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ARTICLES

RATIONAL DECISIONMAKING ABOUT MARRIAGE AND DIVORCE

*Elizabeth S. Scott**

THE apparent normative goal of modern divorce law is the efficient termination of unsuccessful marriages. Once the couple (or either party) determine that the marriage is no longer satisfactory, then quick and easy exit is deemed desirable. As Carl Schneider suggests, the law has withdrawn from moral discourse about divorce, adopting a neutral stance toward marital dissolution.¹ Although divorce typically imposes formidable psychological and economic costs, there are few *legal* incentives to remain married, or even to consider thoughtfully the decision to end the marriage. Moreover, although decisions about marriage and divorce have important legal implications, the law does nothing to prevent or deter hasty or ill-informed choices by couples entering marriage.

The current stance of the law is understandable in its historical context. Divorce law of a generation ago conflicted with prevailing social norms and was frequently evaded or ignored.² The movement from

* Associate Professor of Law, University of Virginia. This Article has benefited greatly from the helpful comments of colleagues who read an earlier draft. I would like to thank Kenneth Abraham, Katharine Bartlett, Lillian BeVier, Robert Cooter, Robert Emery, Mary Ann Glendon, Kent Greenawalt, John Jeffries, Saul Levmore, John Monahan, Linda Monahan, Subha Narasimhan, Glen Robinson, Carl Schneider, William Stuntz, Steven Sugarman, Franklin Zimring, and the participants in faculty workshops at the Columbia Law School, at the University of Virginia Law School, and at a Law-Psychology Colloquium at SUNY-Buffalo. I also thank Polly Schaefer and Diane Heller for their able research assistance. Most of all, I thank Robert Scott, whose unfailing support and helpful suggestions have been invaluable.

¹ Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1810 (1985). See *infra* notes 30-41 and accompanying text for a discussion of this trend.

² For an insightful early analysis of the malfunctioning of the fault-based system and proposals for reform, see Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32 (1966); see also *infra* notes 15-20 and accompanying text.

legal rules based on "fault" to "breakdown" grounds for divorce reflected a modern conception of marital dissolution. More precisely, it signaled a changed conception of marriage. Marriage is no longer a relationship reinforced by religious, moral, and legal restraints. Indeed, contemporary marriage has been aptly described as a "non-binding commitment,"³ a relationship that may begin with optimistic hopes that it will endure, but that survives only as long as each spouse's needs are met.

This conception of marriage and divorce, although apparently offering enhanced personal freedom, has seemed unsatisfactory to many observers.⁴ Some perceive the high divorce rate⁵ as symptomatic of deep societal dysfunction. Social critics have described with alarm the "culture of narcissism" in our society, characterized by self-gratification and the absence of commitment.⁶ Several legal scholars have suggested that the rhetoric of family law should emphasize rela-

³ Schneider, *supra* note 1, at 1848 (citing N. O'Neill & G. O'Neill, quoted in C. Lasch, *The Culture of Narcissism*, *infra* note 6, at 200).

⁴ Lawrence Stone questions whether escalating divorce "has done much to advance the Benthamite objective of the greatest happiness of the greatest number." Stone, *The Road to Polygamy* (Book Review), *N.Y. Rev. Books*, Mar. 2, 1989, at 12, 15. He describes the current situation as one in which "spouses are being traded in almost as cheaply and easily as used cars." *Id.*

⁵ If the current trend continues, almost 50% of marriages begun in the 1980's will end in divorce. Glick, *How American Families are Changing*, 6 *Am. Demographics* 20, 24 (1984). In the past few years, the divorce rate has leveled off. *Id.* at 23-24.

⁶ C. Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (1978) [hereinafter C. Lasch, *The Culture of Narcissism*]; C. Lasch, *The Minimal Self: Psychic Survival in Troubled Times* (1984) [hereinafter C. Lasch, *The Minimal Self*]. Lasch views modern persons as struggling for psychic survival in response to the unstable social and economic conditions after the Second World War. The response is a retreat from long-term commitments because of uncertainty about the future. C. Lasch, *The Minimal Self*, at 15-20. Robert Bellah and his colleagues have examined the negative influence of our strong tradition of individualism on the inclination toward personal and social commitment. In a study that set out to find what is important to modern Americans by questioning people about their concerns, Bellah and his colleagues report that many people tend to resort to the "first language" of individualism. R. Bellah, R. Madsen, W. Sullivan, A. Swidler & E. Stipton, *Habits of the Heart: Individualism and Commitment in American Life* 20-21 (1985) [hereinafter R. Bellah]. This language is, in Bellah's terms, expressive and utilitarian; it serves poorly as a medium for talking about societal problems because it focuses on personal and immediate concerns. *Id.* The tension between individualism and commitment is clearly reflected in the modern ideology of marriage and divorce. To the extent that love and marriage are seen in terms of psychological gratification, as Bellah finds they increasingly are, they may less effectively serve their "older social function of providing people with stable, committed relationships that tie them into the larger society." *Id.* at 85.

tionship and responsibility and speak less in the language of individual rights.⁷

Of particular concern are the most vulnerable casualties of the modern marriage, the minor children of divorce.⁸ Children typically bear substantial psychological and economic costs for a decision in which they have no role. The easy availability of divorce today surely contributes to the magnitude of its harmful effect on children.⁹ In a legal culture committed to protecting the welfare of children, this realization is disquieting. It suggests, at least, that some reflection on these matters is in order. This would be so even if the interests of adults were well served by the current freedom-maximizing policy, a conclusion that is far from certain.

Although dissatisfaction with contemporary marriage has generated nostalgia about "family values," few suggest that we respond by resurrecting the traditional legal regime. Instead, we might look to the nature of the current disquiet about popular marital norms for clues about a legal regime toward which we might aspire. The conventional "story" of modern marriage is one of limited investment and individual pursuit of self-gratification, followed by disappointment and the breakdown of the relationship. If this story suppresses important individual and societal values and goals, then it may be

⁷ This has been an important theme of feminist legal scholars. A recent thoughtful exposition is offered by Katharine Bartlett, who argues that the law should express a view of parenthood emphasizing relationship and responsibility rather than exchange and rights in responding to certain custody disputes. Bartlett, *Re-Expressing Parenthood*, 98 *Yale L.J.* 293 (1988). Other scholars who have focused on the destructive effects on the family of the legal emphasis on individual rights include Mary Ann Glendon. M. Glendon, *Abortion and Divorce in Western Law* (1987) (examining how the deeply entrenched language of individual rights in this country has shaped the "story" the law tells of divorce and pointing out that ours is virtually the only Western country in which married persons have a "right" to divorce); see also Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 *Mich. L. Rev.* 463 (1983) (challenging individual rights analysis as sacrificing an important social interest in the family); Minow, "Forming Underneath Everything that Grows:" *Toward a History of Family Law*, 1985 *Wis. L. Rev.* 819 (focusing on the social experience within the family rather than on the law as written); Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 *Calif. L. Rev.* 151 (1988) (discussing the flaws inherent in an individual rights analysis of neonatal euthanasia).

⁸ In 1976, for example, 57% of divorces involved minor children. *Divorce, Child Custody, and Child Support*, in *Bureau of the Census, U.S. Dept. Commerce Current Population Reports, Special Studies 8 (Series P-23, No. 84, 1979)*.

⁹ See *infra* notes 63-80 and accompanying text.

important to ask what alternative conception we would prefer. Only then can we explore whether the law could better mirror our goals.

There is an alternative story¹⁰ that better comports with the aspirations of many people for their own marriages.¹¹ Two people enter marriage committed to its success and endurance, though not, as in the past, because of religious obligation or moral duty to the spouse. Rather, each person determines that individual self-fulfillment will be promoted by a substantial investment in a stable, interdependent, long-term relationship with a marital partner. The couple also view having and raising children together in a loving home as important to self-realization. Here, they are also motivated by a sense of responsibility to their offspring to provide the best possible environment for their children's development. The couple realize that over time, stresses may threaten the stability of their relationship, but they hope and expect that the relationship will last. If the marriage should prove unfulfilling despite the couple's best efforts, they would divorce only after long and careful consideration, doing everything possible to reduce the costs to their children.

The law currently does not express the values reflected in the story of enduring marriage. This disjunction may represent a significant lost opportunity. At least at some intangible level, the law itself, in the way it portrays marriage and in its reinforcement of social norms, influences what people perceive the marital relationship to be. A legal regime that reflects the values of commitment could further several important social interests, ranging from the concrete (reduction of divorce litigation) to the intangible (enhancement of personal happiness). Most important, a legal regime that reinforces a cultural con-

¹⁰ Several legal scholars in recent years have argued that an important function of law is its role of telling stories about our culture; in so doing, the legal rhetoric interprets the culture to itself and also affects change. The leading proponent of this perspective is James Boyd White. See White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life*, 52 *U. Chi. L. Rev.* 684 (1985) (Law is a branch of rhetoric, "the central art by which community and culture are established, maintained, and transformed."). Mary Ann Glendon has adopted this metaphor in examining and comparing abortion and divorce law in different countries. M. Glendon, *supra* note 7, at 8-9. Glendon suggests that the story of family law in this country is shaped by the deeply rooted language of individualism. *Id.* at 112-14. The legal vocabulary of individual rights defines and restricts the story of divorce told by the law. As Glendon suggests, this vocabulary "ha[s] been inadequate to the task of telling the kind of story most Americans would want to tell about . . . divorce . . ." *Id.* at 113.

¹¹ See *infra* notes 49-50 and accompanying text.

ception of marriage as an enduring and stable relationship may enhance the welfare of children.

This Article applies precommitment theory to the marriage relationship in order to explore whether social norms supporting lasting marriage should be legally reinforced. Precommitment strategies are useful when an individual seeks to pursue a declared long-term preference, but fears that she may make future choices based on short-term preferences that are inconsistent with this goal. The problem of inconsistent choices can be mitigated by various *ex ante* devices designed either to preclude the undesirable choice or to increase its costliness. A precommitment analysis suggests that the discredited fault-based divorce law, despite other inadequacies, may have served a beneficial function by imposing costs on divorce. An alternative legal regime offering precommitment options that are more compatible with contemporary social norms may promote marital stability and thereby benefit spouses and children.

Precommitment analysis also clarifies the importance of thoughtful decisionmaking about marriage and divorce as a means of reducing the risk of marital failure. Research in decision theory suggests that cognitive biases, haste, and poor information may cause decisionmaking error. The current law of marriage and divorce does little to reduce the potential for such error. Legal regulation can provide a context for decisions that would more accurately reflect long-term interests.

In Part I of the Article, I trace the evolution of divorce law from the fault-based regime of the past to the normatively neutral modern law. I question the assumption that current divorce law accurately reflects the modern social norm of self-realization. A recognition that self-fulfillment may have replaced religious and moral duty as a primary behavioral objective does not necessarily mandate replacing the barriers of fault divorce rules with "quick and easy" divorce. As I have suggested, policies supporting investment in and commitment to marriage may also reflect contemporary attitudes and values. Further, policies promoting marital stability may better protect the welfare of children, an outcome that also reflects commonly shared goals. Drawing on social science research on divorce, I also challenge the assumption, implicit in modern divorce law, that if either parent is dissatisfied with the marriage, then divorce must be better for children.

Part II introduces precommitment theory and explores its application to decisions about marriage and divorce. Using theoretical models of divorce decisionmaking grounded in social psychology, I examine the potential impact of precommitment strategies on that decision and conclude that some couples may reduce the risk of marital failure by using precommitment mechanisms. Moreover, these strategies may promote cooperative behavior during marriage and encourage more thoughtful decisions about entering marriage. In this Part, I also consider the potential for cognitive error in marriage and divorce decisions. This potential suggests a beneficial role for a corrective legal response, but it also points to limits on the usefulness of precommitment theory in this context. Nevertheless, I conclude that precommitment mechanisms may help some couples to realize their goals of lasting marriage. More generally, precommitment theory offers both the basis and the means to shape an ideology of marriage and family that reflects important societal values obscured under current law.

Part III explores how precommitment theory might influence legal policy regulating divorce. I argue that a precommitment rationale supports legally imposed burdens on divorce decisions by parents of minor children. Such restrictions reinforce the hopes of most parents for enduring family relationships and signal the societal value of family stability. However, modern norms do not support paternalistic restrictions on those divorces in which only the interests of two adults are at stake. Here, I argue that the legal enforcement of antenuptial precommitment contracts offers couples maximum freedom to pursue their goals for marriage. Thus, I conclude that different legal regimes for regulating divorces involving minor children and other divorces may be desirable.

I. MODERN MARRIAGE AND DIVORCE: CHALLENGING THE "EFFICIENCY" NORM

A. *Divorce Law: From Fault to Moral Neutrality*

1. *The Failure of Traditional Divorce Law*

American law has never raised substantial obstacles to entering

marriage.¹² Even when marriage was presumed to be a life-long commitment and divorce was rare, the law did little to promote thoughtfulness in decisions to marry. This function may have been served historically by religious and cultural traditions, such as betrothal periods and posting of banns.

In contrast, divorce was historically restricted by the law and was unavailable other than in extreme circumstances. Divorce law was largely a nineteenth-century development, and divorces were not common until the twentieth century.¹³ Until the 1960's, most states allowed divorce only upon the proof by one party that the other had committed a serious offense against the marriage.¹⁴

As the social climate in this country became more hospitable to divorce in the postwar era, fault-based divorce law became less effective as a barrier to exit from marriage. The reform movement was supported in part by the argument that restrictive laws were often subverted and ignored.¹⁵ Two common evasions were migratory divorce (the practice of "moving" to a jurisdiction whose laws were hospitable to divorce)¹⁶ and collusion between the parties, resulting in

¹² In most states, couples must file for a marriage license and demonstrate evidence of having met medical requirements (primarily tests for venereal diseases). Waiting periods before or after issuance of the license vary from no waiting period to five days. See the list of state marriage laws in 23 Council of State Gov'ts, *Book of the States* 46 (1980-81).

¹³ In 1867, the first year for which statistics are available, the annual divorce rate was 0.3 divorces per 1000 population; in 1979 this figure was 5.3 per 1000 population. Glick & Lin, *Recent Changes in Divorce and Remarriage*, 48 *J. Marriage & Fam.* 737, 737-38 (1986).

¹⁴ Fault grounds were numerous and varied among the states. The most typical grounds were adultery, desertion, physical and mental cruelty, long imprisonment for a felony, habitual intoxication, or drug addiction. Many modern state laws retain fault grounds along with breakdown grounds. See, e.g., *Ga. Code Ann.* § 19-5-3 (1982) (fault grounds including drunkenness, cruelty, desertion, and adultery).

¹⁵ See Wadlington, *supra* note 2, at 33-35. Walker describes the response of couples or persons seeking to end marriage in the face of strict traditional divorce laws as "law avoidance." Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 *J. Fam. L.* 267, 269-70 (1971).

¹⁶ What made a state attractive to a person seeking divorce was both lenient divorce law and a short time period to establish domicile. The popularity of Nevada as a jurisdiction in which to obtain divorce was based in part on its requirement of only six weeks residence to establish domicile. In a typical case, the spouse "moved" to Nevada, remained long enough to establish domicile, obtained a divorce, and then returned to the "home" state, i.e., the state with more restrictive divorce laws. See Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 *Vand. L. Rev.* 633, 641-43 (1956). Rheinstein applied Gresham's law to divorce in arguing that if divorce is difficult to obtain in one place and easy in another, "cases tend to accumulate in the place of easy, and to dry up in the place of hard divorce." *Id.* at 641.

perjury to establish fault.¹⁷ Observers in the 1960's reported that ninety percent of all divorces based on a fault ground were granted without contest, and that hearings were brief and perfunctory.¹⁸ Thus, the status of being the "innocent party" in a divorce often only conferred an advantage in negotiating a settlement.¹⁹

At least by the 1960's, fault grounds were not a disabling barrier to marital dissolution. The traditional moral and religious premise of divorce law—that marriage should last until death unless one party had grievously misbehaved—seemed no longer to reflect the prevailing social norms. Further, the predicate of fault as the basis for divorce was inconsistent with modern conceptions of the complexity of marital breakdown. Under the modern view, the specific behavior that constituted legal fault was usually only a small part of a story of shared responsibility for the failure of the marriage.²⁰

¹⁷ In New York, which maintained rigorous evidentiary requirements for establishing adultery as the sole ground for divorce, collusion between the spouses was notorious and widespread. In one description of the staged evidence of adultery, a judge reported "[s]he is always in a sheer pink robe . . . [a]nd he is always in his shorts when they catch them." Wadlington, *supra* note 2, at 33. Divorce "rings" in New York provided trumped-up evidence of adultery as early as the late 19th century. L. Friedman, *A History of American Law* 439 (1973). See generally Wels, *New York: The Poor Man's Reno*, 35 *Cornell L.Q.* 303 (1950) (discussing the large volume of uncontested adultery actions that were handled in an assembly line manner); Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 *Colum. L. Rev.* 1121 (1936) (arguing that the adoption of divorce by mutual consent would limit the amount of perjury and collusion present in divorce trials).

¹⁸ It was reported that the average divorce trial in New York rarely lasted 15 minutes. Wels, *supra* note 17, at 318.

¹⁹ The fact that there was collusion and often implicit consent did not signify that both spouses wanted the divorce. Rather, the reluctant spouse likely often used the bargaining advantage afforded by the fault requirement in the negotiation of a separation agreement. See Foster & Freed, *Divorce Reform: Brakes on Breakdown*, 13 *J. Fam. L.* 443 (1973-74). This could be a significant advantage if one spouse was eager for release. Lenore Weitzman has argued that an important effect of no-fault divorce is the loss of this bargaining advantage (which she assumes generally benefited women). L. Weitzman, *The Divorce Revolution* 28-31 (1985).

²⁰ In California, the Governor's Commission on the Family, established in 1966, recommended that fault grounds for divorce be abolished. One important justification of this stance was the recognition "that a system which inflexibly characterizes one spouse as 'innocent' while thereby stamping the other as 'guilty' simply does not jibe with a realistic assessment of human behavior" Report of the Governor's Commission on the Family 30 (1966).

2. *The Move to No-Fault Divorce*

The early reform movement was led primarily by academics, lawyers, and clerics; curiously, there is little evidence that public dissatisfaction with traditional divorce law was a significant factor.²¹ The reforms were characterized primarily as efforts to save the integrity of the law and the legal process by allowing humane and dignified divorce to couples who were certain that their marriage was dead. At the outset, the reform proposals did not contemplate easy or unilateral divorce; mandatory counseling and proof of breakdown were often recommended.²² The objective was to promote a careful determination that the marriage was indeed not viable.

In the last fifteen years, the law (at least in practice) has moved increasingly toward a goal of facilitating termination of marriage. The underlying premise is that if either or both partners determine that the marriage is no longer satisfactory, then the law should not raise barriers to ending the relationship. In many states today, marriage is functionally a contract terminable at will by either party.²³ If

²¹ H. Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* 9, 83-88, (1988). One of the few commentators in the 1960's and early 1970's who saw a value to the fault regime despite its malfunctioning was Max Rheinstein. Rheinstein pointed out that the legal regulation that made divorce difficult reflected the ideals of society as a whole, whereas the mechanisms for thwarting the law (such as migratory divorce and collusion) allowed escape for those who could not live up to the ideal. See M. Rheinstein, *Marriage Stability, Divorce, and the Law* 51 (1972).

²² In 1968, Brigitte Bodenheimer commented, "Entirely unilateral divorce at the option of either spouse, without conditions, is seldom advocated today." Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. Fam. L. 179, 193 (1968) (arguing that no one should be bound to an intolerable marriage, but also against easy divorce); see Group Appointed by Archbishop of Canterbury, *Putting Asunder: A Divorce Law for Contemporary Society* 63, 68 (1966) (British divorce law reform commission recommending abolition of fault grounds, to be replaced by breakdown of the marriage; judicial inquiry into the condition of the marriage and proof of breakdown recommended); Report of the Governor's Commission on the Family, *supra* note 20, at 9-12 (proposing the establishment of a system of family courts staffed by counselors who would evaluate the couple and promote reconciliation or provide divorce counseling and determine whether the marriage had truly broken down); Foster & Freed, *supra* note 19, at 446; Kay, *A Family Court: The California Proposal*, 56 Calif. L. Rev. 1205, 1227 (1968) (objective of the counseling proposed by the Commission was to protect the privacy of the parties, not to serve as curative function for the individual). See generally L. Hale, *Divorce Reform: Changing Legal and Social Perspectives* 233-83 (1980) (discussing the proposal and adoption of no-fault divorce as an escape from an irretrievably broken marriage without the need to place blame on either party).

²³ Only two states, New York and Mississippi, require both spouses' consent to obtain divorce on breakdown grounds. M. Glendon, *supra* note 7, at 76. In 40 states, divorce may be obtained after a separation of one year or less, regardless of the opposition of one spouse. *Id.*

either spouse asserts that the marriage has broken down, then the law facilitates a relatively quick and simple end to the relationship. In most states, it is possible to extricate oneself from marriage in well under a year.²⁴

Two examples illustrate the trend toward promoting "efficient" divorce as a primary normative goal. The first involves the separation ground for divorce. Even in the era of fault divorce, many states allowed divorce after a couple had lived separately for an extended period of time. Separation is a ground for divorce in many states under no-fault regimes as well. The trend in the last ten or fifteen years has been to reduce the time period of separation. For example, in Virginia, in 1962 a couple could obtain a divorce after a three-year separation; in 1970, the separation period became two years; today the period is one year or six months if the couple has no minor children.²⁵

A more indirect example of the policy of promoting disentanglement of divorced couples is seen in the law regulating property distribution and support. Here, the trend has been toward settling all financial matters at the time of the divorce and discouraging a continuing financial relationship. Thus, lump-sum property settlements and short-term rehabilitative alimony are preferred over arrangements that extend payments over time.²⁶ Long-term alimony is virtually a thing of the past in many states. Although the sources of this legal trend are complex, one factor has been the goal of promoting quick, clean resolution of the relationship and its attendant responsibilities.²⁷

Judges deciding divorce on breakdown grounds are sometimes directed by statute to make an inquiry into the validity of the breakdown; in practice, this has become a formality. *Id.* at 78; see I. Ellman, P. Kurtz & A. Stanton, *Family Law* 203 (1986) [hereinafter I. Ellman]. Only Washington explicitly affords either unhappy spouse a unilateral "right to divorce." Wash. Rev. Code Ann. § 26.09.030 (1986).

²⁴ New York, with the most restrictive divorce law, requires a one-year judicially recognized separation by written agreement before divorce. N.Y. Dom. Rel. Law § 170(6) (McKinney 1988). The emphasis on quick divorce was brought home to me recently by a lawyer's advertisement in a Boston subway car: "Divorce \$295—24 hour divorce \$595."

²⁵ See Va. Code Ann. § 20-91(9) (1960); Va. Code Ann. § 20-91(9) (Supp. 1970); Va. Code Ann. § 20-91(9)(a) (Supp. 1989). One reason for this trend toward shorter mandatory waiting periods was the accommodation of parties whose desire to avoid lengthy delay before divorce might lead them to opt for an alternative fault ground.

²⁶ Indeed some commentators have argued for lump-sum alimony. See H. Clark, *The Law of Domestic Relations in the United States* 653-54 (2d ed. 1988).

²⁷ The preference today is increasingly for short-term rehabilitative alimony to allow the dependent partner to obtain skills so that she can become financially independent. Some states limit by statute the duration of alimony. E.g., Del. Code Ann. tit. 13, § 1512(d) (Supp. 1988)

The modern norm seems to be, as a pessimistic Yogi Berra might have put it, "once the marriage is over, it's over."²⁸ And it's over when one partner wants to end it. In sharp contrast to the approach of an earlier era when moral and religious commitments toward marriage were legally enforced, there seems to be a view today that it would be unseemly for the law to restrict quick departure from an unhappy marriage, or even to promote caution in the decision to depart.²⁹

This neutrality toward divorce reflects what Carl Schneider has called the law's withdrawal from moral discourse about the family.³⁰ In general, the law increasingly has left decisions about the regulation of marriage and family life to the involved parties. In Schneider's view, several factors have contributed to this trend. A legal policy of respect for family autonomy and for individual liberty has traditionally inhibited intervention in the family; this policy has been enhanced by the development of the constitutional privacy doctrine.³¹ Further, changing moral values in society, as evidenced by the sexual revolution and the decline of religion in American life, have greatly reduced

(alimony limited in most cases to period of 50% of the marriage term). Other states allow courts to limit the duration of alimony. Cal. Civ. Code § 4801(a), (d) (West Supp. 1989); Unif. Marriage and Divorce Act § 308(b), 9A U.L.A. 348 (1987). The move to rehabilitative alimony is based in part on the expectation that divorced men will remarry and have responsibility for new families. See *Turner v. Turner*, 158 N.J. Super. 313, 317, 385 A.2d 1280, 1281-82 (1978) ("The law should provide both parties with the opportunity to make a new life. . . . Neither should be shackled by the unnecessary burdens of an unhappy marriage."). See generally Note, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. Rev. 493 (1978) (discussing the relevant factors in an award of rehabilitative spousal support and the trend toward sending the dependent spouse back to work). David Chambers has suggested that the policy underlying rehabilitative alimony may be extended to child support obligations in the future. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 Mich. L. Rev. 1614 (1982).

²⁸ See R. Lederer, *Anguished English* 89 (1987) (quoting Y. Berra: "It ain't over 'til it's over.").

²⁹ Mary Ann Glendon suggests that American divorce law is almost unique among that of Western nations in coming close to establishing a "right to divorce." Although many European countries have no-fault divorce law, few allow easy termination of the marriage unless both parties agree. In the absence of consent and fault, most European countries require waiting periods of more than a year; in England, the period is five years. In all European countries except Sweden, courts have discretion to deny divorce. In 18 American states, courts lack this authority. M. Glendon, *supra* note 7, at 64-81. Divorce may be (and occasionally is) denied in France if it would entail "material or moral consequences" to the unwilling spouse or the children. *Id.* at 72 (citing French civil code, C. civ. art. 240).

³⁰ Schneider, *supra* note 1, at 1807-08.

³¹ *Id.* at 1833-42.

consensus about moral norms; this has surely weakened the moralistic base of family law.³² Perhaps the most important influence on the law's current stance is what Schneider calls the "Rise of Psychologic Man."³³ He argues convincingly that the behavior of modern persons is directed more toward self-realization and personal well-being than toward the fulfillment of moral and religious duty.³⁴ This shift in cultural norms has contributed to a changed conception of marriage. The language of therapy has become the rhetoric of modern marriage.³⁵

Changing gender roles have also contributed to this changed conception of marriage. Ideal wives in traditional marriages were devoted, unselfish caretakers of the home, the family, and the marriage. As the traditional model has eroded, the qualities associated with masculine values of achievement, self-development, and personal fulfillment have become dominant for both spouses.³⁶ With this

³² Id. at 1842-45.

³³ Id. at 1845.

³⁴ In developing his thesis and in describing "psychologic man," Schneider draws on the recent literature in psychology and sociology, although he traces the roots of the perspective to Freud. Id. at 1846-51. A sharply critical analysis of the trend toward self-fulfillment as the central motivating force of persons in modern society is articulated by Christopher Lasch. See C. Lasch, *The Culture of Narcissism*, supra note 6; C. Lasch, *The Minimal Self*, supra note 6. Bellah and his colleagues have offered an influential and troubling description of the character of modern Americans in an examination of the modern expression of the deeply rooted value of individualism in our society. For a description of Bellah's study, see R. Bellah, supra note 6. In the arena of love and marriage, modern individualism leads persons to seek relationships that will meet their needs. Self-sacrifice in relationships, which was once highly valued, has been replaced by an ideal of self-fulfillment. Swidler, *Love and Adulthood in American Culture*, in *Individualism and Commitment in American Life: Readings on the Themes of Habits of the Heart* 107, 120-21 (R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton eds. 1987) [hereinafter *Individualism & Commitment*].

³⁵ Bellah and his colleagues found that many modern Americans describe the ideal love relationship in therapeutic terms. "[T]he therapeutic attitude denies all forms of obligation and commitment in relationships, replacing them only with the ideal of full, open, honest communication among self-actualized individuals." R. Bellah, supra note 6, at 101. Although lasting relationships may be desirable, they are possible only as long as the needs of both persons are met. The only obligation of individuals entering relationships is to be clear about their needs; "[t]hen love becomes no more than an exchange, with no binding rules except the obligation of full and open communication." Id. at 108.

³⁶ The movement from traditional to modern marriage has been examined by Francesca Cancian. F. Cancian, *Love in America: Gender and Self-Development* (1987). Cancian suggests that both husbands and wives in modern marriages assume roles that were formerly differentiated by gender. Thus, in traditional marriage, love was feminized (i.e., women were responsible for the emotional quality of marriage), and self-development was masculinized (i.e., men were independent and sought success outside of the home). Today, self-development

change, marriage has become an "exchange" relationship.³⁷ Husband and wife are equal, autonomous parties, each pursuing emotional fulfillment through marriage. The relationship is sustained as long as it produces "returns" for each party.

These evolving cultural norms are reflected in no-fault divorce law. Marital breakdown is an event without moral connotations and should be treated as such by the law. In Schneider's words, "[t]here ought to be no sense of guilt when a marriage doesn't work, because there was simply a technical dysfunction; there ought to be no sense of prolonged responsibility, because that itself would be dysfunctional"³⁸ No-fault divorce exemplifies the "doctrine of nonbinding commitments."³⁹ The modern marriage is a relationship that should be sustained only if it "works." "[O]ptions' should be kept numerous and open to 'facilitate personal growth.'"⁴⁰ Divorce law reflects the conclusion that these values are best served by allowing quick and simple exit from marriage.⁴¹

The law regulating marriage and divorce today does more than refrain from moralistic prescriptions. It may even frustrate couples who would bind themselves to the marital relationship. For example, it is unclear whether a premarital contract establishing a three-year waiting period upon notice of a desire to divorce by either party would be enforceable in most states.⁴² The message is clear; no barrier should seriously hinder a decision at any time by either party that the marriage should end.

is important to both men and women, as is emotional expression and fulfillment in marriage. *Id.* at 4-8, 105-33.

³⁷ Swidler, *supra* note 34, at 118-19 (citing a 1972 study of group relationships by Marcia Millman). As Swidler points out, exchange imagery suggests a picture of marriage very different from the traditional relationship. Individuals value marriage for what they get out of it. Each individual is concerned about what he or she will take away when the relationship is over. Exchange suggests autonomy rather than union; it also suggests impermanence. *Id.*

³⁸ Schneider, *supra* note 1, at 1853.

³⁹ See *supra* note 3.

⁴⁰ Schneider, *supra* note 1, at 1855.

⁴¹ In Schneider's words, "This view prefers temporary marriages, temporary nonmarital arrangements, and temporary children, and the law is coming to accommodate it." *Id.* Schneider may be challenged here. I will argue that many people have a sense of moral commitment to their children (although it may be overwhelmed by self-interest in the divorce context). See *infra* note 52 and accompanying text.

⁴² For a discussion of the enforceability of contracts restricting divorce, see *infra* notes 174-80 and accompanying text.

B. *The Challenge to Quick and Easy Divorce*

Modern divorce law reinforces a pessimistic account of contemporary marriage as a relationship involving minimum commitment and maximum self-gratification. It probably also reflects the preferences of unhappy spouses desiring to end a marriage. As I will argue in this Section, however, the law, in responding to the erosion of the moral and religious framework that supported traditional marriage, has embraced a version of the evolving norm of self-realization that distorts many, perhaps most, people's goals for marriage and family.

For many, the goal of self-fulfillment in marriage means substantial investment in a long-term relationship, rather than short-term gratification and "nonbinding commitment." It also means raising one's children in an intact family. The story of modern marriage told by current law is one that often ends with children living with a single parent in reduced economic circumstances, an outcome that most people would avoid for their children, if possible. As I will demonstrate, social science research evidence strongly supports the conclusion that marital instability and divorce are harmful for children. If this is so, and if many people are motivated to promote their children's welfare through family stability, then the law would do well to encourage and reinforce this aspiration. Indeed, the persuasive evidence that children fare better in stable intact families argues for the legal regime influencing the evolution of the self-realization norm toward this objective.

1. *Commitment to Marriage and the Self-Realization Norm*

Much that can be observed in modern culture suggests that Americans today may be motivated more by striving toward self-fulfillment than by a sense of moral or religious duty.⁴³ It does not follow from this, however, that most people conceive of marriage as a relationship of shallow commitment and easy dissolution.

There is much evidence of dissatisfaction with the "exchange" model of marriage, at least as it currently functions. If media attention is a measure, the high divorce rate is perceived as a serious social problem in this country. Academic critics bleakly depict modern

⁴³ See Schneider, *supra* note 1.

marriage as reflective of a society that embraces shallow values.⁴⁴ This pessimistic view of marriage appears to assume that—having rejected values that supported the traditional model—we are left with only the alternative of marriage as an arrangement to promote the selfish ends of each party. For some, the contrast makes traditional marriage seem attractive.⁴⁵

A different conception of marriage based on self-fulfillment is possible. In a recent historical and empirical study of marriage, Francesca Cancian argues that commentators decrying the “culture of narcissism” have been overly pessimistic about the future of marriage and family in our society.⁴⁶ To be sure, a modern conception of marriage has replaced the traditional ideal. Cancian argues, however, that critics fail to recognize that contemporary marriage need not signify tenuous commitment and the selfish pursuit of individual ends by each partner (a norm that she calls the “independent model”).⁴⁷ To the contrary, many modern couples aspire to a relationship conforming to an “interdependent model,” in which self-fulfillment is achieved only through a lasting, satisfactory marriage, based on mutual dependence and commitment.⁴⁸

⁴⁴ Swidler links modern conceptions of adulthood and adult love with “a kind of empty despair in high culture, abandoning hope for meaning, and in popular culture a shallow and somewhat hysterical emphasis on protecting a childish version of the self.” Swidler, *supra* note 34, at 123. See generally C. Lasch, *The Culture of Narcissism*, *supra* note 6 (modern fear of commitment due to uncertainty and instability).

⁴⁵ The Reagan administration’s emphasis on family values and the trend toward social conservatism in the 1980’s suggest feelings of nostalgia, as does the revival in Christian fundamentalism with its emphasis on “the home, the family, [and] morality.” Falwell, *Revival in America*, *in* *Individualism & Commitment*, *supra* note 34, at 361.

⁴⁶ F. Cancian, *supra* note 36, at 3.

⁴⁷ *Id.* at 4-8, 105-33. Critics such as Lasch, Bellah, and others document the evolution of the trend toward self-fulfillment at the expense of commitment to binding relationships. See *supra* note 6. Other observers have argued that women cannot develop as individuals and fulfill family roles. C. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (1980); F. Cancian, *supra* note 36, at 3, 107 (citing S. Rothman, *Women’s Proper Place: A History of Changing Ideals and Practices 1870 to the Present* (1978)). Cancian acknowledges that Lasch and Bellah do not deny the importance of intimacy in modern love relationships; however, intimacy is not linked to commitment to an enduring relationship but rather to emotional expression and fulfillment of individual needs and desires. F. Cancian, *supra* note 36, at 8. Each individual should do her or his own thing. See *id.* at 9. “Independent love” is ancillary to self-development. *Id.* at 8-9.

⁴⁸ Cancian’s conception of interdependent love links self-development to committed love. Security and support of a committed relationship is deemed necessary to self-development. In Cancian’s view, the challenge to couples in an interdependent relationship is to avoid the

In the beginning of this Article, I offered a story of marriage as a committed long-term relationship and suggested that it describes the aspiration of many people for their lives. This account conforms to Cancian's interdependent model and to the (admittedly sketchy) empirical evidence about personal aspirations for marriage. Many people who enter marriage have both a current belief and intention that the relationship will endure.⁴⁹ If asked to describe their goals for personal fulfillment, many would include a lasting, satisfying marriage and the establishment of a family. Most would concede that even successful marriages have significant problems and that at times the relationship would be unrewarding. Despite this, the anticipated rewards of an enduring marriage justify a personal commitment to "hang in there" through difficult times.⁵⁰ In short, some people surely believe that personal fulfillment is promoted by long-term

constraint of traditional gender roles and still to depend on each other for emotional and material support. F. Cancian, *supra* note 36, at 122-33.

⁴⁹ There is little rigorous social science research on this topic, but the survey data strongly support this point. Surveys of young people indicate that they are optimistic about the success of their own marriages. For example, a Glamour Magazine survey indicated that 89% of male college students and 95% of female college students surveyed saw only one marriage in their future. *How College Women and Men Feel Today About Sex, Aids, Condoms, Kids: A Campus Report*, Glamour, Aug. 1987, at 261, 263. Two years earlier, 95% of men and 97% of women agreed that "marriage is a lifetime commitment." *What Do Women and Men Expect of Marriage Today*, Glamour, Feb. 1985. A public opinion survey of high school seniors found that 85% thought that it was fairly likely that they would stay married to the same person for life; in another study of high school seniors, over 80% of both sexes considered it very likely, or fairly likely that they would stay married to the same person for life; fewer than five percent thought such an outcome was fairly or very unlikely. Thornton & Freedman, *Changing Attitudes Toward Marriage and Single Life*, 14 *Fam. Plan. Persp.* 297, 300 (1982). Cancian cites Scott Peck's best-selling guide to personal happiness, *The Road Less Traveled* (1978). F. Cancian, *supra* note 36, at 9. Peck recognizes that individual growth is "the ultimate goal of life," but admonishes that "significant journeys cannot be accomplished without the nurture provided by a successful marriage . . ." *Id.* (quoting S. Peck, *supra*, at 168). The popularity of Peck's book may suggest that this message resonates with many people.

⁵⁰ Many people apparently believe that divorce is too readily available. According to a Miami Herald phone survey in 1986, 79.6% of the people surveyed agreed with this statement: "Divorce is so easy to get today that people don't really work as hard as they should to stay married." *Pub. Opinion Index*, Nov. 4, 1986. A follow-up survey of teenagers found that 79% of those age 13 through 17 believed it was too easy to get a divorce in this country; 72% felt that most divorced couples had not tried hard enough to save their marriages. A Roper poll in 1982 found that a majority of those polled thought divorce laws should be stricter. H. Jacob, *supra* note 21, at 83 (citing *Gen. Soc. Surveys, 1972-1982*, Chicago: Nat'l Opinion Research Center, July 1982). Interestingly, this public attitude seems to have predated the reform in divorce law. In 1966, only 13% of respondents to a poll thought divorce law was too strict.

investment in marriage, rather than maximum freedom to pursue immediate preferences.

Divorce law distorts contemporary norms by failing to recognize that although many people aspire to self-fulfillment in marriage, their short-term and long-term goals may conflict. Ready dissolution of the currently unsatisfactory relationship may not promote self-realization over time. Further, the law's rejection of some characteristics of traditional marriage such as commitment, responsibility, and mutual dependence may have been precipitous. These qualities may be important in modern marriage, not as ends in themselves, but because they contribute to an exchange that promotes long-term personal fulfillment.

2. Divorce and the Impact on Children

If the current version of the self-realization norm endorsed by the law promotes short-term rather than long-term goals, it may also distort commonly shared values regarding the role of children. For many people, self-fulfillment includes having and rearing children to adulthood with a marital partner. The value of children in a life plan is both basic and complex; it derives from a desire to pass on a cultural and personal heritage, to instill values, skills, and interests, and to enjoy the companionship of persons sharing a unique and insoluble bond. These intentions for the role of family would appear to conflict with legal and social norms that facilitate minimal commitment and ready dissolution of marriage.

Parents may also value a stable marriage because of a sense of responsibility toward their children. Although moral obligation has likely diminished in importance as an influence on behavior generally, most parents probably continue to feel responsible for their children's welfare.⁵¹ Parents may accept the widely shared belief that children fare best growing up in a stable intact family, and they may seek to provide this for their own children. Again, these goals are not sup-

Id. A Gallup poll taken the same year found that most people favored stricter divorce laws. Pub. Opinion Surveys, Inc., Princeton, N.J., Feb. 20, 1966.

⁵¹ This is likely true even though self-sacrifice by parents for children may be deemed less laudable today than when the moral obligation was the pervasive theme in family relationships. The view that "parents have rights also" is frequently articulated. Swidler, *supra* note 34, at 120-21.

ported by the law; further, the widespread incidence of divorce suggests that many people fail to fulfill their intentions.

Several factors may at least partly explain why so many parents "defect" from these long-term personal objectives. First, at some intangible level, conflicting cultural signals about the meaning of self-fulfillment and of marriage may influence behavior. Aspirations for lasting marriage may conflict with the expectation of a sustained high level of gratification. In a culture in which divorce is routine, disappointment of that expectation may lead quickly to thoughts of ending the marriage. Second, I will argue in Part II that the context in which unhappy spouses consider the decision to divorce may be subject to cognitive biases and may promote emphasis on short-term rather than long-term interests. In this setting, the parent's feeling of responsibility toward children may be discounted because of strong personal preferences favoring divorce. Finally, and perhaps most importantly, a parent who cares about her children's welfare may believe that although, in general, divorce is bad for children, in her case it is better than the family's current unhappy situation. Thus, parents may choose divorce as the better of two unfortunate alternatives for them and their children.

If parents do consider the interests of their children in thinking about divorce, it is not because the law encourages or helps them to do so. In only a few states is the legal norm supporting the quick and easy availability of divorce modified even slightly to encourage parents to consider the impact of the decision on their children.⁵² Parents are not required to justify their divorce by demonstrating that it is not harmful to their children; nor are children represented in the proceeding. Nowhere, for example, can a guardian ad litem argue to the judge that the divorce is contrary to the child's best interest and therefore should not be granted.⁵³ Only when the court turns to the custody determination is the focus on the child's welfare; here, the paramount concern that the law ostensibly has for the best interest of

⁵² In Virginia, divorce may be obtained after six months separation if the couple have no minor children, one year if they do. Va. Code Ann. § 20-91(9)(a) (Supp. 1989).

⁵³ A guardian ad litem may be appointed to represent the child in a contested custody proceeding but the guardian has no role in the divorce decision. See generally Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 *Yale L.J.* 1126 (1978) (discussing the function of a child's legal representative in a child custody hearing as the protector of the child's best interest).

the child is insistently emphasized.⁵⁴ The issue of whether the child's best interest might be promoted by the parents' continued marriage is never addressed.

That parents have a "right to divorce" without regard to the possible detriment to their children is taken for granted; on reflection it is puzzling. The attention directed toward divorce as an important social problem focuses on the harmful impact on minor children. Yet children themselves are legally powerless to influence the divorce decision, and in contrast to its typical response when children's welfare is threatened, the law does not assert their interests until after the harmful decision is made.⁵⁵

a. Justifications for Excluding Children's Interest

Two related arguments based on a libertarian privacy rationale could be offered to support maximum freedom to divorce by parents. First, it may be argued that decisions to divorce, like reproductive choices,⁵⁶ are intimate personal decisions that are so important to the individual that serious restraint by the state is intolerable, and indeed, unconstitutional. This argument has some merit. Some restrictions, such as an absolute bar to divorce, would be so onerous as to violate

⁵⁴ See *Veazey v. Veazey*, 560 P.2d 382, 386 (Alaska 1977) ("The literature discussing the detrimental effects parental divorce can have on children is large and growing."). In focusing on the best interest of the child as the basis for the custody award, courts have specifically held that "[t]he best interest of the parent, or detriment to the parent, is not the test." In *Re Marriage of Tweeten*, 172 Mont. 404, 406, 563 P.2d 1141, 1143 (1977).

⁵⁵ The state has broad authority to intervene in the family in cases of child abuse and neglect, based on its *parens patriae* power to protect the welfare of children. See generally Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623 (1976) (discussing the present system for removing neglected children from their parents and proposing a new system); *Inst. Judicial Admin. & Am. Bar Ass'n, Juvenile Justice Standards: Standards Relating to Abuse and Neglect (Tentative Draft) (1977)* (setting model guidelines for state intervention in abuse/neglect cases).

⁵⁶ See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976) (holding statute requiring husband's or parents' consent to abortion unconstitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that state prohibition of abortion prior to viability is violative of constitutionally protected right of reproductive privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that state may not prohibit sale of contraceptives to single people, because right of reproductive privacy is right of individual, married or single, to decide whether to have child).

personal integrity.⁵⁷ The analogy to reproductive privacy is tenuous, however, and surely does not support a right to divorce without restriction,⁵⁸ particularly when the interests of third parties are implicated.⁵⁹

The constitutionally based tradition of legal deference to parental authority provides another privacy-based argument favoring parental freedom to divorce. The law generally presumes that parents will consider their children's interests in making decisions that affect the children's welfare; it typically does not interfere with parental authority absent evidence of a serious conflict of interest.⁶⁰ Respect for parental authority, however, is balanced against the state's interest in protecting children. If parents make decisions that harm their child's interest, the state may intervene under its *parens patriae* authority.⁶¹ Furthermore, in the context of divorce, the interest in parental auton-

⁵⁷ Anthony Kronman argues that the law appropriately limits contractual freedom by prohibiting contracts that bar divorce because they signify self-enslavement. Contracts of self-enslavement violate personal integrity because they offer no alternative to performance and bind the individual to a course or venture that may now be irrational in light of changed goals. Kronman, *Paternalism and the Law of Contracts*, 92 *Yale L.J.* 763, 775-82 (1983).

⁵⁸ The individual's interest in bodily privacy is far more directly implicated in reproductive decisions than in the decision to divorce. In *Roe*, the Court emphasized the physical burden on the woman forced against her will to endure pregnancy and childbirth. 410 U.S. at 153. Constraints on divorce do not signify forced intimate relations with a spouse by an unwilling partner. Indeed, the recent recognition of the crime of marital rape underscores that marital sexual relations may not be forced. See *State v. Smith*, 85 N.J. 193, 426 A.2d 38 (1981) (husband not exempted from rape charge during separation). The right of reproductive privacy itself is not an absolute right but may be subject to restrictions to protect viable fetuses and the health of the mother. *Roe*, 410 U.S. at 153-54.

⁵⁹ Libertarian philosophy emphasizes that personal freedom is not absolute, but is limited to acts that do not harm others. John Stuart Mill described this as the "harm principle." J. Mill, *On Liberty* 205 (Meridian Ed. 1969) (1857). Mill is very critical of the freedom given parents to harm their children and suggests that parents have a moral responsibility to provide their children with "at least the ordinary chances of a desirable existence." *Id.* at 242. He concludes, "we might imagine that a man had an indispensable right to do harm to others, and no right at all to please himself . . ." *Id.*

⁶⁰ The Supreme Court has emphasized the constitutional basis of parental authority over children as a constraint on state authority. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that under first and fourteenth amendments, Wisconsin may not require Amish parents to send children to school until statutorily required age of 16); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Oregon statute requiring public school attendance struck down); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (Nebraska statute limiting foreign language instruction in schools struck down as interference with parents' fourteenth amendment liberty to rear children).

⁶¹ See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that state under *parens patriae* authority may restrict parent's authority to guide child's religious practice when child's

omy becomes attenuated; state involvement occurs that would be offensive to family privacy in an intact family.⁶² Thus, although the doctrine of family privacy limits state intrusion into the family, it does not mandate or fully explain a legal regime that affords easy divorce, regardless of the interests of children.

Perhaps the most persuasive justification for unrestricted availability of divorce is the empirical assumption that if either parent is sufficiently dissatisfied with the marriage to contemplate divorce, then children may be more harmed by the continuation of the unhappy marriage than by divorce. I have suggested that this belief may influence some parents contemplating divorce; it may also in part explain the current legal stance, which otherwise seems inconsistent with a strong tradition of child protection. Unfortunately, this somewhat reassuring assumption finds little support in the extensive body of empirical research on divorce. This research indicates that, in general, children suffer both economic and psychological harm when their parents divorce.

b. Social Science Research Findings: The Effects of Divorce on Children

1. Effects on Psychological Adjustment

There is substantial evidence that the process of going through their parents' divorce and the resulting changes in their lives are psychologically costly for most children.⁶³ At a minimum, divorce involves significant stress and upheaval. The adjustment of most children is disrupted substantially for a year or two after divorce; for some the

welfare is threatened). State authority to intervene in the family is derived from both *parents patriae* and police power sources.

⁶² In part this is because the parents may be in conflict and cannot be presumed to cooperate to make decisions in the child's interest. Courts typically defer to parents when they are in agreement regarding custody arrangements, probably because they believe that arrangements agreed to by parents are likely to be more stable than those imposed by courts. However, courts have authority to supervise and change custody arrangements throughout the child's minority if the noncustodial parent challenges existing arrangements based on changed circumstances. This represents a continuing threat to the privacy of the family unit of the custodial parent and child. See Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 *Yale L.J.* 757 (1985).

⁶³ See generally R. Emery, *Marriage, Divorce, and Children's Adjustment* (1988) (description and analysis of the social science research on divorce and its impact on children).

disruption continues to exert a harmful influence for many years.⁶⁴ The child usually has less contact with one parent, and sometimes with both, particularly if the primary caretaker goes to work for the first time.⁶⁵ In the early years of a divorce, both parents tend to function poorly at a time when the child may especially need care and stability.⁶⁶ Divorce may result in important changes in children's

⁶⁴ In one of the most respected longitudinal studies of children in divorced families, Mavis Hetherington and her colleagues studied 72 preschoolers (half girls and half boys) who were followed and evaluated for two years after divorce. This group was compared to a control group of children in intact families. Hetherington, Cox & Cox, *Effects of Divorce on Parents and Children* [hereinafter Hetherington, *Effects of Divorce*], in *Nontraditional Families* 233 (M. Lamb ed. 1982). Hetherington observed that children in divorced families functioned worse than those in intact families at two months and one year but had improved substantially by two years after divorce. Girls were more compliant than boys. In a six-year follow up, boys in divorced families continued to be less compliant than boys in intact families. Hetherington, Cox & Cox, *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 *J. Am. Acad. Child Psychiatry* 518, 527 (1985) [hereinafter Hetherington, *Long-Term Effects*]; see also Wallerstein & Kelly, *Surviving the Breakup* (1980) (children in this study improved 18 months after divorce; boys more likely to have continuing problems than girls).

Wallerstein conducted a 10-year follow up study in which she found long-term effects for some children. J. Wallerstein & S. Blakeslee, *Second Chances* (1989). Children older at the time of divorce experience more continuing anger and sadness 10 years later than younger children. In general, the long-term effects—particularly for girls—seem to be more harmful than had been previously believed. Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-up of Older Children and Adolescents*, 24 *J. Am. Acad. Child Psychiatry* 545 (1985). Some girls may seem to have adjusted well after divorce and only show the harmful effects as they reach adulthood and contemplate serious relationships themselves. Wallerstein, *Children After Divorce: Wounds That Don't Heal*, *N.Y. Times Mag.*, Jan. 22, 1989, at 20-21. Wallerstein's study is less scientifically rigorous than Hetherington's; a serious limitation is the absence of a control group.

⁶⁵ According to a national survey of children living with mothers, 50% of mothers reported that their children had not seen their fathers in a year; only 17% saw their fathers as often as once a week. Furstenberg, Peterson, Nord & Zill, *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 *Am. Soc. Rev.* 656, 662-66 (1983) [hereinafter Furstenberg]. There is evidence that contact diminishes over time. *Id.* at 665. Hetherington found that by two years after the divorce only 19 of the 48 middle class divorced fathers in her study saw their children once a week or more. Hetherington, Cox & Cox, *The Aftermath of Divorce* [hereinafter Hetherington], in *Mother/Child, Father/Child Relationships* 149, 163 (J. Stevens & M. Mathews eds. 1978). Wallerstein and Kelly found many of the children they studied wanted more contact with their fathers. Wallerstein & Kelly, *supra* note 64, at 132-38.

⁶⁶ Wallerstein & Kelly, *supra* note 64, at 26-34; Hetherington, *Effects of Divorce*, *supra* note 64, at 245-50. Hetherington and other researchers have found that custodial mothers were less communicative and affectionate with their children and more inconsistent and less effective in setting limits than were mothers in intact families. Custodial mothers particularly had problems dealing with their sons. Hetherington, *Effects of Divorce*, *supra* note 64, at 252. Hetherington found that boys received more punishments than girls and less positive feedback. *Id.* at 255. The parenting by custodial mothers had improved by two years after the divorce. *Id.* at 251-60. Six years after divorce, mothers continued to be less effective in disciplining

lives; children must often leave the family home, neighborhood, friends, and school. In many divorced families, reduced income results in significant economic deprivation.⁶⁷

Social scientists have attempted to measure the effect of divorce on children by examining different indicators of adjustment. By almost any measure divorce appears to be harmful to children. Compared to children in intact families, and controlling for other variables associated with divorce, children of divorce exhibited more delinquent and antisocial behavior,⁶⁸ used more mental health services,⁶⁹ and per-

sons, but were as affectionate as mothers in intact families. Hetherington, Long-Term Effects, *supra* note 64, at 527. Emery describes other research findings on deterioration in parenting. Some parents become "overly permissive, rigid or emotionally dependent" on their children although, after a period of adjustment, most parents improved in their functioning. R. Emery, *supra* note 63, at 83. Some long-term disruptions were observed, particularly among mothers who were depressed, were isolated from relatives and friends, experienced severe economic concerns, or had several young children. *Id.* at 81-86. See generally Emery, Hetherington & DiLalla, Divorce, Children and Social Policy, *in* Child Development Research and Social Policy 189, 210-17 (H. Stevenson & A. Siegel eds. 1984) (discussing the difficulties experienced by parents and children in adjusting to their new roles, as well as the inconsistent levels of affection and discipline resulting from these new situations).

⁶⁷ See *infra* notes 74-80 and accompanying text for a discussion of the economic effects of divorce.

⁶⁸ See Douglas, Broken Families and Child Behaviour, 4 *J. Royal C. Physicians* 203 (1970). See generally Anderson, Where's Dad? Paternal Deprivation and Delinquency, 18 *Arch. Gen. Psychiatry* 641 (1968) (study of boys in juvenile detention school found that almost all had experienced separation from paternal influence). Emery comments, "Divorce has consistently been found to be associated with externalizing problems among children. There is little need to review the research that substantiates this conclusion in detail because the association has been so well documented." R. Emery, *supra* note 63, at 52. Emery cites numerous studies that indicate that children of divorce evidence more aggressive and delinquent behavior than children in intact families: Hetherington, Effects of Divorce, *supra* note 64, at 267-72 (finding boys of divorce to be more disobedient and aggressive); Peterson & Zill, Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children, 48 *J. Marriage & Fam.* 295 (1986) (study finding that children of divorce tend to be more aggressive); Rutter, Parent-Child Separation: Psychological Effects on the Children, 12 *J. Child Psychology & Psychiatry* 233 (1971) (same); see also M. Wadsworth, Roots of Delinquency 46-60 (1979) (tracing the correlation between broken homes and juvenile delinquency); Fehier, Farber & Primavera, Children of Divorce, Stressful Life Events, and Transitions: A Framework for Preventive Efforts, *in* Prevention in Mental Health: Research, Policy, and Practice 81 (R. Price, R. Ketterer, B. Bader & J. Monahan eds. 1980) (discussing the consistency with which studies have found antisocial behavior present in children of divorce). Some confusion in interpreting the research findings has resulted because researchers have tended to group children whose fathers were absent for any reason, rather than to look separately at children of divorce. R. Emery, *supra* note 63, at 52-53.

⁶⁹ Children of divorce are disproportionately represented in outpatient mental health clinic populations. Kalter, Children of Divorce in an Outpatient Psychiatric Population, 47 *Am. J. Orthopsychiatry* 40 (1977).

formed worse in school.⁷⁰ Both boys and girls tend to differ somewhat from children in intact families in sex role behavior.⁷¹

For one group of children, the assumption that divorce promotes their welfare may be valid. These are children whose parents engage in intense conflict with each other during marriage that is greatly alleviated by the divorce. Exposure to high levels of interparental conflict is associated with poor adjustment among children.⁷² There is evidence that children in single-parent homes with a low level of conflict experience better adjustment than children in intact families with a high level of conflict.⁷³ There is no evidence, however, that divorce

⁷⁰ Featherman and Houser found that men raised in single parent households had almost a year less education than those raised in intact families. D. Featherman & R. Hauser, *Opportunity and Change* 242-46 (1978). Differences increase as children grow older. Hetherington, *Effects of Divorce*, supra note 64, at 272. Emery suggests that some of the differences in academic performance may be explained by more disruptive behavior in school and resulting teacher perceptions about children. See R. Emery, supra note 63, at 59-60.

⁷¹ The absence of a father may contribute to differences in boys' development of masculine identity. Hetherington and her colleagues found that boys tended to have less traditional same-sex preferences, as evidenced by game choices and sex role orientation check lists. Hetherington, *Effects of Divorce*, supra note 64, at 275-77. The theory is that because fathers have a more remote role in the child's life, boys of divorced parents do not have strong male role models. *Id.* at 276. Other research has focused on the effect of divorce on children's relationships with the opposite sex. Hetherington observed precocious and provocative behavior by young adolescent girls whose parents were divorced. See Hetherington, *Effects of Father Absence on Personality Development in Adolescent Daughters*, 7 *Developmental Psychology* 313 (1972). There has been declining interest in this research focus with greater acceptance of more flexible sex roles in recent years. See R. Emery, supra note 63, at 60.

⁷² There is substantial research support for this proposition. Ellison, *Issues Concerning Parental Harmony and Children's Psychosocial Adjustment*, 53 *Am. J. Orthopsychiatry* 73 (1983); Emery & O'Leary, *Children's Perceptions of Marital Discord and Behavior Problems of Boys and Girls*, 10 *J. Abnormal Child Psychology* 11 (1982); McCord, McCord & Thurber, *Some Effects of Paternal Absence on Male Children*, 64 *J. Abnormal & Soc. Psychology* 361 (1962). An excellent overview and analysis is provided by Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *Psychological Bull.* 310 (1982). See generally Rutter, *Protective Factors in Children's Responses to Stress and Disadvantage*, in 3 *Primary Prevention of Psychopathology: Social Competence in Children* 49 (M. Kent & J. Rolf eds. 1979) (analyzing the factors that enable some children to overcome the adverse effects of stress in the home).

⁷³ Hetherington, *Family Interaction and the Social, Emotional, and Cognitive Development of Children After Divorce*, in *The Family: Setting Priorities* (V. Vaughan & T. Brazelton eds. 1979). This study divided participants into four groups: high-conflict divorced parents, low-to-moderate conflict divorced parents, high-conflict married parents, and low-to-moderate conflict married parents. The findings suggested that children in high-conflict divorced families had the greatest adjustment problems, followed by children in high-conflict intact families. Low-conflict divorced families had fewer adjustment problems, and low-conflict intact families had the lowest level. Chess found that exposure of three-year-old children to

promotes children's adjustment if the conflict continues or if the level of open conflict in the intact family is moderate—despite the fact that one or both parents may be dissatisfied with the marriage. If the child is not confronted regularly with the parents' anger and hostility toward each other, then the continuity and stability of an intact family may promote better adjustment. It is plausible that, unless conflict escalates, "staying married for the sake of the children" may indeed be better for the children in many families.

2. *The Economic Impact of Divorce on Children*

Children who are in their mothers' custody (approximately ninety percent of all children of divorce) experience a significant decline in family income from their predivorce status, while noncustodial fathers experience an increase in their income level. Although the extent of the economic impact of divorce is disputed, the fact is not.⁷⁴

high levels of interparental conflict correlated with later poor adjustment as young adults, whether or not the parents eventually separated. See Chess, Thomas, Korn, Mittelman & Cohen, *Early Parental Attitudes, Divorce and Separation, and Young Adult Outcome: Findings of a Longitudinal Study*, 22 *J. Am. Acad. Child Psychiatry* 47 (1983). Children who experience a postdivorce reduction in family conflict show improvements in adjustment. See Rutter, *supra* note 72, at 67.

⁷⁴ Lenore Weitzman found that mothers and children underwent a 73% decline in their income, while fathers experienced a 42% increase after divorce. Weitzman, *The Economics of Divorce: Social and Economical Consequences of Property, Alimony and Child Support Awards*, 28 *UCLA L. Rev.* 1181, 1251 (1981). Weitzman's conclusions regarding this change in the standard of living of divorced men and women were based on interviews of 114 divorced men and 114 divorced women in Los Angeles County in 1978. *Id.* at 1187. She compared the spouses' predivorce standard of living in 1977 to their postdivorce standard of living one year after the divorce in 1978. See generally L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985) (explaining the methods used in her interviews of 114 divorced men and 114 divorced women in Los Angeles County in 1978 and the results obtained). For a criticism of Weitzman's methodology, see Jacob, *Faulting No-Fault*, 1986 *Am. B. Found. Res. J.* 773.

Saul Hoffman, using a better sample than Weitzman's, repeated measurement, and longer time lags, found a less dramatic but still substantial decrease in income for women and children and increase for men. Hoffman found, after adjusting for family needs, that divorced women experienced a 6.7% decline in living standards, divorced men a 16.5% gain, and married couples a 20.8% gain over a six-year period. Hoffman, *Marital Instability and the Economic Status of Women*, 14 *Demography* 67, 69 (1977). Hoffman studied the changing incomes of 2,400 women using data from the Michigan Panel Study of Income Dynamics (MPSID). He found that the real income (before adjustment) of couples remaining married over a six year period increased by 21.7%. The income of divorced women decreased by 29.3% and that of divorced men by 19.2%. *Id.*; see also Espenshade, *The Economic Consequences of Divorce*, 41 *J. Marriage & Fam.* 615, 618-19 (1979) (finding that men were in a better economic position as a result of divorce, while the economic position of women

This economic decline is not only a direct cost of divorce but is often associated with other stressful disruptions such as leaving the family home, changing schools, leaving friends, and placement in child care. It has been suggested that many of the psychological difficulties experienced by children after divorce may be related to economic hardship.⁷⁵

An important reason for the decline in economic status of children of divorce is the failure of many divorced fathers to provide adequate financial support to their children.⁷⁶ Contributing to poor compliance

declined). Espenshade also used the MPSID data. He found that children who remained in their mother's custody experienced a 13.8% decline in real family income. Children who were in their father's custody fared much better, with an increase of 49.4% in real family income. He points out that in these cases, fathers may have been awarded custody because they were economically in a good position to care for children. *Id.* at 619.

⁷⁵ See R. Emery, *supra* note 63, at 102. Several reasons have been offered for this decline in children's economic status. Benefits of economies of scale are lost in the divorced family in which the income must support two households. Men typically enjoy significantly higher incomes and earning capacity; after divorce, custodial mothers and children no longer share proportionally in family income. For example, a family of four may live on the father's income of \$50,000 a year. Upon divorce, the child support arrangements typically result in the mother and two children living on 30% of that income and whatever income the mother can earn. For income in the two households to be equalized, a far larger percentage of the father's income would have to go to child support. Judicial reluctance to increase child support is understandable, because to do so would probably result in even poorer compliance with child support orders than currently exists. Some observers have criticized judges for awarding less child support than the noncustodial parent can afford and typically half of what it costs to raise a child. It has been suggested that judges are simply ignorant of the actual costs of child-raising and greatly underestimate it; the custodial parent must make up any expense not taken into account by the judge. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. Davis L. Rev. 49 (1982).

One response to the costs created by the children's economic status would be to award custody to the more financially secure parent. Few observers, however, think that this is an appropriate remedy. First, substantial unfairness would result if the parent whose financial position is less secure, because she took care of the children rather than worked, would therefore be disadvantaged in a custody dispute. Presumably the allocation of work and child care roles are agreed upon by the couple. Second, there is consensus that the relationship between parent and child is a more significant criterion than the parent's economic status. Finally, because both parents are financially responsible for the child, effective income shifting for the child's benefit would seem to be a superior response.

⁷⁶ Of those mothers awarded child support in 1984, only 50.5% reported receiving the full amount due even in the first year; 25.5% received partial payment and 24% received none of the court-ordered payment. See I. Ellman, *supra* note 23, at 380. Fathers who start out by making regular payments pay less, or even nothing, as time goes on. See Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 Mich. L. Rev. 1614, 1623 (1982). There are two principal reasons why the enforcement of child support obligations is so difficult. First, the parent may not have the financial resources to make the payments, a fact that is complicated by the increased financial burdens of remarriage. Second, there are

with child support obligations is the fact that many fathers remarry soon after divorce and assume financial responsibility for a new family.⁷⁷ Emotional ties to children in the new family may weaken interest in and commitment to the children of divorce. Limited financial resources are more likely to be directed to the new family.

The policy of modern divorce law may contribute to the financial insecurity of children. Efficient termination of the relationship and

problems in locating noncustodial parents and collecting payments in jurisdictions other than the one issuing the support order. The Revised Uniform Reciprocal Enforcement of Support Act (RURESA), which has been adopted by 37 states, is a remedy directed at this problem. 9B U.L.A. 381 (1987). It provides for collection of child support across state and county lines. More recently, Congress enacted the 1984 Child Support Enforcement Amendments to Title IV of the Social Security Act. 42 U.S.C. §§ 654-67 (Supp. V 1987). These provisions function to compel states to institute certain child support enforcement mechanisms. For instance, states are required to set up two new forms of enforcement: the interception of state and federal income tax refunds and a system for withholding of child support from the obligor's wages. 42 U.S.C. §§ 664(a), 666(a)(1), 666(a)(3), 666(b) (Supp. V 1987). Other provisions are discretionary. This law requires states to develop guidelines for determination of support awards. 42 U.S.C. § 667 (Supp. V 1987). Federal regulations provide guidelines as to specific items state agencies are to include in their formulas for determining support payments, but these guidelines are not binding in a judicial proceeding. 45 C.F.R. §§ 302.53, .56 (1988). See generally H. Clark, *supra* note 26, at 735-39 (describing the scope and effect of the federal regulations).

⁷⁷ One study concluded that 80% of men and 70% of women remarry within six years of divorce. Hetherington, *Effects of Divorce*, *supra* note 64, at 281 (results of study in Virginia; authors caution against overgeneralizing results). Twenty-five percent of children spend time in a stepparent family before they are young adults. Furstenberg, *The New Extended Family: The Experience of Parents and Children After Remarriage*, in *Remarriage and Stepparenting: Current Research and Theory* 42, 44 (1987). About half of divorced persons remarry within three years. See Chambers, *supra* note 76, at 1624 (citing Koo & Suchindran, *Effects of Children on Women's Remarriage Prospects*, 1 *J. Fam. Issues* 497 (1980) (1975 study of childless white females divorced for the first time)). Almost 40% of children whose parent remarries experience a second divorce. Furstenberg, *supra* note 65, at 661. Of young women who divorce under age 35, 50% of those who subsequently remarry do so within two and a half years. See Koo & Suchindran, *supra*, at 505. This may be due in part to the incentive to obtain additional financial support for children. The economic status of custodial mothers was largely determined by whether or not they remarried; divorced women who remarried were far better off economically than those who did not. See Duncan & Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 *Demography* 485 (1985). The economic well-being of women decreases when their former husbands remarry; women who themselves remarry but whose husbands do not are economically better off than those whose husbands also remarry. Buehler, Hogan, Robinson & Levy, *Remarriage Following Divorce: Stressors and Well-Being of Custodial and Noncustodial Parents*, 7 *J. Fam. Issues* 405, 416-17 (1986). See generally S. Albrecht, H. Bahr & K. Goodman, *Divorce and Remarriage: Problems, Adaptations, and Adjustments* (1983) [hereinafter S. Albrecht]. Of course, the dependence of the new wife and her children on the subsequent husband will make him less able to provide support to children of an earlier marriage.

disentanglement of economic ties allows adults to get on with their lives, free of financial and other ties to former spouses. It permits them to assume quickly new family financial burdens. This may contribute to the attenuated sense of financial responsibility and to a reduced capability of meeting obligations toward children of the broken marriage, a response reflected in the poor rate of compliance with child support orders. In every regard *except* child support, modern divorce law encourages parties to put the marriage behind them. Many fathers apparently adopt the general norm and fail to preserve their parental role and responsibility.⁷⁸ In this way, the law's objective of efficient division and final settlement may inadvertently exacerbate the costs of divorce for children.⁷⁹

⁷⁸ David Chambers has argued that the time may come when legally compelled child support may be limited to a few years duration. See Chambers, *supra* note 76, at 1631-34. This could come about, according to Chambers, if the social consensus weakens that noncustodial parents have a moral responsibility to their children. Chambers points out that although there seems to be consensus today that moral responsibility to children exists, many noncustodial parents do not act upon it. Chambers states that

the pre-separation standard of living of the mother, father and child (would cease to be) the relevant touchstone for deciding whether the new unit of one parent and child has enough income. Such changes in the concept of family might well not be good for children, any more than the increase in the rate of divorce itself has been good for children. That's just the way it would be.

Id. at 1622-23. "Neither love nor a sense of moral responsibility induces most absent parents to pay as much as they could." *Id.* at 1623.

⁷⁹ Mary Ann Glendon has proposed an alternative scheme, a "family property" model, that preserves family assets for the children's support, rather than promoting quick division of property on divorce. She refers to this as the "children-first principle." In effect, the court would place a lien on all the parents' property and income to provide for the needs of the children of the marriage. Upon divorce, no property would be divided according to marital property law until the children's welfare is adequately secured. The principle emphasizes that marriages with and without children should be treated differently because of their different social, political, and moral implications. See M. Glendon, *The New Family and the New Property* 82 (1981); Glendon, *Family Law Reform in the 1980's*, 44 *La. L. Rev.* 1553, 1558-60 (1984); Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 *Tul. L. Rev.* 1165, 1172-76 (1986); Glendon, *Property Rights Upon Dissolution of Marriage*, *in* *The Cambridge Lectures 1981*, at 245 (1983). Glendon has described the British approach to financial settlements in divorces involving children. She refers to a British Law Commission Report, which noted that children under 16 were involved in 60% of divorces and observed that

[i]n such cases it may well be thought that the primary concern must be for a broken family rather than a broken marriage: and that the welfare of the children, social, psychological, and economic, should take precedence over the adjustment of the financial rights and duties of the former spouses towards each other.'

M. Glendon, *supra*, at 84 (quoting *The Law Commission, The Financial Consequences of Divorce*, 103 *L. Commission* 3-4 (1980)).

In sum, although not every child will suffer from her parents' divorce, and some may benefit from the change, there is substantial evidence of pervasive psychological and economic detriment to children when parents decide to divorce. The empirical evidence supports the commonly held intuition that divorce is bad for children. The projection that, at current divorce rates, fifty percent of children in this country will experience the divorce of their parents during their minority is a statistic that suggests a troubling social problem. Further, except in cases of extreme interparental conflict, little evidence supports the reassuring assumption that divorce is better for children if either parent is unhappy with the marriage.⁸⁰ What does not seem debatable is that children in general are harmed by divorce and are better off if their parents realize their goal of marital stability than if they fail to do so.

3. *Summary*

Two inconsistent expressions of a cultural norm defining self-realization may influence the goals and behavior of married persons. The first is reflected in aspirations to invest in a rewarding long-term relationship and to raise children in a stable home. The second is represented by the goal of promoting maximum individual freedom to pursue current preferences in relationships. The second norm is reinforced by modern divorce law, a value choice that is puzzling in its preference for short-term over long-term goals, and disturbing in that it may promote decisions by parents that may harm their children. Empirical research clearly associates divorce with detrimental effects on children. If the law condones the harm by facilitating quick and easy divorce, then some reevaluation is in order in light of the state's responsibility toward children's welfare. Moreover, the aspiration of many people for a lasting marriage offers an opportunity for the law to influence the evolving ideology of marriage so that legal rules may better reflect values of commitment and relationship.

⁸⁰ Of course, this assumption cannot be directly "disproved" by the research. Empirical resolution of this issue would require studies comparing couples who stayed married although at least one partner wanted divorce with couples who divorced and evaluating the impact on their children. Such studies have not been done. The large body of existing research does challenge the presumption that divorce is less harmful than the alternative because divorce involves significant harm, and the effects of the alternative are unknown.

II. A PRECOMMITMENT PERSPECTIVE ON MARRIAGE AND DIVORCE DECISIONS

This Part begins with the premise that for many people, self-fulfillment and marital stability are linked, and that in the decision to divorce they have acknowledged their failure to achieve long-term goals both for themselves and for their children. Applying precommitment theory to the marital relationship, I will demonstrate that people entering marriage could reinforce their original commitment to a lasting relationship through strategies that would make divorce more costly. Precommitment mechanisms could discourage impulsive or erroneous divorce, thereby enhancing careful and more accurate consideration of the decision. By imposing additional costs on divorce, precommitments also would indirectly encourage cooperative behavior during marriage and promote more careful consideration of the decision to marry.

Despite their promise, however, precommitment strategies may not function properly in all cases. Long-term goals may change, turning precommitments into obstacles to self-fulfillment. Further, cognitive biases may distort premarital decisionmaking, a problem that raises questions about the ability of individuals to gauge their long-term interests accurately in this setting.

I conclude, however, that although precommitment mechanisms involve a risk of error as well as some limits on personal freedom, some persons may choose to assume these risks in pursuit of long-term goals of marriage. No strong paternalistic claim argues against permitting them voluntarily to opt into such binding agreements. Indeed, socially imposed precommitments may be justified when children as well as adults may benefit. Thus, the application of precommitment theory to behavior and attitude change in marriage may have a dual focus. Most directly, precommitment theory suggests how couples may use simple mechanisms to reinforce their intentions for lasting marriage. More intangibly, the theory offers a framework for legal transformation of the conception of marriage from a "nonbinding" and transitory bond to a more enduring relationship.

A. The Causes of Marital Failure

Even though many people aspire to permanent relationships, marriages often end in divorce. The causes of marital failure have been much examined. At the risk of great oversimplification, it is useful to

think of marriages that break down as falling into one of three general categories. The first is the marriage that is a mistake at the outset. The individuals entering marriage lack adequate information about each other or about themselves (or they do not carefully consider available information) and the information, once received and weighed, makes the marriage seem untenable.⁸¹ In the second category, one or both persons change so fundamentally from the time of marriage that, at the time of divorce, they are, in some sense, "different persons," who are no longer compatible and no longer share values or goals.⁸² In the third category, failed marriages result because, over time, marriage is vulnerable to many stresses, and simply having a commitment at the outset is sometimes not enough to get through difficult times. Predictable stresses may include boredom, economic problems, conflict over children, the competition of other relationships or of career, mid-life crises, illnesses, and family tragedies. In response to these stresses, the exercise of individual resolve simply may not be sufficient to maintain the original objective of making the marriage succeed.⁸³ In terms of short-term personal happiness, the costs of staying in the marriage during times of stress may outweigh the costs of leaving and pursuing other alternatives. Today, there are

⁸¹ A large percentage of marriages that end in divorce do so within the first seven years. It seems probable that at least a substantial percentage of these fit into this first category of marriages based on inadequate information. The most extreme case, of course, would be a situation in which the marriage was based on a material misrepresentation by one party. Such fraud would be the basis for annulment. More typical would probably be a marriage based on a short relationship or a relationship that was limited in the extent to which it allowed each individual to get to know all aspects of the other's personality. Impulsive marriages may be more typical among young couples. Youth at the time of marriage is the factor most correlated with marital instability. For example, marriages of men in their teens are three times as likely to result in divorce during the first five years of marriage as those of men who marry in their late twenties. Glick & Norton, Frequency, Duration, and Probability of Marriage and Divorce, 33 *J. Marriage & Fam.* 307, 310, 315 (1971); see Bumpass & Sweet, Differentials in Marital Instability: 1970, 37 *Am. Soc. Rev.* 754, 755-56 (1972); Kitson & Raschke, *Divorce Research: What We Know, What We Need to Know*, J. Divorce, Spring 1981, at 1, 12-13.

⁸² Many marriages between very young persons that end in divorce may belong in this category. The high divorce rate in teenage marriages may relate to the likelihood that persons who marry before the age of 20 may still be dealing with issues of adolescence. Their identities may not be fully formed. See *infra* notes 171-73 and accompanying text.

⁸³ Stresses are likely to have a cumulative erosive effect on marital stability over time. Probably less common is the single destabilizing event, such as a death or illness, that leads to the failure of a marriage.

few religious and no legal restraints to reinforce the initial commitment and to provide additional barriers to exit.

The analysis that follows will initially assume that individuals who divorce fall into the third category described above: marital failure caused by a series of stresses and choices that eventually lead to divorce. I will then relax this assumption and examine the implications of the analysis for other categories of marital failure.

B. Introducing the Precommitment Perspective

1. Introduction

At least since Ulysses told his crew to tie him to the mast so that he would not yield to the entreaties of the sirens,⁸⁴ (and undoubtedly long before this), people have used precommitment strategies as a means of self-management. These strategies are useful in situations in which an individual has a long-term preference or goal that she anticipates will conflict on some occasions with temporarily dominant short-term preferences. Through *ex ante* precommitment devices, the person can reinforce long-term goals, thereby mitigating the problem of inconsistent choices. For example, an individual may decide that choice A (to stop smoking) reflects his consistent long-term interest and preference. He also knows, however, that because of his weak will, choice B (to smoke) may sometimes appear more attractive. Therefore he devises in advance a strategy to discourage himself from acting on his short-term preference. He may impose costs on choice B (inviting public ridicule by announcing that he has stopped smoking), or provide rewards if he adheres to choice A (a new stereo if he refrains for six months). He may devise rules that allow him to avoid confronting choice B (a mandatory three-hour wait before smoking). Finally, he may simply exclude it as an option (throw out the cigarettes and go for a walk in the woods).

The problem of inconsistent preferences has been of interest both to psychologists and economists as a seeming contradiction to the standard assumption that individuals make choices and order their preferences by maximizing their expected utilities at any point in time.⁸⁵ Modern academic interest in precommitment probably began in the

⁸⁴ Homer, *The Odyssey*, Book XII, lines 39-54, 177-79 (R. Lattimore trans. 1965).

⁸⁵ For a discussion of the work of economists and psychologists in developing modern precommitment theory, see *infra* note 87.

1950's with an article by R.H. Strotz, who first demonstrated that individuals will tend to make choices inconsistent with optimal plans, assuming a tendency to discount the future, despite the fact that they have constant ordering of preferences.⁸⁶ Strotz suggests that one response is to precommit to preclude future inconsistent options.⁸⁷ Precommitment strategies represent a conscious attempt to reduce one's future options because subsequent preferences may be impulsive or contrary to one's long-term interests. Precommitment is thus a recognition of weak will. However, it is not directed at strengthening the will,⁸⁸ but at manipulating, *ex ante*, the costs, benefits, and availability of different options. Precommitment is also not a hedge against

⁸⁶ See Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 *Rev. Econ. Stud.* 165 (1955-56).

⁸⁷ *Id.* at 173. George Ainslie, a psychologist, focused on the mechanics of controlling impulsive behavior. He examined precommitment devices as means to avoid temporarily attractive short-term ("specious") rewards inconsistent with later, larger rewards. Ainslie, *Behavioral Economics II: Motivated, Involuntary Behavior*, 23 *Soc. Sci. Info.* 47, 54-55 (1984); Ainslie, *Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control*, 82 *Psychological Bull.* 463, 476-93 (1975). Thomas Schelling, a political economist, has enlivened the discussion of precommitment and self-command strategies with many illustrations of the use of these strategies from everyday life; smoking clinics, Christmas savings clubs, and diet clubs are all examples. See T. Schelling, *Choice and Consequence* 83-112 (1984); Schelling, *Economics, or the Art of Self-Management*, 68 *Am. Econ. Rev. (Papers and Proc.)* 290 (1978); Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 *Am. Econ. Rev. (Papers and Proc.)* 1, 6-7 (1984) [hereinafter Schelling, *Self-Command*]. Jon Elster has described the impact of weakness of will on human capacity for perfectly rational behavior, which would take all future preferences into account. Precommitment strategies represent responses to imperfectly rational behavior. J. Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 36-47 (1979). Richard Thaler and H. M. Shefrin use a model derived from agency theory to explain the decisionmaking process to resolve conflicts between long-term and short-term interests. In Thaler and Shefrin's model, each individual decisionmaker consists of a principal (the "planner") and many agents (the "doers"). The planner, like the rational decisionmaker, is capable of taking into account the individual's prospective utility over a lifetime. Each doer makes decisions only for a short time period and has preferences that take only that time period into account. Thus, in order to pursue a rational life plan, the planner must control each doer to ensure that long range objectives are taken into account and that decisions are not based just on the preferences of the moment. The planner's preferences are consistent over time while each doer's preferences, focusing on its immediate time frame, will discount the future. Thaler & Shefrin, *An Economic Theory of Self-Control*, 89 *J. Pol. Econ.* 392, 393-96, 404 (1981); see Shefrin & Thaler, *Rules and Discretion in a Two-Self Model of Intertemporal Choice* (Cornell Univ. Graduate School of Business and Pub. Admin., working paper no. 80-07) (1980).

⁸⁸ In Schelling's words,

What I'm talking about is different from what is usually thought of as self-control or self-discipline. I am not talking about the development of inner strength, character, or moral fiber, or the change in values that goes with religious conversion. Nor am I

“true” changing preferences.⁸⁹ The “reformed” alcoholic, reaching for a drink, is not acting on new long-term preferences but on temporarily dominant short-term preferences. Precommitment strategies reinforce self-control and enable the individual to adhere to the initial utility-maximizing plan.⁹⁰

2. *Precommitment Strategies in Marriage*

In order to test whether precommitment strategies may function to reinforce commitment to the marriage relationship, I will assume initially that, for many persons, marriage (and remaining married) represent “rational” decisions that take into account long-term interests, and divorce results from choices that reflect short-term preferences. This is basically a restatement, in the language of precommitment theory, of the aspirational norm for marriage and family that I have described.

Marriage partners who enter the relationship committed to its success may over time make choices or engage in behavior inconsistent with that goal. Predictable strains in any long-term relationship may lead to destabilizing responses. Withdrawal, boredom, pursuit of other relationships, immersion in career, and conflict over finances, children, and other family may all weaken the resolve to sustain a lasting relationship and may ultimately lead to marital breakdown.⁹¹ Precommitment strategies can promote choices that reinforce the

talking about education in the consequences of behavior—lung and heart disease from smoking, spoiled careers and families and livers from alcohol . . .

T. Schelling, *supra* note 87, at 69.

⁸⁹ Indeed, if long-term preferences truly change, the precommitment becomes a worthless or even harmful constraint. See *infra* notes 132-38 and accompanying text.

⁹⁰ It is possible in some situations that the initial plan, although consistent with long-term preference, would not be generally perceived as utility maximizing. For example, the anorectic who devises strategies to avoid eating is acting against long-term interests by most measures, and the binge that represents temporarily dominant short-term preferences may be more consistent with actual long-term interests.

⁹¹ In one study of marital breakdown, individuals cited infidelity, lack of love, emotional problems, and financial problems as the major reasons why marriage failed. S. Albrecht, *supra* note 77, at 99-101. Of course, it may not be possible to assess the nature of marital problems from the behavior itself. Behavior such as infidelity, conflict, and devoting excessive amounts of time to professional rather than family concerns may represent a temporary straying from one's long-term objectives; alternatively, such behavior may signify true changed preferences. It seems at least plausible that one path to marital breakdown involves small steps, none of which, at least in the early stages, is directed to this outcome. Avoiding the path altogether makes it less likely that the point will be reached when divorce is desired. Schelling has

original commitment and discourage decisions and behavior that are inconsistent with the long-term commitment, including the decision to leave the marriage.

Couples may recognize that stresses will pose threats to the marriage and therefore may make informal precommitments to reinforce the objective of a stable, lasting marriage. They may agree to rules against behavior that threatens the marriage (flirting, adultery), rules promoting resolution of problems ("never go to bed angry"), understandings that reduce conflict ("your family visits when I'm away"), rules about time spent together and time spent with others. Such rules of thumb or understandings likely exist in most successful marriages. They restrict behavior that may momentarily seem appealing in the interest of the stability of the marriage over time. Probably most of these rules are not designed to discourage divorce directly but rather to influence the parties' behavior during marriage in ways that support the relationship.⁹² These mechanisms are unlikely to be legally enforceable, and indeed most would not be suited to legal enforcement. Of the strategies currently used, only prenuptial economic agreements would be legally enforceable if found equitable by a court.

A variety of binding precommitment options would, of course, theoretically be possible. The most extreme would be a legal prohibition against divorce. Like Ulysses, the married individual would be irrevocably bound to the original choice. In terms of precommitment analysis, a no-exit rule would make the inconsistent short-term preference unavailable (theoretically), forcing the individual to abide by the commitment.⁹³ Less extreme precommitment mechanisms could impose costs on the decision to divorce and directly or indirectly sup-

emphasized the importance of avoiding precursor behavior that may lead to the undesired choice. Schelling, *Self-Command*, *supra* note 87, at 6-7.

⁹² If the objective is to avoid divorce, these rules of thumb and understandings are mechanisms to avoid precursor behaviors that may threaten marital stability. See Schelling, *The Intimate Contest for Self-Command*, *Pub. Interest*, Summer 1980, at 94, 114.

⁹³ A fully enforceable no-exit rule is not feasible either constitutionally or practically. See *supra* notes 56-62 and accompanying text for a discussion of constitutional limits on restraints on divorce. The experience of countries that do not allow divorce would suggest that desertion or separation is likely to be a substitute. See M. Rheinstein, *supra* note 21, at 158. Moreover, the costs of a no-exit rule would be high in cases in which the decision to marry was erroneous or in which true changed preferences have made the decision to leave the marriage the rational choice.

port the choice to continue in the marriage. A couple could agree before marriage to impose economic penalties, benefiting the spouse or children, on the partner seeking divorce.⁹⁴ Some precommitment mechanisms would impose costs on the decision to divorce, while at the same time discouraging impulsiveness. An agreement or a legal rule⁹⁵ requiring mandatory delay before divorce (a two- or three-year waiting period, for example) would discourage impulsive divorce and provide sufficient opportunity for a reconciliation.⁹⁶ A similar effect would result from an agreement to submit to counseling, mediation, or arbitration, or a requirement of psychological evaluation of the children to assess the probable effect of divorce.⁹⁷

Precommitment mechanisms such as these, by imposing costs on divorce or reinforcing continued marriage, potentially function to promote marital stability in three ways: They may directly burden the decision to divorce, indirectly promote cooperative behavior during marriage, and encourage careful decisionmaking about marriage. Each of these effects may assist married persons toward fulfillment of their goals for marriage and family.

C. *A Social Psychological Model for Divorce Decisionmaking*

Precommitment mechanisms that impose costs on the decision to leave a marriage will discourage divorce only if the process of making the decision is influenced by a calculation of costs.⁹⁸ Thus, in order to

⁹⁴ A precommitment benefiting children may require a certain level of enforceable child support or a designation of family property to go to the children (such as the family home). A more novel suggestion would be a monetary fine paid by the party who leaves the marriage to benefit the children upon divorce. Penalties benefiting the children would have a dual purpose; they would not only deter divorce but would reinforce another dimension of the original commitment for many persons, the responsibility to their future children, that would dictate that an adequate level of financial support be provided if the marriage should fail. This objective, like the commitment to the marriage, may erode in the context of divorce.

⁹⁵ In theory, the precommitment mechanism is intrinsically a voluntary undertaking. However, it is possible to adopt mandatory rules reflecting the goals of the initial commitment if one is only bound by the rules by voluntarily getting married. For a discussion of mandatory rules as precommitments, see *infra* notes 198-205 and accompanying text.

⁹⁶ The divorce decision is more likely to reflect long-term preferences if a substantial delay is required. Further, mandatory (although shorter) waiting periods before marriage would promote careful decisionmaking at the outset and discourage impulsive marriages. See *infra* notes 166-70 and accompanying text.

⁹⁷ See *infra* notes 162-65 and accompanying text.

⁹⁸ Thus, for example, if the decision is based primarily on emotional impulse, then precommitment mechanisms would not function as predicted.

analyze the effects of precommitment strategies, it is necessary first to examine how individuals make the decision to divorce. Social psychologists have studied divorce decisionmaking and devised theoretical decisionmaking models conforming to the empirical research.⁹⁹ These models share many common features and consistently describe the decision to divorce as a calculus in which the individual weighs the costs and benefits of remaining in the marriage with those of divorce. For example, under the model offered by George Levinger, the most comprehensive social psychological model of marital dissolution,¹⁰⁰ the strength and stability of a marriage are a function of the intrinsic attractions of the marriage and of the barriers around it and an inverse function of the attractions of alternatives.

A key insight of Levinger and others who have described the divorce decisionmaking process is that the extent to which the marriage itself is satisfactory is only one variable in predicting the probability of divorce.¹⁰¹ The divorce decision may also be influenced

⁹⁹ There are two leading social psychology models of divorce decisionmaking. The first is an adaption of the theoretical small group behavior model of John Thibaut and Harold Kelley. J. Thibaut & H. Kelley, *The Social Psychology of Groups* (1959). Several researchers have adapted Thibaut and Kelley's model to divorce decisions. See, e.g., S. Albrecht, *supra* note 77, at 94-101 (applying the model to determine the causes of divorce); Albrecht & Kunz, *The Decision to Divorce: A Social Exchange Perspective*, 3 *J. Divorce* 319, 320-22 (1980) (same); Edwards & Saunders, *Coming Apart: A Model of the Marital Dissolution Decision*, 43 *J. Marriage & Fam.* 379 (1981) (combining several social psychological models including Levinger's and Thibaut and Kelley's). The other model, by George Levinger, focuses directly on marital instability and dissolution. Levinger's model draws on the Thibaut and Kelley model but is not a direct adaptation. Levinger, *A Social Psychological Perspective on Marital Dissolution* [hereinafter Levinger, *A Social Psychological Perspective*], in *Divorce and Separation: Context, Causes, and Consequences* 37-60 (G. Levinger & O. Moles eds. 1979) [hereinafter *Divorce and Separation*]; Levinger, *Marital Cohesiveness and Dissolution: An Integrative Review*, 27 *J. Marriage & Fam.* 19 (1965) [hereinafter Levinger, *Marital Cohesiveness*]. An economic model of marital dissolution was developed by Gary Becker. Becker, Landes & Michael, *An Economic Analysis of Marital Instability*, 85 *J. Pol. Econ.* 1141 (1977) [hereinafter Becker, *Marital Instability*]; see also Becker, *A Theory of Marriage*, (pts. I & II), 81 *J. Pol. Econ.* 813 (1973), 82 *J. Pol. Econ.* S11 (1974) (suggesting that persons decide to marry when the expected utility of marriage exceeds that of remaining single); Huber & Spitze, *Considering Divorce: An Expansion of Becker's Theory of Marital Instability*, 86 *Am. J. Soc.* 75 (1980) (adding sociological variables to Becker's theory of marital instability and measuring their impact on individual utility). Becker's model, although somewhat more complex than the social psychology models, is consistent in its implications for precommitment analysis.

¹⁰⁰ See Levinger, *A Social Psychological Perspective*, *supra* note 99.

¹⁰¹ Levinger associates the intrinsic satisfactions of marriage with three types of rewards: material rewards, which include economic incentives to stay married, such as family income

by barriers around the marriage and by the attraction of alternatives, such as another relationship or potential benefits of the status of being single for career or personal development.¹⁰² Thus, a marriage that is intrinsically satisfactory may be vulnerable if few barriers reinforce the relationship or if alternative attractions are powerful. Alternatively, a marriage with few intrinsic rewards may be relatively stable if the barriers to exit are substantial or if the unmarried status has little appeal. Under Levinger's model, barriers to leaving the marriage include financial costs, social, moral, and community constraints, and the costs to family relationships.¹⁰³ In making a decision about divorce, the spouse compares the attractiveness of the marriage and the barriers that surround it with alternative attractions.¹⁰⁴

and home ownership (Levinger notes that high income and home ownership are inversely related to divorce, although high income—when it exceeds the needs of the family—may lead to greater external involvements and higher divorce rates); symbolic rewards, which include vocational and occupational status, social similarity and other measures of homogeneity; and affectional rewards, which include companionship, esteem, and sexual enjoyment. *Id.* at 44-50.

Thibaut and Kelley call the individual's baseline for satisfaction in a relationship the "comparison level." A relationship is determined to be minimally satisfactory (or not) based on the individual's past experience and observation of the relationships of others. If the relationship is better than the standard, the person is likely to view it with some satisfaction. J. Thibaut & H. Kelley, *supra* note 99, at 97-99. Thibaut and Kelley define the comparison level as a "neutral point on a scale of satisfaction-dissatisfaction." *Id.* at 81. The comparison level "indicates a point . . . where the mood changes from positive to negative and where the orientation changes from *toward* the dyad to *away from* it." *Id.* If satisfaction with outcomes goes below the comparison level, a person is dissatisfied and unhappy with the relationship and would leave the group if possible. *Id.* The individual's past experience is relevant because if his relationships have been superior, the comparison level will be higher. Individuals will differ in their comparison level depending on what their experience has led them to expect.

¹⁰² Levinger is drawing on a conception first developed by Thibaut and Kelley that they call "comparison level for alternatives." Thibaut and Kelley suggest that a relationship that is not intrinsically unsatisfactory may be unstable because an alternative is more attractive. J. Thibaut & H. Kelley, *supra* note 99, at 21-24. They define the comparison level for alternatives as "the lowest level of outcomes a member will accept in the light of available alternative opportunities." *Id.* at 21. The alternative relationships that are compared to the current one may include relationships with other individuals, groups, or even the nonrelationship alternative of joining no group and working or being alone. The comparison level for alternatives is the standard the group member uses in deciding whether to remain in or leave the relationship. Levinger adopts this notion. Levinger, *A Social Psychological Perspective*, *supra* note 99, at 42-43.

¹⁰³ Under Levinger's model, the importance of barriers is explicit. See *infra* note 104. Under Thibaut and Kelley's model, exit costs (barriers) are implicit in the calculation of the comparison level for alternatives. See *supra* note 102.

¹⁰⁴ Levinger describes these costs, respectively, as material costs, (the financial expenses of leaving the marriage including lost spousal income and economies of scale, alimony, and child

Levinger suggests that barriers to divorce may have another effect. The married person who tends to explore alternative relationships may thereby increase the probability that divorce will, at some point, seem more attractive than marriage.¹⁰⁵ The extent to which alternatives are explored may depend on barriers to exit as well as on the intrinsic attractiveness of the marriage. If substantial barriers to termination exist, married persons may not be likely to consider the decision to stay or leave the marriage unless the marriage is extremely unrewarding. As barriers decrease, the continuation of the marriage is dependent on sustained continuous satisfaction with the relationship relative to alternatives. The calculus becomes a more direct comparison between marriage and alternatives with less mitigation for temporary fluctuation in preferences. As Berscheid and Campbell have commented, the freedom to come and go has a price.

To have a perpetual choice means that one must choose—not once but over and over again. And to do so one must continually expend time and energy in evaluating and reevaluating the wisdom of the choice. . . .¹⁰⁶

support), symbolic costs (including religious constraints, the sense of obligation to marriage and family, and community pressure), and affectional costs (which include the loss of the marriage relationship and impairment of relationships with children). Levinger, *A Social Psychological Perspective*, supra note 99, at 51-55.

Levinger's evidence that there are costs to leaving the marriage associated with an obligation to the marriage bond includes the following: higher divorce rate among marriages entered into after a short acquaintance and the inverse relation between the divorce rate and the length of the marriage. *Id.* at 52. The nature of the religious belief, the extent of religious practice, and the effects of having the same or different affiliation are relevant to the effect of religious constraints on divorce decisionmaking. *Id.* at 53. The effect of community pressure may be reflected in the higher divorce rates in urban than in rural communities. Community pressure, of course, will only be a barrier to divorce if the prevailing norms are not supportive of marital breakup. *Id.* at 54. Interestingly, Levinger does not include legal barriers in the most recent description of his model. An earlier version of the model of divorce decisionmaking included the costs of legal barriers. See Levinger, *Marital Cohesiveness*, supra note 99, at 25.

¹⁰⁵ Levinger argues that the relationships that each person in the marriage has with third parties may compete with the marriage relationship; because external relationships demand time and energy, they may draw affect away from the pair. Moreover, relationships with possible partners contain the threat that the involved spouse will eventually prefer the alternative. Levinger, *A Social Psychological Perspective*, supra note 99, at 42-43. In terms of precommitment theory, exploration of alternatives may reflect choices based on short term preferences, the kind of "precursor behavior" that may lead to a decision to divorce. See Schelling, supra note 92.

¹⁰⁶ E. Berscheid & B. Campbell, *The Justice Motive*, in *Times of Scarcity and Change* 23-24 (M. Lerner & S. Lerner eds. 1981).

The social psychological research of Levinger and others supports the intuition that precommitment mechanisms imposing burdens on divorce could influence decisions about divorce. There is consensus that the individual considering divorce usually undertakes a cost-benefit calculation, comparing continued marriage with divorce.¹⁰⁷ One type of cost that makes divorce less attractive is the barrier to exit from marriage. Precommitment mechanisms may function as barriers to exit and may thereby promote marital continuity and stability both directly and indirectly.

D. Applying the Precommitment Perspective to Divorce and Marriage Decisions

Precommitment mechanisms potentially promote marital stability in both direct and indirect ways. First, and most obviously, precommitments may add directly to the cost of the decision to divorce. Second, these mechanisms may indirectly reduce the risk of marital failure by influencing behavior during the marriage, promoting cooperation and reducing conflict. If they promote marital stability, precommitments may reduce the likelihood that divorce will ever be considered. In other words, by making divorce more difficult, precommitments may change the way people think about and act in marriage. Third, the use of precommitment mechanisms may discourage impulsive marriages and promote decisions about marriage that reflect the long-term preferences of the individual.

1. Precommitment Strategies and the Decision to Divorce

Precommitment strategies directly increase the costs of choosing divorce by raising the costs of leaving the marriage. Some precommitment devices may impose direct penalties on the decision to divorce (such as promises to relinquish a substantial portion of postdivorce income or property). Other costs may be measured in terms of inconvenience, delay, and uncertainty (such as waiting periods, or mandatory counseling, psychological assessment, or arbitration). At the margin, the proposed precommitment plan may increase the costs of exit enough to effect a decision to continue in the marriage by one who might otherwise opt for divorce. Put another way,

¹⁰⁷ This conclusion is also supported by Becker's model. See Becker, *Marital Instability*, *supra* note 99, at 1142.

precommitment represents a significant fixed cost that will always weigh in favor of continuing marriage in any comparison of the marriage and its alternatives.¹⁰⁸

This does not mean that the party who decides against divorce because of the costs imposed by precommitment is thereby imprisoned in an unhappy marriage. Precommitment is designed to promote, not to thwart, long-term personal fulfillment. Thus, strategies that discourage divorce are meant to operate only as safeguards against overvaluation of the alternatives or exaggeration of the costs of marital dissatisfaction. If, as the theory predicts, short-term preferences bias the calculus toward divorce, these preferences will over time weigh less heavily. If this happens, the long-term cost-benefit calculus will once again support remaining in the marriage because of its intrinsic benefits and not because leaving is made too costly by the precommitment device. For example, the attraction of another relationship may temporarily weigh heavily in comparing the alternative of divorce with continued marriage. The decisionmaker may opt to remain married only because of the additional costs imposed on the divorce decision by the precommitment. However, with the passage of time, the other relationship may lose its attractiveness, and continued marriage may be preferred to divorce, independent of the costs added by the precommitment.

¹⁰⁸ A reader may ask at this point why the existing costs of leaving a marriage are not adequate to thwart all but the most considered decisions to divorce, decisions that may reflect the individual's long-term interests. Probably for many individuals who are unhappy in marriage and are thinking about divorce, the economic and psychological costs may serve as a deterrent to ill-considered actions. Cohen has described the relationship-specific investment in marriage that, in part, explains why divorce is costly for many persons. Cohen, *Marriage, Divorce, and Quasi-Rents*; or, "I Gave Him the Best Years of My Life," 16 *J. Legal Stud.* 267, 267-68 (1987). However, two related factors function to distort the divorce decisionmaking process and may result in an undervaluation of the costs. First, cognitive biases and fluctuating preferences may influence decisionmakers to make errors in valuing the costs and benefits of divorce and of staying married. For example, an alternative relationship that may be weighed heavily in the decision may diminish in value over time. Second, decisionmakers may simply be unable to foresee the costs of divorce in terms of time, money, and psychological stress. In part, this may result from the misleading signal transmitted by modern divorce law which suggests that efficient disentanglement may be accomplished. A lawyer-psychologist, who has worked with many divorcing clients, commented that he often hears the lament, "If I had known that this was going to be so awful (difficult, expensive, psychologically stressful) I never would have done it." Remarks of Charles Ewing, Professor of Law, State University of New York-Buffalo, *Law-Psychology Colloquium* (May 6, 1988).

In terms of precommitment theory, an extensive waiting period prior to divorce is a particularly appropriate strategy. A waiting period ensures that divorce will occur only if the calculus remains in favor of leaving the marriage. In a sense, a waiting period puts precommitment theory to the test in each case. The theory predicts that frequently the cost-benefit calculus will shift as individuals recognize their long-term interests in maintaining the marriage, and the attraction of alternatives wanes. If, after a waiting period, the cost-benefit calculus continues to favor divorce, then the choice may represent a change in the individual's long-term interests. In this case, precommitment theory may not apply (because it assumes consistent long-term interests), and divorce may be the appropriate outcome, at least for the unhappy spouse.¹⁰⁹

This raises a more general problem with the application of precommitment strategies to the divorce decision—a problem that will be explored in more depth below.¹¹⁰ If the assessment by the unhappy spouse of the costs and benefits of remaining married or alternatively of obtaining divorce accurately reflects long-term preferences that have changed since the time of the marriage, then the costs imposed by precommitment strategies may be the principal barrier to leaving the marriage.¹¹¹ If this is so, then the individual's realization of long-term goals may be thwarted, perhaps indefinitely (depending on the device). Although this result suggests a daunting problem, it may be mitigated in some cases because barriers to exit from the marriage created by precommitment devices may have a feedback effect on behavior during marriage. This positive effect may make contemplation of divorce less likely to occur.

2. *Precommitment Analysis and Behavior During Marriage*

Individuals who enter marriage dedicated to its success may try to cooperate and to avoid conduct that would lead to conflict, withdrawal, or dissolution of the relationship. Indeed, the generally accepted norm for behavior in marriage is cooperative rather than

¹⁰⁹ For a more extensive discussion of mandatory delay, see *infra* notes 166-72 and accompanying text.

¹¹⁰ See *infra* notes 132-38 and accompanying text.

¹¹¹ Levinger describes the "empty shell" marriage as one that is without intrinsic attraction, but continues only because of barriers that prevent exit. Levinger, *A Social Psychological Perspective*, *supra* note 99, at 41-42.

conflictual or competitive.¹¹² The failure of many marriages suggests that this norm is often not effective to prevent behavior that may eventually lead to breakdown of the relationship. In this Section, drawing on recent scholarship about long-term contractual relationships, I will speculate about why the informal cooperative norm sometimes fails and analyze how legal precommitments may reinforce this norm, thereby promoting marital stability.

Robert Scott has illuminated the relationship between social norms and legal regulation in long-term contractual relationships.¹¹³ Scott's analysis suggests that informal social norms are important in reinforcing cooperative patterns of interaction in ongoing business relationships.¹¹⁴ Despite the intentions and efforts of the parties, however, misunderstanding and mistrust may threaten the cooperative interaction. Moreover, informal norms are inadequate to deal with severe defections that may trigger retaliation or simply destroy the relationship. Thus, legal enforcement of contractual provisions in business

¹¹² The cooperative norm in marriage may include such values and behavior as fidelity, honesty, open communication, and concern for the spouse's preferences and welfare. Arguably this is particularly true for families with children. For many parents, a stable marriage is an optimal setting for rearing children.

¹¹³ Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 *Calif. L. Rev.* 2005 (1987). Scott describes experimental research in game theory which demonstrates that conditional cooperation—"tit for tat"—is the best strategy to maintain a cooperative equilibrium in a long-term strategic game relationship. See R. Axelrod, *The Evolution of Cooperation* 30-33 (1984); A. Rapoport & A. Chammah, *Prisoner's Dilemma: A Study in Conflict and Cooperation* 65-66 (1965); Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 *J. Conflict Resolution* 3, 7-9 (1980); Downing, *The Prisoner's Dilemma Game as a Problem-Solving Phenomenon: An Outcome Maximization Interpretation*, 6 *Simulation & Games* 366, 382-85 (1975).

The player who wishes to maximize his individual interests should begin with a cooperative stance and defect only if the other player defects and then, after a single retaliation, return to the cooperative pattern. This pattern, once established, is likely to lead to equilibrium. Scott uses this experimental research to develop a game-theoretic model that may be applied to decisionmaking to distribute risk in real world long-term contractual relationships. See Scott, *supra*, at 2009-30.

¹¹⁴ See Scott, *supra* note 113, at 2030-34. Parties in long-term contracts may use extralegal signals to convey their cooperative intentions and to discourage defection by the other party. A reputation for cooperation is one method for signaling cooperative intentions. This social norm of reciprocity is important in contractual interactions as are honesty, promise-keeping, and trust. *Id.* at 2040-42. Legal scholars and sociologists have studied the role of cooperation in informal norms as social control mechanisms. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 *J. Legal Stud.* 67 (1987); MacCaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963) (study of Wisconsin businessmen suggesting that importance of honoring commitments went beyond legal enforcement threat).

settings serves the important role of providing a remedy to the non-breaching party and also as the ultimate deterrent to noncooperative behavior. Knowledge that the defection will be sanctioned reduces the temptation to defect and reinforces cooperative patterns of behavior.¹¹⁵

The similarities between marriage and commercial contractual relationships should not be exaggerated. However, some insights may be drawn from Scott's analysis about the potential importance of precommitments as mechanisms to reinforce cooperation during marriage. Modern marriage is analogous to a long-term contractual relationship without legal enforcement. Although most spouses probably adopt a cooperative norm of marital behavior, the temptation to "defect" from this norm may be substantial, given the stresses of marriage and the broad range of interactions involved. Defection leading to divorce might occur in at least two ways. First, a retaliatory pattern of noncooperation may emerge that eventually erodes the unreinforced commitment to cooperation in marriage. With no mechanism for altering the pattern, the couple drift toward divorce, which is always an option.¹¹⁶ Second, a massive defection, such as an extramarital relationship, may so damage the relationship that reestablishment of a cooperative pattern becomes impossible.

Social norms supporting cooperation in marriage encourage couples to renew their cooperative efforts after periods of conflict and to seek to avoid defection or destructive patterns of retaliation. For several reasons, however, unreinforced informal norms alone may be ineffective to sustain long-term cooperation (just as they may be in a contractual relationship). First, in the marital context, the cooperative norm has weakened somewhat; indeed it may conflict with other

¹¹⁵ See Scott, *supra* note 113, at 2042-49. Scott emphasizes the importance of legal enforcement to provide a threat of retaliation to discourage deviations from the cooperative pattern. *Id.* at 2044.

¹¹⁶ Schelling has observed the usefulness of precommitments in avoiding precursor behavior. See *supra* notes 91-92. It seems probable that many people who ultimately become dissatisfied with their marriages embark on a course of behavior that leads to divorce without intending that result. For example, marital breakdown that is associated with an extramarital affair by one party may begin with flirtatious behavior that is not intended to imperil the marriage.

Levinger describes the relationship among low barriers to exit from marriage, exploration of alternatives, and marital instability. See Levinger, *A Social Psychological Perspective*, *supra* note 99, at 55-58.

values in marriage, such as enhanced personal freedom. Cooperation may require accommodation to the spouse and sublimation of preferences, responses that may seem to conflict with some conceptions of self-fulfillment. Moreover, the fact that divorce is always an option may contribute to the erosion of cooperative intentions. The temptation to engage in behavior that seriously threatens the relationship (a massive defection) or to continue a destructive pattern of retaliation may be more compelling if the damaged relationship can be left behind. Further, because it can always be ended, the marriage relationship is intrinsically insecure; therefore, the risk of misinterpretation and mistrust may be great. Uncooperative acts by one spouse may now be interpreted by the other as evidence of withdrawal from the relationship, thereby triggering responsive patterns of retaliation or withdrawal that weaken the unreinforced commitment to marriage.

In contrast, legally enforced precommitments creating barriers to divorce may reinforce cooperative intentions for marriage, reducing the temptation to defect. The knowledge that because of precommitment, leaving the marriage will be costly may, at least indirectly, influence marital partners to resist the temptation to engage in behavior that would threaten the relationship (an affair, for example). Like a party to a long-term contractual relationship, the married partner may be dissuaded from defection by the prospect of legal enforcement of the commitment.

At an intangible level, precommitments burdening divorce may influence day-to-day choices and behavior in marriage, shaping the attitudes of the spouses about the kind of relationship they have undertaken. Such a conception of marriage might be expressed as follows: "We have made a commitment to this marriage, and we are not getting out of it easily. Since we are here for the duration, we may as well make the best of it." A quite different frame of mind may be anticipated in the midst of the stresses of marriage if divorce is always an option. In a marriage bounded by precommitment, the original cooperative intentions may be less likely to be forgotten, because the relationship cannot be readily abandoned if it becomes unsatisfac-

tory.¹¹⁷ This may influence parties to protect the marriage by avoiding behavior that may lead them to confront the costly decision to divorce.¹¹⁸ In this way, legally enforceable precommitments powerfully reinforce the informal cooperative norm in much the same way that the threat of legal enforcement reinforces cooperative norms in long-term contractual relationships.

3. *Precommitment Analysis and the Decision to Marry*

Individuals who contemplate marriage today have an option that was unavailable in earlier times to enjoy many of the benefits of the relationship without changing their legal status. Certainly, unmarried couples live together for long periods without significant social stigma in many cultural settings.¹¹⁹ Thus, it is likely that most persons entering marriage see themselves as making *some* commitment; otherwise the purpose of marriage is unclear.¹²⁰

Currently, few legal constraints or formalities signal that marriage is a decision that should be made thoughtfully. In virtually every state, acquaintances of a few weeks may become legally married with-

¹¹⁷ An analogy is the New Year's resolution to stop smoking or to engage in some other behavior change. Chances for success may be greater if precommitment mechanisms are used to reinforce the result. See T. Schelling, *supra* note 87, at 57-82.

¹¹⁸ The common sense of this point is supported by a cross-cultural example. Dispute resolution in some South Pacific island societies is achieved through a process of mediation. Accommodation and restoration of harmony are the apparent normative goals rather than "justice" or designation of a winner and loser. Confrontation and conflict are discouraged. Researchers studying these societies have explained this pattern of conflict resolution as derived from the nature of the community and the geographic constraints. Members of a community on a small island must continue to live together after the resolution of the current dispute. They have continuing multistranded relationships and must engage in interaction in the future. It is, in short, a no-exit situation. Comments of Cliff O'Donnell, Professor of Psychology, University of Hawaii, Study Group on Child Advocacy Research, Lincoln, Neb. (June 27, 1988).

¹¹⁹ Probably largely because of changing sexual mores regarding premarital relationships, the number of cohabitating unmarried couples has increased steadily over the past 30 years. See generally Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 *Ariz. L. Rev.* 207 (1988) (arguing that legal preferences for the institution of marriage should be invalidated because they discriminate against various alternative lifestyles).

¹²⁰ Anecdotal evidence suggests that many couples living together probably decide to get married because they plan to have children. If this is so, it suggests that prospective parents may associate the responsibility of having children with commitment and a goal of a stable relationship.

out significant delay.¹²¹ Moreover, divorce law may reinforce a view of marriage as a relationship embraced and discarded with ease. A legal policy favoring precommitment by reinforcing a conception of marriage as a lasting relationship may influence the attitudes of persons considering this step.

The analysis thus far presumes that the decision to marry typically represents the reflective consideration by the individual of her long-term interests. The use of precommitment increases the likelihood that this will be so, promoting decisions that represent a thoughtful choice to bind oneself to a long-term relationship. To take an extreme example, a person contemplating marriage might consider the decision more seriously if divorce were unavailable than if it were readily obtainable. Because of the heavy cost of error, there would be fewer marriages altogether and far fewer among persons whose acquaintance is brief. Those couples who do not want to bind themselves may live together without the social opprobrium of an earlier era.¹²²

An obvious objection occurs: If a policy encouraging precommitment discourages from marriage some couples who will later have children, then their children may be harmed. It is plausible to assume, however, that plans to have children will influence parties to choose commitment and marriage. Further, research on teenage marriage offers little support for the notion that promoting unstable marriages between persons who are immature, uninformed, and not ready to make a commitment ultimately promotes the welfare of children.¹²³

¹²¹ See *supra* note 12. Historically, social and religious traditions such as betrothal and the posting of banns may have encouraged more thoughtful decisions about marriages. Today these traditions have eroded, but so also have the strong social norms favoring marriage for couples living together.

¹²² There is a trend toward imposing financial exit costs on long-term nonmarital relationships in the form of "palimony" or property settlement. Such awards are ordered on an implied contract theory. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (describing trend toward couples living together without marriage; court permitted enforcement of expectations of nonmarried couple regarding support and property based on express or implied contract upon separation).

¹²³ Furstenberg studied over 400 adolescent mothers who were pregnant at the time of marriage. Furstenberg, *Premarital Pregnancy and Marital Instability, in Divorce and Separation*, *supra* note 99, at 83, 88. He found that three out of five of these marriages ended in divorce within six years. The findings of this study support two hypotheses explaining the amount of marital instability when a premarital pregnancy is involved. Furstenberg's study suggests that premarital pregnancy disrupts the courtship process and cuts short the stage of preparation for marriage. Couples who had a longstanding relationship prior to the pregnancy were less likely to divorce. Economic factors also contributed to marital instability in these

Nonetheless, the possibility that precommitment may impose costs on some children by discouraging marriage is a normative concern that can not be readily resolved.¹²⁴

E. The Limits of the Precommitment Model for Marriage and Divorce Decisionmaking

To this point the analysis has assumed that decisions about marriage and divorce conform to precommitment theory. That is, the decision to marry reflects considered long-term preferences while short-term interests influence decisions to divorce. In this Section I explicitly relax these assumptions and acknowledge that some marriage and divorce decisions may not conform to the precommitment model.¹²⁵ First, some marriage decisions will be impulsive, immature, or poorly informed and thus will not involve the careful consideration of long-term preferences that the analysis predicts. Second, contrary to the assumption thus far, some people decide to divorce because their values and goals have changed so greatly that remaining in the marriage no longer reflects long-term interest or preferences.

cases. Many of the fathers were required to quit school and enter the labor force in menial positions. Their earning capacity was thus impaired. *Id.* at 84-86. Adolescent parents experience additional stresses that may contribute to marital instability. Their level of educational achievement is generally lower than that of their peers; they have fewer employment opportunities and are generally relegated to low-paying jobs. Their children often have more health problems in infancy and exhibit cognitive deficits compared to other children, deficits that may be linked to the educational and economic situation of their parents. See studies cited in Scott, *Adolescents' Reproductive Rights: Abortion, Contraception, and Sterilization, in Children, Mental Health, and the Law* 125, 137-39 (1983). A substantial body of social science research has examined the relationship between premarital pregnancy and later divorce. The general finding is that premarital pregnancy greatly increases the probability of eventual divorce. Christensen found that marriages that involved a premarital pregnancy were more than twice as likely as marriages that involved a postmarital pregnancy to end in divorce within the first five years of marriage. See Christensen, *Cultural Relativism and Premarital Sex Norms*, 25 *Am. Soc. Rev.* 31, 37 (1960); Christensen, *Timing of First Pregnancy as a Factor in Divorce: A Cross-Cultural Analysis*, 10 *Eugenics Q.* 119, 124 (1963). Coombs and Zumeta found that 10.3% of couples who conceived premaritally were divorced after five years compared to 3.5% who did not have a premarital pregnancy. Coombs & Zumeta, *Correlates of Marital Dissolution in a Prospective Fertility Study: A Research Note*, 18 *Soc. Probs.* 92, 97-98 (1970).

¹²⁴ For further discussion, see *infra* notes 170-73 and accompanying text.

¹²⁵ Fortunately, in many cases the marriage decision may conform to other generally held life goals and values that may influence and reinforce the choice. Similarity in religious practice, values, and socioeconomic status is associated with marital stability; most people tend to find a marital partner who is similar to themselves in these regards. See Becker, *supra* note 99, at 827; Bumpass & Sweet, *supra* note 81, at 760-65.

Another factor that complicates the functioning of the precommitment model, but in two conflicting directions, is that predictable cognitive biases distort the individual's ability to make rational choices about marriage and divorce.¹²⁶ The usefulness of precommitments is reduced if decisions about marriage often reflect cognitive error. However, the influence of cognitive biases on the decision to divorce suggests the benefit of precommitment mechanisms, which may promote more careful decisionmaking in this context.

1. Suboptimal Decisions About Marriage

If the decision to marry does not reflect careful consideration, then precommitment strategies may bind the individual to an impulsive or mistaken choice. An erroneous decision to marry could occur in several ways. The couple may marry after a short acquaintance and thus know too little about each other.¹²⁷ More rarely, one party may intentionally deceive the other about material facts relevant to the decision to marry.¹²⁸ Alternatively, circumstances may make further search (for a suitable spouse) unduly costly, leading one or both parties to "settle" prematurely for a suboptimal mate.¹²⁹ Finally, one or both persons may be too immature to make sound judgments about their long-term interests and may calculate erroneously.¹³⁰ If, in each

¹²⁶ It is also probable that cognitive biases distort decisionmaking at the time of divorce. See *infra* notes 152-54 and accompanying text.

¹²⁷ Furstenberg's study of marriages involving a premarital pregnancy found that a shorter period of acquaintance before marriage correlated with a higher probability of divorce. Furstenberg, *supra* note 123, at 90-92. The importance of the courtship period is emphasized in marriage textbooks. E. Burgess & P. Wallin, *Engagement and Marriage* 159-69 (1953). Brief acquaintance before marriage is correlated with higher marital instability. Burchinal, *Research on Young Marriage: Implications for Family Life Education*, 9 *Fam. Life Coordinator* 6, 16 (1960).

¹²⁸ Fraud is a ground for annulment in 30 states and the District of Columbia. See statutes cited in H. Clark, *supra* note 26, at 105. In others, it is included among fault divorce grounds. *Id.* at 105-06.

¹²⁹ Becker analyzes decisions to marry in terms of search costs. An individual may accept a less than optimal mate if the value of additional search is offset by additional search costs. This may occur because of a premarital pregnancy, or because the individual has unusual traits, and the pool of appropriate partners with matching traits is small. Becker, *Marital Instability*, *supra* note 99, at 1147-51.

¹³⁰ See *supra* notes 81-82. Decision error by young individuals may result because they are less capable of calculating their long-term interests or because their long-term interests, based on values and goals, are not clearly defined and are thus incalculable. The research evidence is consistent and compelling that those who marry at a young age are more likely to divorce. Becker analyzes this finding in terms of search costs. Those who have high search costs are

of these situations, precommitment strategies bind the person to an impulsive, uninformed choice which turns out to be inconsistent with long-term goals, then these goals may be temporarily undermined.

The cost of precommitment in these circumstances may be mitigated if, as I have argued, precommitment mechanisms themselves discourage impulsive marriage. The invitation to undertake a legally binding commitment may have a sobering effect that makes the marriage choice less attractive. Specific devices, such as a mandatory waiting period before marriage, may themselves promote more careful decisions. Further, the stabilizing effect of precommitment mechanisms may help some marriages to endure and thrive despite the suboptimal start. It is likely, however, that in some instances the mistake will not be discovered for some time after the marriage and will not be overcome. Romantically distorted perceptions may dissolve slowly and information that clarifies that the marriage decision was erroneous may come to light only over time. Thus, legally enforceable precommitments may indeed impose costs on some individuals bound to impulsive marriage decisions.¹³¹

2. *Precommitment and the Problem of "Later Selves"*

Even a marriage that was entered after careful consideration may later fail to offer personal fulfillment. Based on all information available at the time of the marriage, a commitment to a future with the partner may have been a thoughtful, reflective choice. Ten years later, the couple may no longer share the same values, plans, and interests that supported the earlier commitment. In some real sense they may be "different" persons from the couple that married. One or both partners may have grown and changed so significantly that continuation in the marriage may represent self-denial. Under the traditional view of marriage, failure of compatible goals and interests left the marriage supported only by the sense of moral and religious

more likely to marry suboptimally at a young age and thus are more likely to dissolve their marriages. He also suggests that marriage at a young age is more likely to occur if the individual is pessimistic about potential options. Becker, *Marital Instability*, *supra* note 99, at 1151. This comports with the traditional explanation for some youthful marriages—the desire of the young girl to escape from an unhappy family.

¹³¹ A legal response directed at reducing the likelihood of impulsive marriage decisions may be desirable. Some possibilities for achieving this goal are discussed in Part III, *infra* notes 170-73 and accompanying text.

duty—and by legal bars to divorce. Modern social and cultural norms do not support such self-sacrifice. To the extent that precommitment strategies create bonds to marriage that impede the pursuit of important life goals, these mechanisms may defeat their own purpose, with costly results.

The impact of change over time on the meaning of personal identity has been the subject of a lively debate in moral philosophy in recent years.¹³² Derek Parfit has offered a provocative analysis of this issue that provides insight when applied to changing personal identity over the course of a marriage.¹³³ Parfit presents what he calls the “complex view” of personal identity as one perspective on the effect of change over time.¹³⁴ According to this view, an individual’s identity as a separate person over time is grounded in psychological connections such as memory, character traits, and plans. The extent to which these connections exist between different parts of a person’s life varies and is a matter of degree; thus, the continuity of personal identity may be a matter of degree. If a person’s character changes, memory fades, and intentions and goals shift significantly over time, then the person is a “self” different today from the “self” that existed at an earlier time. To take an extreme example, the person who experiences a permanent amnesia has an identity different from the one she had before the amnesia occurred.¹³⁵

¹³² See Penelhum, *Personal Identity*, in 6 *Encyclopedia of Philosophy* 95 (P. Edwards ed. 1967) (“To reidentify someone is to say or imply that in spite of a lapse of time and the changes it may have wrought, the person before us now is the same as the person we knew before.”). See generally S. Shoemaker, *Self-Knowledge and Self-Identity* 125-36 (1963) (proposing that identity is the persistence of a person through time going beyond what can be known by observation and memory); B. Williams, *Problems of the Self* 127-35 (1973) (questioning the premises in S. Shoemaker, *supra*, while exploring the relationships between psychological states of mind); Perry, *Personal Identity, Memory, and the Problem of Circularity*, in *Personal Identity* 135 (J. Perry ed. 1975) (defending the “memory theory” of personal identity).

¹³³ See Parfit, *Later Selves and Moral Principles*, in *Philosophy and Personal Relations* 137 (A. Montefiore ed. 1973) [hereinafter Parfit, *Later Selves*]; Parfit, *On the Importance of Self Identity*, 68 *J. Phil.* 683, 686-89 (1972). See generally D. Parfit, *Reasons and Persons* (1984) (arguing that personal identity is less static than previously believed).

¹³⁴ Parfit describes the “simple view” and the “complex view” of personal identity. The simple view is an all-or-nothing conception; it presumes psychological continuity and contemplates no “degrees” of personal identity over time. In contrast, the complex view focuses on connectedness. Parfit, *Later Selves*, *supra* note 133, at 139-40.

¹³⁵ Parfit draws on literary examples to demonstrate the familiarity of the idea that personal identity may change over time.

The complex view has implications for promises and commitment. If the person binds himself to perform certain acts in the future, he may be binding a different person without that person's agreement. If psychological connections are very weak over time, a commitment that seriously restricts one's own behavior in later life is no more supportable than a commitment that would bind a different individual without that person's consent.¹³⁶ Carried to the extreme, this perspective may abrogate notions of personal autonomy and responsibility; the individual is not free to commit his later selves and is not responsible for behavior of earlier selves.¹³⁷ The conception of changing personal identity is a fragmenting and unsettling notion in ethical discourse. Mitigating this response is Parfit's emphasis that wholly separate selves are rare; what he is suggesting instead is degrees of connectedness.

Although this conception of personal identity may have troublesome implications as a way of thinking about personhood or as a basis for moral responsibility, it does suggest rather powerfully a life course different from that presumed by the precommitment model. In some

Nadya had written in her letter: 'When you return . . .' But that was the whole horror: that there would be no *return* A new unfamiliar person would walk in bearing the name of her husband, and she would see that the man, her beloved, for whom she had shut herself up to wait for fourteen years, no longer existed

Id. at 140-44 (quoting A. Solzhenitsyn, *The First Circle* 232 (1969)).

¹³⁶ Parfit describes a case that suggests the problems of precommitment theory. An idealistic young nobleman signed a document that would automatically give away all of his land at some future time, a promise that could only be revoked with his wife's consent. He told his wife that she must never consent if he should at some later time ask her, because

I regard my ideals as essential to me. If I lose these ideals, I want you to think that I cease to exist. I want you to regard your husband, then, not as me, the man who asks you for this promise, but only as his later self. Promise me that you will not do what he asks.

Id. at 145. Years later when the man's socialist ideals fade, he asks his wife to revoke the document. Parfit explores the implications of the wife's earlier promise to her husband. Is her obligation to her current husband or to the young man whom she married who has in some sense ceased to exist? Id. at 145-46.

From the man's perspective this case suggests a problem with precommitment theory. The idealistic young man attempted to bind himself (and his wife) to an outcome that was consistent with his deeply held values and with the "life plan" based on these values. These values later changed. The husband's "later self" was bound by a commitment made by the earlier self that conflicted with his current values and goals.

¹³⁷ For example, the psychological connections between the man charged with a crime today and the criminal who committed the offense may be weak (perhaps because of a religious conversion). In this situation, under the complex view the moral claims supporting criminal responsibility are weaker than if psychological connections are strong.

persons, dramatic changes in character and in life goals may occur over the course of a marriage. A young couple may each change in important ways as they mature. One person may pursue an educational or career path that departs from the family or social norm of the couple. Religious conversion, wartime military experience, or an encounter with serious illness may have a major impact on shaping and changing personal identity. Perhaps more typically, the marriage may join two young individuals with relatively unformed personal identities. Each may grow to form a mature "self" who is very different from the earlier person.

A potential for error exists if precommitment mechanisms are used by couples such as these. If the young person entering marriage makes a commitment that restricts her freedom at a later time when she wishes to get divorced, she may in at least a symbolic sense be binding a "different" person with different values, character, and long-term goals. That person may not, as the precommitment model predicts, be pursuing short-term preferences in seeking the divorce. Rather, the marital breakdown may reflect a change in long-term preferences, and divorce may be necessary to the pursuit of her life plan. If this is so, precommitments devised by the person at marriage would impede rather than promote self-actualization, contrary to the predicted outcome. Put another way, the decision to divorce represents the expression of the (later) individual's long-term interests over time. In this situation, if the individual is bound by the earlier commitment, the enforcement cannot be based on the rationale that supports precommitment.¹³⁸

Precommitment mechanisms may not function correctly in cases in which one or both marital partners experience significant changes in personal identity over time. Indeed, to the extent that personal identity is an evolving rather than static construct, a broader challenge to the precommitment model may be offered, because the model presumes that long-term goals and interests are consistent over time. Further, the determination of whether one or both spouses will experience significant personal change is probably impossible at the time of marriage.

¹³⁸ This is not to say that enforcement will always be unjustified. The reliance interest of the spouse or harm to children may support enforcement in some cases despite the failure of the precommitment rationale. See Part III *infra*.

The analysis suggests, however, that the use of precommitments itself may mitigate the problem of "later selves" and promote conformity to the model. Personal change that results in an intolerable distance or incompatibility between spouses is arguably less likely to occur in a marriage that is supported by enforceable commitments. The later "self," in most instances, evolves slowly over time in response to life experiences; the marital relationship itself may affect that evolution. Cooperative behavior may promote change or growth that results in compatible rather than alienated later selves.

The fact that, for some persons, long-term objectives may change significantly suggests that very burdensome commitments may sometimes impose onerous costs. It does not argue against the use of precommitment mechanisms in general. Indeed, some precommitments, such as mandatory delay, serve a valuable sorting function. Under the current legal regime of quick divorce, the unhappy spouse who wants to leave a marriage may be unable to assess accurately whether this desire reflects short-term or long-term preferences. After an extended period of delay, the spouse who is firm in the resolve to divorce is likely acting on truly changed preferences.

3. *Cognitive Biases in Decisionmaking*

Cognitive error that tends to distort decisionmaking creates a further complication for the application of the precommitment theory to marriage. Individuals are not perfectly rational decisionmakers, not only because of impulsivity or fluctuating preferences, but also because of systematic cognitive biases that predictably distort decisionmaking. Cognitive error may influence decisionmaking in both the premarital and divorce contexts, with conflicting implications for the use of precommitments. Because a person contemplating divorce may overvalue that option in comparison with the alternative of remaining married, precommitments burdening divorce may improve decisionmaking in this setting. In the premarital context, however, cognitive biases may result in an overly optimistic calculation of the prospects of marital success, a response that raises questions about the quality of decisionmaking about precommitment.

a. *Cognitive Error in the Premarital Context*

Costs that may be incurred when the decision to marry does not conform to the precommitment model may be exaggerated by predict-

able cognitive error. Persons contemplating marriage are unlikely to view the prospective partner objectively and may not measure the potential costs and benefits of the marital state accurately. This together with (and exaggerated by) impulsiveness and immaturity may result in erroneous decisions to marry. Furthermore, a person about to marry may have difficulty contemplating divorce and making choices about that eventuality. Binding commitments made at the time of marriage may be affected by romantic enthusiasm for the partner that discounts the possibility of marital failure.

A body of experimental and theoretical research in decision theory suggests that the context in which decisions and judgments are made may have an important effect on the outcome. Individuals use heuristics or rules of thumb to evaluate information and to make probability assessments. For the most part, these mechanisms are a useful method of simplifying complex choices,¹³⁹ but they may also result in cognitive error.¹⁴⁰ The type of cognitive error most likely to distort

¹³⁹ There has been a substantial interest in the field of cognitive psychology in the way in which individuals use heuristic principles to organize and simplify complex data in making judgments and assessing the probability of uncertain events. Although they are useful tools, heuristics lead to systematic error and inferential biases. Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *Judgment Under Uncertainty: Heuristics and Biases 3* (D. Kahneman, P. Slovic & A. Tversky eds. 1982) [hereinafter *Judgment Under Uncertainty*].

¹⁴⁰ Theoretical and empirical understanding of cognitive error has been derived from a vast body of experimental laboratory research designed to systematically measure error at performing certain intellectual tasks. Edwards and von Winterfeldt describe the elements of a cognitive illusion (error):

1. A formal rule that specifies how to determine a correct (usually *the* correct) answer to an intellectual question;
2. A judgment, made without the aid of physical tools, that answers the question; and
3. A systematic discrepancy between the correct answer and the judged answer.

Edwards & von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. Cal. L. Rev. 225, 227 (1986). The findings of laboratory research testing subjective judgments of individuals against a formally determined correct answer are, of course, not directly applicable to decisionmaking about marriage and divorce. Nonetheless, the types of systematic error that bias judgment, prediction, and inference in the laboratory setting also operate in judgmental operations in a "natural" setting.

The modern research on cognitive error by Kahneman and Tversky and others developed out of three separate lines of research in the 1950's and 1960's. The introduction of Bayesian theory to psychological research by Edwards provided an optimal model of subjective probability assessment under conditions of uncertainty. Much of the subsequent experimental research has compared human judgments against the Bayesian paradigm. See Edwards, *Dynamic Decision Theory and Probabilistic Information Processing*, 4 *Hum. Factors* 59 (1962); see also Edwards, Lindman & Savage, *Bayesian Statistical Inference for Psychological*

premarital decisions is caused by the availability heuristic, which leads the decisionmaker to overvalue vivid experiential data.¹⁴¹ The choices of decisionmakers contemplating divorce in the premarital context may also be distorted by cognitive dissonance, the discomfort experienced in contemplating two logically inconsistent facts or choices.¹⁴²

Research, 70 Psychological Rev. 193 (1963) (examining the implications of the Bayesian statistical model for psychological research). Another line of research compared statistical predictions with clinical performance. See P. Meehl, *Clinical Versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence* (1954). A third body of research studied human cognitive strategies for simplifying complex judgments. H. Simon, *Models of Man: Social and Rational* (1957). Building on these three research lines, modern cognitive psychologists have focused on detecting and examining the use of judgmental heuristics and on the development of descriptive theories that explain the use of heuristics in human reasoning. See generally *Judgment Under Uncertainty*, supra note 139 (discussion of the experimental research and descriptive theories about cognitive error); R. Nisbett & L. Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (1980) (building on Kahneman and Tversky's descriptive theories of cognitive error); Abelson & Levi, *Decision-Making and Decision Theory*, in 1 *The Handbook of Social Psychology* 231 (G. Lindzey & E. Aronson 3d ed. 1985) (reviewing literature describing the decisionmaking process of individuals).

¹⁴¹ Another heuristic that may operate in the premarital setting is the anchoring effect. Because of anchoring, decisionmakers fail to adjust estimates and predictions sufficiently to accommodate subsequently gained information; as a consequence final estimates are systematically biased to overvalue information acquired at the beginning of any calculation.

Two mind experiments demonstrate the anchoring effect. In one, subjects were asked to estimate quantities, such as the percentage of African countries belonging to the United Nations, and whether the percentage was higher or lower than a given number between 0 and 100. For those given a starting point of 10, the median estimate of percentage of African countries was 25; with a starting point of 65, the median estimate was 45. In another experiment, one group of subjects was asked to calculate $8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1$ in five seconds; a second group was asked to multiply $1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8$. The median estimate of the first group was 2250; for the second group the estimate was 512 (correct answer is 40,320). Tversky & Kahneman, supra note 139, at 14-15.

Partly because of anchoring, persons thinking about marriage may tend to exaggerate the positive qualities that attracted them to the prospective spouse and discount subsequently gained negative information. This tendency will be more pronounced once the decision to marry is made.

Anchoring may also lead people to overestimate the probability of conjunctive events and to underestimate disjunctive events. Predictably, this leads to excessive optimism about the success of plans and underestimation of the probable failure of complex systems. Tversky and Kahneman describe how the anchoring effect may be observed in a plan, such as the development of a product, that involves a series of events, each of which is likely to occur. Planners will underestimate the possibility of failure, because the probability of success of the conjunctive event (the whole project) is less than the probability of each component event. *Id.* at 15-16.

¹⁴² The research on cognitive dissonance predated by more than two decades the experimental studies and theoretical formulations defining the biasing effects of heuristics such as availability and anchoring. Leon Festinger developed a theory of cognitive dissonance in

The availability heuristic leads decisionmakers to weigh more heavily information that can readily be called to mind and particularly information that is directly related to immediate experiences in a sensory, temporal, or spatial way.¹⁴³ In contrast, information that is abstract or remote may be undervalued. Thus, in evaluating automobile performance, a person whose Toyota has been plagued with mechanical difficulties may be influenced by this experience more than by positive Consumer Reports assessments.

The availability heuristic may influence persons entering marriage to underestimate the probability of marital breakdown.¹⁴⁴ The context in which the decision to marry is made may promote a rose-colored view of the partner and an optimistic assessment of the positive aspects of marriage. Predictable problems that may undermine successful marriage (for example, economic hardship, career conflict, or religious, age, social, or educational differences) may seem remote and be undervalued in the decision.¹⁴⁵ In the midst of this warm, eno-

the late 1950's, setting the research agenda in cognitive social psychology for more than a decade. L. Festinger, *Conflict, Decision, and Dissonance* (1964); L. Festinger, *A Theory of Cognitive Dissonance* (1957) [hereinafter L. Festinger, *Cognitive Dissonance*].

¹⁴³ Availability relates, in part, to the retrievability of information. Information that is familiar, vivid, or salient will be more readily retrieved than unfamiliar or abstract information. See Borgida & Nisbett, *The Differential Impact of Abstract vs. Concrete Information on Decisions*, 7 *J. Applied Soc. Psychology* 258 (1977); Nisbett, Borgida, Crandall & Reed, *Popular Induction: Information Is Not Necessarily Informative*, in *Cognition and Social Behavior* 113, 128-29 (J. Carroll & J. Payne eds. 1976). This type of availability has been called vividness. Markus & Zajonc, *The Cognitive Perspective in Social Psychology*, in 1 *Handbook of Social Psychology* 137, 181-82 (G. Lindzey & E. Aronson 3d ed. 1985). Imaginability also plays a role in the assessing probabilities. For example, if the risks of an upcoming expedition are dramatically portrayed, their likelihood will be exaggerated. If certain risks are hard to imagine or do not come to mind, they may be underestimated. Tversky & Kahneman, *supra* note 139, at 12-13.

¹⁴⁴ Of course, the influence on some persons entering marriage may be similar to that predicted for people in general, i.e., overestimation of the probability of divorce. This may be more likely for persons whose own parents were divorced. These people may be less likely to bind themselves to an idealistic precommitment.

¹⁴⁵ Tversky and Kahneman describe another way in which the availability heuristic may affect a prediction of the probability of divorce. An individual may attempt to construct scenarios leading to divorce; she will then evaluate the plausibility of such scenarios and the readiness with which they come to mind. Unlike predictions that are the subject of experimental research, here the judgment cannot be measured against an objectively correct answer. Tversky and Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in *Judgment Under Uncertainty*, *supra* note 139, at 163.

This operation of constructing scenarios is the simulation heuristic, a variation of availability. It may bias prediction in two ways in the premarital context. First, the

tional climate, most persons are not likely to be thinking about divorce at all. At most it is a remote possibility—something that happens to other couples.¹⁴⁶

Cognitive dissonance may intensify the possibility of distortion in decisionmaking because the discounted, remote information is inconsistent with the vivid experiential data. Research on cognitive dissonance suggests that people have great difficulty contemplating two logically inconsistent facts or events.¹⁴⁷ If I know that I smoke three packs of cigarettes a day and also know that this creates a substantial risk of lung cancer, I am likely to distort one of these facts to reduce cognitive dissonance (assuming that I value good health). I may persuade myself that I am cutting down on smoking, or I may decide that the risk of lung cancer has been exaggerated. Researchers have also found that after a choice is made, decisionmakers will exaggerate the attractiveness of the choice and derogate alternatives.¹⁴⁸ Because of cognitive dissonance, individuals considering marriage may discount undesirable qualities about the prospective mate or other potential problems that marriage may bring. Furthermore, a person who has decided to marry is likely to discount the possibility of his or her own divorce because the two events are inconsistent. Persons about

implausibility of scenarios of future divorce may result in underestimation of the risk. Second, the couple may contemplate their future as a "chain of plausible links" in a successful marriage. Although the probability of failure in a given link is not high, probability of failure at some point is considerably higher. Kahneman & Tversky, *The Simulation Heuristic*, in *Judgment Under Uncertainty*, supra note 139, at 201, 207-08.

¹⁴⁶ This may suggest why antenuptial agreements are used so infrequently.

¹⁴⁷ See supra note 142. Leon Festinger described cognitive dissonance as follows: "[T]wo elements are in a dissonant relation if, considering these two alone, the obverse of one element would follow from the other." L. Festinger, *Cognitive Dissonance*, supra note 142, at 13. Markus and Zajonc offer the following propositions in a statement of cognitive dissonance theory. Cognitive dissonance is a "noxious state" that the individual will attempt to reduce or eliminate. It can be reduced or eliminated only by (a) adding new cognitions or (b) changing existing ones. Adding new cognitions reduces dissonance if (a) they add weight to one side and thus decrease the proportion of cognitive elements that are dissonant, or (b) the new cognitions change the importance of the cognitive elements that are in dissonant relation with one another. "Changing existing cognitions reduces dissonance if (a) their new content makes them less contradictory with others or (b) their importance is reduced." Markus & Sajonc, supra note 143, at 202.

¹⁴⁸ Several researchers have studied postdecision effects. Once a decision is made, individuals attempt to reduce dissonance by reevaluation of alternatives. The attractiveness of the chosen alternative is increased and that of the rejected alternative decreased. Brehm, *Postdecision Changes in the Desirability of Alternatives*, 52 *J. Abnormal & Soc. Psychology* 384 (1956).

to marry may conclude that those people who get divorced do not approach marriage with the same commitment as they do.

If the decision to marry is separate from the decision to precommit,¹⁴⁹ cognitive biases may influence the latter judgment in several ways. For example, individuals may view the risk of divorce as remote and hence reject precommitments as unnecessary to the success of their marriage. In nonmarital contexts, it is likely that persons adopt precommitment strategies after experiencing substantial failure to meet the desired goals.¹⁵⁰ Most people entering marriage do not have the memory of repeated failure.¹⁵¹ Further, purposefully considering and planning for the possibility of divorce would invite the discomfort of cognitive dissonance, which people generally avoid. However, some couples may view the adoption of precommitments as an opportunity to affirm their confidence in the success of the marriage. The effect of availability might result in overly enthusiastic precommitment based on optimism about the duration of the marriage. Indeed, "overcommitment" may result; that is, a greater precommitment than an unbiased, rational decisionmaker seeking to maximize her expected utility would make, based on all the information available to the soon-to-be-married person. The biased decisionmaker may bind herself to a marriage that a neutral observer would predict has little chance for success.

Cognitive error affecting premarital decisions is costly if the nature of marriage and divorce decisions varies from that presumed by the precommitment model. However, if remaining in a marriage is in fact consonant with the individual's long-term goals, then it matters little that the initial commitment was not based on a realistic assessment of the chances for success of the marriage. In the optimal case, there is no such thing as overcommitment. Precommitments function to reinforce the individual's effort to attain marital success and do so in a way that in itself contributes to the success. In other words, the use of precommitment mechanisms increases the probability that the mar-

¹⁴⁹ This will be true if people precommit contractually. If precommitment mechanisms are implemented through mandatory legal rules, then the decision to marry is the decision to precommit. See *infra* notes 198-204 and accompanying text.

¹⁵⁰ For example, people are likely to develop precommitment strategies to assist them to stop smoking or to lose weight after several unsuccessful efforts.

¹⁵¹ Some persons may, of course, have a memory of their own parents' failed marriages that may encourage caution. This, of course, may promote careful decisionmaking or, at least, reduce haste. Whether it would promote precommitment is unclear.

riage decision will become what the individuals entering marriage optimistically believe it to be.

b. Cognitive Error and the Decision to Divorce

Cognitive error may bias decisionmaking about divorce as well as about marriage. The individual who seeks to escape an unsatisfying marriage may not be a careful decisionmaker, accurately weighing the costs and benefits of remaining married or getting divorced. The availability heuristic may lead the decisionmaker to weigh heavily current dissatisfaction in contrast to more positive aspects of the marriage, the partner, or the commitment to children. These latter considerations may seem remote and abstract in the context of thinking about divorce.¹⁵² Optimism about the prospects for happiness with a new partner may result in discounting the extent to which stresses will confront that relationship. In effect, cognitive biases may in some instances contribute to the mistaking of short-term for long-term preferences. Cognitive dissonance research predicts that individuals contemplating divorce will tend to avoid contemplating concurrently the inconsistent course of continuing in the marriage. The possibility of resolving marital problems may be discounted as the plan to divorce develops.¹⁵³ To resolve the dissonance between the two inconsistent courses, individuals may be motivated to make a decision prematurely, at a time when temporarily intense short-term preferences may be overvalued. Further, after making the decision there may be an effort to reduce dissonance by discounting the attractiveness of the rejected course of continued marriage. The more difficult the decision, the greater this postdecision effect.¹⁵⁴

In general, the accurate calculation of the costs and benefits of continued marriage versus divorce may be subverted by contextual biases resulting in error. The analysis suggests that the distortion will not generally or randomly affect the calculus but rather will tend systematically to reinforce the decision to leave the marriage. The upshot is that cognitive error and dissonance, as well as fluctuating short-term preferences, may lead to divorce decisions contrary to the individual's long-term interest.

¹⁵² See *supra* notes 143-45. The vividness and salience of the contextual data may result in their receiving undue weight.

¹⁵³ See *supra* notes 147-48.

¹⁵⁴ Brehm, *supra* note 148, at 384, 389.

c. Cognitive Error and Precommitment Theory

Precommitment mechanisms may serve to improve decisionmaking about divorce in two ways. By adding to the cost of divorce, precommitments make it more difficult to implement erroneous divorce decisions that reflect short-term preferences or predictable cognitive biases. Moreover, some precommitment mechanisms, such as mandatory delay, may also assist in reducing decision error by promoting careful decisions.

In the premarital context, the use of precommitments may compound the cost of error when individuals bind themselves to unworkable marriages. Today, this cost is mitigated by the fact that divorce is readily available. We can correct our mistakes. If precommitments make divorce more difficult, then the decision to marry becomes more consequential, and distorted judgment about the prospects for a successful relationship is more costly. Only if the commitment influences individuals making marriage decisions to calculate more carefully will these costs be reduced.¹⁵⁵

It is true, of course, that the law has never required perfect information or rationality as a precondition to attaching juridical significance to an individual's exercise of choice. The fact that decisionmakers make errors in prediction or make decisions based on inadequate information is not grounds for releasing them from binding obligations. In this context, however, the argument for binding obligation rests on key assumptions covering the nature of marriage and divorce decisionmaking. Deviations from these assumptions suggest limitations in the applicability of the model.

F. Summary

In an era in which legal, religious, and social barriers to divorce have eroded, many couples find it very difficult to maintain the commitment with which they begin marriage. The analysis in this Part has demonstrated that married persons could reinforce their aspirations for an enduring relationship through the use of precommitment strategies. Binding commitments made at the time of marriage that impose costs on the decision to divorce may promote conduct and decisions in marriage that support the couple's express long-term

¹⁵⁵ Experimental research shows that error may be reduced through the use of tools; one of the most useful tools is time. See *infra* note 169 and accompanying text.

goals. Moreover, precommitments may intangibly shape attitudes toward the marriage relationship in a way that promotes cooperative behavior. By adopting precommitments, a couple may thus reduce the risk of marital failure generally. They may also reduce the risk that decisions to divorce will reflect predictable cognitive error or fluctuating short-term preferences.

Unfortunately, precommitment mechanisms may not function well in all cases. Some couples marry in haste or make decisions based on inadequate information. Cognitive biases distort individual predictions about the probability of a successful relationship with the chosen partner. Some people change greatly over time and no longer find fulfillment in the marriage. In short, individuals may bind themselves to mates who turn out to be incompatible, a costly decision in terms of long-term self-fulfillment. Although, as I will demonstrate in Part III, some of this error may be mitigated by corrective responses that reduce biases and promote better decisionmaking about marriage and divorce, there will be many "nonconforming" cases.

Nonetheless, precommitment mechanisms offer the intriguing potential to assist many couples to achieve more successful marriages. To be sure, the cost to personal freedom that precommitments would impose on failed marriages argues against legally mandated restrictions on all divorces. Moreover, modern values would not support such restrictions when only the interests of adults are at stake. The societal interest in protecting children, however, together with the widespread perception that divorce often sacrifices these interests, argues for a policy of reinforcing the commitment to marriage of parents, even if some costs to personal freedom may result. Precommitment theory clarifies an opportunity to promote family stability that in its essence is not repressive but a means to more effective fulfillment of personal and societal goals.

III. THE PRECOMMITMENT MODEL AND LEGAL POLICY

A. *Introduction—Fault Revisited*

In this Part, I explore how the precommitment perspective would change the legal landscape of divorce. This task requires, first, a reexamination of the discredited fault regime and of the misguided nature of the law's response to its failings. In one sense, the recent legal reforms express modern cultural norms more accurately than did traditional divorce law, both by recognizing the complexity of marital

breakdown and by acknowledging the erosion of moral and religious prescriptions for lifelong marriage. At the same time, however, the definition of marriage and divorce offered by the no-fault regime distorts relationship values that continue to be important for many people.

The discarded fault-based divorce law, although inadequate in many ways, served a little noticed precommitment function that has been inadvertently sacrificed in the effort to modernize legal norms.¹⁵⁶ Leaving a marriage was not easy under traditional law. It is plausible that even as the religious and moral basis for lifelong marriage weakened, legal barriers may have continued subtly to reinforce personal attitudes that marriage was a lasting relationship, attitudes that may have promoted cooperative behavior. Moreover, the legal requirement of proving fault increased the costs calculated by the person considering divorce.¹⁵⁷ Precommitment theory suggests that this may have encouraged caution that ultimately served to benefit some individuals and families.¹⁵⁸ The unhappy spouse could extricate herself, but only with some difficulty. Thus, although many people evaded the law's restrictions, it is plausible to assume that for others, the legal barriers functioned to reinforce the marriage and to discourage divorce. It is not surprising that the divorce rate has escalated dramatically as the barriers have fallen.

The traditional scheme failed, not because it erected barriers to divorce, but because of the nature and scope of the barriers. The scope of the legal restraints was both excessive and inadequate to function effectively in contemporary society. The restrictions were excessive because they impeded all divorces. In a society committed to self-realization, substantial restrictions imposed by the state on divorces involving only the interests of two adults may appear excessively paternalistic. The restrictions under traditional law were inade-

¹⁵⁶ It is hard to find commentary supportive of the traditional scheme making divorce contingent on spousal fault. An exception is Lawrence Stone, who has pointed out that the fault divorce regime allowed the truly miserable person to escape from marriage while assuring that she thought long and hard about the decision. See Stone, *supra* note 4, at 15.

¹⁵⁷ Even avoiding the requirement of proving fault was costly. Consider, for example, the pecuniary and nonpecuniary effects of securing an out-of-state divorce in Nevada.

¹⁵⁸ The benefit would be realized in those cases in which divorce represented a fluctuating short-term preference. Eventually the long-term preference of the unhappy spouse reasserted itself, revealing the beneficial function of the legal barrier. Moreover, the restrictive legal regime may have influenced behavior and attitudes in marriage.

quate in scope in that many unhappy spouses could largely avoid their impact by collusion between spouses, or by migratory divorce. The limits imposed on divorce by the fault regime were also normatively unsatisfactory, premised as they were on moralistic prescriptions for lifelong marriage, to be set aside only for grave offense by one spouse against the other. Finally, the fault grounds themselves offered a simplistic picture of marital breakdown that was inconsistent with contemporary understanding.

A modern scheme of legally sanctioned precommitments would express commitment to marriage and family in a manner reflecting contemporary goals and norms. The important societal interest in the welfare of children would argue for a different use of precommitment and a different legal response when divorces involve children than when only the interests of adults are implicated. Thus, a permissive policy of legal enforcement of antenuptial precommitment agreements under general contract law principles may benefit those couples who seek to achieve personal goals through reinforcement of their marriage relationship. A more interventionist legal stance is justified in families with children. Precommitment theory supports a scheme of mandatory rules designed to reinforce parental aspirations for family stability. The law, by signaling to parents of minor children that divorce is a weighty decision to be considered carefully, may reflect social values that are obscured under current law. It may also reinforce and strengthen these values in a way that will influence the evolution of modern cultural norms about marriage and family.

B. A Typology of Precommitment Mechanisms

One lesson of the failed fault regime is that the nature of the restriction that burdens divorce may affect both its social acceptability and its effectiveness as a precommitment mechanism. In order to evaluate the efficacy of various precommitments in contractual and mandatory regimes, I begin by developing a typology of precommitment mechanisms. The first category includes those strategies that function directly as precommitment mechanisms, imposing costs on divorce and thus indirectly reinforcing marital continuity. The second category includes provisions that may serve this function but also encourage more careful decisionmaking. Those "indirect" mechanisms either encourage decisions to marry that better reflect long-term preferences or discourage decisions to divorce that do not.

1. *Direct Precommitment Strategies*

a. *Economic Sanctions*

In theory, the simplest precommitment device is a direct economic cost (agreed upon in advance) imposed on the person who decides to leave the marriage. In weighing the costs and benefits of divorce, the dissatisfied spouse must consider the additional monetary costs imposed by the precommitment and may therefore be deterred from that decision. Economic sanctions include provisions for a stipulated level of child or spousal support, a designated division of property, or a direct fine, to benefit the children or the spouse who wants to continue in the marriage.

A family property trust also functions as a precommitment device. Divorce will be less attractive if property of the marriage is not divided upon divorce between the parties, but rather held in trust to be used if needed for the support of minor children.¹⁵⁹ Moreover, the children will receive enhanced economic protection because parents could not so easily move on to new relationships and new family responsibilities after divorce.

Economic penalties may be effective precommitment devices, but their use is likely to be controversial. First, their usefulness will often be linked to family income and to the predictability of family economic status.¹⁶⁰ Also troublesome is that events not anticipated at the

¹⁵⁹ See *supra* note 79. Courts and legislatures in a few states have begun to move in this direction with provisions that the custodial parent should be awarded the family home. Until recently, courts routinely ordered the sale of the home so that proceeds could be divided and an efficient property settlement facilitated to allow each party to continue with life unencumbered with entanglements of the marriage. Today, some courts allocate other property so as to compensate the noncustodial parent, or if this is not feasible, defer the sale of the home; the deferral of settlement is typically limited to two or three years, reflecting the continued influence of the efficient settlement norm. *Pitsenberger v. Pitsenberger*, 287 Md. 20, 410 A.2d 1052, appeal dismissed, 449 U.S. 807 (1980) (examining constitutionality of Maryland law); Md. Fam. Law Code Ann. § 8-206 to -210 (1984) (providing for order pendente lite allowing one spouse to occupy and possess the family home in order to maintain a residence for the children for up to three years after divorce is granted); see *supra* notes 23-29 and accompanying text.

¹⁶⁰ For example, a premarital agreement may require a defaulting spouse to pay the other \$200,000. This amount may prove to be uncollectible because the defaulting spouse has inadequate resources, or it may be an inadequate deterrent if the family has acquired great wealth at the time divorce is contemplated. To use another example, the designation of a family property trust is likely to mean little for families with few assets. In general, economic sanctions are probably most useful for middle and upper class couples. It is, of course, possible

time of marriage may result in unfairness if precommitments are enforced.¹⁶¹ Further, economic penalties may have the paradoxical effect of facilitating divorce by making it more attractive to the "injured" spouse. Finally, some contractually agreed upon penalties may have no place in divorces involving minor children. Enforcement against the custodial parent may threaten children's welfare, and one-sided enforcement against noncustodial parents would be unfair (and create distorted incentives to seek custody).

Some economic sanctions, however, particularly those that benefit children—such as provisions for rigorous enforcement of substantial child support or the encumbrance of property for the benefit of children—may have broad applicability and are appropriately the subject of mandatory legal rules. There is persuasive evidence that custodial mothers and children are economically disadvantaged as compared to fathers after divorce. Thus, in all but truly poor families, mechanisms that more effectively protect children's claims to parental income and property are useful as precommitments.

b. Nonpecuniary Precommitments

There are a variety of nonpecuniary precommitments that restrict divorce by discouraging unilateral termination of the marriage and requiring "best efforts" to save the relationship.¹⁶² For example, a

to accommodate variations in income by describing economic penalties as a percentage of income or by using sliding scales.

¹⁶¹ A couple may agree before marriage to a sizeable economic penalty for defection, each party presuming that both will be employed. Later, one may decide to stay at home to care for the couple's children. Because of this decision, she may be disproportionately burdened by an economic penalty, should she decide to leave the marriage. This inequity may be mitigated somewhat under modern equitable distribution statutes. Property distribution upon divorce will include all property obtained during the marriage, including the value of a nonworking spouse's interest in a business or profession. See N.Y. Dom. Rel. Law § 236, at 132 (McKinney 1986). The homemaker spouse may also receive compensation for homemaker services and for training or education expenses needed to prepare her for employment. Nonetheless, to the extent that the two parties have disparate earning capacities, homemakers will be disadvantaged by economic penalties. This problem may be less pronounced if the possibility that one party may fill a caretaker role is anticipated and the precommitment is fashioned to accommodate this circumstance. Thus, either standard-form contracts, see *infra* notes 195-97 and accompanying text, or mandatory rules, see *infra* notes 198-204 and accompanying text, may avoid the problems of unfettered private ordering about economic penalties, see *infra* notes 181-94 and accompanying text.

¹⁶² Unilateral divorce disadvantages the spouse who wants the marriage to continue. She cannot insist on performance of the marriage contract and thus lacks any bargaining

provision that couples engage in marriage counseling, arbitration, or mediation of disputes increases costs of divorce and indirectly supports marital continuity. Beyond its therapeutic value, counseling serves the dual function of increasing exit costs and promoting more careful decisions.¹⁶³

A provision for mental health evaluation of children as a precondition to obtaining divorce requires the divorcing parents to calculate the effects of divorce on their minor children.¹⁶⁴ Additional delay before divorce or mental health counseling for the child might be the agreed upon or required outcome if these steps were deemed beneficial to children.¹⁶⁵ Insufficient attention is directed toward the impact of

advantage that would result from a requirement of consent to divorce. Bargaining leverage is conferred on the disappointed spouse if divorce without consent is more costly (in nonpecuniary terms) than divorce by agreement.

¹⁶³ Although "involuntary" counseling may be of limited effectiveness, the prospect may be weighed *ex ante* by the decisionmaker as a cost of divorce. Some states authorize courts to order couples to participate in mediation of custody disputes. See, e.g., Cal. Civ. Code § 4607 (West 1983). Many observers believe that resolving custody disputes through mediation promotes cooperation between divorcing parents about their children's future. Researchers have found that even couples who were ordered to participate in mediation often reached agreement about their children's custody. See Emery & Wyer, *Divorce Mediation*, 42 *Am. Psychologist* 472, 474, 477 (1987). Thus, counseling and mediation may serve two functions. First, they create additional steps that must be undertaken before divorce and thus add costs to the decision. Second, they may encourage care in the decision and focus on the interests of children.

¹⁶⁴ Mental health evaluation may offer information relevant to the child's current functioning and potential negative effects of divorce, given the child's psychological functioning and developmental stage. This information might be weighed by a party to the divorce decision and could also provide a basis for recommended therapeutic intervention.

¹⁶⁵ The most extreme response would be a commitment barring (or indefinitely postponing) divorce when it is contrary to the child's interest. Such a device would enhance the uncertainty about whether divorce would be permitted when sought. Game theory suggests that uncertainty about the termination point of the relationship in a prisoner's dilemma game may promote cooperation. The person who knows that steps a, b, and c are necessary for divorce may conform his behavior to these requirements and have less incentive to cooperate in the marriage. Uncertainty about the outcome may discourage a purposeful move toward divorce and encourage investment in the marriage.

To be sure, there are potential drawbacks to requiring the dissatisfied spouse to focus on the impact of divorce on minor children. Some observers would argue that mental health professionals lack the expertise to make such assessments and predictions. See Melton, *Shrinking the Power of the Expert's Word*, *Fam. Advoc.*, Summer 1986, at 22 (arguing that mental health professionals should limit themselves to describing and investigating family dynamics to give the courts a better "picture" on which to base their judgment). Moreover, to condition divorce on a psychologist's opinion that it would be in the child's best interest may create incentives for the divorcing parent to make the relationship so intolerable that divorce may be the better alternative for the child. Furthermore, the indeterminacy of the best interest

divorce on children in the calculus of some parents unhappy with their marriage. The mandate to confront directly and formally this issue signals its importance and imposes psychic costs on the divorce decision even if *no* additional consequences hinge on the evaluation.

2. Provisions That Improve Decisionmaking

a. Waiting Periods Before Divorce

An extensive period of delay¹⁶⁶ before final divorce is the optimal precommitment mechanism, serving three precommitment functions. First, a waiting period creates a barrier to divorce that makes leaving the marriage more costly. Second, to the extent that the costs and benefits of the marriage and of alternatives to marriage may fluctuate in value, an extended waiting period permits more accurate assessment of preferences over time and promotes decisions reflecting long-term interests.¹⁶⁷ Indeed, mandatory delay sorts out cases in which the desire to divorce reflects a transitory intense preference from those

of the child standard may undermine its value in influencing divorce decisions. See Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. Chi. L. Rev. 1, 4 (1987) (attacking "best interest of the child" standard as too indeterminate to be helpful). Indeterminacy in this context may offer some benefits however. In another context, Meir Dan-Cohen has argued that indeterminacy in the definition of certain criminal defenses (such as duress) may reduce the ability of offenders purposely to conform their behavior to the requirements of the defense. Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 632-34 (1984). In sum, the case is strong against a mandatory legal rule requiring that divorce be postponed if contrary to the child's interest, but less persuasive against a voluntary precommitment or a required psychological evaluation to advise the parties about the child's needs and potential adjustment problems.

¹⁶⁶ Although in some sense any time period is arbitrary, a delay of at least two years has much to recommend it. Such a period effectively serves all the precommitment purposes described in this section, i.e., it adds a substantial cost to the divorce decision, promotes the likelihood that the decision reflects long-term interests and may reduce biases that distort decisionmaking. Moreover, a two-year waiting period before divorce is supported by the psychological literature on divorce. Most spouses, whether they seek the divorce or not, go through a period of psychological separation and recovery from the broken marriage. Psychologists estimate this period of serious stress and disruption lasts two years. Hetherington, *Effects of Divorce*, supra note 64, at 285. Thus, it is probable that a precipitous subsequent marriage would begin on an unstable foundation. Indeed, many divorced persons remarry quickly and second marriages end in divorce at a substantially higher rate than first marriages, in part perhaps for this reason. Glick, supra note 5, at 25. The interests of children may be directly promoted by an extensive waiting period. Delay of remarriage will also delay claims upon parents' financial and emotional resources by children of a second marriage. See supra note 77 and accompanying text.

¹⁶⁷ For example, the importance of an extramarital relationship (or a mid-life crisis) may seem overriding at one point in time, but its significance may diminish if substantial time

in which long-term preference has truly changed.¹⁶⁸ Thus, it is an effective response to the troublesome problem of true changed preferences, or "later selves." Finally, a waiting period serves an independently useful function of reducing cognitive error in the decision process. In experimental research, observers have found that cognitive error is reduced if decisionmakers have "tools" to assist them in making judgments. One of the most useful tools is time.¹⁶⁹ Contextual error created by availability may dissipate if individuals are given more time to make their choices.

Mandatory delay before divorce will impose costs in some cases. If the marriage is "dead" before the waiting period begins (and divorce represents long-term preferences), then delay interferes with individual fulfillment through pursuit of other relationships. Moreover, for some persons the continued uncertainty of the waiting period may have costly psychological effects and will only postpone and extend the period of dislocation. Finally, the period of delay could potentially impose economic costs on a dependent spouse if economic settlement is linked to the actual divorce. These economic burdens could be ameliorated, however, by legal mechanisms providing for support and protection of assets at separation.

Overall, despite some ill effects, mandatory delay before divorce remains the most promising mechanism both to encourage marital continuity and to promote more thoughtful decisions by persons contemplating divorce. Indeed, it is probable that many persons evaluating precommitments prospectively would conclude that the cost of delay if the marriage fails is significantly outweighed by the potential benefits if the precommitment promotes marital stability. It is also a restriction that reflects contemporary values and avoids the inadequa-

passes before a divorce is obtained. If this does not happen, precommitment theory offers no basis for barring divorce.

¹⁶⁸ Research reveals that a substantial percentage of people who petition for divorce do not follow through to obtain a divorce decree. Presumably, some of these are cases of changed preferences.

¹⁶⁹ Edwards, Remarks Delivered at Symposium on Legal Implications of Cognitive Error, University of Southern California School of Law (Feb. 1985). Common sense suggests that error and impulsiveness will be reduced and better decisions made with increased time to weigh alternatives and carefully consider the decision. This belief supports "cooling off" periods afforded purchasers from door-to-door salesmen under Home Solicitation Sales Acts. See, e.g., Vt. Stat. Ann. tit. 9, § 2454 (1984); see Sher, The "Cooling-Off" Period in Door-to-Door Sales, 15 UCLA L. Rev. 717, 734-35 (1968).

cies of fault grounds. Waiting periods do not connote blame for the failure of the marriage, but merely encourage caution in the divorce decision. Moreover, mandatory periods of delay could be designed to be less vulnerable to collusion and other manipulation than were fault grounds.

b. Mandatory Delay Before Marriage

A waiting period before marriage¹⁷⁰ does not function directly as a precommitment mechanism. It does, however, promote more thoughtful marriage decisions and ameliorate the cognitive biases that distort decisionmaking in this context. Impulsive marriage decisions or those based on inadequate information are unlikely (or less likely than choices based on greater consideration) to be the rational judgments reflecting long-term interests presumed by the precommitment model. Even a short waiting period marginally increases the ability of each partner to acquire information about the prospective spouse and to weigh long-term interests adequately. Further, passage of time before marriage may reduce the errors caused by availability and cognitive dissonance. This may improve the soundness of both the marriage and the precommitment decisions.

Another strategy for encouraging better decisions is raising the minimum age requirement for marriage. Success or failure of marriage is more closely correlated with age at the time of marriage than with any other variable.¹⁷¹ Up to a point, the older the parties are at the time of (first) marriage, the lower the risk of divorce. Precommitment theory suggests that raising the legal age of marriage would marginally reduce the expected rate of divorce.¹⁷² Greater maturity

¹⁷⁰ A period of more than a few months would likely be unacceptable to most people. Today, maximum delay of a few days is typically required. See *supra* note 12.

¹⁷¹ Many studies support the proposition that marriages by persons under the age of 20 are more likely to end in divorce than those entered by older persons. See, e.g., Bumpass & Sweet, *supra* note 81, at 755, 759; Glick & Lin, *Recent Changes in Divorce and Remarriage*, 48 *J. Marriage & Fam.* 737, 738 (1986) (divorce for women married under 20 is 53 per 1000; for women 25-29, 40 per 1000). Another study found that couples who marry in their teens are twice as likely to divorce as those who marry in their twenties. Norton & Glick, *Marital Instability in America: Past, Present, and Future*, in *Divorce & Separation*, *supra* note 99, at 6, 10. See generally, Kitson & Raschlee, *Divorce Research: What We Know, What We Need to Know*, *J. Divorce*, Spring 1981, at 1, 12-13 (citing articles on same relationship of age and marital stability).

¹⁷² The minimum age of marriage in most states today is 18; marriage is permitted with parental permission at age 16 in many states. Council of State Gov'ts, *supra* note 12, at 46.

at the time of marriage promotes more thoughtful decisionmaking by persons whose identity is more fully formed and whose long-term goals more clearly formulated. Overall, as long as delaying marriage signifies postponing children, such a policy offers substantial societal benefits.¹⁷³

C. Antenuptial Contracts as Precommitment Mechanisms

Couples entering marriage could execute antenuptial agreements restricting divorce to reinforce their commitment to each other and to the marriage. Such agreements should be enforceable under ordinary contract principles. To be sure, because of the novelty of such contracts, courts might initially subject precommitment contracts to skepticism and critical scrutiny. Antenuptial agreements today are typically executed for other purposes, such as protecting the assets of one or both spouses from the claims of the other upon divorce or death.¹⁷⁴ Moreover, even these "traditional" antenuptial agreements are less routinely enforced by courts than commercial contracts or

The law currently varies the age at which minors are allowed to engage in adult activities, depending on the activity. Thus, minors can drive at age 16, vote at 18, and purchase liquor at age 21. Society has an interest in promoting mature judgments about decisions to marry, just as it does about decisions to drink.

¹⁷³ There are two disadvantages of raising the legal age for marriage: (1) young couples may migrate to other states; and (2) marriage will be unavailable to pregnant teenagers. The latter problem seems more serious; unless some flexibility in the age requirement permits marriage by pregnant teenagers, which itself may create undesirable incentives, their children may suffer. Although, in general, teenage marriages following pregnancy do little to benefit the children whose existence led to the marriage, there are likely some cases in which children's welfare is promoted by their teenage parents' marriage. One point is clear: Policies promoting education about and access to contraceptives would be important if marriage were delayed.

¹⁷⁴ Typically, premarital agreements are executed in two types of cases. In the first situation, one of the partners is wealthy, and she (or her family) may wish to protect assets from the claims of the other spouse should the couple divorce in the future. See *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981) (upholding antenuptial contract between wealthy heiress and future husband in which each relinquished interest in property of other).

Second, couples who marry later in life may seek to protect the inheritance of children from previous marriages. See *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982). One study calculated that 80% of men and 70% of women who executed antenuptial agreements had been married before and that 90% of men and 94% of women had children in the earlier marriage. Gamble, *The Antenuptial Contract*, 26 U. Miami L. Rev. 692, 733 (1972) (basing findings on antenuptial contracts from 1956 to 1966).

Even more unusual is the use of premarital agreements to restrict divorce. For one example, see *Sanders v. Sanders*, 40 Tenn. App. 20, 288 S.W.2d 473 (1956) (premarital contract

even separation agreements executed at the time of divorce.¹⁷⁵ Nonetheless, given that the current trend is toward more routine judicial enforcement,¹⁷⁶ and that the legal environment is generally hospitable to private ordering, the claim for enforcement of many precommitment agreements is strong.¹⁷⁷ Of course, extreme restrictions, such as contracts never to divorce, would be unenforceable because they implicate the prohibition against voluntary enslavement.¹⁷⁸ However,

providing that party seeking divorce forfeits all interest in all joint property). Some courts have upheld restrictions on remarriage. See *infra* note 179.

Theodore Haas has recently argued that the law should recognize contracts restricting divorce such as the one in *Sanders*. He argues that such contracts pass constitutional muster and should be enforceable under modern contract law. Although derived from a different theoretical foundation, much of Haas's thesis is consistent with this Article. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L. Rev. 879, 882 (1988).

¹⁷⁵ During the regime of fault divorce, antenuptial contracts were rejected by courts because they were thought to encourage divorce. Enforcement today is much more common, but prenuptial agreements continue to receive greater scrutiny than other contracts. The enforcement decision typically focuses on an assessment of the fairness of the prenuptial agreement when executed *and* at the time of enforcement. Prenuptial agreements that impose "undue hardship" on one spouse may be unenforceable. Couples entering into prenuptial agreements may not predict the circumstances that may result in hardship or unfairness when the agreement is enforced. An agreement may stipulate little or no spousal support, based on the presumption that both spouses will work during the marriage. If one stays at home to care for children, and fails to acquire job-related skills and experience, this provision may impose a hardship. Unfairness may also result when assets increase beyond premarital expectation. See *Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984) (striking down premarital agreement allotting wife \$200 a month alimony where husband's assets increased from \$500,000 to \$6 million during marriage).

¹⁷⁶ The Uniform Premarital Agreement Act, which has been adopted by several states, reflects this trend; it treats antenuptial agreements, in most regards, like commercial contracts. *Unif. Premarital Agreement Act*, 9B U.L.A. 371 (1987). Under the Uniform Act, agreements are enforceable if voluntary, informed, and not unconscionable when executed, even if unforeseen circumstances thereafter result in disadvantage to one spouse. The Uniform Premarital Agreement Act, drafted in 1983, has been adopted by California, Virginia, Texas, and several other states. See, e.g., *Cal. Civ. Code* § 5300-5317 (West Supp. 1989); *Va. Code Ann.* § 20-147 to 20-155 (Supp. 1989).

¹⁷⁷ Indeed, courts may be more favorable to some precommitment agreements than to traditional premarital agreements. Courts often refuse to enforce prenuptial agreements *because* they encourage divorce. See *Neilson v. Neilson*, 780 P.2d 1264 (Utah Ct. App. 1989) (refusing to enforce provision of premarital agreement that unreasonably promotes divorce).

¹⁷⁸ Anthony Kronman argues that contracts not to divorce are of a type that are appropriately subject to paternalistic restriction by the state. The effect of such a contract is to limit the choice usually available under a binding executory contract either to perform or pay damages. In Kronman's view, by removing the alternative of paying damages, a contract not to divorce is a form of self-enslavement. This restriction represents a threat to personal integrity or self-respect because it removes the right to depersonalize the marriage relationship

restrictions on divorce that simply make that option more costly, including delays that temporarily restrict freedom to remarry, do not prohibitively interfere with personal freedom.¹⁷⁹ Indeed, the effect (if not the purpose) of many currently enforceable antenuptial agreements is to make the decision to divorce more costly.¹⁸⁰

If the current trend toward enforcement of antenuptial agreements under general contract principles continues, no great impediment blocks the enforcement of precommitment contracts, and absent some strong paternalistic justification, none should. A libertarian policy would argue for permitting couples to pursue their goals of lasting marriage even though some risks are involved. This does not, however, resolve the normative question whether precommitment agreements should be encouraged or facilitated. Such judgments require examination of the formation and enforcement of this peculiar type of contract, and of the factors that may distinguish these agreements from the general run of commercial contracts.

1. Unrestrained Private Ordering

Freedom to design precommitment agreements is most fully protected if parties can negotiate individualized terms.¹⁸¹ In addition to the precommitment terms describing economic penalties, waiting

by paying damages instead of performing under the contract. This is particularly costly if the promisor's values have changed greatly from the time that the contract was executed. Kronman, *Paternalism and the Law of Contracts*, 92 *Yale L.J.* 763, 774-82 (1983).

In essence, Kronman is raising the "later selves" problem described in Part II, see notes 132-38 and accompanying text; one implication of his analysis is that if paying damages may be substituted for performance (as would often be true under precommitment terms), the self-enslavement problem is greatly reduced. Further, mandatory delay represents significantly less of a restraint on personal freedom than a promise not to divorce.

¹⁷⁹ Indeed, even under traditional law some courts have upheld contractual restraints on remarriage. See S. Williston, *A Treatise on the Law of Contracts* § 1741, at 67 (W. Jaeger 3d ed. 1972); see also *Cowan v. Cowan*, 247 *Iowa* 729, 75 *N.W.2d* 920 (1956) (contract restraining remarriage until children are adults with forfeiture of \$10,000 upheld); *Saslow v. Saslow*, 104 *Ohio App.* 157, 147 *N.E.2d* 262 (1957) (three-year restraint on second marriage after divorce upheld).

¹⁸⁰ Consider, for example, a spouse who forfeits a life of luxury with the wealthy partner by leaving the marriage.

¹⁸¹ The following terms might be included in a "typical" precommitment contract, formally executed and recorded at the time of marriage: If either party should in the future want to leave the marriage he or she would forfeit \$200,000. If the couple has minor children, marital property is to be held in trust for the support of the children. Final divorce will follow two years after notice is tendered, three years if the couple has minor children. The parties agree that should either party be seriously dissatisfied with the marriage, they will participate in six

periods, and other conditions, the parties can designate modification provisions¹⁸² and contingencies under which all or part of the agreement will not be enforced against a party seeking divorce.¹⁸³ Precommitment theory suggests that, thereafter, either spouse will be dissuaded from seeking exit from the marriage by a calculation of the additional costs that were assumed by the contract. Further, if he does announce an intention to leave the marriage, reconsideration during a waiting period may lead to reconciliation.

Several problems with a pure contractarian precommitment regime are evident. A premarital precommitment agreement is a long-term relational contract executed in a setting that may exaggerate the difficulties of formulating contract terms.¹⁸⁴ Uniquely problematic is the possible effect of cognitive biases that may distort decisionmaking in the premarital context. Enthusiastic optimism about the success of the marriage may lead parties to impose onerous costs on a divorce decision that is perceived as remote and improbable.¹⁸⁵ Moreover, a difficulty intrinsic to all relational contracts, that of providing mechanisms for later adjustment, is especially troublesome here.¹⁸⁶ The parties may be less likely than commercial contractors to foresee con-

months of marriage counseling. Finally, divorce is conditioned on a psychological evaluation of minor children and provision for necessary therapeutic interventions.

¹⁸² For example, the contract could designate modification of economic terms if income departs from predicted levels, or one party's employment status changes.

¹⁸³ For example, one party may find infidelity intolerable and stipulate that sexual involvement by the spouse with a third party will be cause for excuse from the precommitment penalties. The other party, reared by alcoholic parents, may insist that a pattern of frequent intoxication be designated as an excuse from performance of the contract.

¹⁸⁴ A relational contract is one in which important terms cannot be defined explicitly because all contingencies cannot be anticipated. For an analysis of relational contracts and the difficulties of applying classical contract doctrine to these agreements, see Goetz & Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981). Examples of commercial relational contracts include franchises, joint ventures, and employment contracts. *Id.* at 1091. A premarital agreement is also subject to hazards that are commonly recognized limitations on contract formation when negotiations are not at arm's length. Each party may not consider his or her own interests, and duress or information deficits may result in an agreement unfair to one party.

¹⁸⁵ For example, if entering precommitments before marriage became common practice, a couple might view the agreement as a symbolic expression of their determination to have a lasting marriage.

¹⁸⁶ Providing mechanisms for adjustment is one of the challenges of relational contract. See Scott, *supra* note 113 (examining adjustment in the relational contract context using game theory rather than bargain theory). Gillette argues against a duty to adjust when an intervening event greatly changes the benefit of the contract for one party. Commercial contractors, Gillette argues, are rational planners capable of taking into account the

tingencies that would support modification or excuse. Partly because of contextual cognitive biases, couples may discount or fail to anticipate the need to include provisions for excuse from performance.¹⁸⁷ For example, the couple negotiating a prenuptial agreement may simply not contemplate the effect of spousal abuse on the victim's obligation under the contract, because such an eventuality seems remote and dissonant.¹⁸⁸ Moreover, the couple simply cannot and will not anticipate every event in the course of a marriage that may alter the impact of the burden on one or both parties¹⁸⁹ and that if considered *ex ante* would have affected the terms of the contract. For example, a precommitment agreement executed before marriage when both parties contemplate careers later may impose a differential burden if one party has chosen to be a homemaker in the interval.¹⁹⁰ Thus, although there might be consensus that some contingencies should alter the obligation or even excuse one spouse from the marriage and precommitment contract without sanction, the couple might not adequately address such matters in the contract. Further, the problems are compounded by the difficulty in modifying long-term contractual agreements once they are executed.¹⁹¹ Thus, in the future the unhappy spouse may be forced to choose between remaining in an intolerable marriage or opting for a costly divorce.

A couple, recognizing that they cannot anticipate all contingencies and that the designation of specific contingencies may promote oppor-

uncertainty of the future in bargaining. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 *Minn. L. Rev.* 521, 523-24 (1985).

¹⁸⁷ See generally *supra* notes 139-51 and accompanying text.

¹⁸⁸ Other unanticipated contingencies might include adultery, mental illness, or alcoholism.

¹⁸⁹ It should be clear that this is different from the "later selves" problem. See *supra* notes 132-38 and accompanying text. Life will offer unanticipated contingencies without a change in personal identity.

¹⁹⁰ Other examples of changes in economic fortune that may affect the precommitment burden are a large inheritance, a disability or long illness, or an extraordinarily successful or disappointing career. Both parties may be burdened by the unanticipated turn of events. For example, if the couple's income is considerably less than they anticipated before marriage, both may be imprisoned in the marriage and unable to bear the cost of the penalty. In this case, the party who wants to continue the marriage is in a good strategic bargaining position.

¹⁹¹ See *supra* notes 184 and 186. Modification may be particularly difficult in the marital setting because of the absence of arm's-length negotiations. Discussion about modification may be difficult; it may create dissonance (or at least discomfort) if the couple is happily married, or resistance, because a party raising the issue may signal unhappiness with the marriage.

tunistic behavior,¹⁹² might use a broader standard describing, in general, the nature of the circumstances that would support inodification or excuse.¹⁹³ For example, the parties might agree that excuse from performance and release from contractual penalties would occur if the behavior of the spouse should destroy the value of the marriage for the individual seeking divorce.¹⁹⁴ A broad standard raises formidable enforcement difficulties, however. In a world with perfect information and an omniscient decisionmaker, such an excuse provision clearly reflects the objectives of the precommitment contract. In the real world, however, applying an excusing condition stated as a broad standard will generate error. Because the goal of the contract is to discourage impulsive expression of short-term preferences, evidence that the condition has been met cannot be satisfied simply by the assertion of the party seeking release from the marriage and the contract that the other spouse has destroyed the value of the marriage. Decisionmaking biases, as well as the possibility that the decision represents temporarily dominant short-term preferences, suggest that this is unreliable evidence that the excusing condition has been met.

The problem of modification and excuse may loom larger in theory than in practice. Background legal rules defining conditions of modifications and excuse in precommitment agreements will go far to miti-

¹⁹² Opportunistic behavior occurs when a party acts contrary to the other party's understanding, though not contrary to any explicit contract term. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 *Minn. L. Rev.* 521 (1981). A party may opportunistically seek release from the contract or a bargaining advantage on the occurrence of a contingency that does not in fact have the effect of making the marriage intolerable. Precommitment theory also suggests that some contingencies and events may seem in the short run to destroy the value of the marriage. Release from the marriage and commitment in these cases may be a response to fluctuating short-term preferences and may undermine the purpose of the precommitment agreements. Alternatively, a spouse may adhere to the letter of the agreement, but undermine the marriage commitment and objectives in subtle ways that do not fall within specific categories of excuse.

¹⁹³ Long term contracts have traditionally used general terms to describe obligations. An example is the use of "best efforts" standards of performance. Goetz & Scott, *supra* note 184, at 1092-95. One interpretation of the "best effort" obligation is that it creates an obligation to produce an outcome that best maximizes the joint gains of the contracting parties. *Id.* at 1114-18.

¹⁹⁴ Theoretically (that is, consistently with precommitment theory), an excusing condition might be any event, condition, or conduct that destroyed the value of the marriage for one party. However, broad excuse provisions threaten to undermine the operation of the model to the extent that they allow easy release from the commitment. The key is to provide a mechanism for determining that a contingency in fact destroys the value of the marriage. See *infra* notes 207-10 and accompanying text.

gate the costs created by unanticipated contingencies. Lawmakers will be better situated than couples contemplating marriage to predict and define the conditions that would make marriage intolerable for most people or that argue compellingly for modification of the contract. The couple, of course, may contract out of the conditions defined by the rules. Otherwise, the framework of legal rules will reflect the judgment about the provisions that most couples entering precommitment agreements would include in their contracts had they anticipated the contingencies. Moreover, legally required mandatory delay (absent contrary contractual provisions) will promote the enforcement of only those excuse conditions that destroy the value of the marriage.

2. *Standard-Form Contracts*

Standard-form precommitment contracts offer another means to mitigate some of the problems with freely negotiated premarital agreements. Although standard-form contracts restrict the parties' ability to tailor the terms of the agreement to their own particular relationship, their advantages are particularly compelling, given the rather daunting problems of contract formation and enforcement. Standard-form contracts offer couples seeking to execute a precommitment agreement the benefit of accumulated information about precommitment terms and contingencies. Precommitment terms in standard forms can be tested over time against a variety of different variables such as income level and the presence of minor children.¹⁹⁵ Further, changes that occur in many marriages but that may not be anticipated by the parties may be accommodated by terms defining contingencies for modification and excuse.¹⁹⁶ Release from the contractual obligation could be based on experiential judgment about behavior or conditions that would make the release appropriate for most people.

¹⁹⁵ A bar association or American Law Institute committee might assume the task of formulating terms of standard-form contracts. Such a group is well situated to oversee the evolution of model standard-form provisions, proposing, monitoring, and amending terms as information accumulates over time about the use of precommitment agreements. See Coffee, *infra* note 197.

¹⁹⁶ Thus, for example, the contract may define modifications based on changes in income, net worth, job status, etc.

Standard-form precommitment contracts may also mitigate the effects of cognitive biases that might lead decisionmakers in the premarriage context to undertake excessive commitment. Thus, for example, a standard contract term might prohibit divorce until two years after one spouse had given the other notice, but would not require a ten-year delay (as an ardent couple might). Similarly, terms dealing with monetary support of children, property, and financial penalties could be adjusted to eliminate idiosyncratic or extreme commitments. In sum, a menu of standard-form terms may reduce many of the formulation and enforcement problems that would impair a system of unrestrained private ordering.

The extent to which the use of standard-form terms restricts private ordering will depend on how much the state wants to promote the use of precommitment agreements and to influence the nature of the precommitment burden that couples assume. Couples could be invited to precommit at their option, either negotiating their own deal or choosing from a menu of standard terms. Alternatively, adoption of a precommitment contract could be encouraged through incentive schemes or by legally requiring a couple to choose from a menu of standard-form terms. Given our libertarian tradition, a legal requirement to execute a precommitment agreement would be troublesome if only the interests of the parties were at stake. On the other hand, the case is strong for restricting the freedom of parties to negotiate individualized terms if the interests of third parties, such as minor children, are at stake.¹⁹⁷

¹⁹⁷ Currently, because of the state's interest in protecting the welfare of children, courts are not bound by premarital contracts dealing with custody or child support. Contractual provisions freeing one party from child support obligations are unenforceable. Under a more restrictive policy, all couples could be directed to choose from among several standard term packages dealing exclusively with the contingency of divorce occurring during the minority of the couples' children. Each package would provide substantial support and protection to children. At their option, couples could include other provisions. For an interesting corporate law analog, see Coffee, *No Exit?: Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 *Brooklyn L. Rev.* 919 (1988). Coffee has examined contractual modification of corporate charters to limit liability of officers and directors and to restrict shareholder access to derivative suits. He argues for restrictions on private ordering in this context because of high information costs and the possibility of opportunistic manipulation by management. Coffee's solution is to regulate "contracting out" from generally applicable rules, by requiring that modification be limited to a menu of "model" standard form contractual provisions drafted by the ABA or ALI. *Id.* at 970-74.

D. Precommitment Through Mandatory Rules

The interests of adults in pursuing their personal goals for lasting marriage may be advanced if they are permitted to execute legally enforceable precommitment contracts. Precommitment theory also supports a scheme of mandatory legal rules making the divorce process more cumbersome. Legislative restrictions would constructively express the aspirations of individuals for their marriages and provide a mechanism to assist people to realize their goals. To be sure, no societal consensus today supports serious legal restrictions on divorces not involving children. Any proposal generally limiting divorce would be resisted as an unwarranted interference with personal freedom. This response loses strength if legal regulation grounded in precommitment theory is more narrowly directed toward encouraging parents of minor children to view marriage as a lasting relationship, to be set aside only as a last resort. This is so because restrictions directed at this goal express and reinforce widely shared societal values.

A mandatory precommitment scheme potentially avoids many of the costs of a pure contractarian regime. Legislatively announced precommitments presumably reflect a socially defined consensus about appropriate barriers to divorce under different circumstances. They also reflect accumulated wisdom about contingencies warranting modification and excuse.¹⁹⁸ Legislatures can avoid the romantic distortion of persons actually entering marriage; the rules would likely reflect greater realism about human limitations in following life plans. Finally, legislative precommitments express societal aspirations for marriage and family through mechanisms that may influence behavior and attitudes more effectively than a permissive policy. A precommitment rationale supports mandatory rules creating premarital and predivorce waiting periods, rigorous support obligations and enforcement,¹⁹⁹ required mediation or counseling, and family property trusts.

¹⁹⁸ These rules could be devised from the perspective of a Rawlsian "original position," defining the hypothesized commitment that individuals would make to protect their life plans and promote their children's welfare under different contingencies without knowing what their own future held. See J. Rawls, *A Theory of Justice* (1971).

¹⁹⁹ In theory most precommitment terms discussed above in Part IIIB could be legislatively mandated. For example, mandatory delay before divorce could be enacted as a provision that two years separation is the only available divorce ground.

The principal argument against mandatory commitment is a formidable one: If precommitment policy is implemented through mandatory rules, does not the precommitment rationale become merely a fiction cloaking an intrusive paternalistic policy? The state, having decided what is best for families, justifies the legal rules on the grounds that individuals would have desired these restrictions if only they had thought about them in a rational manner and had not suffered from weak will.²⁰⁰ It is not hard to imagine extreme policies that could be justified using this rationale. Furthermore, precommitment theory presumes a voluntary decision to bind oneself, a premise that is undermined if mandatory rules are imposed.²⁰¹

Mandatory commitments may be defended against the attack of paternalism. If the restrictions imposed by law reflect the *ex ante* preferences of individuals who are thereby bound, then they are not paternalistic.²⁰² I have argued that this may indeed be the case in the marital context. Thus, a measure of the acceptability of any mandatory restriction on divorce (and a check on legislated precommitments) is that the rule plausibly reflects the preferences of rational couples seeking to reinforce their commitment to lasting marriage. The fact that people get married voluntarily also supports mandatory precommitments. In the current social environment, the alternative of cohabitation is available and offers many of the benefits of marriage.²⁰³ A regime of mandatory commitments simply announces to the couple considering marriage that it is a relationship governed by a legal norm that supports the continuation of the marriage as long as there are minor children. The choice to get married represents

²⁰⁰ Linked to this concern about paternalism is the fear that mandatory commitments will gradually lead to regressive social policies based on political conservatism and religious fundamentalism, all justified by a precommitment rationale. Limiting legal enforcement of precommitment strategies to those chosen by the individuals themselves offers a safeguard that protects individual and family autonomy and privacy and is only indirectly subject to political pressures.

²⁰¹ State-imposed restrictions on marital freedom may raise constitutional challenges that would not apply to voluntarily assumed contractual restrictions. Statutes imposing excessive restrictions on marriage may be struck down as interfering with liberty and privacy.

²⁰² See J. Elster, *supra* note 87, at 88-94 (analyzing the exercise of governmental power in democracies (for example, use of a constitution or a central bank) as precommitments).

²⁰³ See Jaff, *supra* note 119, at 226-27. Jaff argues that unmarried couples suffer from legal or social discrimination. Her primary focus, however, is discrimination against homosexual and minority relationships. The legal disadvantages met by unmarried heterosexual couples are minimal by comparison.

acceptance of that norm, which is implemented through the divorce law. A regime that encourages long and careful consideration about the decision to divorce by parents of minor children would reflect broadly shared societal values. If this is so, the choice for most future parents considering marriage is not oppressive or coercive. Rather, the legal restrictions reinforce and support the goals that many people have for themselves, serving in fact as precommitments rather than as burdensome restraints.

A potential cost of uncertain dimensions arises if a couple is deterred from marriage (because they do not wish to make the commitment) and then later have children. If my intuition is correct and many people entering marriage have an incentive to make a commitment, this problem may not be significant.²⁰⁴ Also, the costs can be mitigated by provisions for the economic support of children in single parent homes. Nevertheless, legitimate concerns that legal rules may create incentives not to marry should moderate the choice of precommitment rules.

A more basic theoretical challenge occurs. Restrictions on divorce will be burdensome and paternalistic for those individuals for whom personal liberty is more important than the relationship values I have described. Although the choice of cohabitation may be available, freedom to enter a marriage of limited commitment may be constrained.²⁰⁵ Thus, a mandatory regime that restricted all divorce for the announced purpose of assisting people to achieve their personal goals would be vulnerable to challenge by those whose goals depart from the norm.

The argument favoring mandatory precommitments is far stronger if only divorces involving minor children are regulated. First, the assertion that such restrictions reflect the *ex ante* preferences of most people is convincing in this context. Moreover, the precommitment rationale is supplemented by another objective that enjoys broad societal support, that of protecting the welfare of children. Thus, if restrictions are limited to divorces involving children, objections by those adults whose personal goals are impeded by this redefinition of marriage and family lose force. A precommitment-based legal regime

²⁰⁴ Anecdotal evidence suggests that many couples living together decide to marry when they plan to have children.

²⁰⁵ Some people may find the status of being married desirable for social, moral, or religious reasons.

that burdens divorce by parents of minor children expresses the values and personal goals of many people. The expression itself announces the importance of these values and thereby may subtly influence attitudes and behavior, reinforcing as the dominant norm a conception of marriage and family that emphasizes commitment and relationship.

E. The Case for Two Legal Regimes

My analysis suggests that precommitment could influence the law of divorce in two ways. The first involves only modest doctrinal reform that would clarify the enforceability of antenuptial precommitment agreements under general contract law principles. The second use is considerably bolder. Precommitment theory would serve as the basis of a reconceptualization of the legal regulation of divorces involving children.

Antenuptial precommitment agreements should be uncontroversial in a libertarian legal regime. Some couples may wish to bind themselves contractually to promote marital stability through difficult times, whether or not they will have children in the future. They may conclude that the potential benefits of precommitment more than justify the risk that costs may be incurred should the marriage fail. Further, as in other contractual relationships, one party may act in reliance on the commitment to her detriment if the other party breaches the contract. The hazards that are predictably associated with such contracts may be largely mitigated either by the use of standard-form contracts or by background legal rules defining conditions of modification and excuse. Moreover, limits on the enforcement of extremely restrictive provisions may be justified on paternalistic grounds. In general, however, no compelling reason argues against allowing couples to assess the risks and benefits of attempting to further their personal objectives through precommitment.

The application of precommitment theory to divorces involving children is more far reaching in scope. At a minimum, the legal rules will distinguish parents from other divorcing spouses. The more ambitious objective is that by signaling that divorce in this context is a very serious matter, the law not only will influence the decisions of parents contemplating leaving a marriage, but will affect more generally social norms defining the meaning of family relationships.

How might the law treat families with minor children differently from others? First, and most importantly, parents of minor children could be subject to substantial mandatory delay periods to promote more thoughtful divorce decisions and to make divorce less attractive. Thus, a two-year separation could be the only ground for divorce for this group. Parents could be bound to more substantial support obligations than currently and to property distribution schemes that are beneficial to children. Counseling, mediation, and mental health evaluation of the children might be required before divorce is permitted.

To be sure, a policy promoting commitment will also make divorce less attractive or available to some parents whose long-term interests may be reflected in the choice to end the marriage. Nevertheless, even if parents reveal themselves to be "nonconforming" cases, social science research on divorce at least indirectly supports the view that many of their children may benefit if their parents' marriage continues.²⁰⁶ In sum, precommitment theory goes a long way toward justifying a policy of promoting marital stability in families with minor children. To the extent that such a policy cannot be entirely justified by precommitment theory alone, other well-established policy objectives offer further support.

Many individuals who enter marriage are probably highly motivated to fulfill their responsibilities to future children. I have argued that although the norm of moral or religious responsibility that supported traditional marriage has eroded, the sense of moral responsibility to one's own children continues to be important to most persons. Therefore, many would be willing to accept a greater risk of error in the application of precommitment theory in pursuit of the objective of protecting the welfare of their children.

F. A Potential Solution to the Problem of Fault

Whether precommitments are adopted contractually or imposed by mandatory rule, there remains a vexing problem of defining the circumstances that justify excuse from performance. Any justifiable scheme must provide for an effective response to seriously offensive behavior by one spouse without encouraging avoidance of precommit-

²⁰⁶ This is surely true if continued marriage need not signify continued cohabitation, and parents who are engaged in substantial conflict are separated.

ment obligations by any unhappy marital partner.²⁰⁷ For example, a legal scheme is untenable if it requires an abused spouse to choose between continuing in the marriage or bearing the costs imposed by precommitment. On the other hand, allowing fault grounds as an excuse from precommitment may seriously undermine the regime. A dissatisfied party may opportunistically or impulsively assert a fault ground to obtain release from the marriage and the precommitment. Other problems that emerged under the traditional divorce law are also predictable. Couples may collude to establish a ground because both are temporarily dissatisfied or because one is dissatisfied, and the other wants to extract a monetary advantage. The challenge is to discourage opportunistic, impulsive, or collusive use of fault while at the same time offering protection and ultimately excuse to the "innocent" spouse.

Legal regulation may go a long way toward this goal if separation is available to the aggrieved spouse, but divorce and excuse from the precommitment obligation follow only after an extensive mandatory waiting period. If fault by one spouse is not the means to ready release from marital obligations by the other, it is less likely to be used opportunistically or collusively. Offensive spousal behavior may severely but temporarily damage the marriage, or it may destroy the relationship altogether. Mandatory delay before divorce may reduce the number of hurt or angry decisions to leave the marriage in situations in which time and reflection would lead to a different

²⁰⁷ Although this problem may exist with contractual precommitments, it may be more acute under statutory schemes. Legislatures may be less likely to overlook circumstances that, in general, will justify excuse from performance of the precommitment obligation; in any specific marriage, however, a mandatory rule may be less accurate than a private contract in designating contingencies that would make marriage intolerable for either party. Behavior by one spouse that may destroy the value of the marriage for the other might include infidelity, abandonment, physical abuse, criminal conviction, or even mental illness or alcoholism. However, different persons vary in their response to different contingencies; behavior that would destroy the marriage for one individual may have a less devastating impact for someone else. Thus, defining excuse from precommitment under generally applicable rules is difficult.

That many of the examples of offensive spousal behavior correspond to traditional fault grounds for divorce is not surprising. See Ga. Code Ann. § 19-5-3 (1982). Criticism of traditional divorce law was not based on the irrationality of announcing that certain conduct could be destructive of the value of the marriage. Rather, fault grounds were deemed inadequate as the sole basis for divorce because they were simplistic in defining causes of marital breakdown, and tended to promote collusion and opportunistic behavior. See *supra* notes 15-20 and accompanying text.

decision.²⁰⁸

For those cases in which the offensive behavior destroys the value of the relationship, a two-stage process can substantially protect the injured spouse. First, she may be permitted to effect a legal separation and to compel financial support and protection of assets during the waiting period.²⁰⁹ At the end of the waiting period, a finding of substantial offensive behavior by one spouse would excuse the aggrieved party from the marriage and from the obligations imposed by precommitment.²¹⁰

This response to fault behavior substantially protects the injured party while remaining wholly consistent with precommitment theory. A decision to divorce after a period of mandatory delay more likely reflects changed long-term preferences of the aggrieved spouse than would be the case if fault grounds provided the means to accelerated divorce. Time may reduce impulsive decisionmaking and may also reduce contextual decisionmaking biases (which are likely to be substantial in these situations). In general, the case for mandatory delay to promote thoughtful divorce decisions is probably as strong in situations in which the desire to leave the marriage is prompted by offensive behavior of the spouse as it is when boredom or other attractions are the motivating factors. There are two differences, however. First, the need for legal and financial protection of the injured spouse during the separation period may be particularly compelling in the case of fault-induced separation; second, ultimately the injured spouse may be excused from any other precommitment obligations.

IV. CONCLUSION

The costs of marital failure are substantial. Adults may experience the disappointment of their personal aspirations, and children suffer

²⁰⁸ In terms of precommitment theory, the angry response may in some cases express a short-term preference to leave the marriage.

²⁰⁹ Many state laws today include provisions for legal separation. See, e.g., Va. Code Ann. § 20-91(9)(a) (1983). Alternatively, provisions for separate maintenance (under which financial support is ordered but no legal separation takes place) could be adapted to respond to this situation. N.J. Stat. Ann. § 2A: 34-23 to 34-24 (West 1987). Financial protection may include protection of the financial assets of the marriage.

²¹⁰ Indeed, it will be appropriate in many cases for precommitment penalties to fall on the "guilty" spouse for the destruction of the marriage. Certainly in cases of abandonment, any other response would provide an escape, allowing a dissatisfied spouse to leave the marriage without experiencing the precommitment costs.

psychological and economic harm. I have argued that the law could reduce these costs by assisting individuals to conform to their intentions for lasting marriage. A regime of enforceable precommitment to marriage will discourage precipitous decisions to divorce by making that choice more costly. It also will indirectly tend to promote marital stability and to encourage more careful decisionmaking about both marriage and divorce.

Precommitments will not always function optimally, however. They may impose unnecessary costs on persons for whom unimpeded divorce would best promote their goals of self-fulfillment. Therefore, although precommitment agreements should be enforced under general contract principles, a regime of mandatory legal rules promoting commitment to marriage is justified only to protect the interests of minor children. That is to say, the legal regulation of divorce involving children should promote long and careful consideration of the decision and assure, to the extent possible, that their interests are recognized. By announcing to future parents that marriage with children is a relationship not easily set aside, the law may promote a modern ideology of marriage that reflects more accurately than the current legal norm the goals of many people for themselves and their children.