific performance*

Specific performance is the other remedy that has been available in marriage dissolution cases. With the fault-based grounds for divorce, innocent spouses had a right to specific performance of the agreement to remain married during the joint lives of the parties. However, under contract law, specific performance will only be ordered when damages are not an adequate remedy, such as when damages are difficult or impossible to measure because of the lack of good substitutes for the performance promised by the breaching party. This remedy requires the breaching party to perform the contract or face contempt of court. Still, specific performance is a right rather than a requirement, because the party who has a right to specific performance can waive that right.<sup>38</sup> The usual incentive for waiving the right is compensation.

The most common use of specific performance occurs when the subject of the contract is unique, such as real estate transactions.<sup>39</sup> However, it also can be used in suits for personal property when the property is unique.<sup>40</sup> While personal services are often unique, courts have been less willing to apply specific performance to contracts for personal services.<sup>41</sup> Nevertheless, when specific performance has been applied to personal service contracts, courts have issued an injunction to stop the person from providing the service elsewhere rather than performing the contracted service.<sup>42</sup>

### *B. Efficient Remedies*

Contract remedies tend to create incentives for parties to make efficient decisions --the benefits exceed the costs-- that increase social welfare.<sup>43</sup> When two parties contract, it is reasonable to assume that both expect to be better off due to the contracted transaction. However, contracts that involve future activities can be subject to unforeseen changes. These unforeseen circumstances present the parties with the option of either performing the contract or paying damages. If the seller's costs

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38 PARKMAN, *supra* note 3, at 127.

39 FARNSWORTH, *supra* note 21, at 829-30.

40 *Id.* at 830-31.

41 *Id.* at 835-36.

42 *Id.* at 836.

43 POSNER, *supra* note 31, at 118.

rise so that the buyer can acquire the contracted goods from another source at a lower price than the seller's costs, society is better off if the buyer buys from the alternate source. However, the law requires the seller to compensate the buyer for the difference between the contract price and the price actually paid.<sup>44</sup> Meanwhile, the supplier has avoided incurring the higher costs of production.

On the other hand, the use of specific performance as the remedy for the breach of a contract for unique goods is also based on a desire for efficient outcomes.<sup>45</sup> When a breach is worth more to the breaching party than performance to the victim, specific performance creates incentives for the parties to reach a settlement that leaves them better off. Specific performance forces the parties to identify their costs and benefits from not performing.<sup>46</sup> The costs associated with nonperformance when the good is unique are the value of the good to the buyer and the expense of finding an alternative.<sup>47</sup> Given the uniqueness of the particular good, these costs usually cannot be estimated by anyone other than the parties who have incentives to make that calculation to determine a possible basis for a negotiated settlement.<sup>48</sup> Specific performance does have the disadvantage that it can increase the costs of settlement negotiations. These negotiations are a deadweight loss since the costs incurred by one party do not confer benefits on the other.

William Bishop noted that the choice of a remedy often turns on a trade-off between the potential cost of "excessive breaches" when damages are awarded and of "excessive performance" when specific performance is awarded.<sup>49</sup> Because of the legal requirement that damages must be proven and not speculative, the actual damages resulting from a breach can be underestimated. If the damages are under estimated, individuals could be induced to breach contracts when the costs of the breaches exceed the benefits, i.e., excessive breaches. Alternatively, with specific performance one party can demand the

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44 CALAMARI & PERILLO, *supra* note 20, at 619.

45 See William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299 (1985); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 365 (1978); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 291-92 (1979).

46 PARKMAN, *supra* note 3, at 126-27.

47 *Id.* at 126.

48 *Id.* at 126-27.

49 Bishop, *supra* note 45, at 299-300.

performance of the contract either due to spite or to an incorrect estimate of the outcome of negotiations when the net benefits are negative, i.e., excessive performance. With either remedy, the parties can avoid the legal outcomes by negotiating their settlements. The preferred rules will be the ones that are more likely to produce efficient outcomes with damages preferred for normal transactions and specific performance when the subject of a contract is unique.

#### IV. REMEDIES FOR BREACH OF THE MARRIAGE AGREEMENT

Because the decision to dissolve a marriage involves costs and benefits, social welfare is improved when the remedies encourage divorce only when the net benefits are positive.<sup>50</sup> The fault-based grounds for divorce provided the spouses with a legal right to specific performance of the marriage agreement, especially the right to certain standards of conduct and a continuation of the marriage. If a spouse breached the agreement by adultery, cruelty or desertion, the innocent party could sue for divorce. The spouse who committed the breach could not use that act to initiate a divorce. If a spouse initiated a divorce based on the fault grounds and relied on the courts to decide the financial and custodial arrangements, the remedy was liquidated damages based on the reliance interest of the innocent spouse.<sup>51</sup> The actual divorce arrangements based on specific performance, however, were often more generous to the divorced spouse based on private agreements that were ratified by the courts, rather than being independent determinations by them.

With the introduction of no-fault divorce, however, the importance of private arrangements changed dramatically. In most states, a spouse could get a divorce without the agreement of his or her spouse under the new no-fault laws. In contrast to the situation under the fault based grounds, the financial and custodial arrangements of no-fault based divorce were more likely to be based on legal standards. It was unlikely that negotiated settlements would differ dramatically from what the parties could expect from litigation. Because of the increase in employment and marriage opportunities for divorced women,

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50 PARKMAN, *supra* note 3, at 123.

51 Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 870-82 (1988).

the courts under the reliance interest generally provided more limited awards for divorced women.<sup>52</sup> Without any grounds for divorce, the people who did not want a divorce were in a much weaker position to negotiate settlements which substantially improved the award they could expect from litigation. At divorce, a woman could expect to receive a property settlement that returned her separate property and gave her approximately half the tangible property acquired during the marriage, some rehabilitative support, and child support until the children became adults. These arrangements are similar to damages under contract law.

The damage remedy for a contract breach will produce excessive and inefficient breaches when the damages are less than the loss experienced by the non-breaching party.<sup>53</sup> If the divorcing spouse is confronted with costs that are less than those of all affected parties, then the probability increases that a divorce will occur when the net benefits to the divorcing spouse are negative. Under the Coase Theorem, the divorce would not occur when the costs and benefits consist of private goods that can be converted to common units, i.e., dollars, and transaction costs are zero.<sup>54</sup> Under those circumstances, if the costs of a choice exceeded the benefits, the parties have an incentive to negotiate an outcome that rejects that choice. This efficient outcome may not occur, however, because the benefits of marriage and the costs of divorce may be public goods, valued in heterogeneous units, and the transaction costs associated with divorce can be substantial.<sup>55</sup>

The loss experienced by the divorced spouse, especially one who increased her specialization in household production during marriage, is often underestimated because the impact of decisions during marriage on her income earning capacity, human capital, is usually ignored in the financial arrangements at divorce. At marriage, individuals have already ac-

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52 Some have argued that no-fault divorce was interpreted by the courts as recognizing the equality of men and women. Therefore, it was no longer necessary to provide substantial support to women after divorce. See WEITZMAN, *supra* note 4, at 357.

53 PARKMAN, *supra* note 3, at 127.

54 See generally R.H. Coase, *The Problem of Social Costs*, 3 J.L. & ECON. 1 (1960).

55 See Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503 (1993); Douglas W. Allen, Comment, *Marriage and Divorce*, 82 AM. ECON. REV. 679 (1992).

quired some separate property. For many people, their most valuable asset is their human capital. The value of this human capital is the discounted value of earnings that reasonably can be expected in the future net of any future investments. During marriage, human capital can either increase or decrease. If human capital increases, marital property is created. Alternatively, if a spouse's human capital decreases during marriage due to decisions by the spouses, that loss is similar to a contribution of separate property to the marriage. Often a couple decides that the family will benefit if one spouse, usually the wife, limits her career to assume a primary role as a housewife and mother. At divorce, this person's human capital is worth less than if she had not limited her career. Typically, legal standards for divorce settlements do not consider this loss in any systematic way.

Without the limited protection provided by the fault grounds for divorce, many people who increased their specialization during marriage, especially as housewives and mothers, are worse off under no-fault divorce if their marriage is dissolved. Even those women who remain married may seek additional employment and education during marriage as insurance against their costs if they are divorced. If employment and education confer only limited benefits on their family, the other family members may not assume many of the chores that the women have traditionally provided at home.<sup>56</sup> Finally, all the family members may be worse off because of the incentives created for married women to pursue additional employment and education during marriage.<sup>57</sup> Based on their benefits and costs, many married women have incentives to pursue employment and education during marriage even when the net benefits to their family are negative. This additional employment and education may not provide compensating benefits for the family, but it does provide insurance for the married woman if the marriage is dissolved.

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56 This can often happen later in marriage because of the asymmetry of the contributions of the spouses. See Cohen, *supra* note 10, at 285-87. A number of authors have noted that the total hours worked by married women both at home and at a job have increased over the last few decades at the same time that the hours worked by married men have declined. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 77-78 (1988); BETH ANNE SHELTON, *WOMEN, MEN AND TIME* 112 (1992).

57 Allen M. Parkman, *Unilateral Divorce and the Labor Force Participation Rate of Married Women, Revisited*, 82 AM. ECON. REV. 671 (1992).

A more accurate measurement of the costs that result from divorce, including consideration of human capital, would increase social welfare. The incorporation of human capital into the property considered at divorce, however, would still not recognize the subjective costs due to a divorce. Although the knowledge that the divorcing spouse no longer wants to live with the divorced spouse might reduce that person's attraction to the divorcing spouse, there is still a potential loss to that person due to the desire for a continuing relationship with that person.

Another important source of costs for the divorced spouse is search.<sup>58</sup> Both parties incurred search costs to identify each other initially. Now, either one spouse has decided that he or she has already found a person that he or she prefers to the current spouse or is willing to incur additional costs searching for a better spouse or situation. The divorced spouse must involuntarily incur the cost of searching for another mate or living situation. Often, this cost can be very high.

Finally, the divorce may be costly to the children.<sup>59</sup> The quality of life can deteriorate for children shared by two parents—living separately—compared to the conditions still possible when living with both parents. If divorce were more difficult to obtain, some parents probably could make their marriage work and, thereby, provide benefits to their children. The parent, usually the mother, who expects custody of the children after divorce, is more likely to recognize the costs that the children incur because they will be less happy when they live only with her. These relationship, search and children's costs are difficult to calculate and, therefore, are not included in awards at divorce. As a result, the awards at divorce tend to underestimate the costs of divorce. When the costs of divorce are underestimated, the probability increases that a divorce will occur when the net benefits are negative. These divorces reduce social welfare.

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58 Marriage is the result of a search process during which the parties weigh the benefits and the costs of additional search. See BECKER, *supra* note 14.

59 Unfortunately, little is known about the effect of divorce on children. See generally Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1 (1988). However, generally, children prefer an unhappy marriage to a divorce. See JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP* (1980).

## V. A MARRIAGE CODE

Since most marriages benefit from increased investments in specialization by the spouses, making marriage a long-term arrangement may be necessary to protect these investments.<sup>60</sup> A Marriage Code similar to the Uniform Commercial Code could be drafted that would specify the terms of the marriage contract, subject to any modifications by the parties. The presumed duration of marriage would be the joint lives of the parties with the usual remedy being specific performance. The recognition of the subjective costs of divorce ignored under current divorce laws advocates specific performance as the preferred remedy for the breach of the marriage agreement. If the benefits of the dissolution exceed the costs, social welfare would be improved by permitting the couple to negotiate a dissolution of the marriage. The party who did not initiate the divorce may no longer feel strongly attracted to her spouse. She can find a situation just as appealing as the current marriage with a limited amount of effort and any children would not be adversely affected by a divorce. She might, therefore, be willing to reach a divorce agreement at a small cost to the party who wanted the divorce. Social welfare would be improved by permitting the divorce. Alternatively, she might still be strongly attracted to her spouse, feel that only a long and costly search would find another comparable situation and that the children would suffer compared to the quality of life possible if the parents stay together. Under those circumstances, she might ask for a level of compensation that the other spouse is unwilling to pay. In other words, the party who wants the divorce does not value the dissolution as much as the wife values the continuation of the marriage. Then, social welfare is improved by continuing the marriage.

The definition of property should be expanded in the Code to include all the assets owned by the parties including their human capital. At divorce, separate property would be returned to the parties and marital property would be divided equally between them. To protect any children, the Code should specify unmodifiable support standards that include any income reduction incurred by the custodial parent due to custody. With a

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60 The gains from a division of labor and specialization during marriage are discussed in BECKER, *supra* note 14.



more accurate definition of property and child support, alimony could be limited or eliminated. With the exception of the child support standards, the other provisions of the Code could be modified by the parties.

Mutual consent divorce gives substantial power to spouses who do not want a divorce. To limit abuse of this power, it may be attractive to permit no-fault divorce when the potential costs of divorce are likely to be low, as they tend to be early in a marriage and when there are no children. Therefore, no-fault divorce might be permitted during the first year of marriage or until the wife becomes pregnant, whichever comes first.

## VI. CONCLUSION

The introduction of no-fault divorce has resulted in a deterioration in the financial condition of many divorced women and their children and a reduction in the quality of family life. This outcome is due to the financial arrangements under no-fault divorce tending to underestimate the costs of divorce, thereby, producing inefficient outcomes. This situation could be improved by viewing marriage as a contract and recognizing that a contractual remedy can improve social welfare. The current marriage contract in most states is terminable at will subject to financial and custodial arrangements similar to damages. Because many marriages benefit from investments by spouses that require long-term protection, the presumption should be that marriage is for the joint lives of the parties. The remedy for the breach of the marriage contract should be specific performance. These changes will increase the likelihood that the parties will divorce only when the benefits exceed the costs.