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Essay

Friendage

The Honorable Edmund V. Ludwig*

At the end of the poignant British film “Four Weddings and a Funeral,” actors Hugh Grant and Andie MacDowell are standing in the rain, embracing. “Marriage and me,” he says to her, “are very clearly not meant for each other. Do you think after we lived and spent lots more time together, you might agree not to marry me?” Glistening and with a rapturous smile, she responds, “I do.”¹

In 1970, according to the Census Bureau, only one out of one hundred couples living together in the United States was unmarried.² Today, the ratio is more than six times larger, and an untold number of other couples are involved in some type of long-term relationship.³ A highway sign in front of a car repair shop reads

* Judge for the United States District Court for the Eastern District of Pennsylvania.

1. *Four Weddings and a Funeral* (Polygram-Rank 1994).

2. The number of unmarried couple households in the United States was 3.5 million in 1993, compared with 523,000 in 1970. See Bureau of the Census, U.S. Dep’t of Commerce, Current Population Reports, Series P-20, No. 478, Marital Status and Living Arrangements: March 1993, at IX, tbl. D (1993) [Marital Status Report]. An “unmarried-couple household” is composed of two unrelated adults of the opposite sex who share a housing unit with or without the presence of children under 15 years old. See *id.* at VII.

3. The “traditional family” of a working husband, a housewife and children is no longer the norm in the United States. See District of Columbia Commission on Domestic Partnership Benefits for D.C. Government Employees, 1 Final Report and Recommendations 7 (1990). The number of couples that cohabit without entering marriage has increased dramatically over the past 20 years, from 523,000 in 1970 to 3,308,000 in 1992. See Bureau of the Census, U.S. Dep’t of Commerce, Statistical Abstract of the United States 1993, at 54, tbl. 62 (113th ed. 1993). The classification of nontraditional families includes an increasing number of same-sex couples. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii held that, “although same-sex couples do not have a fundamental privacy

"Prevent Divorce. Don't Get Married!" Previously married court-battle scarred veterans are apt to say, "I finally learned how not to get divorced."⁴ The well-known astronomical rise in divorces in this country since World War II⁵ has had widespread societal effects,⁶ including the increasingly popular decision to eschew the rite of marriage.⁷

While the modern trend has been to favor no-fault divorce⁸ on the ground that a dysfunctional marriage is unjustifiable and fre-

right to marry under the Hawaii Constitution, the Hawaii marriage statute is presumptively unconstitutional because it creates a sex-based classification." Steven K. Homer, Note, *Against Marriage*, 29 Harv. C.R.-C.L. L. Rev. 505, 507 (1994) (summarizing *Baehr*, 852 P.2d 44).

4. It is speculated that divorce has replaced death as the most frequent terminator of marriage. See Lawrence Stone, *The Family, Sex, and Marriage in England 1500-1800* 55 (1977). In common law England, the average marriage lasted 20 years. The main causes of termination were death, illness and desertion. Admittedly, today's longer life-spans and better record-keeping have had an effect on marriage/divorce statistics. See *id.* at 46; Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. Colo. L. Rev. 1223, 1224 (1993).

5. The divorce rate for non-first marriages now exceeds 50%. Approximately half of all marriages end in divorce, and the ratio for non-first marriages is even higher. According to divorce researchers Frank F. Furstenburg, Jr. and Andrew J. Cherlin, 15% of all children of divorced families will see their custodial parent remarry and re-divorce before reaching age 18. See Susan Chira, *Struggling to Find Stability When Divorce is a Pattern*, N.Y. Times, Mar. 19, 1995, at 42, available in LEXIS, News Library, Arcnws File. In 1987, there were 9.9 marriages and 4.8 divorces per 1000 persons in the United States, or nearly one divorce for every two marriages. See Zelig, *supra* note 4, at 1223 n.1 (citing U.S. Dep't of Health and Human Services, 3 Vital Statistics of the United States: Marriage and Divorce tbl. 1-1, at 1-5 & tbl. 2-1, at 2-5 (1987)).

6. Some politicians implicate the "breakdown of the family" as the catalyst for society's ills. See Diana Hochstedt Butler, *Romanticizing the Family*, Baltimore Sun, May 26, 1995, at 19A, available in 1995 WL 2444258.

7. Since 1970, the number of unmarried couple households has grown from 523,000 to 3.5 million. See Marital Status Report, *supra* note 2, at VIII. Changing sexual mores with respect to premarital relationships has been the main cause of this steady increase in cohabitating unmarried couples over the past 30 years. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 54 n.119 (1990).

8. The trend towards no-fault divorce recognized that many of the "fault" grounds for divorce were in reality the symptoms of an irreparable breakdown of the marital relationship. See Joyce Hens Green et al., *Dissolution of Marriage* §2.12, at 83 (1986); Max Rheinstein, *Marriage Stability, Divorce, and the Law* (1972); John S. Bradway, *The Myth of the Innocent Spouse*, 11 Tul. L. Rev. 377, 389 (1937) ("The legislature has declared certain causes for divorce. The medical profession, the social workers, the psychiatrists, dealing with families, report that the legislative 'causes' of divorce are only *symptoms*; that the real causes are such matters as unemployment, ill health, lack of self control, jealousy, selfishness."). To-

quently harmful,⁹ the psychological, social and economic wreckage that can result from marital breakups is undeniably gargantuan.¹⁰ Rejected spouses and conflicted children will never be the same and may need hurtful years just to regroup and start over again.¹¹ Industriosly accumulated family nest eggs are sucked down the familiar drain of lawyers, accountants and mental health professionals.¹²

day, marriage is the functional equivalent of a contract terminable at the will of either party. See Scott, *supra* note 7, at 17. Most no-fault divorce statutes require the complainant spouse to allege the irretrievable disrepair of the marriage. However, the practical effect of the no-fault system is to grant either spouse a unilateral "right to divorce." *Id.* at 17 n.23; see also Ira M. Ellman et al., *Family Law* 203 (1986).

9. It is well-known that children regularly confronted with hostility and anger between their parents may suffer psychological harm. Studies claim that children in single-parent homes with a low level of conflict achieve better adjustment than children in homes comprised of intact families with a high level of conflict. See Scott, *supra* note 7, at 32 & n.72; Edythe S. Ellison, *Issues Concerning Parental Harmony and Children's Psychosocial Adjustment*, 53 *Am. J. Orthopsychiatry* 73 (1973); Robert E. Emery & K. Daniel O'Leary, *Children's Perceptions of Marital Discord and Behavior Problems of Boys and Girls*, 10 *J. Abnormal Child Psychol.* 11 (1982).

10. The process of going through a divorce is psychologically costly for children as well as for the estranged parents. See generally Robert E. Emery, *Marriage, Divorce and Children's Adjustment* (1988) (reviewing clinical findings regarding the impact of divorce upon children). In a study of fifth and sixth-graders in two midwestern cities published last year, Professors Lawrence A. Kurdek, Mark A. Fine and Ronald J. Sinclair noted that children who experience repeated divorces earn lower grades and lower approval ratings from their peers. See Chira, *supra* note 5. See also Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 *UCLA L. Rev.* 1181 (1981), for a comprehensive study of the economic impact of no-fault divorce on all family members.

11. See Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Series P-70, No. 23, Family Disruption and Economic Hardship: The Short-Run Picture for Children* (1991). In 1991, in a nationwide study of 1243 people tracked since 1980, Paul R. Amato of the University of Nebraska and Alan Booth of Pennsylvania State University found that those subjects who experienced multiple divorces reported comparatively higher levels of anxiety and depression as adults and a higher incidence of troubled marriages and divorce rates. See Chira, *supra* note 5, at 42.

12. Public costs, such as the use of court facilities, judicial salaries and court administration, add to the universe of private litigation expense. However, legal dissolution is a relatively small part of the economic impact of divorce. Divorce dramatically affects the living standards of children, particularly those in their mother's primary custody. One researcher reported that mothers average a 73% decline in their disposable income, while fathers experience a 42% increase after divorce. See Weitzman, *supra* note 10, at 1251.

The not-so-long-ago stigma of divorce has been largely dissipated by the immense increase in volume.¹³ Since the advent of no-fault divorce, the nation's divorce rate has soared over thirty percent to the point where nearly half of all marriages now dissolve.¹⁴ Some scholars attribute the epidemic proportions of divorce to a shift in cultural norms.¹⁵ But the acute and residual bitterness, together with the painful and costly destruction wrought by divorce, is a lesson indelibly visited on the parties and their progeny.¹⁶ No wonder an alternative to marriage—such as just not getting married—should seem to be attractive.

Marriage poses interpersonal dynamics problems as well. There is the cliché that “[n]othing ruins a nice friendship so quickly and easily.” The state's regulation of marriage and divorce, as well as the religious sacrament, was intended to protect the dependent wife and, in turn, the children.¹⁷ Men were the

13. “The most striking change in this area of family relations is, of course, the lessened social stigma attached to divorce At the turn of the century almost everyone who divorced was viewed as having lost respectability to some extent, and from many circles the divorcee was excluded.” William J. Goode, *World Revolution and Family Patterns* 81 (1963); see also Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Cal. L. Rev. 1169, 1203 n.152 (1974) (arguing that society now accepts divorce as “normal”).

14. In 1970, approximately one out of every three marriages ended in divorce. Between 1970 and 1990, the period during which no-fault divorce became the norm in every state, the divorce rate jumped by 34%. See *Louisiana To Make Some Matrimony Bonds Tighter: “Covenant Marriage” First Legislative Success for Pro-Family Activists*, *The Milwaukee J. Sentinel*, June 25, 1997, at 8, available in 1997 WL 4805559.

15. One writer asserts that marriage is now viewed by many as a “nonbinding commitment.” Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1810 (1985). The widespread acceptance of no-fault divorce exemplifies the “doctrine of nonbinding commitments.” *Id.* (citing Nena & George O’Neill, quoted in Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (1978)). Ergo, a marriage should be sustained only if it “works,” attributing the increase in divorce to changed societal attitudes. See *id.* at 1842. Schneider argues that the primary motivating force of individuals in modern society has become self-realization and personal well-being, rather than fulfillment of moral and religious duty. See *id.* at 1845.

16. See *supra* note 10 and accompanying text.

17. In the early Middle Ages, marriage implied a private contract between two families that included a property exchange and provided some financial protection to the bride in the event of the death of her husband, or his desertion. See Stone, *supra* note 4, at 30-31. Under common law in England, numerous legal restraints were placed upon married women. Upon marriage, the wife's personal property and possessions became the property of her husband and upon his death passed to

bread-winners and the movers-and-shakers; women raised families.¹⁸ With the advent of egalitarian feminism and the political and economic emergence of women,¹⁹ the age-old idea of female dependency became subservient to partnership equality.²⁰

Yet, the legal status of marriage and the difficulties of resolving the issues of divorce—alimony, support, child custody, division of property and counsel fees—may shift the balance of psychological power in the marital relationship and produce untoward and

his personal representatives. A husband was entitled to his wife's wages. If a married couple separated, then the husband would gain custody of the children. Also, a woman could not contract in her own name, either with her husband or with third parties. See Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* §8.1, at 499-500 (2d ed. 1988). The inferior legal position of women was remedied by the passage of the Married Women's Property Acts, the first of which was enacted in 1839 in Mississippi. See Leo Kanowitz, *Women and the Law: The Unfinished Revolution* 40 (1969); Weitzman, *supra* note 13.

18. Blackstone noted: "By marriage, the husband and wife are one person in law . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 William Blackstone, *Commentaries* *442. Under the common law doctrine of coverture, the husband and wife merged into a single legal identity, that of the husband. The traditional roles of husband and wife assumed that the husband was solely responsible for support of the family. See *id.*; see also, e.g., *Carlson v. Carlson*, 256 P.2d 249, 250 (Ariz. 1953) ("The law imposes upon the husband the burden and obligation of the support, maintenance and care of the family and almost of necessity he must have the right of choice of the situs of the home.").

19. Married women now constitute 60% of the female labor force. See *Employment Standards Admin., U.S. Dep't of Labor, Women Workers Today* 2 (1971). Over 20 million married women work and contribute to the support of their families. See *Bureau of the Census, U.S. Dep't of Commerce, The Statistical Abstract of the U.S.* 222-23 (1974). According to one author, husbands are the dominant bread-winners in less than 50% of blue-collar marriages, producing an egalitarian gender ethic in most of those families. See Mirra Komarovsky, *Blue-Collar Marriage* 223 (1964).

20. Several courts, dissatisfied with the inherent inequities in the traditional common law concepts of marital property, now view marriage as an economic partnership. See John De Witt Gregory et al., *Understanding Family Law* §3.08, at 64-65 (1993) (noting a trend towards this economic partnership view). This concept, based on principles of shared ownership of property during marriage, is embedded in community property law and is incorporated into the Uniform Marital Property Act. It has influenced the development of equitable distribution of property in common law states, although these states still retain the principle of individual property rights. See *id.*; see also *Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women* (1963) (concluding that during marriage each spouse should have a legal right to the earnings of the other spouse, including property purchased from their earnings, and such a right should continue to be legally recognized in the event of annulment, divorce or death), quoted in *Prefatory Note, Unif. Marital Property Act*, 9A U.L.A. 97 (1987).

unanticipated consequences. There is the story about the affluent husband who wanted to give his wife a special present for her 50th birthday—"A big party? A five-carat diamond ring? A trip around the world?" he asked. "No, I don't think so," she said. "I want a divorce!" "Oh," he said, "I couldn't afford anything that expensive." And the more commonplace sequelae is the loss of romance and the decrease in regard for one's mate, if not oneself, that can degenerate into desperate boredom and distastefulness, and much worse. Marriage can turn into bondage.

Divorce as a panacea may engender as many problems as it resolves, as evidenced both historically and by recent developments in family law. Until this century, divorce was uncommon.²¹ Viewing marriage as a permanent union, the courts granted a divorce only upon proof of certain legislatively defined transgressions or incapacities.²² Restive societal changes began with World War I and were accelerated by World War II. Couples, with the guidance of counsel, learned how to manipulate the fault-based divorce system by perjuring themselves or colluding in order to obtain marital freedom.²³ As society began to regard marriage as a partnership between individuals, the movement in favor of no-fault divorce gained momentum.²⁴ Between 1969 and 1985, all of the states had enacted no-fault divorce laws.²⁵

Advocates of no-fault divorce argued that, by removing fault as an obstacle to consensual divorce, the law was brought into conformity with practice.²⁶ However, the no-fault system proved to be

21. See Scott, *supra* note 7, at 15.

22. For example, in 1822, Rhode Island granted a divorce for "impotency, adultery, extreme cruelty, wilful desertion for five years . . . [or] neglect or refusal . . . of the husband, being of sufficient ability, to provide necessaries for the subsistence of his wife." Rev. Stats. R.I., 368-69 (1822) (current version at R.I. Gen. Laws §15-5-2 (1956) (1996 Reenactment)).

23. The fault-based divorce laws required couples to prove that one party was innocent while the other was guilty. In order to satisfy the law's strictures, one spouse would often testify falsely to create an appearance of the other's fault. See Zelig, *supra* note 4, at 1225.

24. See Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 Stan. L. Rev. 607, 613 (1997).

25. See *id.* at 614. See generally Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *Divorce Reform at the Crossroads* (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

26. See Bradford, *supra* note 24. In the 1960s, courts granted 90% of all divorces based on a fault ground without contest, and hearings were brief and perfunctory. For example, it was reported that in New York the proceeding had

no less problematic than its predecessor. Critics allege that it has had catastrophic effects on women and children. In tandem with the no-fault movement, many states adopted equitable distribution statutes,²⁷ designed to treat spouses as legal partners.²⁸ However, this mechanism, which calls for a division of the parties' marital property upon divorce,²⁹ tends to penalize the spouse—still almost always the wife in a long-term marriage—who has foregone a professional degree or career to care for the family.³⁰ Typically, the “dependent” spouse has not developed marketable skills during child-rearing years. Furthermore, there continues to be an earnings inequality in the workplace.³¹ The combination of these factors usually leaves the “dependent” spouse at a considerable economic disadvantage during and after the dissolution of the marriage.³²

become such a formality that the average divorce hearing rarely lasted more than 15 minutes. See Scott, *supra* note 7, at 16 n.18.

27. See Diane Green Smith, Note, *Til Success Do Us Part: How Illinois Promotes Inequities in Property Distribution Pursuant to Divorce by Excluding Professional Goodwill*, 26 J. Marshall L. Rev. 147, 157 (1992).

28. The goal of equitable distribution is to distribute marital property upon divorce in an equal manner, regardless of who holds title. See Joseph W. McKnight, *Defining Property Subject to Division at Divorce*, 23 Fam. L.Q. 193, 201-05 (1989).

29. See *In re Marriage of Lee*, 398 N.E.2d 126, 133 (Ill. App. Ct. 1979); *In re Marriage of Slauson*, 562 P.2d 604, 607 (Or. Ct. App. 1977); see also Robert J. Levy, *An Introduction to Divorce Property Issues*, 23 Fam. L.Q. 147, 151-52 (1989).

30. Some courts have recognized services as a homemaker as economic contributions. See, e.g., *In re Marriage of Aschwanden*, 411 N.E.2d 238, 242 (Ill. App. Ct. 1979) (holding that the wife's contributions as a homemaker are a factor in the division of marital property). However, most courts are unwilling to include intangible property (e.g., professional degrees or enhanced earning capacity) as part of the marital estate subject to division. See Bradford, *supra* note 24, at 616; see also, e.g., *In re Marriage of Zells*, 572 N.E.2d 944 (Ill. 1991) (holding that a business interest is not part of marital property subject to distribution if it consists of professional goodwill).

31. In a recent Census Report, the average weekly salary of a white male was \$497, while that of white females was \$243. The average weekly salary of a black male was \$339, while that of black females was \$205. See Bureau of the Census, United States Dep't of Commerce, Statistical Abstract of the United States 410 (1990).

32. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. Cin. L. Rev. 1, 20-21 (1987). One writer states that over half of all women who were former homemakers earn incomes at or below poverty level. See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnerships Buyouts and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67, 79 (1993).

In response to dissatisfaction with the no-fault system, at least nine states are considering proposals to repeal or modify their divorce laws.³³ In July 1997, the Louisiana legislature adopted a law re-establishing a more binding form of marital status, one that permits divorce only in narrow circumstances such as adultery, abuse, abandonment, a lengthy marital separation or imprisonment for a felony.³⁴ This status, known as "covenant marriage," is not subject to no-fault divorce. Its proponents hope that it will make wedding vows more meaningful and divorce less likely.³⁵ Requirements for termination mirror the once prevalent fault-based laws. While the strengthening of marriage and return to fault-based divorce may be viewed as a commendable development,³⁶ it is also bound to be controversial, and will no doubt foment an increased antipathy to marriage. Given the number of couples who have already chosen the avoidance of marriage as a

33. See Bradford, *supra* note 24, at 636 n.91 (stating that Georgia, Idaho, Illinois, Kentucky, Minnesota, Pennsylvania, Virginia, Washington and West Virginia are considering legislation which would repeal no-fault divorce, while the state legislatures in Alaska, Iowa and Maryland are considering other divorce impediments). In Michigan, State Representative Jessie Dalman has proposed a series of bills designed to strengthen the institution of marriage. Representative Dalman's scheme would make it harder both to get married and to obtain a divorce. See *id.* at 618-19. Couples seeking a marriage license would have to complete a program in premarital counseling or wait 30 days and pay an extra \$80 for the marriage license. Fault requirements would apply to spouses unilaterally seeking a divorce. All divorcing couples with children would face additional restrictions. See Michael J. McManus, *State of the Union Laws Need a Complete Overhaul*, Fort Worth Star-Telegram, Feb. 18, 1996, at 8, available in 1996 WL 5523667.

34. Couples choosing a covenant marriage pledge to enter upon matrimony only after serious consideration. They agree to try to resolve potential marital conflicts through counseling if either spouse requests it and to seek divorce only by a mutually agreed upon two-year separation or under other limited circumstances. See Amitai Etzioni, *Marriage Covenant Allows Couples to Reject Too-Easy Divorce*, St. Louis Post-Dispatch, Aug. 20, 1997, at 7B, available in 1997 WL 3361116.

35. See Jon Jeter, *Upping the Marriage Ante: Louisiana Covenant Marriage Option Makes Breaking Up Much Harder to Do*, Pittsburgh Post-Gazette, Aug. 17, 1997, available in 1997 WL 11839574.

36. Louisiana State Representative Tony Perkins, the sponsor of the covenant marriage legislation, in a national television appearance, stated that "[t]he first thing we're trying to do is to kind of turn the culture of divorce that has been created over the last 25 years to a culture of marriage." See CBS *This Morning* (CBS television broadcast, July 7, 1997), available in 1997 WL 5627539.

societal arrangement, it is worthwhile to explore that alternative further, amorphous as it may be at the present time.³⁷

From almost every standpoint, coupling without marriage is a dimly lit, uncertain relationship.³⁸ The question voiced by Hugh Grant—"Would you "agree not to marry me?"³⁹—leaves open a huge unstructured set of legal, economic and psychological possibilities.⁴⁰ Thinking about it leads into areas of the law such as partnership and joint ventures.⁴¹ Also, like "Marriage," it needs its own name: "Friendage."⁴²

As defined for hundreds of years, a legal partnership is created when persons put together their money, goods, labor and skill to carry on an enterprise in which there is a community of interest.⁴³

37. In the 1960s, when it became obsolete, the fault system was believed by many to be out of step with modern family life. The Archbishop of Canterbury's Group, for example, noted that divorce based on fault "no longer represented wise legal or social policy." Kay, *supra* note 25, at 7.

38. Common-law marriage is a nonceremonially-created status that requires a "positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations." Black's Law Dictionary 277 (6th ed. 1990). Currently, only 13 states and the District of Columbia recognize common-law marriages. See 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* §2.4, at 101 (2d ed. 1987). When faced with disputes arising out of informal relationships, courts have taken a "functional" approach. See Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164, 1169 (1992). The courts examine the characteristics of a particular relationship and attempt to protect the reasonable expectations of the parties. See *id.*

39. *Supra* note 1 and accompanying text.

40. See William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 La. L. Rev. 1677 (1984); Joel E. Smith, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 3 A.L.R.4th 13 (1981).

41. "[O]ur society has undergone profound transformations in the past century, and the long-standing legal structure of marriage may now be anachronistic. The state's interest in preserving the traditional family may not be important enough to offset new societal and individual needs which require more flexibility and choice in family forms." Weitzman, *supra* note 13, at 1170.

42. At present, the law refers to unmarried coupling by the somewhat pejorative rubric of "cohabitation"—and to the parties as "cohabitants." See *supra* note 38. Since labels can be important, the neologism of "Friendage" is suggested as an attractive correlative of "Marriage."

43. A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." Unif. Partnership Act §6 (amended 1994), 6 U.L.A. 256 (1995). The official comment to the Uniform Partnership Act states: "Ownership involves the power of ultimate control. To state that partners are co-

Ordinarily, such a partnership is commercial and is focused on economic profit. A joint venture is a form of partnership, usually arranged for a limited purpose.⁴⁴ Like any contract, a partnership agreement need not be in writing but a written agreement is highly desirable. It forces the parties to think conscientiously about their relationship and is much clearer and easier to prove than conversation. It should contain provisions on the nature of the relationship, the parties' contributions, their rights and duties, the term of the partnership, dispute resolution and dissolution—as well as any other pertinent areas.⁴⁵ So long as the means and objectives do not violate public policy, no impediment exists which would prevent two persons from joining together in a social partnership.⁴⁶

Friendage agreements should resemble business partnership agreements—and to a substantial extent would be just as enforceable in a court of law. All of the important areas of the friendage relationship could be covered. Ante-nuptial agreements are well-known in the law but have usually been confined to property mat-

owners of a business is to state that they each have the power of ultimate control." *Id.* cmt. (1); see also Harold G. Reuschlin & William A. Gregory, *The Law of Agency and Partnership* §175, at 250 (1990).

44. See Restatement (Second) of Torts §491 cmt. c (1965) (defining the concept of joint enterprise through the use of four elements: (1) an agreement, express or implied; (2) a common purpose; (3) a pecuniary purpose; and (4) an equal right of control); see also Walter H. E. Jaeger, *Partnership or Joint Venture?*, 37 *Notre Dame Law* 138 (1961) (discussing the circumstances under which certain business associations are considered either joint ventures or partnerships). See generally Walter H. E. Jaeger, *Joint Ventures: Membership, Types and Termination*, 9 *Am. U. L. Rev.* 111 (1960) (examining the rights and duties of the participants in a joint venture; the necessity of a contract between the joining parties; the various formations of the joint venture; and under what circumstances it will be terminated).

45. The benefits of a clearly defined agreement that outlined the duties of the spouses during marriage and provided for the disposition of their property upon death or divorce were recognized by well-to-do British families in the seventeenth century, when marriage contracts were the rule. See Stone, *supra* note 4, at 30-31.

46. At common law, a partnership agreement between a husband and wife was invalid because of the woman's lack of contractual capacity. See, e.g., *In re Bowles*, 15 F. Supp. 353 (E.D. Ky. 1936) (holding that the wife, while married, lacked the ability to contract with her husband). However, in the wake of statutes that enlarged the rights of women, several courts have upheld the validity of partnership agreements between a husband and wife. See Ian F.G. Baxter, *Marital Property* §37:1-:2, 589-91 (1973). For example, in a Pennsylvania case, the court stated: "There can be no doubt that under existing law in this state a husband and wife may be partners in a business. Any previously existing incapacity of a married woman to contract in this respect has been removed by statute." *Northampton Brewery Corp. v. Lande*, 10 A.2d 583, 584 (Pa. Super. 1939).

ters where an economic disparity and often an age difference exists between the parties.⁴⁷ At one time, courts refused to enforce contractual provisions regarding future support obligations,⁴⁸ and they are still reluctant to implement provisions that regulate an ongoing marriage.⁴⁹ Judicial reticence in this area arose as the consequence of societal notions of the traditional family.⁵⁰ While marriage is an ancient institution, friendage entails the making of a private agreement based on open communication and rational decisionmaking. The parties to a friendage agreement, having carefully negotiated its terms, would anticipate being bound by them. Provisions in a friendage agreement could encompass a

47. Agreements made by married couples providing for property division, support obligations or child custody in the event of divorce usually are enforceable if made after the couple has decided to separate. *See, e.g., Graham v. Graham*, 33 F. Supp. 936, 940 (E.D. Mich. 1940). Until recently, such agreements made prior to or during marriage, when the couple had no intention of separating, have generally been held unenforceable. *See Weitzman, supra* note 13, at 1263; *cf. Restatement of Contracts* § 586 (1932) ("A bargain to obtain a divorce or the effect of which is to facilitate a divorce is illegal."). *See generally* Charles W. Gamble, *The Antenuptial Contract*, 26 U. Miami L. Rev. 692 (1972) (advocating increased use and enforcement of antenuptial contracts); Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. Colo. L. Rev. 141 (1979) (same).

48. Courts usually treat premarital contracts differently from ordinary contracts for three reasons: (1) their unusual subject matter, (2) the confidential relationship of the parties to the agreement and (3) the possibility of enforcement in the distant future. *See* Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 Rutgers L. Rev. 1059, 1061 (1988). In 1983, the National Conference of Commissioners on Uniform State Laws approved the Uniform Premarital Agreement Act in order to clarify existing law. *See* Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 Wake Forest L. Rev. 1037, 1038 (1993).

49. Judges were concerned that "interference" during an ongoing marriage may exacerbate conflict between the parties, give rise to difficult enforcement problems and frustrate judicial economy. *See* Graham, *supra* note 48, at 1043; Clark, *supra* note 47, at 161.

50. *See* Graham, *supra* note 48, at 1040. The fictional unity of husband and wife at common law produced barriers to premarital contracts. As the "head of the household," *id.* at 1041 & n.33 (quoting William Blackstone, Commentaries 445 (1813)), a husband was obligated to provide for his family. Therefore, courts would not enforce premarital agreement provisions that attempted to alter or eliminate the support obligations of the parties. In addition, a wife was obligated to render "services in the home" without compensation. *Id.* (quoting Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L.J. 558, 567 (1974)). Courts invalidated agreements to the contrary on public policy grounds. *See, e.g., Ritchie v. White*, 35 S.E.2d 414 (N.C. 1945) (holding that the public policy of the state imposed a duty of support on the husband).

wide variety of subject matters, without having to deal with many of the historical public policy issues that encumbered premarital agreements.

A friendage agreement should be comprehensive, and its formation would best be facilitated by a professional with legal and perhaps family therapy credentials. The parties to the agreement could provide for careers, children, lifestyles, as well as economics and a myriad of other issues after thoughtful and sensitive consideration. In contrast to what happens when anger and mistrust have tyrannized the relationship, good sense has a much better chance at the outset while good feelings and a desire to reach agreement prevail.⁵¹

Essential to the idea of friendage is thoughtful planning for the future. One law and psychology professor, Elizabeth S. Scott, advocates the use of "precommitment strategies" as a self-management technique for partners considering a long-term relationship.⁵² She hypothesizes that parties in a long-term relationship, at least implicitly, share a mutual goal—to maintain that union.⁵³ Given that frequent short-term pressures and strains may debilitate even a robust relationship, she recommends the use of precommitment planning to help the parties achieve their long-term goals.⁵⁴ Some of her suggestions are economic sanctions for re-

51. Psychologists emphasize the importance of communication in marriage, which would apply with equal vigor to friendage. See Patricia Noller, *A Longitudinal Study of Conflict in Early Marriage*, 11 *J. Soc. & Pers. Relationships* 233, 249-50 (1994). The need for a pragmatic approach is also essential to a lasting relationship.

Perhaps one of the clearest requirements for a successful romantic relationship is that it be based on a foundation of realism. This is the ability and willingness to see our partner as he or she is, with shortcomings as well as virtues, rather than attempting to carry on a romance with a fantasy.

Nathaniel Branden, *The Psychology of Romantic Love: What Love Is, Why Love Is Born, Why It Sometimes Grows, Why It Sometimes Dies* 131 (1980).

52. See Scott, *supra* note 7, at 40-44; see also R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 *Rev. Econ. Stud.* 165 (1955-56).

53. See Scott, *supra* note 7, at 42 (recommending the use of precommitment planning to preclude future options that reflect short-term preferences). Precommitment planning strategy acknowledges the reality that stresses, such as career conflicts over children and lifestyles, and changing interests and pursuits, may threaten the stability of a long-term relationship. See *id.*

54. See *id.* at 43. Professor Scott also recommends informal arrangements. "[T]hey may agree to rules against [destabilizing] behavior . . . (flirting, adultery), [or to] rules promoting resolution of problems (never go to bed angry)." *Id.*

proachable conduct, mandatory "cooling off" periods and, where marriage is contemplated, a comprehensive prenuptial agreement. These strategies encourage careful decision-making about entering into a long-term relationship, and foster cooperative behavior thereafter.⁵⁵ As a fundamental approach to friendage, the parties should agree on their substantive goals and the procedures for dispute resolution.

As between the parties, marriage in the law is a contract made by the exchange of statements of intention in the present tense;⁵⁶ however, marriage differs from most contractual arrangements in that it is a status governed by state statute.⁵⁷ Ordinarily, the parties are oblivious to the contractual nature of their commitment.⁵⁸ In contrast—and in lieu of the generic and numbly taken vows of ceremonial marriage—the friendage agreement would be the result of heartfelt and head-reasoned negotiation.⁵⁹ The institution of marriage could also greatly benefit from such an enlightened and analytical precommitment process.⁶⁰

55. A mandatory delay would discourage impulsive decision-making and allow an opportunity for reconciliation. *See id.* at 44.

56. *See, e.g.,* *Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich. 1940) ("[M]arriage is not merely a private contract between the parties, but creates a status in which the state is vitally interested and under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties.").

57. *See* Weitzman, *supra* note 13, at 1170.

58. The idea of a contract within marriage will strike many as incongruous, for marriage is typically thought of as the most intimate and private social relationship, while a contract is typically regarded as the prototype of rational business transactions. And yet, upon closer examination, it will become clear that there is an implicit contract that governs every marriage—an unwritten contract that is imposed by law.

Lenore J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* xv (1981).

59. Similarly, one of the major benefits of negotiating a prenuptial agreement is that the parties are compelled to think about the potential sources of disagreement before, rather than after, the fact. *See* Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 *Stan. L. Rev.* 887, 895 (1997); Judith Schoolman, *Advice for Newlyweds: Keep Some Finances Single*, *Reuter's Bus. Rep.*, Feb. 25, 1994, available in LEXIS, News Library, Arcnws File.

60. Advocates of prenuptial agreements argue that the process of negotiating before entering marriage can save the couple from a disastrous breakup. *See* Marston, *supra* note 59, at 894. Contracts require the parties to think about the obligations they are about to undertake before they become spouses or parents. *See* Weitzman, *supra* note 58, at 353. Moreover, there is less room for misunderstanding when each other's expectations have been discussed and reduced to a written agreement. *See id.* Many agencies, such as the Catholic and Episcopal churches,

Another area of the law offers a further analogy, the law of property. In the usual marriage ceremony, the words "until death do us part" have a hollow, almost cruel ring, given the statistics to the contrary.⁶¹ The ceremonial implication is that of fee simple ownership, and one of the stereotypical complaints about marriage is, "He thinks he owns me," or "She now owns everything we have!"⁶² It is almost as though the professed charade of permanency is a counter-productive self-fulfilling prophecy of divorce—a forbidden fruit, as it were, which tempts or impels one or both spouses.

In this era of increasing transience, both in time and geography, it may be much more realistic to utilize the law of leasing. A term of years, with renewal options, might accentuate the parties' attention span and alert them to each other's and their own needs.⁶³ And if, as it happens, the needs of one or both change so drastically that their friendage must come to an end, then the psychological and economic devastation of divorce may at least be reduced—and their children's suffering humanely dealt with by prior

offer various types of premarital counseling. See Siona Carpenter, *Tying a Strong Knot*, The New Orleans Times-Picayune, Aug. 12, 1997, at F1, available in 1997 WL 12660233.

61. See *supra* note 5.

62. Common law states adhere to a "title theory" of property, allocating ownership to the spouse who holds title to the asset in question. The owner of property may manage, control and dispose of the asset without the consent of, or notice to, the other spouse. See Gregory et al., *supra* note 20, §3.03, at 54. The Uniform Marital Property Act (UMPA), promulgated in 1983, incorporates the partnership concept of marriage. The UMPA is based on principles of shared property ownership during marriage, and is generally regarded as a community property law. The UMPA provides for a dual classification system of a married couple's property, which categorizes property as either marital property or individual property. Each spouse has a present undivided one-half interest in marital property. All property of spouses is presumed to be marital property, as is income from any source. Individual property consists of property acquired prior to marriage and property obtained during marriage by gift or inheritance from a third party. See *id.* §3.07, at 62-63. However, increases in the value of individual property during the marriage are also considered to be marital property.

63. According to sociological data, the present average duration of a marriage that ends in divorce is 10 years. The average time period before separation is eight years. See Thomas P. Monahan, *When Married Couples Part: Statistical Trends and Relationships in Divorce*, 27 Am. Soc. Rev. 625 (1962). These figures suggest that the notion that a marriage (or a friendage) will "last a lifetime" is statistically unrealistic. See Weitzman, *supra* note 13, at 1204.

planning.⁶⁴ Breakups would still be painful, but by comparison with divorce, less damaging and much shorter in duration and, hopefully, kept out of court. A final and binding arbitration-of-disputes provision would be a private, economical and expeditious way to avoid the harrowing trek through the court system.⁶⁵

Many lawyers have a healthy respect for the interests of children and do not enjoy leading their clients down the litigation path in an acrimonious divorce.⁶⁶ Nowadays, they often bring in therapists and clinicians to deal with their clients' agonizing problems. Mediation is much more preferable to the adversary system.⁶⁷ Lawyers recognize that, in divorce and child custody proceedings, there are no winners.⁶⁸ Judges find family court to be the most frustrating and unrewarding of judicial assignments. Friendage, while it would create a new set of problems—such as palimony,

64. Today, as the result of increasing divorce rates and more liberal divorce laws, some courts have abandoned their paternalistic concerns for the enforcement of premarital agreements as to property division or child support issues. See *supra* note 47. Also see *Hill v. Hill*, 142 P.2d 417, 422 (Cal. 1943) (“[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.”).

65. The movement toward nonadversarial divorce has increased the use of extrajudicial dispute resolution methods such as arbitration and mediation. “Arbitration is a method of dispute resolution which is invoked on the parties’ agreement to provide a solution or remedy when the parties are deadlocked on an issue arising in negotiation, mediation, or enforcement of a separation agreement or divorce decree.” Green et al., *supra* note 8, §5.02, at 186. Advantages include: (1) the existence of an arbitration clause may serve as a deterrent to using the process; (2) the hearings are private and informal and (3) the arbitration process is usually much faster than the court system and more cost-efficient. A disadvantage is that arbitrators are not necessarily bound by the same principles of substantive law that apply to the courts. Therefore, ordinary judicial protections are not available. See *id.* §5.03, at 189-90.

66. See Joseph Goldstein et al., *Beyond the Best Interests of the Child* (2d ed. 1979) (stating that the primary emphasis of the court’s inquiry in custody litigation should be the relationship, in particular the psychological relationship, between the parents and children.)

67. Divorce mediation encourages spouses to solve their own problems and determine the parameters of their agreement, thereby avoiding traditional divorce battles. See generally Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 Fam. L.Q. 107, 135 (1982) (arguing that ethical concerns can be resolved within the structure of the divorce mediation programs).

68. One lawyer-psychologist commented that he often hears divorcing clients say, “[i]f I had known that this was going to be so awful (difficult, expensive, psychologically stressful) I never would have done it.” Scott, *supra* note 7, at 49 n.108 (quoting Remarks of Charles Ewing, Professor of Law, State University of New York-Buffalo, Law-Psychology Colloquium (May 6, 1988)).

community property issues and the attendant problems of the friendage agreement itself—should also go a long way to reduce the rigidities and complexities of marriage dissolution.

As previously suggested, the best way to enter into a friendage agreement will be to work through all the contemplated issues of the relationship and to agree on a methodology of problem resolution.⁶⁹ Precommitment strategies can promote choices that reinforce the original commitment and discourage behavior and decisions that are inconsistent with a long-term commitment.⁷⁰ Professional assistance can be very helpful and may often be essential. It is hoped that the status of “Friendage” will be a great boon to millions of people in our society and, perhaps, as a form of a commitment process, to “Marriage” as well.

69. *Cf. Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982) (rejecting the argument that antenuptial agreements violate public policy because such planning protects the financial expectations of the parties, thereby enhancing marital stability). *Valid v. Valid*, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972) (suggesting that a contract may promote marital stability if it defines each party's expectations and responsibilities); *Unander v. Unander*, 506 P.2d 719, 720 (Or. 1973) (overruling previous holding that agreements which provide for no alimony encourage divorce because there was no validity to this promise); Studies suggest that divorce planning provisions in premarital agreements promote marital stability by defining the expectations and responsibilities of the parties. See Gregory et al., *supra* note 20, §4.02, at 82.

70. See Scott, *supra* note 7, at 43.