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PROMULGATING THE MARRIAGE CONTRACT

Lynn A. Baker*

From at least the time of Blackstone, Anglo-American legal theorists have discussed the problem of promulgation of the laws and the concomitant question of notice.¹ Two issues traditionally have been the focus of the debate: Between the individual and the State, what is the optimal allocation of the burden of ensuring that the law is known and understood by those whom it is intended to affect? And how might the State most effectively meet its portion of that burden?

The bulk of this controversy through the centuries has focused on the criminal law and the circumstances under which ignorance of legal prohibitions should exempt the violator from sanctioning.² The optimal extent and method of promulgation of other, noncriminal laws, both statutory and judge-made, have engendered far less frequent or comprehensive discussion. Indeed, Bentham, Blackstone, and Fuller are the only Anglo-American legal theorists to give these latter issues any substantial attention.³

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1. 1 W. BLACKSTONE, COMMENTARIES *45-46, *185. The first edition of Volume 1 appeared in 1765.

To promulgate a law is to "announce [it] officially; to make [it] public. . . ." BLACK'S LAW DICTIONARY 1093 (5th ed. 1979).

2. See, e.g., 1 J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE WORKS OF JEREMY BENTHAM 1, 83-86 (J. Bowring ed. 1843); 1 W. BLACKSTONE, *supra* note 1, at *45-46; J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 102 (2d ed. 1921); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 376-414 (2d ed. 1960); O. HOLMES, *THE COMMON LAW* 40-41 (M. Howe ed. 1963).

3. 1 J. BENTHAM, *Essay on the Promulgation of Laws, and the Reasons Thereof; with Specimen of a Penal Code*, in THE WORKS OF JEREMY BENTHAM 155-63 (J. Bowring ed. 1843); 3 J. BENTHAM, *General View of a Complete Code of Laws*, in THE WORKS OF JEREMY BENTHAM 155, 205-06 (J. Bowring ed. 1843); 4 J. BENTHAM, *Papers Relative to Codification and Public Instruction; Including Correspondence with the Russian Emperor*,

Blackstone considered it a "matter of very great indifference" how the state provided the ordinary person notice of the laws.⁴ Public readings in churches and other assemblies, and publication were among the acceptable forms of notice.⁵ Blackstone believed it important only that the law be promulgated in "the most public and perspicuous manner; not like Caligula, who . . . wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people."⁶

Fuller, like Blackstone, thought that the State's duty extended only to making the laws available and accessible to the public, leaving the ordinary person to seek out actual knowledge of those laws of particular personal interest or relevance.⁷ Fuller's belief that formal publication of the laws provided the public sufficient notice⁸ was buttressed by his expectation that much of the behavior-guiding force of the law would be transmitted through less formal, interpersonal routes. Although only

and Divers Constituted Authorities in the American United States, in *THE WORKS OF JEREMY BENTHAM* 451-594 (J. Bowring ed. 1843); 1 W. BLACKSTONE, *supra* note 1, at *45-46, *185; L. FULLER, *THE MORALITY OF LAW* 49-51 (rev. ed. 1969).

Austin gave the matter brief attention. 2 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 170-77 (1863). Gray provided an extensive summary of the promulgation practices of various countries and historical periods. J. GRAY, *supra* note 2, at 25, 162-72. *See also* Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 *CORNELL L. REV.* 409 (1971).

4. 1 W. BLACKSTONE, *supra* note 1, at *45.

5. *Id.* at *45-46.

6. *Id.* at *46. One early nineteenth century "editor" of the *Commentaries*, the barrister Thomas Lee, noted in the 18th edition that he found it "remarkable that nothing should yet be done whereby a knowledge of the statute law, which all are bound to obey, is not gratuitously communicated to all." 1 W. BLACKSTONE, *COMMENTARIES* *46 n.10 (T. Lee 18th ed. 1829). Although Lee asserted that "[w]here, or with whom, such depot should be placed, is [a] matter of detail," he argued that "there should be convenient central depots; to which, for the purpose of perusing [statutes], every man should have access gratis." *Id.* Lee went on to propose that "the keeping [of] a statute book for public inspection, at a stated hour, might be made a condition precedent to the granting [of] a dedimus, or to the exercise of the chief authority in corporations." *Id.*

7.

Obvious and urgent as this demand [that the laws be promulgated] seems, it must be recognized that it is subject to the marginal utility principle. It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him, though Bentham was willing to go a long way in that direction.

The need for this education will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong.

L. FULLER, *supra* note 3, at 49-50 (footnote omitted).

8. Because one could not, with any certainty, identify in advance the citizens that a law would affect, Fuller prescribed general publication of all laws as the best form of notice. *Id.* at 50-51. In addition, Fuller thought it important that the laws be published so they would be available for criticism and so there might be some "check against a disregard of them by those charged with their application and enforcement." *Id.* at 51.

a few persons might actually read the published law and thus know of it directly, "knowledge of the law by a few often influences indirectly the actions of many."⁹

In contrast to both Blackstone and Fuller, Bentham believed the public was entitled to actual, rather than merely formal, notice of the laws.¹⁰ Indeed, the State did not provide sufficient notice even if it "read [a law] to the people" or "published [it] with the sound of trumpets in the streets."¹¹ Rather, the essence of promulgating a law was "to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes."¹²

Thus, Bentham suggested that adequate public knowledge of the laws would be possible only upon State creation of a "complete digest"¹³ or "universal code"¹⁴ that would give some coherence to the "continually increasing and ever shapeless mass of law [that] is . . . shot down [like garbage] upon the heads of the people."¹⁵ Bentham further hoped that this universal code would

9. *Id.* Although Fuller conceded that "[t]he requirement that laws be published does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all," he concluded that "[e]ven if only one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available." *Id.*

10. The law should employ

any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever, in which (being in the station of life he is in) he can be subjected to the penalties of the law.

11 J. BENTHAM, *supra* note 2, at 84 (emphasis added).

Bentham believed that only statutes qualified as laws. He considered the common law a fictional entity:

To be known, an object must have *existence*. But *not* to have existence—to be a mere non-entity—in this case, my friends, is a portion—nay, by far the largest portion—of that which is passed upon you for *law*. I speak of *common law*, as the phrase is: of the whole of common law. . . .

Would you wish to know what a law—a real law—is? Open the statute-book:—in every statute you have a real law: behold in that the really existing object:—the genuine object, of which the counterfeit, and pretended counterfeit, is endeavoured to be put off upon you by a lawyer, as often as in any discourse of his the word *common law* is to be found.

12 J. BENTHAM, *supra* note 3, at 483 (emphasis in original).

11. 1 J. BENTHAM, *supra* note 3, at 157.

12. *Id.*

13. 3 J. BENTHAM, *supra* note 3, at 205 ("A complete digest: such is the first rule. Whatever is not in the code of laws, ought not to be law.")

14. 1 J. BENTHAM, *supra* note 3, at 158.

15. 4 J. BENTHAM, *supra* note 3, at 481 n.*.

become "the chief book" and "one of the first objects of instruction in all schools."¹⁶ His less ambitious proposals for ensuring public knowledge of the laws included making the reading of the code a regular part of all church services,¹⁷ posting in certain public places (such as theaters, markets, and highways) the laws affecting those places,¹⁸ and requiring that all contracts "be written upon stamped paper, which should bear upon its margin a notice of the laws concerning the transaction to which it referred."¹⁹

With regard to the promulgation problem, we have historically found Blackstone, and later Fuller, more persuasive than Bentham. Although our laws, civil as well as criminal, are largely intended to guide human behavior,²⁰ our federal and state governments have for the most part been unconcerned with ensur-

16. 1 J. BENTHAM, *supra* note 3, at 158. Bentham wanted all school-age children to "become more conversant with the laws of their country, than those lawyers at present are, whose hair has grown grey in the contentions of the bar." *Id.* Notwithstanding his advocacy of universal legal education, Bentham asserted, "No: never can the profession of a lawyer be wholly superseded. . . ." 4 J. BENTHAM, *supra* note 3, at 490.

17.

Why should not the reading of the laws form, as it did among the Jews, a part of divine service? . . . Would it not add dignity to the ceremony, if the laws respecting parents and children were read upon the performance of baptism? and the laws respecting husbands and wives at the time of marriage?

1 J. BENTHAM, *supra* note 3, at 158. Bentham added that a test of the appropriate length of a legal code was whether it would be possible to "read it through many times in the year" as a part of church services. *Id.*

18. *Id.* at 158.

19. *Id.* at 158-59.

20. Recently, legal scholars have begun to challenge the fundamental assumption of "legal centrism," which emphasizes the importance of the promulgated law as a behavior-guiding force in society. These scholars have argued that social norms, which may influence and be influenced by the promulgated law, are also powerful determinants of individual behavior. *See, e.g.,* M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 4-9 (1987); H. ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS (1980); Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987); Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 LAW & SOC'Y REV. 199 (1978); Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005 (1987).

Dean Robert Clark has very recently suggested that legal rules are themselves the product of three norms: contracts, elites, and traditions. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703 (1989); *but cf.* Kronman, *A Comment on Dean Clark*, 89 COLUM. L. REV. 1748 (1989).

Saul Levmore had earlier argued that legal rules tend to be uniform across legal systems when they have important social control functions. Variety among legal systems arises in rules regulating behavior about which reasonable people may have differing normative views. Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986); Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987).

ing that the public actually knows and understands the law. They have almost always been satisfied with providing formal notice, disclosing laws to the public only through the regular publication of statutes, regulations, and judicial decisions, which are then available for perusal in special libraries.

The legal formalization of the decision to marry is one of the very few contexts in which there has been any movement toward more Benthamite disclosure of the pertinent law to the ordinary person. In 1975, the Louisiana legislature enacted a requirement that the state provide information about certain economic terms of the marriage contract when any individual applies for a marriage license.²¹ No other state has yet imposed a similar disclosure demand on itself.²²

21. The Louisiana legislation, originally enacted in 1975, states in current form:

A. On receiving an application for a license to marry, the license issuing officer shall deliver to each prospective spouse, either in person or by registered mail, a printed summary of the then current matrimonial regime laws of this state.

B. This summary shall be prepared by the attorney general of this state. It shall emphasize the possibility of contracting expressly a regime of one's choosing before marriage, that spouses who have not entered into a matrimonial agreement before marriage become subject to the legal regime by operation of law, and the possibility of contracting after marriage to modify the matrimonial regime.

LA. REV. STAT. ANN. § 9:237 (West Supp. 1989).

The most recent edition of the "printed summary" that is to be distributed is entitled "Louisiana Community Property Law and How Its Effects Can Be Changed By Contract." LOUISIANA DEPT OF JUSTICE, LOUISIANA COMMUNITY PROPERTY LAW AND HOW ITS EFFECTS CAN BE CHANGED BY CONTRACT (1980) (on file at University of Michigan Journal of Law Reform). The pamphlet describes in easy-to-understand language both how the Louisiana community property laws affect property rights upon marriage and how one formally can contract around them. In addition, it suggests that spouses-to-be see a lawyer "so that you will know how the taxes on your property and the inheritance of your property may be changed by your marriage." *Id.* The pamphlet advises residents of large cities who cannot afford a lawyer to call a Legal Aid Bureau for assistance.

There is, unfortunately, no extant official legislative history of this disclosure legislation setting out the reasons for its enactment. In any case, that information would merely add to, rather than displace or vitiate, the positive analysis of the Louisiana legislation that I provide in this Article.

22. In law, but not in fact, Kentucky also discloses information about the legal terms and consequences of the marriage contract to persons requesting to be married. Pursuant to legislation enacted in 1972

The human resources coordinating commission of Kentucky shall prepare a marriage manual for distribution to all applicants for a marriage license. The manual shall include, but not be limited to, material on family planning, proper health and sanitation practices, nutrition, consumer economics, and the legal responsibilities of spouses to each other and as parents to their children.

KY. REV. STAT. ANN. § 402.270 (Michie/Bobbs-Merrill 1984) (emphasis added). The statute further states that "Each county clerk shall give a copy to each applicant for a marriage license." *Id.*

In attempting to obtain a copy of the Kentucky manual, I learned that the "Human Resources Coordinating Commission" no longer exists. Their manual is no longer (if it ever was) distributed to Kentucky marriage license applicants. Telephone interview with

It is something of a mystery why we have chosen the few contexts that we have in which to disclose the law to the ordinary person through a means other than regular, formal publication. Indeed, until the 1975 action by the Louisiana legislature, the *Miranda* warning stood nearly alone as an instance of more aggressive promulgation of the law.²³ In this Article, I do not undertake the undoubtedly interesting and important project of explaining our selection of the few laws that we have promulgated in a more Benthamite manner. Rather, I accept those choices as given and instead use the age-old promulgation problem as a lens through which to study our legal system's evolving conception of the marital relationship.

I begin Part I of this Article by positing several logically necessary, but insufficient, conditions that precede a state's decision to promulgate a law more aggressively than usual. I then show

Omar L. Greeman of the Office of Vital Statistics of the Kentucky "Cabinet for Human Resources" (June 17, 1988).

23. *Miranda v. Arizona*, 384 U.S. 436, 441-91 (1966). The posting of speed limits along highways is the other well known example.

In addition, the Massachusetts abuse prevention laws enacted in 1978 require that any police officer who "has reason to believe that a family or household member has been abused or is in danger of being abused . . . shall use all reasonable means to prevent further abuse, including . . . giving such person immediate and adequate notice of his or her rights. . . ." MASS. GEN. L. ch. 209A, § 6 (1988). The "notice" required under subsection 6

[S]hall consist of handing such person a copy of the following statement written in English and Spanish and reading the same to such person in English.

"You have the right to go to the superior, probate, and family, district or Boston municipal court . . . and file a complaint requesting any of the following applicable orders: (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorneys fees and other out-of-pocket losses for injuries sustained."

...
 "You have the right to go to the appropriate . . . court and seek a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related offenses."

"If you are in need of medical treatment, you have the right to request that the officer present drive you to the nearest hospital or otherwise assist you in obtaining medical treatment."

"If you believe that police protection is needed for your physical safety, you have the right to request that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured."

Id.

Finally, the laws of several states require that certain medical facilities apprise patients of their legal rights. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2803-c (McKinney 1985 & Supp. 1989); MASS. GEN. L. ch. 111, § 70E (1988).

that each of these conditions was met with regard to the economic terms of the marriage contract in virtually all states by 1975. In Part II, I explore what Louisiana's unusually aggressive promulgation of certain terms of the marriage contract reveals about the legal system's conception of the marital relationship as of 1975. In Part III, I discuss what is added to that conception of the modern marital relationship by the fact that nearly 15 years later none of the remaining states has yet followed Louisiana's lead.

I. THE IMPLICATIONS OF AGGRESSIVE PROMULGATION OF THE MARRIAGE CONTRACT

We might logically expect three necessary, but seemingly not sufficient, conditions to have been met anytime the State discloses, or requires disclosure of, a law through means other than regular, formal publication. First, we would expect knowledge of a law that is aggressively promulgated to have some ex ante utility.²⁴ Such knowledge should have the potential to affect an individual's decision making; ignorance of it would therefore entail certain risks and potential costs. Second, we would expect that the typical recipient of the aggressively conveyed information would neither already have it nor be likely to seek it out at the most appropriate time. Third, we would expect that the potential benefits of providing the ordinary person this information would exceed the costs. In fact, each of these conditions had been met in virtually all states by 1975. In addition, the ideas of mandatory disclosure requirements and aggressive promulgation of certain laws had historically "ripened" within American legal culture.

24. Not all laws have, or are intended to have, such ex ante utility: Some laws "attempt neither to establish norms for the future nor to judge the past. . . ." Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1233 (1987). Among these laws, Professor Dane includes those governing "allocative decisions made by governments," such as the granting of licenses, the distribution of welfare, taxation, and child custody determinations. *Id.* at 1233-36.

A. *The Potential Utility of Knowledge of the Marriage Contract*

Although the law has long explicitly characterized marriage as a legal "contract" among husband, wife, and the State,²⁵ most of its terms traditionally have neither been negotiated by the parties, nor set out in a single document. Rather, the terms have preexisted each marriage as scattered state statutes and judicial decisions of broad applicability. Historically, the vast majority of these laws have directly concerned the spouses' economic condition. Marital status has frequently made a difference in our property,²⁶ estate,²⁷ tax,²⁸ and financial support laws,²⁹ while our

25. While the courts have long characterized marriage as a "civil contract," *see, e.g.*, *Maynard v. Hill*, 125 U.S. 190, 210 (1888) ("[M]arriage is often termed by text writers and in decisions of courts a civil contract"); *Clark v. Clark*, 10 N.H. 380, 382 (1839) ("A perfected negotiation, or treaty, of marriage, is undoubtedly a civil contract."), they have simultaneously made clear that it is in many respects unlike other contracts. The classic judicial description appears in *Maynard v. Hill*, 125 U.S. at 210-11:

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

See also, e.g., *Clark v. Clark*, 10 N.H. at 382-83 (marriage "contains all the essential characteristics of a contract, and it has something superadded. It has been said to be a matter of civil institution, and to be the very basis of the whole fabric of civilized society. . . . It is a contract of a very peculiar character."); *In re Marriage of Franks*, 189 Colo. 499, 506, 542 P.2d 845, 850 (1975) ("It has been stated on numerous occasions that a marriage is a contract between the parties. While this may be so, it is undeniably distinguishable from the ordinary civil contract. The institution of marriage has always been peculiarly a creature of the state, and subject to regulation by its legislature.").

Today, the domestic relations statutes of many states explicitly mention the contractual, if *sui generis*, nature of marriage. *See, e.g.*, WASH. REV. CODE § 26.04.010 (1989) ("Marriage is a civil contract. . . ."); MONT. CODE ANN. § 40-1-103 (1985) ("Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential.").

26. *See infra* text accompanying notes 31-47; *see also* H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 286-304, 589-618 (2d ed. 1988) and cases cited therein [hereinafter H. CLARK, JR., *SECOND EDITION*].

27. Should either spouse die without a will, the law of most states places the deceased's spouse near the top of the list of persons to inherit the estate. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1981 & Supp. 1990); MASS. GEN. L. ch. 190, § 1 (1988). *See generally* E. CLARK, L. LUSKY & A. MURPHY, *CASES AND MATERIALS*

laws governing crimes, torts, and testimonial privilege have only occasionally treated single, married, and divorced persons differently.³⁰

The terms of the marriage contract can be divided into two general types: those whose consequences attach so long as the marriage continues, and those that are applicable only if the marriage dissolves through death or divorce. Laws of the first type have largely concerned the spouses' relationship in the areas of property rights and economic support during marriage.³¹ Here, the spouses' personal, informal arrangements have with rare exception been permitted to govern free from State interference, making knowledge of the pertinent law essentially unnecessary.³² For knowledge of the law is of *ex ante* utility only if

ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS AND FUTURE INTERESTS 65-75 (2d ed. 1977).

Should the deceased have a valid will at the time of death, the majority of states provide the spouse a "forced share" of the estate even if the deceased has not provided for the spouse in the will. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981 & Supp. 1990); *see generally* E. CLARK, L. LUSKY & A. MURPHY, *supra*, at 123-26, 143-44.

28. While our tax laws treat the divorced person the same as an individual who has never married, they treat the income of married persons who file jointly differently than the income of single or divorced persons, the net effect varying systematically with the income level of the spouses. *See* W. KLEIN, B. BITTKER & L. STONE, FEDERAL INCOME TAXATION 40-43 (7th ed. 1987).

29. *See infra* text accompanying notes 32-49; H. CLARK, JR., SECOND EDITION, *supra* note 26, at 250-85, 619-708 and cases cited therein.

30. *See, e.g.*, J. AREEN, FAMILY LAW 184-226 (2d ed. 1985); H. CLARK, JR., SECOND EDITION, *supra* note 26, at 304-08, 370-74; I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW 131-56 (1986); W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 246-86 (1984).

31. By 1975, a fundamental consequence of marriage was that each spouse acquired a duty to support the other. In a small minority of states, the husband remained solely responsible for the financial support of his wife during marriage, and the wife bore a reciprocal duty to render services in the home. The law of most states, however, had become gender neutral and required spouses to support each other financially during marriage in proportion to their individual abilities. H. CLARK, JR., SECOND EDITION, *supra* note 26, at 250-258, 265-66.

Marriage also affected the property rights of the spouses. By 1975, the right of each spouse to the ownership and control of the property with which he or she entered the marriage—so-called "separate property"—was largely unaffected by marriage in most states. *Id.* at 286-303, 595-600. Property acquired by either spouse *during* the marriage, however, was treated by the states in one of two ways. States that followed the old common law rule considered property acquired during the marriage to be within the sole ownership and control of the holder(s) of legal title. The majority of states, however, considered such property "marital property," legally owned and subject to the control of both spouses in common. *Id.*

32. Some women who have had no interest in obtaining a separation or a divorce have nonetheless sued their spouses to obtain greater financial support during marriage. *See, e.g.*, *Miller v. Miller*, 320 Mich. 43, 30 N.W.2d 509 (1948); *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953); *Pattberg v. Pattberg*, 94 N.J. Eq. 715, 120 A. 790 (1923); *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948).

enforcement of that law might be formally requested, a highly unlikely event in an ongoing intimate relationship.³³

In contrast, knowledge of those terms of the marriage contract applicable only upon the dissolution of the marriage had acquired substantial *ex ante* utility by 1975 as a result of various developments in American law and society. Those changes increased the range of choices available to both spouses in several areas, simultaneously increasing the utility of knowledge of the laws pertinent to those choices. Perhaps the most important of these developments was a substantial increase in the likelihood of divorce. By 1975, the "divorce rate" had reached 48%.³⁴ Thus, an individual who married faced a substantial chance that the primarily economic laws governing marital dissolution would eventually be applied to him.³⁵

The courts, however, have historically been reluctant to enter a support decree as long as the spouses are living together. Courts have reasoned, first, that "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine," *McGuire v. McGuire*, 157 Neb. at 238, 59 N.W.2d at 342; *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228, and second, that the husband is entitled to determine the standard of living of the household. *McGuire v. McGuire*, 157 Neb. at 238, 59 N.W.2d at 342 ("As long as the home is maintained and the parties are living as husband and wife, it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out."); *Pattberg v. Pattberg*, 94 N.J. Eq. 715, 120 A. 790. *But see* *Miller v. Miller*, 320 Mich. at 49, 30 N.W.2d at 511 (where there exists a "great discrepancy between the husband's very large income and the very small and insufficient amount he is willing to pay [his wife] for her maintenance and support" husband is guilty of "non-support and extreme cruelty").

33. A marriage in which one spouse is willing to sue the other over property or economic support is likely nearing its end, in which case the laws governing the economics of marital dissolution will come into effect.

34. The concept of the "divorce rate" is usually defined either as the ratio of dissolutions to marriages in a given year or as the number of divorces per 1000 total population.

The ratio of dissolutions to marriages rose steadily until 1975: 13.37% in 1920, 17.39% in 1930, 16.54% in 1940, 23.10% in 1950, 25.80% in 1960, 32.80% in 1970, and 48.13% in 1975. Between 1975 and 1985, the most recent year for which official statistics are available, the ratio has wavered between 47.19% and 50.66%. In 1985, the ratio was 49.32%. See 3 U.S. DEP'T OF HEALTH & HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES: 1985, at table 2-1 (divorces) & table 1-1 (marriages) (1989).

The number of divorces per one thousand total population likewise rose steadily until 1975: 1.6 in 1920, 1.6 in 1930, 2.0 in 1940, 2.6 in 1950, 2.2 in 1960, 3.5 in 1970, and 4.8 in 1975. Between 1975 and 1985, the number wavered between 4.8 and 5.3. In 1985, the number was 5.0. See *id.* at table 2-1.

35. The major substantive matters for resolution upon divorce are property distribution, spousal support, child support, and child custody.

Second, the enactment of no-fault divorce laws³⁶ meant that either spouse could end the marriage at nearly any time³⁷ without proving the other guilty of adultery or another of the specified antisocial behaviors that historically had been grounds for divorce.³⁸ Because a formal finding of one "guilty" and one "innocent" spouse was no longer necessary to dissolve a marriage, the spouses' post-divorce financial condition also became somewhat less predictable. The courts would no longer restrict awards of alimony to "innocent" economically dependent wives, and the form of those awards began to deviate from traditional "permanent alimony" sufficient to maintain the wife, insofar as possible, at the marital standard of living.³⁹

Most state statutes governing post-divorce spousal support had remained essentially unchanged since their original enactment in the eighteenth century, and those laws had always instructed the courts simply to award such support as they considered "just," "equitable," or "suitable."⁴⁰ Upon the abolition of

36. Although California is usually thought to have been the pioneer in no-fault divorce, New York in fact was the first state to pass such legislation. In 1966, more than three years before the California legislation, New York enacted a law permitting divorce upon a showing simply that the spouses had lived separate and apart for two years. 1966 N.Y. LAWS 254. The two years were reduced to one in 1970. 1970 N.Y. LAWS 835. For a fascinating description of how the New York legislation arose, see H. JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 30-42, 81 (1988).

The 1969 California legislation eliminated all fault grounds and permitted divorce only upon a showing of incurable insanity or "irreconcilable differences which have caused the irremediable breakdown of the marriage." 1969 CAL. STAT. 1608s. For a discussion of the legislative and social history of California's no-fault law, see H. JACOB, *supra*, at 43-61.

37. In states such as New York, in which the no-fault route to divorce required the spouses to live separate and apart for a certain period, see *supra* note 36, divorce could entail a "waiting period." These periods ranged from six months in Vermont, see VT. STAT. ANN. tit. 15, § 551 (1974), to five years in Idaho, see IDAHO CODE § 32-610 (1983). See also H. CLARK, JR., *SECOND EDITION, supra* note 26, at 517-21.

38. By 1974, 45 states had some form of no-fault divorce law. Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401 (1974). Only 12 states had followed California's lead and eliminated all fault provisions, permitting divorce solely on the allegation of an irreconcilable breakdown of the marriage. *Id.* at 421. The remaining 33 states had simply added some form of no-fault to their existing divorce codes. *Id.* at 421-23.

The five states that retained fault as the sole basis for divorce were slow to join the rush to no-fault. South Dakota, the last state to enact no-fault divorce legislation, did not do so until 1985. S.D. CODIFIED LAWS ANN. § 25-4-2 (Supp. 1989).

39. See, e.g., H. CLARK, JR., *SECOND EDITION, supra* note 26, at 619-22; L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 143-183 (1985); Krauskopf, *Maintenance: A Decade of Development*, 50 MO. L. REV. 259 (1985).

40. For example, the pertinent New York statute in 1787 stated that "the chancellor shall and may [upon the dissolution of a marriage] take such order . . . touching the maintenance of the wife . . . as from the circumstances of the parties, and the nature of

the fault requirement, however, courts began to use their equitable powers to develop various alternatives to permanent alimony, such as rehabilitative alimony,⁴¹ restitutionary alimony,⁴² and lump sum awards,⁴³ most of which had become part of the common law in several states by 1975. These new types of spousal support awards further blurred the distinction between alimony and property distribution upon divorce.⁴⁴

Simultaneously, the steadily increasing opportunities for women to work in the open market meant that by 1975 a woman faced a genuine choice between being an economically independent or an economically dependent spouse.⁴⁵ In addition, ante-

the case, may be proper and sufficient." 1787 N.Y. Laws 69. More than two hundred years later, the pertinent New York statute states,

In any action or proceeding brought . . . for a divorce, the court may direct either spouse to provide suitably for the support of the other as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of each spouse to be self supporting, the circumstances of the case and of the respective parties.

N.Y. DOM. REL. LAW § 236 (Part A) (McKinney 1986).

Prior to 1970, American alimony statutes all took one of two fundamental forms. In 1935, to take a representative year, the statutes of 30 states directed the courts simply to make whatever alimony award it considered "just," "reasonable," or "proper" (or other similar language) given the "circumstances" or the "nature of the case." 2 C. VERNIER, *AMERICAN FAMILY LAWS* § 107 (1932 & Supp. 1938). The statutes of 18 other states listed a variety of factors for the courts to take into account in making alimony awards, but provided neither definitions of any of the factors nor any formulas or rules for balancing them. All of these multi-factor statutes either explicitly directed the court to consider any other factors it thought necessary for making a just award or did not appear to limit the court to a consideration of the factor or factors listed. In all but three states, the statutes left the amount and duration of any maintenance award to the complete discretion of the court. *Id.* See also Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 203-04 (1939).

41. See, e.g., *Roberts v. Roberts*, 283 So. 2d 396 (Fla. Dist. Ct. App. 1973); *Kover v. Kover*, 29 N.Y.2d 408, 278 N.E.2d 886 328 N.Y.S.2d 641 (1972); *In re Marriage of Watrous*, 23 Or. App. 241, 541 P.2d 1082 (1975).

42. This new form of alimony arose simultaneously with the common law governing professional degrees as property, and was therefore a bit later in coming than the others. See, e.g., *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); see also H. CLARK, JR., SECOND EDITION, *supra* note 26, at 651.

43. See, e.g., *Hall v. Hall*, 18 Ill. App. 3d 583, 310 N.E.2d 186 (1974); *Reed v. Reed*, 457 S.W.2d 4 (Ky. 1969), *aff'd*, 484 S.W.2d 844 (Ky. 1972), *cert. denied*, 410 U.S. 931 (1973). The statutes of many states have since authorized the payment of alimony either as periodic payments or as a lump sum. H. CLARK, JR., SECOND EDITION, *supra* note 26, at 653-54 & n.16.

44. See, e.g., H. CLARK, JR., SECOND EDITION, *supra* note 26, at 589-708; J. KRAUSKOPF, *CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION* (1984); L. WEITZMAN, *supra* note 39 at 70-183; Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery* 23 FAM. L. Q. 253 (1989).

45. By 1975, 57% of all never-married women, 44.4% of all married women, and 40.8% of all widowed, divorced, or separated women had jobs in the open market. 1 U.S.

nuptial and other private contracts altering the economic terms of the marriage contract had become more acceptable and enforceable by 1975;⁴⁶ the law was gradually moving toward the view that many of the economic terms of the marriage contract were merely "default" provisions around which spouses ought to be free formally to contract. Thus, spouses began to have the choice to specify in writing their preferences regarding, for example, spousal support and the distribution of property upon divorce and to expect these agreements, if reasonable, to be enforced.⁴⁷

As a result of the above developments, by 1975 spouses faced several decisions that, to varying degrees, could be affected by knowledge of the economic terms of the marriage contract. Of these, perhaps the least plausibly influenced would be the decision to marry itself. Modern decisions about whether, whom, and when to marry are the product of a vast array of information and speculation about one's self and one's spouse, scarcely any of which is likely to be about the law. Indeed, our modern culture's notion of romantic love as the basis of marriage makes it improbable that knowledge of the economic terms of the marriage contract would alone cause many persons to decide not to

DEPT OF LABOR, LABOR FORCE STATISTICS DERIVED FROM THE CURRENT POPULATION SURVEY: A DATABOOK, at 708-09 (1982). While the percentages of never-married and widowed/divorced/separated women employed have remained fairly constant over time, the percentage of married women employed outside the home has increased steadily: 23.8% in 1950, 30.5% in 1960, 40.8% in 1970, and 50.1% in 1980. *Id.*; see also V. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY (1988); ECONOMIC INDEPENDENCE FOR WOMEN (J. Chapman ed. 1976); R. TSUCHIGANE & N. DODGE, ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES (1974).

46. *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972), is usually considered the pioneering case establishing the validity of antenuptial agreements concerning post-divorce economics. Prior to 1975, many other courts followed *Posner*. See, e.g., *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973).

For general discussions of the growing legal acceptability of antenuptial contracts, see, e.g., H. CLARK, JR., SECOND EDITION, *supra* note 26, at 1-20; Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979); Gamble, *The Antenuptial Contract*, 26 MIAMI L. REV. 692 (1972); Oldham, *Premarital Contracts Are Now Enforceable*, *Unbes . . .*, 21 HOUS. L. REV. 757 (1984); Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Wadlington, *The United States: Continuing Reform to Reflect Social and Economic Realities*, 26 J. FAM. L. 237, 239-40 (1987-88).

47. Even after *Posner*, courts have found particularly troublesome those contracts in which the economically dependent spouse waives her right to post-divorce financial support. Thus, notwithstanding the fact that the Illinois court followed *Posner* in *Volid*, 6 Ill. App. 3d at 386, 286 N.E.2d at 42, it held the agreement in *Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) invalid because it provided that the wife waived all claims for alimony or support if the marriage should be dissolved within seven years. See also, H. CLARK, JR., SECOND EDITION, *supra* note 26, at 8-10.

marry, or to marry someone else, or to marry later. Nonetheless, consistent with the old saw, "It is as easy to fall in love with a rich person as a poor person," one might imagine that, at the margin, such knowledge could affect the spousal search behavior of some persons.⁴⁸

Knowledge of the economic terms of the marriage contract more plausibly would affect the various life choices made *during* marriage which are to some extent influenced by economic considerations and which can substantially affect one's economic condition in case of divorce. Among the most prominent of these choices are whether to be a full-time homemaker or to have a career in the open market, how many children to have and when to have them, and how long to stay out of the work force following the birth of a child.

Several empirical studies conducted after the enactment of no-fault divorce laws have reported that in the first year following divorce from the husband, who has traditionally been the family's principal wage earner, the typical wife suffers a drastic decline in her standard of living while her ex-spouse enjoys a substantial increase.⁴⁹ Professor Lenore Weitzman has con-

48. For interesting theoretical discussions on how economic incentives can affect spousal search behavior, see, e.g., G. BECKER, *A TREATISE ON THE FAMILY* (1981); Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL* 299 (T. Schultz ed. 1974); Bishop, *'Is He Married?': Marriage as Information*, 34 U. TORONTO L.J. 245 (1984); Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987).

49. Lenore Weitzman's findings are probably the best known. See Jacob, *Faulting No-Fault*, 1986 AM. B. FOUND. RES. J. 773, 773 n.1 (listing general media coverage given L. WEITZMAN, *supra* note 39). Weitzman interviewed 114 divorced men and 114 divorced women in Los Angeles County in 1978 and compared their pre-divorce standard of living in 1977 to their standard of living one year after the divorce. She concluded, "when income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women . . . experience a 73 percent decline." L. WEITZMAN, *supra* note 39, at 323.

Weitzman's methodology and analysis have been extensively criticized. See, e.g., Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N.ILL.U.L.REV. 251 (1989); Emery, *Book Review*, 74 AM. SCIENTIST, 662 (1986); Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1987 AM. B. FOUND. RES. J. 781; Hoffman & Duncan, *What Are The Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988); Inker, *Book Review*, 20 FAM. L.Q. 129 (1986); Jacob, *supra*, at 773; Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1987 AM. B. FOUND. RES. J. 759; Mossman, *Book Review*, 5 CAN J. FAM. L. 341 (1986); *Book Note*, 9 HARV. WOMEN'S L.J. 223 (1986). But see Weitzman, *Bringing the Law Back In*, 1987 AM. B. FOUND. RES. J. 791.

Hoffman and Duncan suggest that Weitzman's extreme findings are the result of mathematical error. Although Weitzman declined to provide them access to her original data set, Hoffman and Duncan used her published data and methodology and derived an average decline in income/needs of divorced women of 33% compared to Weitzman's

tended that this disparity in post-divorce standards of living was not expected by either spouse.⁵⁰ Although there are probably

73%. Hoffman & Duncan, *supra*, at 643.

Other studies—using larger and more national samples, and longer time-frames—have found smaller post-divorce standard-of-living decreases for women and increases for men. *See, e.g.*, Hoffman, *Marital Instability and the Economic Status of Women*, 14 DEMOGRAPHY 67, 69 (1977) (finding, over a 7 year period, a 6.7% standard of living decline for divorced women, a 16.5% increase for divorced men, and a 20.8% increase for married couples); Duncan & Hoffman, *Economic Consequences of Marital Instability in HORIZONTAL EQUITY, UNCERTAINTY, AND ECONOMIC WELL-BEING* 427, 437-38, 458 (M. David & T. Smeeding eds. 1985) (divorced women who remain unmarried experience an income/needs ratio decline of 13% during the first year, but by the end of the fifth year they remain down only 6%; all divorced women (including those who remarry and those who do not) experience an average decline of 9% during the first year, but an increase of 10% by the end of the fifth year).

See also Duncan & Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 491 (1985) (“In the year prior to divorce or separation, about 5 percent of the white women and 13 percent of the black women lived in families classified as poor [using a formula of ‘income less than needs’]. In the year following a divorce or separation, these figures jump to about 11 percent for white women and 33 percent for black women. . . . Poverty rates for all men actually fall from six to four percent in the year after divorce.”).

50. Weitzman claims that her own empirical research indicates that “both men and women in marriages of long duration assumed that they were forming a partnership, and both assumed that they would share equally in the fruits of their joint endeavors.” L. WEITZMAN, *supra* note 39, at xiii. Unfortunately, despite her assurance of supporting data, Weitzman never provides any empirical evidence as to what—at the time of marriage or at any other time—either spouse expects the economic consequences of divorce (or marriage) to be. Indeed, she provides no empirical support even for her specific proposition that the ordinary spouse assumes that the “fruits of their joint endeavors” will be “share[d] equally,” not only during marriage, but after divorce. *But cf. Note, Individual Entitlement to the Financial Benefits of a Professional Degree: An Empirical Study of the Attitudes and Expectations of Married Professional Students and their Spouses*, 22 U. MICH. J.L. REF. 333 (1989) (authored by Rebecca Redosh Eisner and Ruth Zimmerman) (finding that spouses believe that an individual who supports her spouse through professional school should be compensated at divorce).

The closest Weitzman comes to offering evidence for the latter assertion is her brief theorizing about the “alimony myth.” L. WEITZMAN, *supra* note 39, at 143-45. She claims, again with out empirical substantiation, that “[u]ntil recently, folk wisdom in the United States led one to assume that nearly every divorced woman was awarded alimony.” *Id.* at 143; Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?* 14 FAM. L.Q. 141, 142 (1980).

Weitzman adds that this allegedly popular myth extends beyond a belief in the extreme likelihood that a woman will receive alimony, to the amount of the probable award. She asserts the existence of a “widespread belief that ex-wives were often freed from worldly cares while their former husbands struggled to support them in the style to which they had become accustomed.” *Id.* at 144. Even if true, this assertion hardly supports Weitzman’s claim of a common expectation of “equal shares.” Indeed, as Weitzman herself portrays it, the popular expectation is that the standard of living of the wife will remain the same following divorce, while that of the husband will decline.

If actually held, such an expectation of course differs drastically from the reality of a sharp decline in the post-divorce standard of living of the ex-wife, and is therefore consistent with Weitzman’s claim that women’s post-divorce economic decline is unexpected. But it is important to ask what the basis is for any of these alleged expectations.

Weitzman herself speculates that the source of these allegedly common expectations has not been post-divorce spousal support law, but rather newspapers that “sensational-

many reasons for the adverse financial condition of recently divorced women,⁵¹ the laws governing the economic consequences of marital dissolution undoubtedly play a significant role. We would, therefore, expect that knowledge of those laws might affect life choices such as those delineated above.

Each of those life choices, like the decision to marry itself, ultimately stems from a wide range of highly contextual and contingent factors as well as essentially personal, nonlegal concerns. Thus, we should not overestimate the probable effect on any of those decisions of knowledge of the economic terms of the marriage contract. Indeed, we likely find difficult to believe a scenario in which a woman tells her husband that although she would love to have a child, she is dissuaded from doing so by her knowledge of the child support and alimony laws and her consequent concern about what her likely economic condition would be in case of divorce. At the margin, however, knowledge of the laws governing the economic consequences of marital dissolution might affect some spouses' decisionmaking. Knowledge of the child support and alimony laws *might*, for example, be *one* factor in a spouse's decision to have only two children rather than three, or to stay out of the workforce for five months, rather than five years, after the birth of a child.⁵²

Knowledge of the law, of course, is often not the same as knowledge of the effects of its application. An individual who knows the text of a given state's alimony law will not necessarily have an accurate sense of what spousal support, if any, she would likely receive (or have to pay) upon divorce in that state. Nonetheless, straightforward information about the formal law might at least cause the ordinary individual to appreciate that

ized stories of seemingly exorbitant awards," books and magazines that "warned men of the financial burdens they would endure following divorce," lawyers who "helped to perpetuate the alimony myth in the popular press by publicizing high alimony awards they had won for their clients," and even *Doonesbury* comic strips. *Id.* at 144. Nowhere in her discussion does Weitzman provide evidence that *the law* was the basis for these expectations or that the ordinary person even knew, let alone understood, the substance of the law governing post-divorce spousal support at any time prior to divorce.

51. The reasons most frequently mentioned include: the woman is more likely to get custody of the children and her childcare responsibilities reduce her "labor supply," *see, e.g.,* Duncan & Hoffman, *supra* note 49, at 495; the woman is more likely to have been responsible for childcare when the couple was married, resulting in reduced past human capital investment as compared to the man, *see, e.g.,* L. WEITZMAN, *supra* note 39, at 342; and outright discrimination in the labor market, *see, e.g., id.*; Duncan & Hoffman, *supra* note 49, at 495.

52. Knowledge of both those laws and the possibility of contracting around them, might instead cause one to contract with one's spouse before or during marriage about the economic issues surrounding divorce.

she *cannot* predict the effect of divorce in this area. The woman who prepares to marry, confident that in the case of divorce she will be entitled to alimony sufficient to keep her at the standard of living established during her marriage, will be able to see that the text of the relevant law provides her no such guarantee. And that information might influence some of her subsequent decisionmaking.

Finally, knowledge of the economic terms of the marriage contract most plausibly would affect the decision whether to enter into a formal, written agreement regarding the allocation of one's earnings and property in case of divorce. If persons applying for a marriage license knew not only the substance of the laws governing the economic consequences of divorce but also that they legally could contract around them, one might expect more persons to enter into such contracts.

Although at the time of marriage many persons, especially the young, have little property or other assets, they typically acquire more over the course of the marriage. Thus, although some individuals may not feel a need prior to marriage to enter into a formal contract concerning the distribution of their property upon divorce, they might have substantial interest in doing so some years later. Given our society's diversity of accepted lifestyles and household economies (dual-career versus "traditional" marriages, to take just two examples), as well as the increased likelihood of divorce, one might expect substantial variation in individuals' preferred marital property relationships. One might therefore also expect individuals to find unsatisfactory, and to contract around, any single default arrangement.⁵³

Providing information is one of the least intrusive ways the State has of attempting to channel citizen behavior. And the goal (if not always the result) of this form of "regulation" is surely among the least controversial: increasing the autonomy and liberty of the individual by increasing the information upon

53. Finally, the dissolution of a marriage necessitates the division of the spouses' property. In most states, each spouse retains sole ownership over her separate property, *see, e.g.*, VA. CODE ANN. § 20-107.3(c) (Supp. 1989), and it is left to the court to divide the marital property either "equally" *see, e.g.*, CAL. CIV. CODE § 4800 (West Supp. 1989); WIS. STAT. § 767.255 (1981); IND. CODE ANN. § 31-1-11.5-11 (West 1987) (equal division a rebuttable presumption), or "equitably," *see, e.g.*, ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1989); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1989). As in the case of alimony, the statutes of several states further provide the court a list of factors to consider when making an "equitable" distribution of the marital property. *See, e.g.*, NEV. REV. STAT. § 125.150(1) (1987); N.C. GEN. STAT. § 50-20 (1987). In a few states, *all* the property owned by either spouse is vulnerable to division upon divorce. *See* H. CLARK, JR., SECOND EDITION, *supra* note 26, at 590-91.

which his decisions are based. As attempts to introduce "informed consent" into citizens' medical decisionmaking have taught us, however, the goal of greater self-determination is also among the most elusive:⁵⁴ A legally mandated informational right easily becomes a rite. And more information need not lead to better understanding.

There is, in short, no guarantee that more informed, let alone objectively "better," decisions of any sort would result from a state providing information about the economic terms of the marriage contract to license applicants. For we have no objective standard by which to judge the "goodness" of individual life choices. It is plausible, however, that disclosure of this information might cause some persons to make some of those decisions differently. And greater information is surely a necessary first step toward more informed, and ultimately more autonomous, decisions.

B. Public Knowledge of the Economic Terms of the Marriage Contract

As we have seen, knowledge of the economic terms of the marriage contract had substantial ex ante utility by 1975. If the average individual contemplating marriage already had a sound knowledge of those laws, however, there would be scant reason for the State to promulgate them more aggressively than usual. Thus, one would expect that at the time Louisiana enacted its unusual disclosure requirement, the ordinary person approaching first marriage⁵⁵ knew little of the laws governing the economic consequences of the decision to marry.

54. For discussion of the difficulties the legal system faces in attempting to provide for meaningful and effective "informed consent," see, e.g., R. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* (1979); R. FADEN, T. BEAUCHAMP & N. KING, *A HISTORY AND THEORY OF INFORMED CONSENT* (1986); J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984).

55. My focus throughout this Article is on persons who have not previously been married. Persons who have already been divorced should have *some* knowledge of the law governing the economic consequences of divorce at the time they remarry, although their knowledge may be of the law of another state or of outdated laws of the same state.

Of persons who married in the U.S. in 1975, 22.5% of the women and 24.1% of the men had previously been divorced. 3 U.S. DEP'T OF HEALTH & HUMAN SERVICES, *VITAL STATISTICS OF THE UNITED STATES: 1975*, at table 1-10 (1979). In 1985, the most recent year for which official statistics are available, 28.0% of the women and 28.8% of the men had previously been divorced. 3 U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 34, table 1-11.

There are no published studies of the ordinary person's knowledge, at the time of first marriage, of the economic terms of the marriage contract. There seems little reason to believe, however, that the public would demonstrate greater understanding of this area of the law than of the other "everyday life" areas for which published studies exist.⁵⁶ Those few empirical studies indicate that as of 1975 the ordinary person knew little of the law that governed her personal interactions. In a 1966 interview survey, 300 Austin, Texas, households were asked 30 yes-or-no questions about Texas civil law in the areas of housing, welfare, civil rights of racial minorities, civil liberties, consumer law, and family law.⁵⁷ The mean overall score was 16 of 30 correct (54%), scarcely better than chance.⁵⁸

Similarly poor knowledge of the law was demonstrated in a 1973 mail survey in which 600 Michigan residents⁵⁹ were asked 22 true-false questions, primarily about criminal and consumer law. The mean overall score was approximately 15 of 22 correct (68%), with the mean number of correct answers in the consumer law section being only a fraction better than chance (53% correct).⁶⁰ Scores on the criminal law section were somewhat better (a mean of about 77% correct).⁶¹

These data, although admittedly sparse, suggest that at the time of the Louisiana legislation the ordinary American probably did not have much knowledge of the law likely to affect everyday life. The absence of special efforts by any state to convey information about the laws of which the marriage contract is

56. See generally Givelber, Bowers & Blitch, Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443; Williams & Hall, *Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences*, 7 LAW & SOC'Y REV. 99 (1972); Note, *Legal Knowledge of Michigan Citizens*, 71 MICH. L. REV. 1463 (1973).

By public knowledge of the law, I do not mean to include public knowledge of, for example, the sanctions that attach to various crimes. I am interested only in studies that measure the ordinary person's knowledge of whether a particular action is prohibited by the criminal law or subjects the actor to liability under the civil law. Thus, the vast majority of studies of public knowledge of the criminal law, which focus on the deterrent effects of various sanctions as well as public perceptions of sanctions, are not relevant. The three studies listed above appear to be the only published surveys of public knowledge of the law, thus described.

57. Williams & Hall, *supra* note 56, at 101-02. Unfortunately, the published report of the survey does not provide the wording of the "family law" questions.

58. *Id.* at 113. The mean number of correct answers ranged from approximately 19 of 30 correct (63%) for "High Income Anglos" to 13 of 30 correct (43%) for both "Low Income Negroes" and "Low Income Mexicans." *Id.*

59. Survey questionnaires were mailed to 600 Michigan residents, and the response rate was 64.2%, or 385 questionnaires returned. Note, *supra* note 56, at 1466.

60. *Id.* at 1468.

61. *Id.*

comprised makes it unlikely that a study of public knowledge of those laws would have yielded substantially different results.

Nor does it seem that the ordinary person considered marriage a life choice about which to consult an attorney for pertinent legal information. Notwithstanding the poor knowledge of the law that the ordinary person apparently possessed, few Americans prior to 1975 ever consulted an attorney on a personal, non-business matter. The largest study to date in this area, a nationwide 1974 American Bar Association survey⁶² (ABA survey) of more than 2,000 adults,⁶³ found that 36% had never consulted an attorney on a personal matter and another 28% had done so only once.⁶⁴ The few earlier studies found comparably little consulting of lawyers by the public.⁶⁵

The ABA survey revealed that the most common uses of attorneys by the public for nonbusiness matters were for real estate transactions and the settling of estates; divorces and other matrimonial disputes were third.⁶⁶ A 1970 Texas study found a similar hierarchy of uses, with land title (30%) and estate transactions (16.9%) being the most common subjects of attorney contact, and divorce matters (10.7%) again occupying third place.⁶⁷

Although both the ABA and Texas surveys found that attorneys were frequently consulted on matrimonial matters,⁶⁸ this was only when divorce was imminent or already had occurred. There is no evidence that any substantial number of persons consulted an attorney shortly prior to marriage in order to obtain information about the terms of the marriage contract.⁶⁹ (In-

62. B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

63. The sampling procedure is set out at *id.* 32-41. Anyone 18 years of age or older was considered an "adult." *Id.* at xxxv, 32.

64. *Id.* at 186, 190.

65. A 1970 survey of 788 Texans found that 40.7% had never consulted an attorney. Those surveyed were 17 years of age or older. *Bar Attitudinal Study Completed, Results Published for First Time*, 34 TEX. B.J. 13, 13 (1971) [hereinafter *Texas Bar Survey I*]; *Use of Lawyers at All-Time High But Serious 'Knowledge Gap' Exists*, 34 TEX. B.J. 105 (1971) [hereinafter *Texas Bar Survey II*].

A 1960 study of 2,500 non-lawyers in Missouri revealed that only 33% had used an attorney for what they considered to be a personal matter. MISSOURI BAR, MISSOURI BAR PRENTICE-HALL SURVEY: A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT 35 (1963).

66. B. CURRAN, *supra* note 62, at 196.

67. *Texas Bar Survey II*, *supra* note 65, at 105.

68. B. CURRAN, *supra* note 62, at 218-19 n.27; *Texas Bar Survey II*, *supra* note 65, at 105.

69. Extrapolating from the ABA survey figures, it seems improbable that many persons contemplating marriage consulted an attorney for any type of advice, let alone in-

deed, this pattern of usage is consistent with the anecdotal evidence that there have long been many "divorce lawyers," but one has heard of rather fewer "marriage lawyers.")

C. *Deterrents to Information Acquisition*

As of 1975, then, the ordinary person at the time of first marriage was likely to have little knowledge of the economic terms of the marriage contract. Why was she so untroubled by her ignorance that she did not seek out expert assistance?

One possibility is that in considering whether to acquire this information prior to marriage, the typical spouse-to-be determined that the costs of obtaining it were likely to exceed any foreseeable benefits of doing so. It is not clear, however, that someone without information can accurately judge *ex ante* how useful that information might prove. Indeed, someone without particular information may not even be aware that the information exists to be obtained. Thus, were there cause to believe that the ordinary individual might be prevented by misinformation, erroneous beliefs, or systematic cognitive errors from carrying out an accurate cost-benefit analysis in this area, the State would have further reason to inform all license applicants of the economic terms of the marriage contract.

At the time of the Louisiana legislation, the ordinary person quite possibly held one or more of four erroneous beliefs, which might partially explain why she apparently knew so little about the economic terms of the marriage contract at the time she entered into it and why she was so untroubled by her ignorance that she did not seek legal counsel: "I know what the law is;" "Marriage is not a legal contract;" "Marriage is not a problem for a lawyer;" and "It won't happen to me."

1. "*I know what the law is*"— State disclosure of the economic terms of the marriage contract might result not only in *more*-informed, but in genuinely *better*-informed, decisions if

formation as to the economic terms and consequences of the marriage contract. Census figures for 1974, the year of the ABA study, reported that 83% of adults over the age of 18 had been married at least once. B. CURRAN, *supra* note 62, at 59-60 (citing 1974 Census). Of the 66% of adults surveyed by the ABA who had ever used an attorney, 56% of those users had done so on more than one occasion. *Id.* at 185, 190. Because an estate or a real property transaction is the most likely reason for a first visit to an attorney, *id.* at 196; *Texas Bar Survey II*, *supra* note 65, at 105, no more than 30.7% (.56 x .66 x .83) of married adults were even vaguely plausible candidates for having consulted an attorney prior to marriage for advice or information concerning marriage. Even this figure is likely higher than our common experience might lead us to expect.

there were reason to believe that the ordinary person's expectations regarding the law were at odds with reality. That is, if an individual believes she is knowledgeable when in fact she is not, providing information that enables her to recognize the erroneous-ness of her belief might enable her to make decisions that are not only different from the ones she might have made without that information, but are in reality better because they are made on the basis of fact rather than myth.

Some evidence indicates that alimony, or post-divorce spousal support, is one area in which the ordinary person believes herself to be knowledgeable about the economic terms of the marriage contract when in fact she is not. Sociologists Lenore Weitzman and Ruth Dixon assert that "folk wisdom about divorce in the United States has assumed that 'nearly every woman who asks for alimony gets it.'"⁷⁰ The reality, however, is that post-divorce spousal support is, and has always been, awarded in a small percentage of divorces.⁷¹ Hence the existence of what

70. Weitzman & Dixon, *supra* note 50, at 142; see also L. WEITZMAN, *supra* note 39, at 143.

71.

The U.S. Census Bureau collected national data on alimony awards between 1887 and 1922 and found that only 9.3 percent of divorces between 1887 and 1906 included provisions for permanent alimony, as did 15.4 percent of those in 1916, and 14.6 percent of those in 1922.

L. WEITZMAN, *supra* note 39, at 180-81; see also P. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 127 (1959).

More recent U.S. Census data indicate that little has changed in more than 60 years. Only 14.6% (2.8 million) of the 19.16 million ever-divorced or currently separated women, as of spring 1986, were awarded or had an agreement to receive alimony. U.S. BUREAU OF THE CENSUS, *CURRENT POPULATION REPORTS, SERIES P-23, NO. 154, CHILD SUPPORT AND ALIMONY: 1985 (Supplemental Report) 6* (1989).

See also E. MAY, *GREAT EXPECTATIONS: MARRIAGE & DIVORCE IN POST-VICTORIAN AMERICA* 151 (1980) (In Los Angeles in 1920, 60% of requests for alimony granted, which represented 32% of all divorces.); Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 *FAM. L.Q.* 225, 267-68 (1988) (of 86 contested adjudications in Montgomery County in 1986, alimony was awarded in 38% (indefinite alimony in 22%); alimony was awarded in only 11.3% (indefinite alimony in 4%) of the 354 cases in which the plaintiff was represented by one of 26 attorneys who had represented 10 or more plaintiffs in divorce cases in Montgomery County in 1986); McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 *FAM. L.Q.* 351, 362 (1987) (alimony of more than \$1 awarded in 59% of random sample of 102 divorce cases filed in New Haven, Connecticut, in 1970-71; in 30% of random sample of 100 divorce cases filed in New Haven in 1982-83); Rowe & Morrow, *The Economic Consequences of Divorce in Oregon After Ten or More Years of Marriage*, 24 *WILLAMETTE L. REV.* 463, 476 (1988) (Sample of divorce decrees of marriages of 10 or more years duration granted between July 1983 and June 1984 in three urban Oregon counties re-

Weitzman and Dixon have termed the "alimony myth."⁷²

Although they present no empirical support for their claim of *public* over-estimation of the frequency with which alimony is awarded, Professors Weitzman and Dixon provide plausible anecdotal evidence. They observe that the popular press has sensationalized stories of seemingly exorbitant spousal support awards (often with the encouragement of the winning lawyers) and that numerous books and magazines warn men of the financial burdens they will endure following divorce.⁷³

Although Weitzman and Dixon do not discuss the "alimony myth" in the context of decision theory, their speculation about the probable source of the myth (assuming that the erroneous belief is as widely held as they maintain) is supported by the

vealed 32 of 116 wives (27.5%) received orders of spousal support; only 14 of 116 (12%) wives received awards of "permanent" alimony.); White & Stone, *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 *FAM. L.Q.* 75, 80 (1976) (Sample of 532 divorce decrees granted between July 1, 1971 through 1974 in Orange County, Florida, revealed alimony awards in 24.43% of cases; permanent alimony was awarded in only 5.8% of cases.); Wishik, *Economics of Divorce: An Exploratory Study*, 20 *FAM. L.Q.* 79, 85, 88 (1986) (Sample of 227 divorce decrees granted between October 1982 through February 1983 in four Vermont Superior Court districts revealed alimony awards in only 6.7% of cases; permanent alimony was awarded in fewer than 2% of cases.).

One must be careful when interpreting such statistics. The low percentage of alimony awards need not imply any anti-female bias or general unwillingness of courts to enter spousal support orders. First, it is often unclear how many divorcing women surveyed *requested* alimony. In addition, it is possible that the low award rate accurately represents the proportion of divorces in which the primary wage-earner had an income sufficient to provide a reasonable degree of spousal support without reducing his subsequent net income below the poverty line.

Indeed, Weitzman's own interviews in 1978 with 218 divorced men and women in Los Angeles County revealed a direct relationship between husband's income and alimony awards. While only 15% of the men who earned less than \$20,000 a year were ordered to pay alimony, 62% of those who earned \$30,000 or more were thus ordered. L. WEITZMAN, *supra* note 39, at 179, 181. Weitzman concluded:

Obviously the alimony "myth" is not a myth for upper-middle-class families. But it is a myth for the families of *most* divorced men—men who earn less than \$20,000 a year. Since only 17 percent of the divorced men in the 1977 random sample of divorce decrees reported gross incomes of over \$20,000 a year, it is the other 83 percent of the men—those who are, in fact, the typical divorced men—whom judges view as incapable of supporting two households, and therefore unable to pay alimony.

Thus alimony is typically not awarded because judges do not perceive it as "possible" in those families that constitute the vast majority of the divorcing population. As one judge remarked during a contempt hearing, "You can't squeeze blood from a stone."

Id. at 181-82.

72. Weitzman & Dixon, *supra* note 50, at 141; L. WEITZMAN, *supra* note 39, at 143; see also discussion *supra* note 50.

73. Weitzman & Dixon, *supra* note 50, at 142-43; L. WEITZMAN, *supra* note 39, at 143-44.

work of some scholars of cognitive illusions. According to Tversky and Kahneman, a general inferential rule, or heuristic, that people commonly employ is "availability": We tend to judge an event's occurrence as likely or frequent if instances of it are easy to imagine or recall.⁷⁴

As Weitzman and Dixon note, the popular press seldom records a denial of spousal support; rather, the press considers the unusually large awards most newsworthy. Thus, availability theories of judgmental biases predict that people will systematically overestimate the frequency of alimony awards, especially, large awards. In fact, the biases in newspaper coverage and people's judgments have been found empirically to be quite similar.⁷⁵

Misled by her own judgmental biases and by what she reads in the popular press, a woman may believe she knows the law governing post-divorce spousal support. She therefore may not investigate that law further at the time of marriage or before making other decisions for which the information might be pertinent. Indeed, if she likes the knowledge that she thinks she has, she may be especially reluctant to expend resources acquiring what could only turn out to be "bad news."

The prevalence of the alleged "alimony myth" may be called into question by the fact that divorced persons with a first-hand knowledge of the alimony laws and their application constitute an increasingly large portion of the population.⁷⁶ We would therefore expect greater numbers of never divorced people to be children of divorced parents or to know personally someone with first-hand stories of the economic consequences of divorce.

74. Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOLOGY* 207 (1973); see also Borgida & Nisbett, *The Differential Impact of Abstract vs. Concrete Information on Decisions*, 7 *J. APPLIED SOC. PSYCHOLOGY* 258 (1977); Markus & Zajonc, *The Cognitive Perspective in Social Psychology*, in 1 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 137, 181-82 (G. Lindzey & E. Aronson 3d ed. 1985); 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); Slovic, Fischhoff & Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 463, 465-72 (D. Kahneman, P. Slovic & A. Tversky eds. 1982).

75. Slovic, Fischhoff & Lichtenstein, *supra* note 74, at 467-68.

76. The proportion of the U.S. population 18 years of age and older that is divorced has grown steadily from 3.2% in 1970, to 6.2% in 1980, and 7.8% in 1987. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1989*, at 42 (109th ed. 1989).

The proportion of the U.S. population 18 years of age and older that is divorced was a mere 0.6% in 1910, 1.3% in 1930, and 2.4% in 1950. U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, Part 1, Series A-160-171*, at 20-21 (1975).

Would we not expect information about alimony laws that is acquired in this way to be even more "available" to the ordinary person than magazine stories about Johnny Carson's wives?

Certainly we would expect the judges and attorneys who specialize in domestic relations law to have highly accurate information regarding all aspects of post-divorce maintenance awards and therefore not to be susceptible to the "alimony myth." In a 1975 survey of 92 lawyers and 26 judges in Los Angeles County, however, Professors Weitzman and Dixon obtained direct empirical support for the existence of the alimony myth: Both judges and attorneys were found to have a greatly exaggerated sense of the frequency with which post-divorce spousal support is awarded.

The lawyers interviewed estimated, on the average, that two-thirds of all "currently divorcing" women are awarded maintenance, while the judges, all of whom hear family law cases in the greater Los Angeles area, estimated that maintenance was awarded to "more than half" of those women.⁷⁷ In fact, a random sample of 1,000 final divorce decrees granted in 1972 in Los Angeles and San Francisco counties revealed that only 15% of wives actually were awarded spousal support.⁷⁸ Alimony was awarded to 17% of wives in a similar sample of Los Angeles county divorce decrees granted in 1977.⁷⁹

77. Weitzman & Dixon, *supra* note 50, at 143; L. WEITZMAN, *supra* note 39, at 144.

Unfortunately, the discrepancy between the estimates of those surveyed and the actual award rates are difficult to interpret because the researchers do not reprint the question actually posed. Thus, part of the apparent overestimation by judges and attorneys of the frequency of awards may be the result of those interviewed including nominal awards of \$1.00 in their estimates, a type of award not counted by Weitzman and Dixon in calculating the percentage of divorcing women who receive maintenance awards. Weitzman & Dixon, *supra* note 50, at 143 n.8, 144 & n.10.

In addition, those surveyed may have provided estimates which accurately reflected the cases with which they were personally familiar. That is, perhaps judges and attorneys come into contact with a disproportionate number of middle- and upper-income divorces in which a spousal support award is feasible, and have disproportionately little contact with low-income divorces in which no spousal support award is possible. Indeed, Weitzman and Dixon note that

[H]igher income husbands are seen as capable of paying alimony, and have typically been ordered to do so. While these families are not numerous, they disproportionately contribute to both the contested caseload and the appellate caseload. Thus, legal norms and judicial standards are more likely to be based on them.

. . . [T]he persistence of the alimony myth is largely due to the visibility of middle- and high-income divorce cases. It is *their* divorce cases which make case law, generate publicity, and form the basis for the folk wisdom about alimony and divorce.

Id. at 182 (emphasis in original).

78. *Id.*

79. *Id.*

Because there is little reason to believe that the ordinary person at the time of first marriage would have more accurate general knowledge of maintenance awards than the judges and attorneys who specialize in domestic relations law, the existence of the "alimony myth"—if not also its cause—would seem to be at least indirectly verified by Weitzman and Dixon's survey.

2. "*Marriage is not a legal contract*"— If one does not view a matter as involving the law, one is unlikely to seek knowledge of the relevant law. Certainly, the legal procedure for getting married has never given spouses much reason to think that they are entering into a contract, let alone one whose economic provisions are alterable and might be relevant to subsequent life choices such as how many children to have or whether to be a full-time homemaker.

In order to marry, it has long been the case that the spouses-to-be must obtain a license from the state by providing medical and other personal information and paying a small fee.⁸⁰ In the majority of states, applicants must wait for a period ranging from twenty-four hours to five days before the State issues the marriage license.⁸¹ If both parties meet the statutory requirements regarding age,⁸² gender,⁸³ and the absence of an existing marriage⁸⁴ or of an unduly close biological relationship to one another,⁸⁵ they then need only take part in a brief ceremony conducted by an authorized official to be deemed legally married.⁸⁶ Prior to 1975, no state took steps to inform persons about to be married of any of the terms of the marriage contract. Nor has any state yet required license applicants to provide evidence

80. See, e.g., S.D. CODIFIED LAWS ANN. § 25-1-10 (1984 & Supp. 1989) (enacted 1890); VA. CODE ANN. §§ 20-1 to 20-16 (1983 & Supp. 1989) (enacted 1919).

81. See, e.g., S.C. CODE ANN. § 20-1-220 (Law Co-op. 1985) (24 hours) (enacted 1911); WIS. STAT. § 765.08 (1987-88) (5 days) (enacted 1917). As of December 31, 1979, the last date for which the Council of State Governments compiled such statistics, only 20 jurisdictions (19 states and Puerto Rico) had no statutory waiting period before issuance of a marriage license, and five of those instead had a statutory waiting period after issuance of the license. 23 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1980-81 46.

82. See, e.g., S.D. CODIFIED LAWS ANN. § 25-1-9 (1984) (enacted 1877); VA. CODE ANN. § 20-48 (1983 & Supp. 1989) (enacted 1919).

83. See, e.g., MONT. CODE ANN. § 40-1-103 (1987) (enacted 1947); VA. CODE ANN. § 20-45.2 (1983) (enacted 1919).

84. See, e.g., S.D. CODIFIED LAWS ANN. § 25-1-8 (1984) (enacted 1877); VA. CODE ANN. § 20-38.1(a)(1) & 43 (1983) (enacted 1919).

85. See, e.g., S.D. CODIFIED LAWS ANN. § 25-1-6 (1984) (enacted 1877); VA. CODE ANN. § 20-38.1(a)(2) & (3) (1983) (enacted 1919).

86. See, e.g., S.D. CODIFIED LAWS ANN. § 25-1-29 (1984) (enacted 1877); VA. CODE ANN. §§ 20-23, 20-25, 20-26 (1983 & Supp. 1989) (enacted 1919).

that they know and understand the legal consequences of their decision to marry.⁸⁷

Thus, the ordinary individual's ignorance and lack of curiosity regarding the economic provisions of the marriage contract may in part result from her failure to appreciate that marriage is a transaction with numerous legal consequences, that marriage is the signing of a legal contract.

3. "*Marriage is not a problem for a lawyer*"— Another reason why the average individual may not consult a lawyer prior to marriage is that she thinks of lawyers as problem solvers and does not think of marriage as a *problem*, least of all a problem for which she needs a lawyer. Several surveys of public use of lawyers have found that the ordinary person has a very circumscribed view of what lawyers do. This popularly held, narrow conception of the lawyer's role may in part explain the low frequency with which the average individual consults them in general, and particularly in anticipation of marriage.

A 1960 Missouri Bar study, for example, found that the ordinary person does not view the lawyer as someone to consult for information about the law, but rather as someone to go to when one has a grievance to be litigated. Those surveyed were asked, "When you think of a lawyer, what type of legal services which [sic] he performs *first* comes to your mind?"⁸⁸ Respondents who had previously used a lawyer, as well as those who had not, listed "accident and damage suits" as the most common service performed by an attorney.⁸⁹ Given this narrow view of lawyers' work, it is not surprising that those surveyed perceived few of life's events or decisions to require the assistance of a lawyer.⁹⁰

87. In this regard, most states' procedures for obtaining a driver's license, which include tests of both one's ability to operate an automobile and one's knowledge of the "rules of the road," are typically far more demanding than those for obtaining a marriage license. Compare, e.g., VA. CODE ANN. § 46.1-369 & 46.1-349 (1986) (examination of applicants for driver's license) with *id.* § 20-13 to 20-49 (1983 & Supp. 1989) (procedures and requirements for marriage).

88. MISSOURI BAR, *supra* note 65, at 36.

89. *Id.*

90. When those who had never consulted a lawyer were asked why, 80% responded that they "had never felt the need" for such services. *Id.* at 34-35.

Similarly, a 1949 study, E. KOOS, THE FAMILY AND THE LAW; THE REPORT OF A STUDY OF FAMILY NEEDS AS RELATED TO LEGAL SERVICES; MADE FOR THE SURVEY OF THE LEGAL PROFESSION (2d ed. 1952), asked 2,050 "working-class" and 4,150 "middle-class" families in six American cities, "What is the major function of the lawyer?" Both classes overwhelming responded, "defending people who are presumed [sic] to have violated the law." *Id.* at 3-4, 8-9. The researchers concluded that both working- and middle-class respondents had a "tendency to see the lawyer as one who in one way or another protects the individual from that awesome (and possibly gruesome) thing called 'the law.'" *Id.* at 9.

Even if a person does view marriage as a "problem" for which a lawyer might provide useful information or advice, she may not consult one. Eighty-three percent of those surveyed in the 1974 ABA study, for example, agreed with the statement that "[a] lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem."⁹¹ In addition, 44% of those questioned in the same survey agreed that "a person should not call upon a lawyer until he has exhausted every other possible way of solving his problem."⁹² This sentiment may in part stem from a perception of lawyers as dilatory. Fifty-nine percent of respondents in the same survey agreed with the statement that "[l]awyers are (not) prompt about getting things done."⁹³

The anticipated cost of legal services may also deter some from consulting an attorney. Fifty-one percent of those surveyed by the ABA agreed that "Lawyers' fees are (not) usually fair to their clients, regardless of how they figured the fee."⁹⁴ Sixty-eight percent believed that "[m]ost lawyers charge more for their services than they are worth."⁹⁵ Those surveyed in the Missouri Bar study, however, were more sanguine about the cost of legal services: Less than 1.5% of those who said they had never used a lawyer gave financial reasons as the cause.⁹⁶

4. *"It won't happen to me"*— Finally, the ordinary individual about to be married may not be curious about those economic provisions of the marriage contract that are pertinent only in case of divorce because she simply cannot imagine that her marriage will not last forever. Social scientists have in fact

91. B. CURRAN, *supra* note 62, at 228. As Curran notes, however, this survey question must be carefully interpreted: "The 83% who agreed that the vagaries of the lawyer selection process inhibited *others* may or may not have been reflecting an uneasiness of their own." *Id.* at 228-29 (emphasis in original).

92. *Id.* at 228.

93. *Id.* at 229.

94. *Id.* at 231.

95. *Id.*

96. MISSOURI BAR, *supra* note 65, at 35.

The 1949 Koos study in contrast, found different reasons for why persons do not consult a lawyer. Those surveyed were asked whether they had ever consulted an attorney for any of 30 problems for which an ordinary person might do so. Those who responded that they had experienced one of the listed problems but had not consulted an attorney were asked for the reason. Those most often given by the middle-class respondents were: "always 'work things out by ourselves'" (20%); "lawyer known to have been too costly or unsatisfactory for others" (15.9%); and "unable to afford fees" (12.3%). The working-class respondents, in contrast, listed "unable to afford fees" 47.6% of the time. The next most commonly given reasons were "received help from non-professional person" (14.4%) and "didn't know that lawyer could help with problem" (10%). E. Koos, *supra* note 90, at 7.

found that people commonly view themselves as personally immune to hazards of all sorts. For example, the great majority of individuals believe themselves to be more likely than average to live past the age of 80,⁹⁷ and less likely than average to be injured in an automobile accident⁹⁸ or to be harmed by products they use.⁹⁹ We might, therefore, expect the ordinary person also to believe that she is more likely than average to stay married to the same person for life.

Indeed, although our "divorce rate" has hovered near 50% since 1975¹⁰⁰ and demographers project that at least half of current American marriages will eventually end in divorce,¹⁰¹ more than 80% of respondents in a five year survey (1975-80) of high school seniors "considered it very likely or fairly likely that they would stay married to the same person for life."¹⁰² Fewer than 5% of those surveyed "thought such an outcome fairly or very unlikely."¹⁰³

One explanation for this systematic optimism is that, from the perspective of each individual's experience, the risks genuinely look very small. At the time of marriage, most individuals have not been divorced.¹⁰⁴ Moreover, their indirect experience with divorce via family, friends, news media, and the popular press shows them that "when divorces happen, they happen to

97. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 806, 810 (1980).

98. See Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers*, 47 ACTA PSYCHOLOGICA 143 (1981).

99. Slovic, Fischhoff & Lichtenstein, *supra* note 74, at 470 (citing A. Rethans, *An Investigation of Consumer Perceptions of Product Hazards* (1979) (unpublished doctoral dissertation, Univ. of Oregon)).

100. See discussion *supra* note 34.

101. See, e.g., Glick, *How American Families are Changing*, 6 AM. DEMOGRAPHICS 20, 24 (1984) (predicting that almost 50% of marriages begun in the 1980s will end in divorce). Norton & Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARRIAGE & FAM. 3 (1987) (citing estimate by Census Bureau demographers that, of women born in 1946-50, 56% of first marriages will eventually end in divorce).

102. Thornton & Freedman, *Changing Attitudes Toward Marriage and Single Life*, 14 FAM. PLAN. PERSP. 297, 300 (1982).

103. *Id.*

104. For example, in 1985, the most recent year for which official statistics are available, only 28.0% of all brides and 28.8% of all grooms had previously been divorced. 3 U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 34, at table 1-11.

others."¹⁰⁵ This is yet another gloss on the "availability" heuristic of Tversky and Kahneman discussed above.¹⁰⁶

Dissonance theory¹⁰⁷ provides a second possible explanation for the apparently common unwillingness to confront—especially at the time of first marriage—the statistical fact that one is as likely to be parted from one's spouse by divorce as by death.¹⁰⁸ Cognitive dissonance is said to exist when a person possesses two contradictory thoughts or beliefs.¹⁰⁹ A basic assumption of dissonance theory is that holding conflicting cognitions is uncomfortable, perhaps intolerable, and that people will therefore be motivated to reduce or eliminate the dissonance.¹¹⁰ One way to achieve this is to alter one of the dissonant elements so that it is no longer inconsistent with the other cognition.¹¹¹

The conflicting cognitions immediately prior to marriage, might be "I am about to be married to the spouse of my dreams" and "But this could all end in a miserable divorce in a very short while." At the time of marriage, thoughts of marital bliss are likely to be more salient than the unpleasant thought that one might be making a mistake. The result, according to dissonance theory, should be decreased ability to entertain thoughts of divorce.

105. Slovic, Fischhoff, & Lichtenstein present the case of automobile driving:

Despite driving too fast, tailgating, etc., poor drivers make trip after trip without mishap. This personal experience demonstrates to them their exceptional skill and safety. Moreover, their indirect experience via the news media shows them that when accidents happen, they happen to others. Given such misleading experiences, people may feel quite justified in refusing to take protective actions such as wearing seat belts.

Slovic, Fischhoff, & Lichtenstein, *supra* note 74, at 470 (citation omitted).

John Donohue has suggested that cognitive dissonance and use of the "availability" heuristic may deter individuals from using seatbelts and other auto occupant safety devices. Donohue, *Using Market Incentives to Promote Auto Occupant Safety*, 7 YALE L. & POL'Y REV. 449, 453-54 (1989).

106. See *supra* text accompanying notes 74-79.

107. Leon Festinger is generally considered the father of dissonance theory by virtue of his 1957 classic, L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). See also L. FESTINGER CONFLICT, DECISION, AND DISSONANCE (1964).

108. See *supra* notes 34 & 101.

109. L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1-3 (1957).

110. *Id.* at 3.

111. *Id.* at 5-6.

*D. An Initial Cost-Benefit Analysis of Aggressive
Promulgation*

We have seen that when the Louisiana legislation was enacted, the typical spouse-to-be was unlikely to have much knowledge of the economic terms of the marriage contract and various erroneous beliefs might have deterred her from independently seeking that information. Given the likelihood that some persons would make certain life decisions differently if they had such information, there would appear to be clear benefits to the states' promulgating the pertinent laws more aggressively than usual. As a precondition of such Benthamite promulgation, we would expect such benefits to exceed any costs.

An initial cost-benefit analysis suggests not only that this precondition had been met in the case of the Louisiana legislation, but also that the most efficient time for any state to provide information about the economic terms of the marriage contract is in fact when the Louisiana legislation required: at the time an individual applies for a marriage license.

First, a very few individuals about to be married might, upon receiving the information, find that the terms are not attractive and decide not to marry after all. Were the information not provided until after the marriage license is issued, its potential effect on the actual decision to marry would obviously be reduced.¹¹² Second, assuming that the information given spouses-to-be included the fact that virtually all of the economic terms of the marriage contract are merely "default" provisions, providing this information shortly prior to marriage would best enable interested persons to contract around any of those provisions in a timely manner.¹¹³

Similarly, providing this information about the law immediately prior to marriage would enable spouses to make more informed life choices during marriage. Unfortunately, cognitive dissonance is likely to make information about the laws governing marital dissolution least psychologically "accessible" to the spouses at precisely this time.¹¹⁴ In addition, normal

112. As the general population gains greater knowledge of this information, however, it might affect persons' decisions to marry, even though the state never provided the information to them personally.

113. Not all such contracting takes place prior to marriage. In some cases, the spouses may not choose to contract about economic issues until they have been married for some time. Such contracting is nonetheless "timely" if it occurs before divorce is imminent.

114. See *supra* text accompanying notes 107-11.

processes of information degradation may, over time, distort any information given then or dilute its power to affect later life choices. Providing information about the economic terms of the marriage contract shortly prior to marriage, however, might at least sensitize spouses-to-be to the fact that marriage is a legal contract with a wide variety of economic terms and potential consequences. Some persons might, therefore, be more likely to seek out such information even years later when contemplating decisions for which it might prove pertinent.

Obviously, this information would be likely to have its greatest impact if it were presented each time one confronted any of the life choices to which it is potentially relevant, rather than at the time one applies for a marriage license. Indeed, most legal duties to disclose information require the disclosure to take place shortly, if not immediately, prior to the time the pertinent decision is made.¹¹⁵ But given the many personal decisions that information about the economic terms of the marriage contract might plausibly affect, and given the enormous variation in individuals' life choices and circumstances, it would scarcely be possible for a state to provide this information at those times.

In addition, because the marital relationship is an on-going one subject to continual adjustment and negotiation, decisions made in the context of that relationship may similarly evolve over time. Thus, there may in fact not be any particular *point* in time to which the above life choices may be specifically traceable. The most generally effective—as well as the most administratively feasible—point for disclosing information likely to be pertinent to those choices may, therefore, be immediately prior to marriage.

Shortly before marriage is certainly the time when it would be least costly to provide information regarding the economic terms of the marriage contract. The law has long required spouses-to-be to contact a municipal office to apply for a marriage license.¹¹⁶ Thus, the relevant population already presents itself through an existing mechanism to which the State could readily and inexpensively add the distribution of printed legal information. Indeed, providing all marriage license applicants a statement in plain language of the laws governing the economic consequences of marriage would in many states require nothing

115. See, e.g., *infra* text accompanying notes 120-126.

116. See, e.g., MONT. CODE ANN. § 40-1-201 (1985) (enacted 1947); VA. CODE ANN. §§ 20-14, 20-16, 20-20 (1983) (enacted 1919).

more than adding another pamphlet to the information that is already required by statute to be given them.¹¹⁷

Thus, the only costs to any state of implementing such a program of systematic disclosure would appear to be the small ones of writing, printing, and updating the materials to be distributed to all marriage license applicants.¹¹⁸ Not only would those costs likely be substantially outweighed by the expected benefits, but we would expect the total cost to a state of providing such information to be a mere fraction of the total cost of all marriage license applicants independently acquiring it.

E. Historical "Ripeness"

Some time prior to 1975, all of the logically necessary conditions discussed above had been met in virtually all states regarding the economic terms of the marriage contract.¹¹⁹ Why, then, did no state take any action prior to 1975 to disclose those terms through means other than the usual publication of statutes and judicial decisions? The history of other legally mandated disclosure requirements may provide a partial answer.

Nearly all of the disclosure requirements that we now take for granted arose only during the last 30 years.¹²⁰ Only since 1982

117. As of November 1, 1989, this information included birth control or family planning (seven states), GA. CODE ANN. § 19-3-41 (1982) (enacted 1973); HAW. REV. STAT. § 572-5 (Supp. 1988) (enacted 1987); KY. REV. STAT. ANN. § 402.270 (Michie/Bobbs-Merrill 1984) (enacted 1972); MD. FAM. LAW CODE ANN. § 2-405(h) (1984) (enacted 1957); N.H. REV. STAT. ANN. § 457:28a (1983) (enacted 1973); S.C. CODE ANN. § 20-1-240 (Law. Co-op 1976) (enacted 1962); VA. CODE ANN. § 20.14.2 (Supp. 1989) (enacted 1972), genetic and pre-natal hazards (eight states), CAL. CIV. CODE § 4201.5 (West Supp. 1989) (enacted 1976); HAW. REV. STAT. § 572-5 (Supp. 1988) (enacted 1987); N.J. STAT. ANN. § 37:1-27 (West Supp. 1988) (enacted 1977); N.Y. DOM. REL. LAW § 13-d (McKinney 1988) (enacted 1986); OR. REV. STAT. § 106.081 (1987) (enacted 1987); R.I. GEN. LAWS § 15-2-3.1 (1988) (enacted 1988); VA. CODE ANN. § 20.14.2 (Supp. 1989) (enacted 1972); WIS. STAT. ANN. § 765.12(1) (West Supp. 1989) (enacted 1985), and sexually transmitted diseases including AIDS (six states), CAL. CIV. CODE § 4201.5 (West Supp. 1989) (enacted 1986); GA. CODE ANN. § 19-3-35.1 (Supp. 1989) (enacted 1988); HAW. REV. STAT. § 572-5 (Supp. 1988) (enacted 1987); IDAHO CODE § 32-412A (Supp. 1989) (enacted 1988); IND. CODE ANN. § 31-7-3-3.5 (Burns Supp. 1988) (enacted 1988); VA. CODE ANN. 20.14.2 (Supp. 1989) (enacted 1987).

118. The 1980 edition of the Louisiana pamphlet, for example, states that ten thousand copies were published at a total cost of \$345.58. LOUISIANA DEP'T OF JUSTICE, *supra* note 21. For a discussion of other, non-monetary costs of aggressive promulgation in this context, see *infra* Part III.

119. Knowledge of the economic terms of the marriage contract would take on its greatest importance when a state's no-fault divorce law went into effect.

120. The 1938 Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982 & Supp. 1988), provides the major exceptions. For example, since 1938, federal law has required

have lending institutions been required to inform the borrower of the total dollar amount of interest to be repaid;¹²¹ not until 1976 were new cars required to bear a label stating their fuel efficiency;¹²² not until 1966 were the police legally obliged to tell a person about to be arrested of her Constitutional rights to an attorney and to remain silent;¹²³ only since 1965 have cigarette packs been required to bear a health warning;¹²⁴ not until 1957 were doctors required to provide patients pertinent medical information before accepting their consent to a particular treatment.¹²⁵

In sum, it is only within the last few decades that the law has come to require in various areas of everyday life that a person or entity with presumptively superior information as to risks, contents, or consequences aggressively disclose that information when the average individual is faced with a decision for which it might prove pertinent.¹²⁶ Thus, the historical "ripening" within American legal culture of mandatory disclosure of legal and non-legal information emerges as a further necessary condition to be met before Louisiana could enact its pathbreaking disclosure legislation.

pharmaceutical companies to tell the consumer of potential adverse effects of using their products, *id.* § 352, and has required processed foods to bear labels stating their contents, *id.* § 343(i).

For discussions of how and why the 1938 Act came into existence so early in this century, see, e.g., R. MERRILL & P. HUTT, *FOOD AND DRUG LAW: CASES AND MATERIALS* (1980); Cavers, *The Food, Drug and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 *LAW & CONTEMP. PROBS.* 2 (1939); Kleinfeld, *Legislative History of the Federal Food, Drug, and Cosmetic Act*, 1 *FOOD DRUG COSM. L.Q.* 532 (1946); Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 *LAW & CONTEMP. PROBS.* 3 (1933).

121. 15 U.S.C. § 1638 (1982 & Supp. 1988).

122. *Id.* § 2006.

123. *Miranda v. Arizona*, 384 U.S. 436, 441-91 (1966).

124. 15 U.S.C. § 1333 (1982 & Supp. 1988). Of course, some of the explanation for the recent growth in health warning requirements is that the pertinent risks were only recently scientifically established.

125. "The doctrine of informed consent surfaced, seemingly out of nowhere, in *Salgo v. Leland Stanford Jr. University Board of Trustees* [317 P.2d 170 (Cal. Dist. Ct. App. 1957)]." J. KATZ, *supra* note 54, at 60.

For a thorough discussion of the varieties of "informed consent" required by the laws of different states, see Meisel & Kabnick, *Informed Consent to Medical Treatment: An Analysis of Recent Legislation*, 41 *U. PITT. L. REV.* 407 (1980). For a history of the rise of—and subsequent partial retreat from—the legal doctrine of informed consent, see R. FADEN, T. BEAUCHAMP & N. KING, *supra* note 54, at 114-50; J. KATZ, *supra* note 54, at 48-84.

126. Why the "disclosure revolution" came when it did is a question worthy of investigation to which there may well be many answers.

II. FROM PUBLIC STATUS TOWARD PRIVATE CONTRACT

By 1975, all of the conditions logically necessary for aggressive promulgation of the economic terms of the marriage contract had been met in virtually all states.¹²⁷ Of those conditions, the ex ante utility of knowledge of those terms reveals the most about the law's conception of the marital relationship. In this Part, I elaborate on the earlier discussion¹²⁸ and demonstrate that the growth in the ex ante utility of that knowledge indicated a larger evolution from public status toward private contract in the law's conception of marriage. Thus, Louisiana's Benthamite promulgation legislation can be understood as explicitly acknowledging—and mandating that marriage license applicants be confronted with—the law's new conception of the marital relationship.

A. *The Traditional Conception of Marriage*

In its 1888 opinion in *Maynard v. Hill*,¹²⁹ the Supreme Court set out what it then considered to be the critical characteristics of marriage: (1) Marriage is founded upon the agreement of the parties;¹³⁰ (2) the terms of the marriage contract are determined by law and cannot be modified or changed by the parties;¹³¹ and (3) marriage is for life and the parties can neither agree nor contract to terminate it sooner.¹³² These attributes accurately captured the core of the law's conception of marriage from this country's beginnings until the enactment of no-fault divorce legislation.

Given these core characteristics, the marital relationship was highly public. To marry was not formally to acknowledge the existence of a personal, and unique relationship, but rather was to agree to live in a certain, State-specified way. Through prohibitions such as those against adultery and cruelty, which carried

127. The exceptions were the five states in which marital misconduct was still the sole basis for divorce: Illinois, Massachusetts, Mississippi, Pennsylvania, and South Dakota. See Freed, *supra* note 38, at 401. So long as a showing of "fault" was necessary to obtain a divorce, many of the necessary preconditions for Benthamite promulgation of the economic terms of the marriage contract were not met. See *supra* Part I.A.

128. See *supra* Part I.A.

129. 125 U.S. 190 (1888)

130. *Id.* at 210-11.

131. *Id.* at 211.

132. *Id.*

substantial indirect economic sanctions, the law dictated central aspects of the spouses' morality and interpersonal behavior.¹³³ In addition, the law mandated a gender-based economic relationship between the spouses: The husband was to support the wife financially and she, in turn, was to provide him "household services."¹³⁴ Once married, many of the spouses' larger decisions about how to live were expropriated by the State.¹³⁵ These State mandates, however, themselves embodied and were influenced by existing norms of spousal behavior.

Because marriage was expected to be, and largely was, for life,¹³⁶ divorce was not something for which one especially needed to, or was encouraged to, plan. Consistent with both the infrequency of marital dissolution and the constraints on spousal economic behavior provided by the terms of the marriage contract, the law portrayed divorce as requiring unfortunate ex post "allocation decisions" rather than as necessitating any ex ante economic contingency planning by the spouses.

The courts' treatment of the marriage contract in the context of retroactive or other laws that might impair its existing obligations further underscored both the public and peculiarly ex post aspects of the traditional marriage contract. Although the federal Constitution provides for the protection of citizens' contractual rights by prohibiting states from passing any "ex post facto Law, or Law impairing the Obligation of Contracts,"¹³⁷ the Supreme Court has long held that marital rights and obligations are not contractual rights within the meaning of this provision.¹³⁸ The perceived "specialness" of the marriage contract has

133. See, e.g., H. CLARK, JR., SECOND EDITION, *supra* note 26, at 496-510 and cases cited therein. For an insightful and comprehensive discussion of the historical evolution of moral thought and discourse in family law, see Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

134. See, e.g., H. CLARK, SECOND EDITION, *supra* note 26, at 250-58, 265, 286-303; Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 823 (1932); Crozier, *Marital Support*, 15 B.U.L. REV. 28 (1935); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956); Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421 (1925).

135. Social conditions, such as the few opportunities for women to work outside the home, were reflected in the terms of the marriage contract and otherwise served to constrain the spouses' decisionmaking.

136. See *supra* notes 34 & 76.

137. U.S. CONST. art. I, § 10.

138. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 210 (1888); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 628-29 (1819). See also, e.g., *In re Marriage of Walton*, 28 Cal. App. 3d 108, 112, 104 Cal. Rptr. 472, 475-76 (1972); *In re Marriage of Franks*, 189 Colo. 499, 506, 542 P.2d 845, 850-51 (1975); *Adams v. Palmer*, 51 Me. 480, 484-85 (1863); *Fearon v. Treanor*, 272 N.Y. 268, 271-73 5 N.E.2d 815, 816-17 (1936); *State v. Duket*, 90 Wis. 272, 276-77 63 N.W. 82, 84-85 (1895).

led courts to hold that state legislatures are free to alter the various laws that constitute the terms of the marriage contract and to have those changes apply even to ongoing marriages.¹³⁹ The courts have seemingly not been concerned that the parties to a marriage contract might have relied on its original terms in deciding to enter into the agreement or in their subsequent decisionmaking.

To justify these holdings, the courts have adverted first to the "substantial public interest" with which the marital relation is infused and which, they assert, mandates that it be subject to plenary control by the state legislatures.¹⁴⁰ Thus, the courts have determined that the marriage contract incorporates and contemplates not only the existing law, but also the reserve power of the state to amend the law and enact additional laws "for the public good."¹⁴¹

Second, the courts have focused on the allegedly "inchoate" nature of the interests affected by changes in the laws that constitute the marriage contract. The courts have considered many of the property and support rights growing out of the marriage relation as not vesting until the legal dissolution of that relation.¹⁴² Prior to vesting, they have considered such interests "expectancies," which therefore did not come within the protective ambit of article I, section 10 of the Constitution.¹⁴³

The laws determining jurisdiction upon divorce, and therefore also the state law to be applied, likewise underscored both the public and the peculiarly ex post aspects of the traditional marriage contract. Jurisdiction merely to end the marital status could be obtained in any state in which the plaintiff had been domiciled for a period ranging from six weeks to three years

139. See cases cited *supra* note 138.

140. See, e.g., *Maynard v. Hill*, 125 U.S. at 211, 213; *In re Marriage of Walton*, 28 Cal. App. 3d at 112, 104 Cal. Rptr. at 476; *In re Marriage of Franks*, 189 Colo. at 506, 542 P.2d at 850-51; *Fearon v. Treanor*, 272 N.Y. at 271-73, 5 N.E.2d at 816-17; *State v. Duket*, 90 Wis. at 276-77, 63 N.W. at 84-85.

141. See, e.g., *In re Marriage of Walton*, 28 Cal. App. 3d at 112, 104 Cal. Rptr. at 476-77; *In re Marriage of Franks*, 189 Colo. at 506, 542 P.2d at 850-51; *Fearon v. Treanor*, 272 N.Y. at 271-73, 5 N.E.2d at 816-17; *State v. Duket*, 90 Wis. at 276-77, 63 N.W. at 84-85.

142. See, e.g., *Baker's Executors v. Kilgore*, 145 U.S. 487, 489-91 (1891).

143. See, e.g., *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1850) "The contracts designed to be protected by [Art. I, § 10] are contracts by which *perfect rights, certain definite, fixed private rights* of property, are vested." (emphasis in original); *Baker's Executors v. Kilgore*, 145 U.S. at 489-91; *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) at 628-29.

before bringing the divorce action.¹⁴⁴ In order for a court to award maintenance or to divide the property of the parties upon divorce, however, personal jurisdiction over the defendant was necessary.¹⁴⁵ This could be obtained through "personal service in the jurisdiction, by substituted service in accordance with local rules if the defendant [was] a domiciliary, or as a result of the defendant's personal appearance, if such appearance subject[ed] him to the court's power under the local practice."¹⁴⁶

Thus, at the time of marriage, one could not know which state's law would govern the economic issues should one later divorce. Indeed, to the extent that the spousal support and property provisions of the marriage contract varied across states, reliable *ex ante* decision making by the spouses was nearly impossible because one could not know the substance of those provisions until jurisdiction had been established at the time of divorce. Insofar as the economic terms of the marriage contract were in fact substantially uniform across states, the laws governing divorce jurisdiction still formally contributed to the law's public and peculiarly *ex post* conception of the marriage contract prior to the enactment of no-fault legislation.

B. Toward a Conception of Marriage as a Private Contract

By 1975, as we have seen, the laws governing several aspects of marriage had evolved in a direction that substantially increased the *ex ante* utility of knowledge of the economic terms of the marriage contract.¹⁴⁷ At least four of those changes also indicated a shift in the law's conception of marriage from that of a public status, toward that of a private contract.

First, marriages were no longer presumed to be of life-long permanence but had become essentially terminable at the will of either spouse.¹⁴⁸ Second, "innocence" in the dissolution of the marriage was no longer a necessary precondition for an award of

144. See, e.g., IDAHO CODE § 32-701 (1983) (six weeks); CONN. GEN. STAT. § 46-15 (1958 & Supp. 1969) (three years—has since been reduced to 12 months, see CONN. GEN. STAT. § 46b-44 (1986)). See generally H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 285-86 (1968) [hereinafter H. CLARK, JR., *FIRST EDITION*]; H. CLARK, JR., *SECOND EDITION*, *supra* note 26, at 413-14.

145. See H. CLARK, JR., *FIRST EDITION*, *supra* note 144, at 314 & nn.1-4; H. CLARK, JR., *SECOND EDITION*, *supra* note 26, at 443 & n.1.

146. H. CLARK, JR., *FIRST EDITION*, *supra* note 144, at 314 & nn.1-3; H. CLARK, JR., *SECOND EDITION*, *supra* note 26, at 443-44 & nn.1-5.

147. See *supra* Part I.A.

148. See *supra* notes 36 & 37 and accompanying text.

post-divorce spousal support.¹⁴⁹ Third, the law no longer assigned the spouses economic roles upon marriage,¹⁵⁰ but instead explicitly accommodated pluralism in the structure of household economies: Two-career marriages as well as marriages in which *either* spouse was the primary wage-earner had achieved comparable legal legitimacy and social acceptability.¹⁵¹ Fourth, consistent with this pluralism, it was increasingly acceptable and possible for one to formalize one's own variation on the economic and other aspects of the marriage relationship through a written, enforceable contract.¹⁵² Through these four fundamental changes, many more "moral" and economic aspects of the spouses' lives became matters for their personal determination, rather than being dictated by the State. Marriage thus became a much less public and more private legal institution, able formally to accommodate broad variation in spousal behavior and preferences.

Simultaneously, marriage became a less assuredly permanent relationship and therefore more individualistic and less "communitarian" or "altruistic." The increased frequency of divorce made it more likely that each spouse would consider that eventuality when deciding both how to structure the wage-earning and homemaking components of the household economy and whether formally to contract about the post-divorce allocation of property and earnings. By taking the possibility of divorce into account in their decisionmaking, the spouses would acknowledge and reaffirm for themselves the fact that marriage is the uniting of two individuals who could at nearly any time regain that earlier status.

C. *The Import of Louisiana's Promulgation Action*

By requiring that all marriage license applicants receive information about the economic terms of the marriage contract, the Louisiana legislature did not change any of those terms. Nor did it in any way alter the conception of the marital relationship those terms embodied. By mandating aggressive promulgation, however, the legislature did, explicitly acknowledge—and confront potential spouses with—the law's new conception of mar-

149. See *supra* note 39 and accompanying text.

150. See *supra* note 134 and accompanying text.

151. See *supra* note 45 and accompanying text.

152. See *supra* notes 46 & 47 and accompanying text.

riage: a contract with important economic consequences, whose terms could be negotiated and formally altered by the spouses, and that could be unilaterally terminated by either spouse at virtually any time.

III. THE PERSISTENT ACCEPTABILITY OF FORMAL NOTICE

Since the enactment of the Louisiana legislation in 1975, the various conditions necessary for aggressive promulgation of the economic terms of the marriage contract have existed in every state.¹⁵³ No intervening changes in the pertinent substantive law or American society have reduced either the utility of knowledge, or the risks attending ignorance, of those terms. To cite just one example, the employment opportunities open to women have grown during the past 14 years,¹⁵⁴ increasing spouses' range of choices in structuring the economics of their household and simultaneously increasing the utility of knowledge of the economic terms of the marriage contract.

Nor is there reason to believe that the ordinary person is more knowledgeable about the law than she was in 1975. The only pertinent empirical study published since then, a 1984 survey of 422 California therapists,¹⁵⁵ found that virtually none (4%) knew what California common law requires them to do when pa-

153. For persons domiciled in the five states that had not enacted no-fault divorce laws as of 1975, knowledge of the economic terms of the marriage contract arguably had less *ex ante* utility than for persons domiciled in other states. By 1985, however, even Illinois, Massachusetts, Mississippi, Pennsylvania, and South Dakota had passed some form of no-fault law. ILL. ANN. STAT. ch. 40, para. 401(a)(2) (Smith-Hurd Supp. 1989) (effective July 1, 1984); MASS. GEN. L. ch. 208, § 1A (1988) (effective Jan. 1, 1976); MISS. CODE ANN. § 93-5-2 (Supp. 1989) (effective July 1, 1978); 23 PA. CONS. STAT. ANN. § 201(c) (Purdon Supp. 1989) (effective July 2, 1980); S.D. CODIFIED LAWS § 25-4-2(7) (Supp. 1989) (effective 1985).

154. Valid measures of employment "opportunities" are not easily obtained. Statistics, however, demonstrate women's greater participation in the workforce since 1975. Women's share of total employment has increased every year since 1947 with the single exception of 1953, when it declined a trivial two-tenths of a percentage point. From a share of 28% in 1947, it increased to 32% in 1957, 36% in 1967, 41% in 1977, and 45% in 1987. V. FUCHS, *supra* note 45, at 11-12.

Additionally, increasing numbers of women are employed in higher-level professional and managerial occupations. In 1960, only 6% of new lawyers, physicians, and Ph.D. recipients were women. By 1985, however, more than one-third of new entrants to those high-level jobs were women. More than two-thirds of this gain occurred after 1975. *Id.* at 14.

155. Questionnaires were sent to 2,875 therapists in eight cities including San Francisco and Los Angeles; 1,722 (59.5 percent) responded, of whom 422 practiced in California. Givelber, Bowers & Blich, *supra* note 56, at 455 n.49.

tients utter threats against third parties during therapy.¹⁵⁶ Thus, as recently as 1984, highly educated professionals were not particularly knowledgeable even about the law affecting their specialties.

It further seems unlikely that any substantial number of persons has since 1975 begun seeking legal advice at the time of first marriage. Consistent with the results of earlier studies,¹⁵⁷ a 1988 survey of 402 "New Yorkers" found that only 39% had used a lawyer in the five years immediately preceding the study, and only 27% had done so in connection with a personal matter.¹⁵⁸ Nor is there reason to believe that the various psychological and cognitive deterrents to acquiring knowledge of the economic terms of the marriage contract¹⁵⁹ have in any way been mitigated over the intervening 14 years.

Notwithstanding all of the above, no state has yet followed Louisiana's lead and aggressively promulgated the economic terms of the marriage contract. The unanimity of this failure is especially surprising when one considers that the marital statutes of virtually every state have long embodied the concern that individuals enter marriage intentionally and with an understanding of its seriousness and consequences. A marriage is usually considered legally voidable or void if either of the spouses at the time of marriage is below the "age of consent,"¹⁶⁰ under duress,¹⁶¹ intoxicated or under the influence of drugs,¹⁶² insane,¹⁶³

156. *Id.* at 465-68. Ninety-six percent of the California therapists surveyed had heard of the *Tarasoff* decision, which contains the pertinent common law rule. *Id.* at 457-59. Only 4% of those therapists, however, correctly understood the decision to require a therapist to use "reasonable care" to protect those whose physical well-being is threatened by a patient. *Id.* at 468. The remaining 96% of therapists familiar with the case misunderstood its holding as follows: only requires warning the victim (64%); requires warning the victim and using reasonable care (28%); requires neither warning the victim nor using reasonable care (4%). *Id.*

157. *See supra* text accompanying notes 62-69.

158. Kaplan, *Lawyers Get No Respect*, N.Y.L.J., May 23, 1988, at 1, col. 3, and at 4, col. 3. The New York survey did not inquire into the nature of the matter for which the attorney was consulted. Because the statistics for overall use of attorneys for a personal matter were comparable to those of earlier studies, one might expect a hierarchy of uses that is also comparable to those discussed *supra* text accompanying notes 62-69.

159. *See supra* Part I.C.

160. *See, e.g.*, VA. CODE ANN. § 20-45.1, 20-48, 20-49 (1983 & Supp. 1989) (enacted 1919); WASH. REV. CODE § 26.04.010 (1989) (enacted 1881).

161. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1506(a)(5) (1981) (enacted 1915); LA. CIV. CODE ANN. art. 93 (West Supp. 1989) (enacted 1870).

162. *See, e.g.*, MINN. STAT. ANN. § 518.02 (West Supp. 1990) (enacted 1858); 48 PA. CONS. STAT. tit. 48, § 1-5(g) (Purdon Supp. 1989) (enacted 1815).

163. *See, e.g.*, MISS. CODE ANN. § 93-7-3 (1972) (enacted 1942); W. VA. CODE § 48-2-2 (1986) (enacted 1849).

an "imbecile" or "idiot,"¹⁶⁴ or otherwise mentally deficient.¹⁶⁵ In some states it is unlawful for the clerk even to issue a marriage license if either of the parties appears at the time to be incapable of consenting.¹⁶⁶

The law, in sum, has long attempted to ensure that the parties to the marriage contract have the *capacity* to understand the terms of that agreement. Why, then, has no state but Louisiana taken the logical next step and maximized the likelihood that the parties also have a genuine *opportunity* to understand those terms at the time of marriage. What does this unanimous failure to provide marriage license applicants information about the economic terms of the marriage contract add to our understanding of the law's current conception of the marital relationship? What does that more complete conception add to our initial analysis of the costs and benefits of aggressive promulgation of the economic terms of the marriage contract?¹⁶⁷

In this Part, I propose three plausible explanations for that unanimous failure to act, each of which renders more complete and complex our description of the law's current conception of the marital relationship:¹⁶⁸ a desire to perpetuate the romantic ideal of marriage; a reluctance to acknowledge the increasing "privatization" of marriage; and a persistent ambivalence toward divorce.

A. *The Romantic Ideal of Marriage*

There is a great, if relatively modern, cultural tradition that marriage is primarily, if not exclusively, about love.¹⁶⁹ In two re-

164. See, e.g., R.I. GEN. LAWS § 15-1-5 (1988) (enacted 1896); W. VA. CODE § 48-2-2 (1986) (enacted 1849).

165. See, e.g., MINN. STAT. ANN. § 518.02 (West Supp. 1990) (enacted 1858); S.C. CODE ANN. § 20-1-10 (Law. Co-op. 1985) (enacted 1902).

166. See, e.g., MISS. CODE ANN. § 93-1-5(F) (1972 & Supp. 1988) (enacted 1930); 48 PA. CONS. STAT. tit. 48, § 1-5(d) (Purdon Supp. 1989) (enacted 1815).

167. See *supra* Part I.D.

168. In an earlier piece, Baker, "*I Think I Do*": *Another Perspective on Consent and the Law*, 16 LAW MED. & HEALTH CARE 256, 258-59 (Winter 1988), I propose another jurisprudential explanation for the lack of Benthamite promulgation of the economic terms of the marriage contract. That explanation, however, does not touch on the law's conception of the marital relationship.

169. For historical discussion of the development of the romantic ideal in courtship and marriage see, e.g., D. DE ROUGEMONT, *LOVE IN THE WESTERN WORLD* (1940); M. HUNT, *THE NATURAL HISTORY OF LOVE* (1959); K. LYSTRA, *SEARCHING THE HEART: WOMEN, MEN AND ROMANTIC LOVE IN 19TH CENTURY AMERICA* (1989). One of the earliest accounts of romantic courtship is A. CAPELLANUS, *THE ART OF COURTLY LOVE* (J. Parry trans. 1941), thought to have been written about 1180.

spects this romantic ideal might partially explain the states' uniform failure aggressively to promulgate the economic terms of the marriage contract.

First, shortly prior to marriage the spouses likely feel unusually romantic and optimistic about their relationship. Were the State to provide marriage license applicants information about the economic terms of the marriage contract, it risks violating the emotions of the moment. Instead, through its inaction, the State helps perpetuate an image of marriage as a thoroughly romantic "uniting in love," without requiring the spouses to acknowledge that marriage is also an economic partnership, the entering into of a contract with wide ranging economic consequences for the parties.

Second, the states' unanimous failure to provide spouses-to-be information about the economic terms of the marriage contract may represent a powerful underlying norm that such information *should not* play a role in certain life choices. We may not want a woman's decision whether to be a full-time homemaker and mother, for example, to be especially influenced by such seemingly crass and contingent economic considerations as what a maintenance award upon divorce is likely to be.¹⁷⁰ Rather, we may want her simply to do whatever her heart tells her, and hope that, in the event of a divorce, she finds the maintenance decision of the court acceptable.

Besides the perpetuation of a non-economic, romantic model of the marital relationship, it is not clear what anyone—the wife-to-be, her children, her spouse, society—gains from this type of "blind" choice.¹⁷¹ It seems implausible, for example, that a woman would be a less "good" mother if she were informed of the law and could, therefore, better evaluate in advance whether becoming a full-time homemaker would provide her sufficient long-term economic security in the event of divorce.

170. Other potentially affected decisions that we might also prefer be made without particular attention to this information include who, whether, and when to marry; when to have children and how many to have; and how long to stay out of the workplace after the birth of a child.

171. In some cases, of course, the spouse may nonetheless know the pertinent law and take it into account in his or her decisionmaking. As was shown above, however, *see supra* Part I.C., a spouse is unlikely to have, or to seek, knowledge of the pertinent law in the absence of state disclosure.

B. *Our Ambivalence Toward the "Privatizing" of Marriage*

A reluctance to emphasize or even acknowledge the increasingly nonpublic nature of marriage is a second plausible explanation for the states' unanimous failure aggressively to promulgate the economic terms of the marriage contract. At the root of this reluctance may be two more particular concerns.

First, were they to apprise spouses-to-be of the substance of those economic terms, as well as the possibility of privately contracting around them, the states might be viewed as contributing to, or even hastening, the extinction of the *public* institution of marriage. As the opportunities for private ordering within marriage expand and become increasingly known, potential spouses might increasingly see little reason to marry. If marriage no longer embodies a (life-long) commitment to adopt the particular economic and moral lifestyle specified by the State, and if commitment to the economic aspects of a couple's chosen lifestyle can be formalized through standard contracts, the public institution of marriage is reduced to a formalistic gesture.¹⁷²

Second, by informing the spouses of their option to contract around the economic provisions of the marriage contract, the states might be viewed as in fact encouraging such private ordering. One feared result of such "encouragement" might be a reduction in the perceived utility, and therefore also the frequency, of legal marriage. Further, because the uniformity of lifestyle that marriage once represented might be thought to have contributed to the stability of society as a whole, the "privatization" of marriage could be viewed as an undesirable, destabilizing force.¹⁷³

In sum, notwithstanding the increasing enforceability of spouses' private contracts regarding the economic consequences of divorce,¹⁷⁴ the states' failure to disclose to marriage license

172. Even as such, the legal institution of marriage is not without utility. At the very least, the need to secure a formal divorce provides a barrier to exit that may increase the duration, if not also the stability or happiness, of the spouses' relationship. In addition, the formal institution of marriage serves a further, formalistic function with regard to the "legitimacy" of the spouses' children.

173. See, e.g., M. GLENDON, *supra* note 20, at 104-11; SCHNEIDER, *supra* note 133. But see, e.g., L. WEITZMAN, *THE MARRIAGE CONTRACT* 227-54 (1981).

174. See *supra* note 46.

The Uniform Premarital Agreement Act (UPAA), 9B U.L.A. 369 (1987), approved in 1983 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, generally supports premarital contracts that address the property division and spousal support that would result in the event of a divorce. As of

applicants, and thereby to publicize, either the substance or the "default" nature of the economic terms of the marriage contract may indicate a deep ambivalence toward private ordering as an increasingly acceptable substitute for the once purely public institution of marriage.

C. *Our Ambivalence Toward Divorce*

A third plausible explanation for the states' unanimous failure thus far to engage in more Benthamite promulgation of the economic terms of the marriage contract is our general ambivalence toward divorce. The ease of obtaining a divorce, as well as the frequency and acceptability of doing so, has increased over time. We no longer attribute moral weakness or some personal failing to a spouse whose marriage ends through divorce rather than death. Indeed, it is virtually axiomatic that maximizing individual happiness was a major goal of no-fault divorce laws, which made possible the unilateral dissolution of any marriage that was no longer subjectively satisfying to either spouse.¹⁷⁵

In two respects, however, we may not yet be completely comfortable with these developments. First, they conflict sharply with the optimism with which most marriages still begin, the belief that at least this time marriage means love without end, until death us do part. Providing marriage license applicants information about both the substance and the "default" nature of the terms of the marriage contract concerning the economics of dissolution pointedly reminds them that the marriage upon which they are about to embark may well not last a lifetime.

Second, the states may wish to draw a clear line between removing certain barriers to divorce and taking an action that could be viewed as explicitly encouraging it. It was not so long ago that the courts unanimously considered per se void as a vio-

February 1989, it had been adopted by 13 states. 9B U.L.A. 13 (Supp. 1989).

The Uniform Marital Property Act (UMPA), 9A U.L.A. 97 (1987), also approved by the National Conference and the ABA in 1983, is quite similar to the UPAA. As of February 1989, it had been adopted only by Wisconsin. *Id.*

See also, e.g., H. CLARK, JR., SECOND EDITION, *supra* note 26, at 1-20.

175. See, e.g., M. GLENDON, *supra* note 20, at 104-11; L. WEITZMAN, *supra* note 39, at 22-26, 37-41, 374-77; Schneider, *supra* note 133, at 1847-48, 1852-55;. *But see*, e.g., H. JACOB, *supra* note 36, at 44-46.

Recently, Theodore Haas and Elizabeth Scott have argued that this goal may be more problematic than originally thought, and have proposed various contractual restrictions on divorce. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L.REV. 879 (1988); Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990).

lation of public policy antenuptial and other contracts between the spouses made "in contemplation of divorce."¹⁷⁶ The reasoning provided then, but no longer considered persuasive,¹⁷⁷ was that a contract made "in contemplation of divorce" in fact facilitated, and therefore "encouraged," divorce, in violation of the acknowledged State interest in the creation and perpetuation of marriages.¹⁷⁸

By not providing marriage license applicants information about either the laws governing the economics of marital dissolution or the possibility of privately contracting around those laws, the states may be avoiding an action that could be interpreted as encouraging divorce. They might thereby also be avoiding explicitly acknowledging, and possibly encouraging, the more individualistic conception of marriage implied in ex ante economic decision making by the spouses, including the decision privately to contract about the economic consequences of divorce.

IV. CONCLUSION

At least at present, no costless solution exists to the problem of how best to promulgate the marriage contract. The issue, rather, is which costs we prefer. Should the states continue to provide only formal notice of the economic terms of the marriage contract, spouses as well as those contemplating marriage will continue to make less informed decisions than they might have otherwise have made. As a result, many of those individuals will, upon divorce, face a substantial and unexpected decline in their economic condition, with its attendant "demoralization costs."¹⁷⁹

176. See, e.g., *Williams v. Williams*, 29 Ariz. 538, 544-45, 243 P. 402, 404 (1926); *In re Gudenkauf*, 204 N.W.2d 586, 587 (Iowa 1973); *Fincham v. Fincham*, 160 Kan. 683, 688, 165 P.2d 209, 213 (1946); *Matthews v. Matthews*, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968); *Crouch v. Crouch*, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (1964); *Fricke v. Fricke*, 257 Wis. 124, 129, 42 N.W.2d 500, 502 (1950); see also, e.g., L. WEITZMAN, *supra* note 167, at 338-44.

177. See *supra* note 46.

178. See *supra* note 170.

179. As used in legal scholarship, the term "demoralization costs" appears to have been coined by Professor Frank I. Michelman in his classic piece, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). Following Michelman, I use it here to mean both "(1) the dollar value necessary to offset disutilities which accrue to [litigants] and their sympathizers specifically from the realization" that the law as applied to their cases will not have the result that they expected; and "(2) the present capitalized dollar value of lost

Should the states choose finally to follow Louisiana's lead and engage in more Benthamite promulgation of the economic terms of the marriage contract, they will incur different costs. In addition to the greater expense of providing actual notice of such laws, citizens of those states will face the various direct and indirect "de-romanticization" costs attending such disclosure.

Given this formulation of the promulgation problem, it seems especially curious and noteworthy that nowhere in Bentham's extensive and engaging discussion¹⁸⁰ does he mention the costs of implementing any of his frequently elaborate promulgation proposals. Nor does he ever attempt to persuade the reader that the benefits of a particular proposal would exceed its costs. There is, in sum, little evidence of the utilitarian that we find elsewhere in Bentham's writings,¹⁸¹ and that he is (rightfully) considered.¹⁸²

For Bentham, a balancing of costs and benefits in the promulgation context was simply unnecessary because he believed the State had a straightforward, unmitigatable duty to provide its citizens actual, rather than merely formal, notice of the laws.¹⁸³ For us, however, the promulgation problem is more complicated. For we would weigh the costs to the State, as well as the result-

future production (reflecting either impaired incentives or social unrest) caused by demoralization by uncompensated [litigants], their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion." *Id.*

180. See citations to essays by Bentham *supra* notes 2 & 3.

181. The most notable of these is likely Chapter 1 of *An Introduction to the Principles of Morals and Legislation*, entitled "Of the Principle of Utility." 1 J. BENTHAM, *supra* note 2, at 1.

182. The *General Preface* to the Bowring edition of Bentham's collected works, for example, states:

[Bentham] met with Hume's Essays, and found in them what he sought—an unassailable central principle, from which he might sally on his quests after truth, and to which he might retire to recruit his powers by repose whenever he was baffled. *This was the principle of utility*, or, as he subsequently expressed it with more precision, the doctrine that the only test of the goodness of moral precepts or legislative enactments, is their tendency to promote the greatest possible happiness of the greatest possible number. Armed with this discovery, he applied it on all occasions, thereby at once directing himself to the truth, and establishing, by a multiplicity of experiments, the trustworthiness of his test.

General Preface, in 1 J. BENTHAM, *supra* note 2, at viii (emphasis added).

183.

To lodge and fix in *each man's* mind, that portion of the matter of law on which *his* fate is thus dependent—exists there that State, in which this operation is not among the most important duties of the government? Yet, where is the state, by the government of which any attention whatsoever appears to have been paid to it?

4 J. BENTHAM, *supra* note 3, at 481 (emphasis in original; footnote deleted); see also 1 J. BENTHAM, *supra* note 3, at 155-163.

ing social benefits, of providing actual notice of a law. And we, unlike Bentham, seem to believe that knowledge of the law, even taken alone, is not always and unambiguously better than ignorance. For sometimes that knowledge comes at the cost of dimming, if not entirely dispelling, our most precious ideals and cherished hopes. And that price is one we cannot always afford to pay.