

LOCKING IN WEDLOCK: RECONCEPTUALIZING MARRIAGE UNDER A PROPERTY MODEL

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ABSTRACT

Legal commentators have long understood divorce laws to reflect our cultural and ideological understanding of the role of marriage, but have criticized topical divorce laws for either failing to match up with current notions of fairness, or for under-compensating at least one party. As divorce laws have evolved, the way we conceptualize marriage has also evolved. Marriage has been modeled as, *inter alia*, a commitment, a governance, a promise, a tort-doctrinal duty, a status, and now more popularly, a contract or a partnership. Each model provides its own corollary for fairness and opportunism between spouses, possible remedies upon divorce, and personhood.

This article sets out a new way to conceptualize marriage—as a property right. While it has long been promulgated that the right to marriage is property, and less stylishly, that a spouse herself is property of the other spouse, the purpose here is to examine the marriage itself as a property right that may be subject to familiar property rules.

Envisioning marriage as property is not only a novel and reasonable way to think about the role and impression of marriage, but offers several advantages, including: (1) repairing the notional problems with viewing marriage as a contract or a partnership, (2) capturing more candidly the personal nature of marriage, and (3) correlating with remedies more consistent with prevailing standards of fairness both in theory and in practice, while at the same time giving courts room to develop in the future. Furthermore, it allows us to conceptualize the evolution of marriage without hopping around different models—for example, claiming that marriage transformed from a Status/Commitment model into a Partnership/Contract model. Instead, my framework facilitates a smoother conceptualization of marriage as property—from inalienable before the nineteenth century, to fully alienable, today.

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I. INTRODUCTION

In a world of completely static, rational men and women, the ability to end a marriage with divorce can be mathematically proven to be completely unnecessary.¹ However, where men and women do not meet this assumption—but are instead dynamic, complex beings brimming with the vicissitudes of hopes, passions, and multifaceted views on morality—we must look beyond a single algorithm. Without compressing the workings of marriage into a single equation, legal academics have nonetheless applied economic rhetoric, formulating that “ultimately one's value on the marriage market is determined by the market, or, more precisely, by the parties on the other side of the market.”² But clearly the market only captures the very first step of marriage— after all, the wedding marks a beginning, not an ending.³

In the way that the idea of life is entwined with the idea of death, our conception of marriage has always been intricately intertwined with our conception of divorce.⁴ Many commentators have examined with the ways our divorce laws both reflect and contour the way

¹ See generally DAN GUSFIELD & ROBERT W. IRVING, *THE STABLE MARRIAGE PROBLEM: STRUCTURE AND ALGORITHMS* (1989). Given a set of n men and n women, marry them off in pairs after each man has ranked the women in order of preference from 1 to n , and each woman has done likewise. If there does not exist any alternative pairing of any two individuals such that both are better off than they would be with the individuals to which they are currently matched, then the Stable Marriage Problem has been solved. See also David Gale & Lloyd Shapley, *College Admissions and the Stability of Marriage*, 69 AM. MATHEMATICS MONTHLY 9–15 (1962) (proving through the Gale-Shapley Algorithm that for any number of men and women, it is always possible to solve the “Stable Marriage Problem” and avoid any elopements).

² Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, “I Gave Him the Best Years of My Life*, 16 J. L. STUD. 267, 278 (1987).

³ Cf. *id.* at 287 (observing that “at the time of formation, the marriage contract promises gains to both the parties who enter into it. Yet the period of time over which these gains are realized is not symmetrical... The creation of this long-term imbalance provides the opportunity for strategic behavior whereby one of the parties, generally the man, might find it in his interest to breach the contract unless otherwise constrained”).

⁴ See, e.g., Catherine T. Smith, *Philosophical Models of Marriage and their Influence on Property Division Methods at Divorce*, 11 J. CONTEMP. LEGAL ISSUES 214 (2000) (“The method of property division selected for divorce also informs us about how the jurisdiction views the marriage relationship independently of divorce. That jurisdictions have moved from “title” to “equitable distribution” or “equal distribution”—like concurrent movements from fault-based to no-fault divorce—gives evidence of deeper changes in their concepts of the marital relationship and of the roles of marital partners”).

we should imagine marriage in law, each with its own nuances and corollaries.⁵ In this pursuit, commentators have modeled marriage after, *inter alia*, a governance,⁶ a commitment,⁷ a status,⁸ a tort-doctrine-like duty,⁹ a promise,¹⁰ and most popularly in recent discussions, a contract¹¹ or a partnership.¹² Commentators have chosen to oscillate between these different conceptions largely in response to the different ways divorces were obtainable over western history.

From the Renaissance to today, the pattern is expansion: divorce grew from unavailable, to available upon a showing of fault,¹³ to becoming available without any requirement of fault.¹⁴ These changes, in part, pushed marriage from the more traditional conceptions of a commitment/governance into more topical conceptions such as a contract or a partnership. While the contract or partnership theories of marriage have served well in explaining many aspects of modern divorce law, commentators have also expressed some frustration with the limitations of

⁵ See *id.* at 215 (“We should expect a state's philosophical model of marriage to influence the method it selects for property division on divorce.”)

⁶ See, e.g., Smith, *supra* note 4 at 214–15 (contrasting the concept of marriage as a monarchy with that of marriage as a democracy).

⁷ *Id.*

⁸ See, e.g., Cohen, *supra* note 2, at 269 n. 2 (“There has been much discussion in the legal literature of whether marriage is best understood as a contract relation or, alternatively, as a status relation. Some commentators have argued that...the relationship is truly one of status rather than contract...The legal distinctions between status and contract need not inhibit the present discussion of the contractual aspects of marriage”); BARBARA A. BABCOCK, *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY* 564 (1st ed. 1978).

⁹ See, e.g., Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2312 (1994) (“The most coherent of these was the theory that a husband who had breached the marital contract sufficient to warrant a divorce should not be permitted by his own wrong to escape his obligations under that contract. The husband's misconduct might be regarded as a breach of duty that constituted tortious behavior...”).

¹⁰ Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce*, 37 J. LEGAL STUD. 315, 318 (2008) (using the general rhetoric of marital contracts, but also noting that “one way to think about marital wrongdoing is as a moral transgression... breaking a promise”).

¹¹ See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

¹² See, e.g., Regan, *supra* note 9 at 2314.

¹³ Smith, *supra* note 4 at 217. See also Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 875 (1994); Cohen, *supra* note 2 at 274–77; Scott, *supra* note 11 at 1234; Betsey Stevenson, *The Impact of Divorce Laws on Marriage-Specific Capital*, 25 J. LAB. ECON. 75, 78–81 (2007).

¹⁴ See, e.g., Regan, *supra* note 9 at 2312 (“The conception of alimony as the payment of damages by a breaching husband exerted an influence until the recent dramatic changes in divorce law beginning in the 1970s”).

these models.¹⁵ A new framework is warranted. This Article begins by tracing the evolution of divorce law as a way to understand the evolution of the way society has come to understand marriage. It also presents the changing ways of conceptualizing the remedy of alimony as a response to the different models of marriage.

Part III briefly sets out an overview of property rights in general, and extracts four lessons to learn from applying the property framework to marriage. Then, given that a property right exists, it analyzes the different rules of protections that may be applied—whether a property rule or a liability rule—and discusses the proper rule to apply to marriage, and its consistency with the property model.

Part IV discusses reasons why a property model would be more consistent with our conception and treatment of marriage and divorce as compared to other models. Conceptualizing marriage as property allows us to visualize changes in the regime as a gradual shift from inalienability to alienability, rather than completely switching models. Then the Article offer a discourse on the problems with contractual and partnership conceptions of marriage. It describes several ways that traditional aspects attributed to property rights complement our conception of marriage, including the personhood aspect of property that is seldom found in contracts. Marriage also lacks the clear articulation of bargained-for conditions that characterizes contract law. Lastly, this Article explores three divorce cases that employ three different remedial tools to conclude that a property framework is not only more sensitive toward the personal aspects of divorce, but is a more accurate reflection of what courts are doing in practice.

This Article will not offer comprehensive consideration of pre-nuptial agreements because “market alternatives to legal institutions, such as prenuptial contracts, [are not] an

¹⁵ See *infra* Part III.

effective means of protecting spouses from inefficient breaches of the marriage contract.”¹⁶ This sentiment has been echoed by other commentators.¹⁷ Lastly, this Article should not be misread to suggest that the spouses become each other’s property to control and maintain, nor does it refer to the right to marry. The “property model” referred to will always mean that the marriage itself, once eventuated, is property held individually by each spouse.

II. THE EVOLUTION OF DIVORCE LAW AND THE WAY WE IMAGINE MARRIAGE

The way marriage has evolved in the Western world can be summarized through three main iterations. In the ancient world, marriage was primarily independent of any notions of love, but used in history, politics and money. During this period, divorce was originally available in Ancient Greece and Rome, but was then abolished by the Christian church for about sixteen hundred years.¹⁸ Also during this period, where divorce was generally unavailable, alimony was considered a “continuing obligation” of marriage.

In the mid-nineteenth century, divorce became gradually available for aggrieved spouses, and the ideals of marrying for love began to take root.¹⁹ During this time, alimony stopped being an obligation from marriage, but became payment for fault, or breach.

Lastly, in the period following 1970, no-fault divorces came to prominence.²⁰ Under this scheme, alimony, or spousal payments, can no longer be seen as either a continuing obligation (the marriage has dissolved), nor as punishment (hence “no-fault”), but requires a new justification, which this Article aims to address.

¹⁶ Cohen, *supra* note 2 at 268.

¹⁷ See, e.g., Ryznar, *infra* note 56 at 145 (“However, premarital agreements are hardly the perfect remedy, particularly when their enforceability is in doubt.”).

¹⁸ See *infra* Part II.A.

¹⁹ See *id.*

²⁰ See *infra* Part II.B.

A. Pre-1800s: The Indissoluble Model of Marriage

1. *Historical Development Toward an Indissoluble Model of Marriage*

Although it is easy to conceptualize the western history of divorce as a one-way movement—that is, we start from the canonical no-divorce model and progress towards increasingly available divorces—it would be disingenuous not to mention that further back in time, divorce did flourish in Ancient Europe. In Ancient Rome, marriages were *de facto* rather than *de jure*, and divorce was actually quite available to either party, and evidently exercised regularly among the upper social classes.²¹ Marcus Porcius Cato, for example, divorced his wife and arranged for her to marry one of his friends, “in order to strengthen the friendship and family connections between the two men”, then promptly remarried her after his friend died.²² Love was sometimes involved, but not a necessary ingredient.²³

The move from commonly-accepted divorces toward a permanent notion of marriage came very slowly. In fact, the “post-Constantine Roman legislation did no more than threaten to punish a husband who repudiated his wife without cause” and in A.D. 542 when Byzantine Emperor Justinian tried to “extend penalties to divorce by mutual consent, [it] was so unpopular that it was promptly repealed by his successor.”²⁴

Marriage became “indissoluble only when, after centuries of striving, the Church gained jurisdiction for its own courts over matrimonial causes.”²⁵ For the first “sixteen hundred years of

²¹ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 17 (1989).

²² STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* n.27 (2005).

²³ *Id.* at Chapter 1. (“The great Roman statesman Cicero exchanged many loving letters with his wife, Terentia, during their thirty-year marriage. But that didn't stop him from divorcing her when she was no longer able to support him in the style to which he had become accustomed”).

²⁴ *Id.*

²⁵ *Id.*

the Christian era”, marriage remained indissoluble.²⁶ With only a few exceptions, marriage was permanent, regardless of abuse, fault, irreconcilable differences, or anything else short of death.²⁷ Although colloquially, one might view this eternal bond is somewhat romantic, that would be a misconception of the times. Up to the eighteenth century, “it was generally held that passionate sexual love between spouses within marriage was not only indecent, but positively sinful, and that “nothing is more impure than to love one’s wife as if she were a mistress;... men should appear before their wives not as lovers but as husbands.”²⁸

Rather than revolving around ideals of eternal love, the move toward the abolition of divorce has generally been described as a story about religion and about land. For example, one account describes the historical movement in the following way:

Thus matters continued, the clergy, and then the ecclesiastical courts, arrogating to themselves the decision of all matters relating to marriage, and proceeding, on the ground that marriage was a sacrament ordained by the Saviour, to argue that being a sacrament it must be held to be indissoluble. And, indeed, the indissolubility of the marriage contract was upheld by the law of England from the earliest time of which we have record.²⁹

Economic benefits arising from this religious view have been recognized by commentators today. Lloyd Cohen, for example, has acknowledged that “the religious nature of marriage and the religious consciousness of the people who have participated and sanctioned the institution” has acted as an informal, rather than legally formal, method of protecting a wife’s quasi-rents

²⁶ See Brinig, *supra* note 13 at 875.

²⁷ Martha Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulations of the Consequences of Divorce*, 1983 WIS. L. REV. 789, at 799 (1983).

²⁸ LAWRENCE STONE, *THE PAST AND THE PRESENT REVISITED* 347 (Routledge 2d ed. 1988) (quoting St. Jerome, quoting Seneca).

²⁹ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, VOLUME 282 (Herbert Broom & Edward A. Hadley ed., John D. Parsons Law Book Publisher 1875) (1765).

and preventing inefficiently strategic behavior.³⁰ It was also a practical way to keep land within particular families.³¹

In addition to examining the driving societal forces that guided the western world toward this conception of marriage, academics have analyzed the psychological and personal implications of this time period:

This model of marriage transformed the individuals entering the marriage into one person. The model promoted the concept of the family as a single unit headed by the husband...The individual legal rights enjoyed by a woman prior to a marriage were vested in her husband; thus, as a wife she could not own property or make contracts... Property was not held individually by husband and wife; rather, it was vested entirely in the husband. And it followed that the husband was made legally responsible to provide for the wife's economic needs. In return the spouses acquired some basic protections: marriage, a reliable status; and, in the event of divorce, the promise of continuing obligations towards each other. Commentators have two explanations of the dynamics of property division on divorce under the coverture system. One is that if the husband wanted to terminate the marriage, the wife could argue she had detrimentally relied on his duty to support her in the future, and thus had a legally protected interest in receiving continued support. The other is that because divorces were so difficult to obtain, as a practical matter a wife was placed in a strong negotiating position should the husband want to separate; essentially, she could negotiate future support in exchange for her agreement to the husband's departure. Although these explanations have merit, in law the wife could not be viewed as a fully contracting partner because her ability to contract ended upon her marriage. The wife was controlled by a legal system that disabled her contracting rights and by her husband who controlled all the assets.³²

Smith describes this model of marriage as a combination of Commitment with Monarchy.³³ For Smith, Commitment means that the lifelong commitment that the two individuals have made should override their individual interests in the relationship,³⁴ and Monarchy means that in the marriage, there is a leader and a follower, and the leader is given the rights and responsibilities in

³⁰ Cohen, *supra* note 2 at 289.

³¹ See Brinig, *supra* note 13 at 875.

³² Smith, *supra* note 4 at 216.

³³ *Id.*

³⁴ *Id.* at 215.

the relationship, in trust, for the sake of the marriage.³⁵ Another way of conceptualizing a permanent marriage—following my proposed framework of viewing marriage as property—is by viewing it as an inalienable property right at this stage in time.³⁶

2. *Alimony as a “Continuing Obligation” in a No-Divorce Scheme*

This conception of marriage, theoretically without divorce, developed alongside an intellectually consistent and straightforward theory of alimony. Alimony “originally arose as a remedy” during the years “in which absolute divorce theoretically was unavailable.”³⁷ Although absolute divorce was unavailable, if an aggrieved wife could prove that her husband “had engaged in specified forms of misconduct”, she could be given “divorce from bed and board.”³⁸ This meant that the couple would remain technically married to each other under the law, but would no longer share a bed or live in the same house.

Although the conceptual soundness of alimony will be challenged as problematic under other schemes, here, it at least makes sense intellectually: the husband should pay alimony not as a remedy per se, but rather as the simple continuing obligation. Since the couple is still married, the alimony payments are the legal obligations of support that a husband is supposed to give his wife during marriage.

This is an important theoretical distinction from the way alimony would be conceptualized in later times—alimony was not paid as punishment for a wrong done, it was not paid as damages for a breach; indeed, in a divorce-less world, the marriage cannot be breached.

³⁵ Smith, *supra* note 4 at 215.

³⁶ See *infra* Part IV.C.

³⁷ Regan, *supra* note 9 at 2311.

³⁸ *Id.*

Instead, alimony was the simple continued marital obligation of a husband to a wife who remains his wife despite physical separation of bed and board.³⁹

B. Mid-1800s to 1970: Fault-Based Divorce and Recasting Alimony

1. *Historical Development Toward Dissoluble Marriages Based on Fault*

However, as the Church, and also family land, became less and less the focus of relationships, this imposition of everlasting marriage without the option of divorce became outdated.⁴⁰ Enlightenment thinkers, in their salons, and romance novelists in their publications, began pushing married love as a credible idea, and women began publically protesting loveless marriages.⁴¹ Eventually, marriage for romantic feelings became the ideal.⁴²

It is not without irony that today, many of the people who advocate against easy divorces do so with the idea that they are defending the idea of romantic love, because it was the very emergence of love-based marriages that pushed for the availability of divorce. It was because marriage became based on romantic feelings, which are emotional, and because “human emotions need not remain eternally constant... [that] divorce became practically possible.”⁴³

2. *Alimony as a Punitive Remedy in a Fault-Based Divorce Scheme*

Because alimony was conceptualized as a continuing obligation under an unbroken marriage in the “separation of bed and board” context, it is by no means obvious that it would have continued as a remedy under divorce. Because the aggrieved spouse was actually leaving the marriage, it does not follow logically why the other spouse would need to continue paying

³⁹ *Id.* (“The payment of alimony in the event of a divorce ‘from bed and board’ thus literally fulfilled an ongoing spousal obligation”).

⁴⁰ See Brinig, *supra* note 13 at 875.

⁴¹ See generally Coontz, *supra* note 22.

⁴² See Brinig, *supra* note 13 at 875.

⁴³ *Id.*

money as a substitute for the wife's right to support had she stayed in the marriage.⁴⁴ Academics have mused, "Would it not be more logical to say that when the marriage is dissolved all rights and duties based upon it end?"⁴⁵ But there were clear policy reasons why the practice of alimony should continue, not the least of which was that divorced women were seldom able to support themselves financially.⁴⁶ Of course, we could imagine a legal alternate universe where these women availed themselves to other sorts of remedies instead of pursuing alimony, but as it happened, interspousal immunity doctrine was developing at about this time, preventing them from bringing tort actions.⁴⁷

As a result, society was caught between wanting wives to be financially supported, and not allowing them to bring separate actions. Society turned to alimony to solve the problem; but this required that alimony be recast as something other than a "continuing obligation." The solution was to turn to the idea of fault.⁴⁸ Alimony was no longer conceived of as continuing obligation, but as a sort of "damages for breach of the terms of the marriage."⁴⁹ The marriage itself was characterized as "an entity or a union rather than as some sort of an arrangement for gain between two players" and there were clear consequences for "breaching": "for women, the loss of their status and support, and for men, the loss of wealth through property division or alimony."⁵⁰

⁴⁴ See Regan, *supra* note 9 at 2311.

⁴⁵ HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.1 (2D ED. 1988).

⁴⁶ See Regan, *supra* note 9 at 2311.

⁴⁷ See Brinig, *supra* note 13 at 875. ("The consolidated remedy of divorce and alimony became an exclusive remedy during the nineteenth century, largely because of the development of the doctrine of interspousal immunity. Although a spouse could sue for breach of contract or for ejectment from solely owned property, there could be no action for torts to person or property. In part this was because of a reluctance to become involved with the intimacies of the marital relationship, in part because the doctrine showed a fear of disrupting marital stability that probably was not warranted, given the severity of some of the harm alleged").

⁴⁸ *Id.* at 875–76 ("This, then was the "old marriage," an enforceable contract designed for the most part to be permanent, which encouraged values of altruism, sharing, and investment in the marriage").

⁴⁹ *Id.* at 876.

⁵⁰ *Id.*

In essence, during this time period preceding no-fault divorce, alimony was punitive; a type of punishment for the spouse-at-fault to pay. At this point, it is appropriate to discuss the difference between torts and contracts. Legal scholarship has generally emphasized the fault aspect of alimony here, without much regard to whether the fault is contractual or tortious.⁵¹

However, there is a distinction between the two. Although there have been some academic currents that push to integrate contract law into torts,⁵² others have emphasized that contracts should occupy its own sphere.⁵³ An earthy distinction between the two is that “the compensation of injury suffered through reliance” is probably a case “of tort liability”, whereas “[i]n contrast, as long as we see contractual obligation as based on promise, on obligations that the parties have themselves assumed, the focus of the inquiry is on the will of the parties.”⁵⁴ In other words, tort damages tend to revolve around the compensation of an injury, and contract damages—prototypically, expectation damages—are about giving the parties the value of what they initially promised to do.⁵⁵

As a result, alimony in fault-based divorce may better be characterized as tort damages rather than contract damages if courts determine these damages on injury to the aggrieved spouse; for example, compensating them for loss of human capital, loss of opportunity, and possible damages for abuse or harm suffered during marriage. In general, this type of remedy was more commonly seen in the United States, where judges determine spousal settlements by

⁵¹ See, e.g., Regan, *supra* note 9 at 2312 (analogizing marital infidelity to breaching a contract, and then analogizing the same thing to tortious conduct in the next sentence).

⁵² See generally GRANT GILMORE, *THE DEATH OF CONTRACT* (2d ed. 1995).

⁵³ See generally CHARLES FRIED, *CONTRACT AS PROMISE* (1982). The title of Professor Fried’s first chapter, “The Life of Contract,” is a reference to Professor Gilmore’s book, cited *supra* note 52.

⁵⁴ Fried, *supra* note 53 at 4.

⁵⁵ *Id.* at 3. Professor Fried deals with marriage explicitly, categorizing it as one of the categories of “legally binding arrangements that are initiated by agreement” but “singled out and made subject to a set of rules that often have little to do with that agreement.”

balancing competing values in an equitable way.⁵⁶ Courts will consider “several legislated factors, such as the length of marriage, the causes for the dissolution of the marriage, the age and health of the parties, and the amount and sources of income, as well as the vocational skills, liabilities, and needs of each party.”⁵⁷ This is tort law in the most general sense: the Court attempts to quantify how the dissolution of marriage hurt the aggrieved party, and under those circumstances, what compensation is just.

In contrast, alimony in fault-based divorce may better be characterized as contract damages rather than tort damages if courts determine these damages based on expectation values; for example, by awarding a wife enough money to maintain the lifestyle she would have maintained had she stayed married. Although not precisely expectation damages, the British divorce system—by dividing property equally between spouses instead of making equitable considerations⁵⁸— is more in line with awarding expectation damages than an American court would be. This is because when a wife receives half of her husband’s estate, she can generally maintain her lifestyle, regardless of how much she contributed to the marriage. For example, public figure Heather Mills allegedly received \$64 million from ex-husband Paul McCartney in her divorce settlement.⁵⁹ This means that Mills was being paid approximately \$1800 for each hour of her marriage,⁶⁰ which cannot reasonably be said to measure her input into the marriage, nor any harm or diminution she suffered as a result of marriage.

⁵⁶ See Margaret Ryznar, *All’s Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115, 119 (2010) (“The principle that governs this... in the majority of states is equitable distribution, which seeks an equitable, but not necessarily equal, division between the spouses”).

⁵⁷ *Id.* at 121.

⁵⁸ *Id.* at 141 (noting that English courts apply “the yardstick of equality to property division” rather than equitability).

⁵⁹ See Jennifer Conlin, *Divorce: Money Changes Everything*, N.Y. TIMES, Feb. 9, 2007, <http://www.iht.com/articles/2007/02/09/yourmoney/mdivorce.php?page=1>.

⁶⁰ See *id.*

Admittedly, the connection between American divorce law and tort damages (that is, reliance damages), and British divorce law and contracts damages (that is, expectation damages), are somewhat attenuated. Also, the American system also makes use of damages that sound like unjust enrichment or restitution, most notably in marital support of educational degrees.⁶¹ Because states vary in divorce settlements, the value of educational degrees are sometimes dealt with in tort-like reliance damages (when the aggrieved spouse is awarded, for example, the amount she contributed to in tuition) or with restitution (when the aggrieved spouse is awarded, for example, with projected future income due to the degree). The underlying premise, however, is that in a fault-based divorce, the aggrieved spouse is being compensated due to the fault of the other spouse. This lends itself to clear analogies to both contracts and torts, where an aggrieved plaintiff seeks damages for the alleged fault of the defendant.⁶²

But this system—stabilized by the idea of fault—would not survive the Progressive Era.⁶³

C. Post-1970 Marriages: The Rise of No-Fault Divorces

1. *Historical Development Toward No-Fault Dissoluble Marriages*

In the 1940s, World War II caused large numbers of women to enter the marketplace, working at jobs previously held by men.⁶⁴ The social atmosphere changed:

⁶¹ See Regan, *supra* note 9 at 2326–27. (“New York has been most explicit in adopting a policy of compensation for expected gain at divorce. In a series of cases, New York courts have held that various forms of earnings enhancement are marital property subject to division at divorce. Only one other state court has followed New York in expressly holding that an educational degree or the like is marital property, the value of which should be measured by the expected earnings attributable to it.”) See also *infra* Part IV.C.

⁶² Further support for the parallel between fault-based litigation and divorce was the existence of tort of criminal conversation. The plaintiff could seek damages against a third party for committing adultery with the plaintiff’s spouse. See Cohen, *supra* note 2 at 271 (“The tort of criminal conversation is the family-law analog of intentional inducement of breach of contract”). Criminal conversation is no longer a tort in practice today because of the societal move away from a fault-based system of marriage and divorce laws, which is described in the upcoming section.

⁶³ See Brinig, *supra* note 13 at 877.

⁶⁴ See, e.g., R.J.Q. ADAMS, ARMS AND THE WIZARD. LLOYD GEORGE AND THE MINISTRY OF MUNITIONS 1915 – 1916 Chapter 8 (1978) (titled “The Women’s Part”).

Soon a pattern emerged of numbers of unhappy spouses going to states where divorces were easier or less costly to obtain and procuring “quickie” ends to their marriages. Another means to evade a relatively strict divorce law was the practice of collusive or fraudulent divorce, where the complaining spouse would perjure himself or herself or actually manufacture incidents (most often, of adultery) with the collaboration of the other partner.⁶⁵

This shift in attitude—reflecting a growing craftiness among unhappy spouses and a growing disregard for the religious sanctity of marriage which characterized the centuries before— was also captured by books and movies of the time.⁶⁶ In 1969, California became the first state to embrace a regime of no-fault divorce.⁶⁷ Before then, adultery was the *only* ground for divorce.⁶⁸ California’s no-fault divorce “not only eliminated the necessity for a showing of fault but also the need for both spouses agreeing to the divorce.”⁶⁹ By 1985, every single one of the United States had adopted no-fault divorce laws.⁷⁰ Following this change, America has experienced a large decline in the number of adults who choose to marry, a large increase in the number of children born out of wedlock, and a striking correlation—that did not exist in 1960—between marriage and education or wealth.⁷¹

Practical effects aside, no-fault divorce also metamorphosed the intellectual motivations justifying the institution of alimony. “Since fault (breach), which had previously been the trigger for alimony (damages), was no longer necessary (or available, in some cases) for divorce,” alimony shifted from damages to merely a way of “providing for the needy spouse who could not

⁶⁵ See Brinig, *supra* note 13 at 876–77.

⁶⁶ See, e.g., *DOUBLE INDEMNITY* (Paramount Pictures 1994) (depicting the story of an unhappy wife who enlists the aid of an insurance investigator to kill her husband in order to collect life insurance).

⁶⁷ See, e.g., Brinig, *supra* note 13 at 877.

⁶⁸ See *id.*

⁶⁹ *Id.*

⁷⁰ See Regan, *supra* note 9 at 2313.

⁷¹ Belinda Luscombe, *Marriage: What’s It Good For?* TIME, Nov. 29, 2010, at 48–49. (“In 1960... nearly 70% of American adults were married; now only about half are. Eight times as many children are born out of wedlock. Back then, two-thirds of 20-somethings were married; in 2008 just 26% were. And college graduates are now far more likely to marry (64%) than those with no higher education (48%). When an institution so central to human experience suddenly changes shape in the space of a generation or two, it’s worth trying to figure out why.”)

support himself or herself.”⁷² It would be a “temporary measure” until the dependent spouse was no longer needy, and the payments “should not bind the other spouse financially.”⁷³ These distributions had to be made “without regard to fault.”⁷⁴

2. *Alimony as a “Continuing Obligation” in a No-Divorce Scheme*

The shift to no-fault divorces also changed the way marriage would be modeled. Marriage “increasingly came to be modeled along the lines of a business partnership” between the spouses.⁷⁵ Catherine Smith has noted several important parallels that can be drawn between marriage under the modern scheme and business partnerships. First, when the partners dissolve the marriage or business, they focus on recovering their share of the venture, not on expectation damages (unlike in Contracts).⁷⁶ Second, the contributions of one spouse or partner do not “overshadow” those of the other, even if it has resulted in more income. Both partners are respected for their providing their share of the work. Under the partnership mode of thinking, the Court typically seeks to divide up conventional forms of property, which do not include human capital.⁷⁷ Lastly, the decision to dissolve the partnership is not viewed as based on fault, but based on changes in circumstances, feelings, or other opportunities that have arisen.⁷⁸ Under this scheme, post-divorce payouts are justified only to the extent that they reflect some extension of the natural allocation of assets to business partners who have both invested in the partnership. They are not punitive, nor are they triggered by fault.

⁷² Brinig, *supra* note 13 at 877.

⁷³ *Id.* at 877–78.

⁷⁴ *Id.* at 878.

⁷⁵ Smith, *supra* note 4 at 217.

⁷⁶ *Id.*

⁷⁷ Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145, 167 (1998).

⁷⁸ Smith, *supra* note 4 at 217.

An alternative model is the contract model of marriage (which Henry E. Smith refers to as the “contractarian model”.)⁷⁹ This approach “differs from the partnership model by seeking an implicit contract in the marriage rather than looking to off-the-rack rules already set up by the law.”⁸⁰ In seeking the implicit contact, the relevant question is what the spouses intended to contract for in the first place, in the same way that a Court would evaluate the expectations of each party in a common law contract dispute. Under this scheme, post-divorce payouts may be compared to expectation damages, but not perfectly so because it is unclear who the breaching party is (the spouse initiating the divorce? The spouse who committed adultery? The spouse who just “it’s not you, it’s me” fell out of love?).

In any event, it is clear that under both the partnership model and the contract model, the alimony damages are conceptualized in accordance with the view that dissolving the marriage—by itself—is not as an punishable act. As a result, like property allocation after the dissolution of a partnership or after the breach of a contract, alimony was no longer viewed as punitive.

D. Summary

The table below presents a summary of Part II Sections A–C, *supra*.

⁷⁹ Smith, *supra* note 77 at 167.

⁸⁰ *Id.*

Time Period	Primary Social Forces Behind Marriage	Availability of Divorce	Nature of Alimony/Property Payments Upon Divorce/Separation	Model of Marriage	Model of Marriage (My Proposal)⁸¹
Antiquity – Renaissance	Politics and Money	Available and Widely Used		Not legally recognized (de facto status)	Commons (non-privatized)
Renaissance – mid 1800s	Religion and Land	Divorce not available, but separation possible	Alimony available upon separation as “continuing obligation” of the marriage	Commitment, Monarchy, Status (permanent)	Property—Inalienable
Mid-1800s – 1970	Rise of romantic love	Fault-based divorce available	Alimony conceptualized as morally punitive (for the fault) under either tort (equitable distribution) or contracts (equal distribution)	Contract (but not for instrumental gain), Union, Duty	Property—partially alienable
1970s – Current	Romantic love	No-Fault divorce available	Alimony conceptualized as contract damages or property allocation at the dissolution of a partnership	Contract, Partnership,	Property—fully alienable

Table 1. This table summarizes Part II, Sections A through C of this paper.

It will become apparent that Column Four of Table 1 (“1970s –”) is the most conceptually problematic part of this table,⁸² and that the contract and partnership theories do not adequately capture what marriage means to us now. With the advent of no-fault divorces, alimony can no longer be soundly categorized as punitive, so academics have turned to economic theories of human capital loss and opportunity costs. However, these prove problematic at times, and a theory of property rights may more ingeniously reflect the meaning and motivation of spousal support today.

⁸¹ Column six represents the model this Article advances.

⁸² See *infra* Part IV.A.

III. WHAT IS A PROPERTY RIGHT?

A. What Is Property?

In law, “property” is a term of art. One way to define property is as “nothing but a basis of expectation, the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.”⁸³ But even the word “possession” is ambiguous—it is used to reference both the physical act of power or control over something, as well as the legal conclusion of lawful entitlement.⁸⁴ Harold Demsetz has prominently offered one way to understand property—that its “main allocative function” is “the internalization of beneficial and harmful effects.”⁸⁵ Thus, property rights “develop to internalize externalities⁸⁶ when the gains of internationalization become larger than the costs of internalization.”⁸⁷ As technologies change, property rights regimes will also develop in the direction of efficiency, usually towards a scheme of private rights.⁸⁸ Private property schemes tend to outperform common property schemes because of a “partial concentration of benefits and

⁸³ Jeremy Bentham, *THEORY OF LEGISLATION*, 111-12 (C.K. Ogden ed. 1931) (explaining that property “is not material, it is metaphysical... a mere conception of the mind.”).

⁸⁴ On this distinction, consider John Kass, *Snowstorm’s Charm Can’t Stand Up to Law of Street*, CHICAGO TRIBUNE 3, (Jan. 5, 1999). Several commentators, including Richard Epstein, have considered the property right implications in view of a Wintertime norm that has developed in Chicago. Following heavy snowfall, shovelers mark their clear street-parking spaces with broken basement chairs or other “heavy ugly object[s].” Although this right claim a shoveled parking spot with a chair is not legally recognized, it creates a sense of entitlement. See generally Richard A. Epstein, *Allocation of the Commons: Parking and Stopping on the Commons* (John M. Olin Law & Econ. Working Paper No. 134 2nd Series and Pub. Law & Legal Theory Working Paper No. 15), available at <http://papers.ssrn.com/abstract=282512>.

⁸⁵ Harold Demsetz, *Toward a Theory of Property Rights*, in *PERSPECTIVES ON PROPERTY LAW* 135, 137 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002). “A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities. Every cost and benefit associated with social interdependencies is a potential externality.” *Id.* at 136–37.

⁸⁶ Demsetz defines “externality” to include “external costs, external benefits, and pecuniary as well as nonpecuniary externalities... What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile.” “Internalizing” means a process that enables “these effects to bear (in greater degree) on all interacting persons.” *Id.* at 136.

⁸⁷ *Id.* at 137.

⁸⁸ *Id.* at 142.

cost” and because the “cost of negotiating over the remaining externalities will be reduced greatly.”⁸⁹ Indeed, it has been observed that it “is for good reason that the law has created institutions whereby only those who sow may reap.”⁹⁰ Marriage can also be viewed as privatization—when couples formally contract to stay in a relationship long-term, it provides a basis for internalizing the fruits of the marriage (both economic and emotional) within the two parties. This may be contrasted with cultures where there is no ideal of commitment between two people that would give them assurance that, at least theoretically, their investments into the relationship should be kept within the marriage.

Some commentators conceive property ownership as comprised of an assorted “bundle of rights” that that the owner may exercise, including the right to possess, the right to transfer, the right to use, the right to exclude, and the right to destroy.⁹¹ These bundles can be limited, as well.⁹² In practice, courts tend to focus on three core rights: the right to exclusive possession,⁹³ the right to exclusively use, and the right to dispose or transfer. This bundle of rights “picture was the overwhelmingly consensus view among commentators of the mid-to-late twentieth century.”⁹⁴

⁸⁹ *Id.* at 143.

⁹⁰ Epstein, *supra* note 84 at 2. Epstein goes on to critique some of Demsetz’s theories, pointing out that even if privatization may solve old problems of negotiating over remaining externalities, it may bring new problems.

⁹¹ See Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69 (J. Roland Pennock & John W. Chapman, eds.1980).

⁹² For example, inalienable rights are rights that can neither be gifted nor sold. Partial market inalienable rights are rights that cannot be sold but can be gifted (for example, body tissue.)

⁹³ See, e.g., Jacque v. Steenberg Homes, IN. 563 N.W.2d 154 (Wisc. 1997) (The Defendant was delivering a mobile home, and the easiest path was cutting across the Plaintiff’s land. Even though the Plaintiff denied his request to cut across his land, the Defendant still did it. The Court decided that punitive damages were valid, recognizing that the right to exclude is one of the most important rights that landowners have—validating personal autonomy and faith in the government—and that when the right to exclude is not protected, destructive self-help remedies might ensue.); State v. Shack, 277 A.2d 369 (N.J. 1971) (The Defendants enter upon the Plaintiff’s land to provide legal and health services to migrant farm workers. The Court finds that the right to exclude is subordinate to the public policy interests of human rights—the rights of the occupants to obtain legal and medical counsel. Property rights are limited by human values.)

⁹⁴ Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, J.L. & ECON., (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758846. Merrill and Smith note that “The bundle of rights picture was the overwhelming consensus view among commentators of the mid- to late twentieth

A competing—although not entirely inconsistent⁹⁵—view is understanding property as a “kind of mini-sovereignty.”⁹⁶ Property has been famously described by William Blackstone as the “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁹⁷ This description of property—as an in rem right to Blackstonian sovereignty rather than as a long checklist of separated rights—has recently grown in popularity, partially because of a renewed focus on the importance of exclusion rights.⁹⁸ By his right to exclude the world, the owner “assumes the role of gatekeeper or manager” and will have “a powerful incentive to invest in and develop the asset, because the owner will capture the benefit of these actions as the residual claimant.”⁹⁹ The bundle of rights, in contrast, has “the exclusion right fade[] into the background as part of the general bundle of sticks, no more important than the right to inherit or the right to use the asset for particular purposes.”¹⁰⁰

century. See, e.g., Bruce A. Ackerman, *Private Property and the Constitution* 26 -29 (1997) (reporting that the bundle-of-rights conception of property is so pervasive that “even the dimmest law student can be counted upon to parrot the ritual phrases on command”); see also *infra* note 26 and accompanying text.”) *Id.* at 2-3, note 5.

⁹⁵ *Id.* at 10 (“The bundle of rights picture is not logically incompatible with the understanding that property rights are in rem. But it has a strong tendency to obscure the in rem feature of property. If property rights can be adjusted along countless margins, often in the course of the rendering of specific judgments by courts, then it becomes natural to start to think of property as a kind of master list of rights and duties set forth by some authoritative state intuition for each type of property—or indeed for each particular parcel of property. Under the bundle picture, property becomes an elaborate catalogue of in personam rights, setting forth what the owner can or cannot do, and concomitantly what others can and cannot do, with respect to specific resources, established by the state either through legislation or litigation. The right-duty relationship no longer runs between the owner and “the world,” but the owner and the state.”)

⁹⁶ *Id.* at 7.

⁹⁷ William Blackstone, *Commentaries on the Laws of England*, in *PERSPECTIVES ON PROPERTY LAW* 45, 46 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

⁹⁸ Merrill & Smith, *supra* note 94 at 22. (“Nevertheless, we will argue that Coase’s picture of property [the bundle of rights picture] had a distorting influence, and in certain respects may have retarded intellectual progress in developing our understanding of the institution of property.”) The authors go on to claim that “the bundle of rights picture fails to capture the centrality of exclusion rights to the institution of property”, “the bundle of rights picture fails to highlight the enormous information cost constraints associated with any system of in rem rights”, and “the in rem nature of property rights renders implausible” the claim that “the problem of social cost is reciprocal in nature, and thus it is not useful to speak of one party to an externality as being ‘the cause’ of any problem of incompatible demands on resource.” *Id.* at 23–24, 26.

⁹⁹ *Id.* at 23.

¹⁰⁰ *Id.*

There are several trends emerging from the understanding of property rights that are applicable in the marriage context. First, property rights are based on expectations, both about what we expect to derive from the relationship, but also from what we intend to contribute. There is some expectation of the right to exclude the rest of the world from the relationship. Second, property rights are personal—they capture elements of our personhood and self-identities more than contracts generally do, even though contracts are also expectation-based. This is partially why injunctions (judgments against property rights) are much more invasive than damages (judgments against liability rights).¹⁰¹ Furthermore, property rights can be characterized either by an essential characteristic (sole and despotic dominion) or by a collection of rights (“bundle of sticks”). Marriage is similar—it can be viewed as either as a deep, floating, overlaying connection between two people, or else as a collection of the list of legal rights that come with marriage. Commentators have described it in both ways. Lastly, property rights can be a tool to facilitate the optimum amounts of investment, and thus facilitate an efficient system. All four of these aspects of property rights offer insight into the way we think about the way marriages are made and dissolved after the divorce regime changes in the 1970s.

B. Property Rules and Liability Rules

The most commonly used types of protections for entitlements are property rules, liability rules, and inalienability rules.¹⁰² Although other entitlements are occasionally used, and others

¹⁰¹ See *infra* Part III.B.

¹⁰² See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, in PERSPECTIVES ON PROPERTY LAW 233, 234 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

theoretically available¹⁰³—and furthermore, the categories are not absolutely distinct¹⁰⁴—the three types of entitlements can help us consider why we want to protect different entitlements.

An entitlement is protected by a property rule “to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”¹⁰⁵ Because the transaction must be voluntary, property rules afford entitlements owners the most amount of autonomy—he can choose whether or not to sell the entitlement, as well as the price to sell if he chooses the latter. Property rules are valuable because they incentivize investment and foster feelings of security.

An entitlement is protected by a liability rule if “someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it.”¹⁰⁶ Contracts, for example, are generally thought to be protected by liability rules insofar as Expectation Damages are awarded.¹⁰⁷

An inalienability rule is one that prevents any transfer of the entitlement, even when both the potential seller and potential buyer are willing.¹⁰⁸ Inalienability rules thus “not only ‘protect’ the entitlement; they may also be viewed as limiting or regulating the grant of the entitlement itself.”¹⁰⁹

¹⁰³ See, e.g., James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, in PERSPECTIVES ON PROPERTY LAW 249, 258 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149 (1997). In addition, entitlements may also be protected by claims of restitution or unjust enrichment.

¹⁰⁴ See Calabresi & Melamed, *supra* note 102 at 234.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Contractual entitlements under the general scheme of Expectation Damages are protected by liability rules, because the breaching party may deprive you of your entitlement (your right to their promised performance) as long as they pay you an amount of money determined by the court. Theoretically, we can contrast this with a hypothetical regime where Contract Law is always enforced by specific performance—this would be a property right rather than a liability right because the only way to avoid performance would be to secure the permission of the counter-party.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 235.

There are several insights that these settings may provide. First of all, it is clear that insofar as marriage can be thought of as property, before the mid-1800s, it was an inalienable right. Even if both husband and wife mutually and completely agreed that they wanted to divorce each other, it was prohibited by the state.¹¹⁰ As a result, after one marries, that marriage becomes inalienable to him or her. The inalienability rule for protecting marriage has completely fallen out of favor, because of an understanding of the value of autonomy, the understanding that romantic feelings change, and the understanding that pre-marriage couples may not completely understand the implications of their vows, and should not be held to them.¹¹¹

Modern marriage rights seem to be protected by Liability Rules. In America, courts handle post-divorce payouts through more equitable means, considering a variety of factors including both spouses future need, contribution to the marriage, human capital, and emotion investment.¹¹² In England, courts handle post-divorce payouts through more rule-like equal-distribution measures.¹¹³ Both of these protect the entitlement of marriage with a liability rule, with respect to the other spouse. In other words, if a husband wants to divorce his wife, he may, but he has to pay a price that is determined by the court system. But the amount of this price will

¹¹⁰ See *supra* notes 26–27 and accompanying text.

¹¹¹ Although the inalienability rule is no longer advanced by commentators as a viable solution, some have recently proposed milder versions. See, e.g., Scott & Scott, *supra* note 11 at 1259–60 (“Experience teaches us, in any case, that unlike the parties to many commercial contracts, [a man and woman] lack the ability to predict the optimal duration of a relationship that depends upon extended investments and emotional maturation. Whether and when the parties have children, the value of the emotional bonds that are generated by the marriage, and the value of alternative relationships are only a few of the numerous factors that will affect the durability of the relationship. Under these circumstances, although [a man and woman] may aspire to a lifelong relationship, they are properly precluded from making a lifetime contract (or any other “excessive” commitment term) that does not preserve the possibility of escaping the commitment in the future should the returns from the relationship fall below the nonmarital alternatives.”).

¹¹² See Ryznar, *supra* note 56 at 141 (noting that “the American system [] remains split between the community property and equitable distribution approaches. In the average American divorce case, there may not be much practical difference between community property and equitable distribution.”).

¹¹³ *Id.* (“In the average English divorce case, applying the yardstick of equality to property division would have a result similar to that under a reasonable needs approach because of the modesty of the divisible assets— half of these would not exceed the spouse’s reasonable needs. In big money cases, however, there is necessarily a significant difference between the lower income spouse’s reasonable needs and half of all divisible property— raising the important question of which approach produces a fairer result.”).

depend on the way the Court approaches the institution of marriage, and its role in relation to the institution.

I am not arguing that marriage modeled on property should be protected by a property rule. It has long been recognized that there are too many costs to forcing spouses to stay in marriages they do not want to be in, so inalienability rules are no longer taken to be a viable option. A property rule has also been universally regarded as problematic. To require that an individual acquire the permission of his or her spouse to divorce would result in hold-out situations, potential strong-arming, and would generally undermine the ideals of love and community that marriage is supposed to protect.¹¹⁴

But protecting marriage with a liability rule is not inconsistent with my thesis that marriage should be conceptualized as a property right. Many things we consider property are subject to liability rules. For example, a person's home is subject to a liability rule with respect to the State's prerogative to eminent domain. The State may elect to condemn a house in return for "just compensation."¹¹⁵ That does not prevent the house from being considered property of its owner. Another example is trespass cases of minor encroachments. Under some jurisdictions, when a plaintiff sues over a minor encroachment onto his property that was not made in bad faith, he is protected by a liability rule—the defendant does not have to remove the encroachment, but must pay market value for the intrusion.¹¹⁶

¹¹⁴ See Cohen, *supra* note 2 at 300. Cohen makes it clear that even in situations where spouses are taking advantage of each others' investments, forcing them to stay together and honor the marriage would be problematic. "First, many of the acts that a spouse has implicitly contracted to perform cannot be specified nor their performance monitored. What is more significant, however, is that the marital duties are to be performed in a certain spirit, and no court can succeed in forcing an unwilling spouse to perform marital duties in a spirit of love and devotion." *Id.*

¹¹⁵ U.S. CONST. amend. V.

¹¹⁶ It is true that the classic case *Pile v. Pedrick*, 167 Pa. 296 (1895) cuts against the principle that minor encroachments should be protected by liability rules rather than property rules. But the Court's ruling in this case has also been repeatedly suggested by property professors to be inefficient and incorrect.

So a spouse's right to his marriage is protected by a liability rule. But given the liability rule, the court must still determine the amount of damages. This is when the nature of the entitlement becomes relevant. If the entitlement is a contract-type creature protected by a liability rule, the court will focus on what the parties expected from the beginning of the union before it dissolved.¹¹⁷ If the entitlement is a partnership protected by a liability rule, the court will focus on sharing the assets of the partnership with less regard to initial expectations. However, if the entitlement is property protected by a liability rule, there is a much stronger case that the court will be more sensitive to the subjective values of each party.

For example, consider eminent domain—where a liability rule protects an owner's home. When the government takes the home, there are widespread concerns over the ability of a fair-market-price to compensate condemnees for their sentimental attachment to the property—that profound emotions, memories, and human sentiments will be diminished by the liability rule.¹¹⁸ Commentators have been encouraged to take these things into account when calculating a good “just compensation” value for eminent domain.

Similarly, we want courts in divorce cases to treat the parties with sensitivity to their marriage, especially the aggrieved spouse. This is the principle difference between applying a liability rule to a liability right versus applying a liability rule to a property right. When a liability rule protects a liability right (for example, a contract), courts tend to be very systematized and automatic. However, when a liability rule protects a property right (such as in eminent domain and here, in divorce cases), we want courts to consider a more human aspect of the property right, and my model captures this.

¹¹⁷ In other words, expectation damages.

¹¹⁸ See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957 (2004).

IV. WHY IS MARRIAGE BETTER CONCEPTUALIZED AS A PROPERTY RIGHT?

A. Inalienability and the Evolution of Divorce Regimes

Until the mid-1800s, divorce were typically unavailable, so marriages were permanent.¹¹⁹ Catherine Smith has described this conception of marriage as “Commitment” mixed with “Monarchy.”¹²⁰ However, I propose using the conception of an unalienable property right. This framework affords two advantages: first, it captures the comparative moral dynamics of inalienability rights with a committed marriage; second, it makes sense of the transition from a no-divorce regime to our regime today. Under this framework, we do not have to hop around different conceptions of marriage to explain divorce regimes under different time periods: for example, claiming that marriage progressed from first a Commitment to a Democracy to a Partnership or anything like that; instead, we can view the development of marriage as a consistent transition of a property right from fully inalienable to fully alienable.

The idea of inalienability is not unfamiliar terrain—it has always “had a central place in our legal and moral culture.”¹²¹ Because inalienability can mean a variety of things, I refer to inalienability as a property right that cannot be lost at all.¹²² In the period before the mid-1800s, the status of being married—if this is considered a property right—was an inalienable one.¹²³ Inalienability “often expresses an aspiration for non-commodification”, because “a world in

¹¹⁹ See *supra* Part II.A.1.

¹²⁰ Smith, *supra* note 4 at 216. Smith defines Marriage as Commitment as “Marriage is a relationship involving two individuals who have made a lifelong commitment—to each other and to the relationship—that overrides their individual interests in the relationship.” *Id.* at 214–15. She defines Marriage as Monarchy as “In marriage one must lead and the other must follow, and the leader is accorded the relationship's rights and responsibilities in trust to assure the success of the marriage.” *Id.*

¹²¹ Margaret Jane Radin, *Market-Inalienability*, in PERSPECTIVES ON PROPERTY LAW 336 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

¹²² *Id.* (“Sometimes inalienable means nontransferable, sometimes only nonsalable. Sometimes inalienable means nonrelinquishable by a rightholder; sometimes it refers to rights that cannot be lost at all.”)

¹²³ Regan, *supra* note 9 at 2311 (describing “the period in which absolute divorce theoretically was unavailable, and divorce from bed and board was the only form of relief available to an aggrieved spouse. If a petitioning spouse could prove that her husband had engaged in specified forms of misconduct, a divorce from bed and board would permit the parties to live separately, although they remained formally married. In such circumstances, a husband continued to be held to his spousal obligation of providing for the financial needs of his wife.”)

which human interactions are conceived of as market trades is different from one in which they are not.”¹²⁴ As such, moves toward alienability are often viewed with suspicion because “commodification brings about an inferior form of human life.”¹²⁵ Similarly, during the period that marriage was inalienable, the rhetoric was similar—the inalienability of the property right was rooted in moral grounds that marriage should not be tradeable or disposable, like an object.¹²⁶

Today’s no-fault regime can be viewed as the intuitive opposite of an inalienability scheme—instead of being bound indefinitely to marriage, spouses can alienate their marriage at will. Even though few argue that we should return to inalienability where divorce is altogether banned, many feel intuitively that no-fault divorces—total alienability—does not sit correctly with a moral view of the value of marriage.¹²⁷

B. Problems With Other Models of Marriage

1. *The Contract Conception*

Although the marriage is technically a contract under state law, there are so many striking differences between marriage and other contracts that marriage begins to look like an entirely

¹²⁴ Radin, *supra* note 121 at 337–38.

¹²⁵ *Id.* at 339 (“For critics of the market society, commodification simultaneously expresses and creates alienation. The word ‘alienation’ thus harbors an ironic double meaning. Freedom of alienation is the paramount characteristic of liberal property rights, yet Marx saw a necessary connection between this market alienability and human alienation... In his treatment of estranged labor, Marx portrayed workers’ alienation from their own human self-activity as the result of producing objects that became market commodities. By objectifying the labor of the worker, commodities create object-bondage and alienate workers from the natural world in and with which they should constitute themselves by creative interaction.”)

¹²⁶ See COONTZ, *supra* note 22. The no-divorce regime was ushered in by the Church under moralistic rhetoric. Contrast this with the story of Marcus Porcius Cato, for example, who saw marriage as more of a commodity that could be traded—he divorced his wife and arranged for her to marry one of his friends, “in order to strengthen the friendship and family connections between the two men”, then promptly remarried her after his friend died.

¹²⁷ See, e.g., Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce*, 37 J. LEGAL STUD. 315, 317–335 (2008). (“Family law practitioners report anecdotally that their divorce clients are incredulous when they learn that the divorce system lacks an official mechanism for assigning blame... In these experiments, we see that many people’s instinct is to punish, or at least disfavor, wrongdoers. Subjects expressed distress that, under the no-fault law, parties can breach a contract without repercussions. A typical comment was: “Doesn’t seem fair for the party who hasn’t done anything wrong and hasn’t broken her part of the contract to be treated equally as the one who has.”).

different creature. Legal academics have repeatedly acknowledged marriage as a “special case.”¹²⁸ They have called it “a peculiar contract.”¹²⁹

First, some have noted that one difference between marriage and other contracts is that marriage “cannot be dissolved solely by the parties but only with the concurrence of a court.”¹³⁰ In practice today, the court’s concurrence is very easy to obtain.¹³¹ However, the fact that couples must go to court to work out their family matters, even if both desire the divorce, is a special restraint on autonomy not usually found in the world of contracts.

Second, there is a colloquial understanding that contract rights are usually assignable.¹³² However, in marriage, “none of the personal rights or obligations of a marriage may be assigned or delegated.”¹³³

Third, the rights and obligations of the parties in marriage “are defined by law and cannot be waived by mutual consent.”¹³⁴ A profound implication of this factor is that, as Charles Fried noted at the beginning of his book on contracts, the legal obligations in a marriage contract are

¹²⁸ See, e.g., FRIED, *supra* note 53 at 3. (“Not all promises are legally enforced, and of those which are, different categories receive differing degrees of legal recognition... And some arrangements that are not promissory at all... are assimilated to the contractual regime. Finally, even among legally binding arrangements that are initiated by agreement, certain ones are singled out and made subject to a set of rules that often have little to do with that agreement. Marriage is the most obvious example.”).

¹²⁹ Cohen, *supra* note 2 at 271. Although Professor Cohen points out differences between marriage and other contracts, he concludes that “Nonetheless, from the legal and, more important, the economic perspective, it is a species of contract.” *Id.*

¹³⁰ *Id.*

¹³¹ See, e.g., Luscombe, *supra* note 71 at 54.

¹³² Legal academics have written at length about the assignability of contract rights, including objections to the usage of the phrase. See generally Bob Allcock, *Restrictions on the Assignment of Contractual Rights*, 42 CAMBRIDGE L.J. 328 (1983). For people seeking legal information, however, there are numerous popularly accessible non-technical sources that claim all contractual rights are assignable. See, e.g., Wikipedia, *Assignment (Law)*, [http://en.wikipedia.org/wiki/Assignment_\(law\)](http://en.wikipedia.org/wiki/Assignment_(law)) (last visited Feb. 2, 2011) (“The common law favors the freedom of assignment, so an assignment will generally be permitted unless there is an express prohibition against assignment in the contract. Where assignment is thus permitted, the assignor need not consult the other party to the contract”); Lawyers.com, *Assigning a Contract*, <http://contracts.lawyers.com/contracts/Assigning-A-Contract.html> (last visited Feb. 2, 2011) (“Before attempting to assign a contract, you will want to make sure it’s legal. If the contract says nothing about assignment, it’s legal to assign it. Contract rights are property under state law and can be assigned, or bought and sold, just like any other property”).

¹³³ Cohen, *supra* note 2 at 271.

¹³⁴ *Id.*

not even defined by the participating parties—the particular vows that individuals choose to recite at their wedding have little bearing on the legal responsibilities they are acquiring.¹³⁵

“While the parties undertake what seems to be a substantial commitment to one another, usually they make no agreement specifying the duties and rights of each party.”¹³⁶ This “failure of the parties to specify and articulate the terms of the agreement may make marriage seem less like a contract.”¹³⁷

Because the spouses do not articulate (and in some cases, are not even particularly aware of)¹³⁸ the exact obligations of marriage, it is difficult to justify marriage under a promise-based approach to contracts. What exactly are they promising? Are they promising to keep the legal obligations of marriage (which both parties might be ignorant of at the time of marriage), the vows that they recite (which are not legally enforceable), or their true underlying intentions (which might not match up exactly with either the law or their spoken vows)? There is also a noticeable lack of legal default rules as gap-fillers for vague marriage vows. Consistent with this point, Robert and Elizabeth Scott have pointed out:

Much of the contractual analysis of marriage thus implicitly posits a contractual relationship in which the parties are presumed capable *ex ante* of allocating and assessing responsibility for failures to fulfill the terms of the marital agreement. In such a world, contract terms are clearly specified, legal enforcement is ubiquitous and straightforward, and expected performance is clear. Marriage not fit this model well.¹³⁹

¹³⁵ See Fried, *supra* note 53 at 3.

¹³⁶ Cohen, *supra* note 2 at 271.

¹³⁷ *Id.*

¹³⁸ For example, bankruptcy courts have interpreted federal law to mean that if an individual spouse files for bankruptcy, he or she is required to include the income of his or her nondebtor spouse in the calculation for disposable income. Even if a wife and husband plan to keep separate bank accounts and their finances apart, there are many legal responsibilities that they have for each other that neither spouse expects or intends at the time of the wedding. See *In re Carter*, 205 B.R. 733, 735 (Bankr. E.D. Pa. 1996); *In re Welch*, 347 B.R. 247, 252 (Bankr. W.D. Mich. 2006); *In re McNichols*, 249 B.R. 160, 169 (Bankr. N.D. Ill. 2000); *In re Bottorff*, 232 B.R. 171, 173 (Bankr. W.D. Mo. 1999).

¹³⁹ Scott & Scott, *supra* note 11 at 1248. Robert and Elizabeth Scott reject the traditional contractual conception of marriage and proceed to a “relational contract” theory to explain patterns of legal enforcement and non-enforcement in marriage. “Relational contract theory largely resolves [the] puzzle. The marriage vows express the

I would argue that because there is no “meeting of minds”, marriage starts to look less like an ongoing contract, and more like the acquisition of property. There is a strong *caveat emptor* side to marriage—you are marrying someone who has no clear obligation to disclose issues of relevance to the marriage.

This is also problematic to an autonomy-based approach to contracts. If the autonomy to tailor deals and alter default rules is paramount to the idea of contracting, the “failure of the parties to specify and articulate the terms of the agreement” in marriage would make it a troublesome contract.¹⁴⁰ Furthermore, not only are the rights and obligations prescribed for spouses, but also the manner in which they should be carried out.¹⁴¹ If we accept the proposition that contract law should be a practice of autonomy, that it should allow individuals to fashion relationships with other individuals on their own terms, then marriage clearly deviates from this ideology.

Marriage also poses problem for a consideration-based approach to contracts. Consideration is “defined as something either given or promised in exchange for a promise.”¹⁴² What exactly is the consideration in marriage? It is clear that both spouses are giving each other something of worth, along with a set of prescribed obligations to each other. However, the kinds

couple’s emotional commitment and use hortatory language to emphasize the seriousness of the undertaking. They describe a standard of performance in idealized and general terms, and remind the parties of their goal of maintaining a caring, cooperative relationship. But emotional commitments are difficult to translate into quantifiable standards of performance, and assessing responsibility for breach proves to be vexingly difficult. Thus, the law relies on social and relational norms to promote cooperation and to enforce intramarital promises. Indeed, relational theory suggests that formal legal enforcement of all the terms of a “marital bargain” is inadvisable, because legal intervention risks undermining the parties’ cooperative equilibrium, and ultimately subverts their efforts to sustain a lasting relationship.” *Id.* at 1230. The relational contract theory offers a lot of insight into the aspects of marriage that the law chooses to enforce. It differs from this Article because it departs from a traditional view of contracts by crafting a new category; here, I am removing marriage from consideration as a special type of contract, but rather attributing it to the very familiar category of property that we are familiar working with.

¹⁴⁰ *Id.*

¹⁴¹ See Cohen, *supra* note 2 at 300 (assuming that “marital duties are to be performed in a certain spirit... of love and devotion”).

¹⁴² FRIED, *supra* note 53 at 28.

of duties associated with marriage, such as sexual relations, affection, and love,¹⁴³ are not even widely recognized as valid consideration outside of the marriage contract.¹⁴⁴ It is cyclical, then, to claim that in marriage, love can be consideration, whereas love is the consideration that makes marriage a contract.

Lastly, marriage poses a problem for the remedial aspect of contracts. Because divorce is no-fault, marriage is now an illusory contract that does not bind either side to their promises. This has been criticized by law and economics commentators as facilitating opportunistic behavior by husbands that undermine the marital investments made by their wives.¹⁴⁵ On one hand, the concept of efficient breach is nonsensical in marriage, because it would be impossible to approximate the value of the marriage to one spouse versus the value of the marriage to an intervening individual who is trying to induce the breach. Indeed, the canonical economic concepts of utility should not be aggregated in marriage—if a wife wishes to leave her husband with 10 units of desire and her husband wishes her to stay with 12 units of desire, most people would still say the relationship should end. It takes two (willing partners) to tango. On the other hand, the most prominent push against efficient breach comes from commentators who emphasize the moral significance of promise.¹⁴⁶ Yet, we should not bind people to their marital vows just because they were promises. Doing so would bring us back to a pre-1800 world of no divorce.

In the end, “both communitarian and law and economics critics argue that the no-fault regime has caused a decline in the importance of marriage and a loss of its valuable social

¹⁴³ See Cohen, *supra* note 2 at 300.

¹⁴⁴ See, e.g., MODERN LAW OF CONTRACTS § 5:18 (2010) (“It is well established that love and affection do not provide consideration. To support a promise, there has to be something more objective or tangible than the natural affections of family relationships.”)

¹⁴⁵ See generally Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978); Cohen, *supra* note 2; Brinig & Crafton, *supra* note 13.

¹⁴⁶ See generally FRIED, *supra* note 53.

functions.”¹⁴⁷ The fact that this aspect of marriage has caught the attention and criticism of many commentators should raise the question: if marriage is rightly conceptualized as a contract, why is modern marriage’s most prominent attributes decidedly non-contractual? If marriage is rightly conceptualized as a contract, why does it diverge from the way contracts are traditionally and essentially enforced? Although marriage is technically a legal contract requiring paperwork and signatures, it cannot be justified as a contract in the classical, academic sense.

2. *The Partnership Conception*

Conceptualizing marriage as a partnership involves viewing it as a venture designed to promote the interests of its participants. Upon dissolution, property should be allocated not according to individual contributions, but according to the overall assets in *equal* distribution, according to some.¹⁴⁸ But other commentators have noted that under “strict application of partnership theory, the law would rely on *market principles to calculate* the relative value of the spouses’ contributions, as well as the balance of payments resulting from implicit economic exchanges between them, to determine each spouse’s entitlement to a share of assets.”¹⁴⁹

With regard to the first measure—equal distribution—however, it has been argued that “the legal equality of men and women does not translate into equality in terms of their roles, earning capacity, and post-divorce needs.”¹⁵⁰ These are among the reasons that partnership

¹⁴⁷ Scott & Scott, *supra* note 11 at 1250.

¹⁴⁸ Commentators have equated a partnership model of marriage with equal distribution of assets upon divorce. *See, e.g.*, Smith, *supra* note 4 at 218. *See also* Regan, *supra* note 9 at 2317 (noting in a discussion on partnership theory in marriage that there “is a tendency, however, at least to begin with the presumption that spouses are entitled to an equal share of marital assets at divorce.”).

¹⁴⁹ Regan, *supra* note 9 at 2317 (emphasis added).

¹⁵⁰ Smith, *supra* note 4 at 218–19.

theory has been rejected as a tenable solution to modern marriage.¹⁵¹ Furthermore, equal distribution is not frequently employed in the United States as an empirical matter.¹⁵²

The second measure—using market tools to calculate contributions to determine entitlements is also conceptually troubling. The partnership theory is problematic when it is “taken as implying a unity of interests in marriage that does not exist, especially in light of less than full sharing in marriages.”¹⁵³ Furthermore, commentators have proposed regarding marriage “not simply as an economic partnership, but as a distinctive open-ended relationship of mutuality, interdependence, and care.”¹⁵⁴ In other words, viewing marriage as a business partnership robs the relationship of its core meaning of devotion and family with the cold calculus of business principles.

B. Property Rights Recognize the Personal Value of Marriage More Than a Contracts/Partnership

1. *Role in Defining Self-Identity*

One of the most notable characteristics of property is its role in identifying its possessor. Property captures something very personal and crucial about the possessor, in a way that contracts seldom do, in rhetoric or in essence. Although the personhood aspects of contracts have

¹⁵¹ Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990)

¹⁵² See generally Ryznar, *supra* note 56. The argument is that in cases with modest assets, it is difficult to differentiate between equal distribution and equitable distribution based purely on amounts allocated to each spouse. However, in cases with unusually wealthy spouses (usually the husband, at the initiation of the marriage), there is a clear difference between equal distribution—which awards the wife with much more money—and equitable distribution.

¹⁵³ Smith, *supra* note 77 at 166. However, Henry Smith proceeds to note that “interestingly, more recent partnership law does not require a complete unity of interests among partners. . . we can say that in marriage, as in partnerships, the extent to which the marital partners’ interests converge or diverge will differ widely in individual cases.” *Id.* at 166–67.

¹⁵⁴ Regan, *supra* note 9 at 2382.

been acknowledged,¹⁵⁵ that people can be deeply hurt by the breaching of a contract, and that people may hold significant non-monetary interests in the fulfillment of contracts and promises, intuition tells us that few people are defined by the contracts they make. In fact, “many critics have identified the move [of marriage] from status to contract as the underlying source of problems” because the “abolition of fault and the use of ‘market discourse’ in conceptualizing marriage” is “destructive of the values of caring and commitment that contributed to the stability of traditional marriage.”¹⁵⁶

In contrast, possession of property has been profoundly linked to personhood and self-definition. “One set of the individual’s possessions has a special relation to self.”¹⁵⁷ Even in the most Spartan situations,¹⁵⁸ we find that people find things to possess, and that the spaces occupied by these things “can represent an extension of the self and its autonomy, becoming more important as the individual foregoes other repositories of selfhood.”¹⁵⁹ People in situations who have had their identities replaced with numbers—such as inmates or mental hospital patients—have been found to stash objects that have little instrumental value as an attempt at maintaining a sense of self.¹⁶⁰ Indeed, while the rise of private property “is explainable, among humans as among animals first and foremost by economic considerations,” it becomes evident that property is a deep part of self-identification. Among children, for example, it turns out that:

[T]he child’s awareness of self—who he or she is—is closely related to the knowledge of what objects the child controls (that is, owns): “I” is that which can dispose of certain objects or a certain territory; “mine” helps define “me.” To

¹⁵⁵ See generally Seana Shiffrin, *Promising, Intimate Relationships and Conventionalism*, 117 PHIL. REV. 418 (2008); J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEG. THEORY 325 (1996).

¹⁵⁶ Scott & Scott, *supra* note 11 at 1248.

¹⁵⁷ Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, in PERSPECTIVES ON PROPERTY LAW 2 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

¹⁵⁸ *Id.* (describing the Benedictine Rule for religious orders that require property dispossession, and later that of mental patients who are institutionalized in hospitals).

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.*

paraphrase Descartes's "I think, therefore I am," psychologically it holds true to say of small children, "I own, therefore I am."¹⁶¹

However, not all property is personal. Margaret Jane Radin describes the personhood aspect of property as a spectrum. One may measure "the strength or significance" of someone's relationship with a possession "by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement."¹⁶² This can be differentiated from the type of possession where the object "is perfectly replaceable with other goods of equal market value" that one holds "for purely instrumental reasons."¹⁶³

3. *Uniqueness and Irreplaceability*

Because of the difference between instrumental possessions and personal possessions, "one should not invest oneself *in the wrong way or to too great an extent* in external objects. Property is damnation as well as salvation...the relationship between the shoe fetishist and his shoe will not be respected like that between the spouse and her wedding ring."¹⁶⁴ This personhood perspective on property promulgates a "hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement."¹⁶⁵ An example of something at the personal end of the continuum is a house that someone resides in.¹⁶⁶ As such, eminent domain and takings commentatorship frequently consider, or at the very least, make a passing reference

¹⁶¹ Richard Pipes, *Human Nature and the Fall of Communism*, in PERSPECTIVES ON PROPERTY LAW 24 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

¹⁶² Margaret Jane Radin, *Property and Personhood*, in PERSPECTIVES ON PROPERTY LAW 9 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 10 (emphasis in original). I do not wish to stretch Professor Radin's reference to the wedding ring as actual support for viewing marriage as property; indeed, she is evidently referring to the wedding ring as property, not marriage itself. But her example is telling—it is socially permissible to invest yourself extensively in an object as long as it is sentimentally associated with marriage. And it is certainly consistent with the notion that society wishes to promote investing in marriage, not only instrumentally, but sentimentally, as well.

¹⁶⁵ *Id.* at 15.

¹⁶⁶ Radin, *supra* note 162 at 15.

to the difficulty of assessing the worth of a home to a resident.¹⁶⁷ This is because we understand that houses—for example, those that have been in the family for generations upon generations, or that hold childhood memories—might hold sentimental value to their owners that exceed the fair market price of the building and land. The law respects these values, which is reflected in various areas of law, including bankruptcy.¹⁶⁸ There are few analogies to this type of legal protection for traditional contracts.

A corollary of sentimental value is irreplaceability. Marriage is one of those things that are considered irreplaceable. Even if a woman, after her divorce, is made economically no worse off—and even manages to marry someone else of the same marriage “market value”¹⁶⁹ as her ex-husband, we would still recognize a clear difference between the first and second marriage. This is intuitively different from the stereotypical contractual setting, money for widgets, where it does not particularly matter who the opposing party is as long as the bargained-for cash or goods are the same.

We recognize that property—or at least some types of property¹⁷⁰—are very personal, to the point of self-definition,¹⁷¹ and not compensable with full market value damage measures. Furthermore, “a more sophisticated version of property” is that “we see property as a way of

¹⁶⁷ See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, in *PERSPECTIVES ON PROPERTY LAW* 497 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002) (describing the nature of valuation to be “imponderable and idiosyncratic”, leading to “interminable wrangling over amounts”). See also Radin, *supra* note 162 at 17–18 (“Perhaps the personhood perspective is not strong enough to outweigh other concerns, especially the government’s need to appear even-handed and the lower administrative costs associated with simpler rules... On the other hand, perhaps the personhood perspective is so deeply embedded that, without focusing on the problem, we expect that the condemning authority will take fungible property where possible. We may simply take for granted that the government will not take homesteads when parking lots will do.”)

¹⁶⁸ See, e.g., 11 U.S.C. §§ 1301 et seq. (allowing the possibility of a debtor, through reorganization, to discharge a large amount of debt while keeping his or her house). Many states also have individual homestead exemptions that make a debtor’s place of residence off-limits for creditors.

¹⁶⁹ For example, whatever makes a spouse desirable to another spouse. Professor Cohen has noted that it is difficult for divorced women to remarry because women “in general lose value in the marriage market relative to men over time.” See Cohen, *supra* note 2 at 273.

¹⁷⁰ See Radin, *supra* note 162 at 10.

¹⁷¹ See Goffman, *supra* note 157 at 2; Pipes, *supra* note 161 at 24.

defining our relationships with other people.”¹⁷² Marriage is very much the same way.¹⁷³ There is no question that marriage is supposed to be deeply personal to the parties involved.¹⁷⁴ There are many self-help books on the market about how to be in a romantic relationship without losing one’s own identity.¹⁷⁵ Although these books are marketed towards *avoiding* the succumbing of one’s self-worth and identity into a relationship, the fact that these books exist tell us that people struggle with self-identifying through marriage. Women especially, it seems like,¹⁷⁶ have struggled with being so consumed in relationships that they lose their identities.

If we conceive of a marriage like a possession, subject to a property right, it more effectively reflects the degree of self-identification we feel. Just as society has long understood and sympathized with the deep sentimental bonds one may hold for his home,¹⁷⁷ society promotes and acknowledges the deep personal and self-identity aspects of relationships and marriage. Contracts do not seem to offer such a deep connection of personhood and identity. Commentators have primarily dealt with this discrepancy by designating marriage as a special type of contract that is especially personal, for example, delineating it as a relational contract,¹⁷⁸

¹⁷² Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, in PERSPECTIVES ON PROPERTY LAW 30 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

¹⁷³ See, e.g., Andrew J. Weigert & Ross Hastings, *Identity Loss, Family, and Social Change*, 82 AM. J. SOC. 1171–1185 (1977); OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 272 (Bernhard Tauchnitz, ed. 1908) (“Of course married life is merely a habit, a bad habit. But then one regrets the loss even of one’s worst habits. Perhaps one regrets them the most. They are such an essential part of one’s personality.”)

¹⁷⁴ I do not think that this claim requires a citation, even in the legal world.

¹⁷⁵ See, e.g., ALTHEA J. HORNER, *BEING AND LOVING: HOW TO ACHIEVE INTIMACY WITH ANOTHER PERSON AND RETAIN ONE’S OWN IDENTITY* (Jason Aronson, ed., 3d ed. 2005). There are many more self-help books similar to this in the market.

¹⁷⁶ See, e.g., HENRIK IBSEN, *A DOLL’S HOUSE*, Act III (Dover Publications 1992) (1879) (“I have been performing tricks for you, Torvald. That’s how I’ve survived. You wanted it like that. You and Papa have done me a great wrong. It’s because of you I’ve made nothing of my life.”).

¹⁷⁷ See generally MARGARET MITCHELL, *GONE WITH THE WIND* (Scribner Books 2007) (1936) (where Scarlett O’Hara is repeatedly returns to her family’s plantation, Tara); DAPHNE DU MAURER, *REBECCA* (Harper Paperbacks 1997) (1938) (where both Mr. and Mrs. de Winter are very attached to their West Country estate Manderley).

¹⁷⁸ See generally Scott, *supra* note 11 at 1230 (“Relational contract theory largely resolves this puzzle. The marriage vows express the couple’s emotional commitment and use hortatory language to emphasize the seriousness of the undertaking. They describe a standard of performance in idealized and general terms, and remind the parties of their goal of maintaining a caring, cooperative relationship.”)

or by enunciating a special focus on promises between intimates.¹⁷⁹ But rather than categorizing marriage as a special type of contract, with many exceptions and differences from the prototypical contract, we can more smoothly categorize marriage as property, entailing the type of personhood and identity concerns that have long been attributed to property.¹⁸⁰

4. *Possession as a Signal*

I mentioned previously that “possession” is an ambiguous term. Yet for the common law, possession is the origin of property.¹⁸¹ Carol Rose examines *Pierson v. Post*,¹⁸² and extracts “two great principles, seemingly at odds, for defining possession: (1) notice to the world through a clear act, and (2) reward to useful labor.”¹⁸³ She suggests that the two principles are not actually at odds, but that “in rewarding the one who communicates a claim”, the common law “does reward useful labor; the useful labor is the very act of speaking clearly and distinctly about one’s claim to property.”¹⁸⁴ Thus, the signaling aspect of possession seems increasingly important.¹⁸⁵ Adverse possession, public records for property, saving one’s place in line at a movie theater, or leaving a chair in a shoveled street parking spot are all unambiguous ways of signaling possession.¹⁸⁶

What does this mean for marriage? Entering into marriage has a signaling function as well. It has often been noted that today, couples “can live together in intimate relationships” without

¹⁷⁹ See, e.g., Shiffrin, *supra* note 155 at 497. (“An account of promising should treat promises within friendly and intimate relationships as central, though not exclusive, cases.”)

¹⁸⁰ See generally Radin, *supra* note 162.

¹⁸¹ Carol M. Rose, *Possession as the Origin of Property*, in PERSPECTIVES ON PROPERTY LAW 180, 181 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman et al., eds., 2002).

¹⁸² 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

¹⁸³ Rose, *supra* note 181 at 182.

¹⁸⁴ *Id.* at 184.

¹⁸⁵ *Id.* at 183–84. (“Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested... Similar ideas of the importance of communication, or as it is more commonly called, ‘notice,’ are implicit in our recording statutes and in a variety of other devices that force a property claimant to make a public record of her claims on pain of losing them altogether. Indeed, notice plays a part in the most mundane property-like claims to things that the law does not even recognize as capable of being reduced to ownership...it is so important that property owners make and keep their communications clear[.]”).

¹⁸⁶ *Id.* at 184.

social sanction, and that this type of cohabitation can be “undertaken and discarded with far less cost than marriage” while retaining “a greater measure of personal freedom” for each partner.¹⁸⁷ If the benefits of sexual intimacy, shared income and assets, mutual support, companionship, company, and children can all be realized through cohabitation, why is marriage still a very popular institution? It is because the people who marry “expect to benefit from undertaking a greater commitment than is possible through other, informal options.”¹⁸⁸ And like the lawn chair occupying a parking spot in Chicago, or a land record filed with the proper authorities, entering into marriage provides a signal:

The signaling function of marriage as distinct from a cohabitation agreement) serves to reveal a person’s preferences toward intimate relationships in which he or she may wish to become involved. Preferences about long-term relationships are likely to vary widely. Parties can be expected to differ on the desired length of the term of the relationship, the degree of sexual loyalty expected from their principal partner, and the desired level of commitment to the relationship generally. Given this diversity of preference, the legal category of marriage conveys a signal to prospective partners of the signalers’ preferences as to the nature of the relationship. Permitting individual parties the freedom to choose from among many varied forms of commitment will inevitably dilute the informational value of the signal.¹⁸⁹

Under today’s no-fault divorce law regime, couples cannot contract each other out of the possibility of divorce. Even though the spouses are saying, “for richer or for poorer, in sickness and in health” at the ceremony, there is no way for one to legally bind oneself to this vow in a legally accountable sense.¹⁹⁰ Because “couples are not free to

¹⁸⁷ Scott & Scott, *supra* note 11 at 1254. (“At first glance, it would seem that most of the functions and purposes of marriage could be achieved through an informal cohabitation relationship. No formal status or commitment is needed for a relationship that includes sexual intimacy, mutual companionship, the sharing of assets and income, the production and rearing of children, and the provision of care and support (both emotional and financial) in times of need.”) *Id.*

¹⁸⁸ *Id.* at 1255. The authors add that “The essence of commitment is constraint. To be sure, many friendships and cohabitation relationships involve a sense of commitment. Marriage, however, adds an overlay of legal and social sanctions that further restrict the freedom to renege and thus strengthen each partner’s commitment.”

¹⁸⁹ *Id.* at 1261.

¹⁹⁰ There are ways for spouses to increase the accountability factor. For example, consider a spouse who wants to bind himself—I am referring to him as male for convenience, without loss of generality—even though both he

substitute legal mechanisms to reinforce their commitment,” the law is essentially choosing ex post autonomy over ex ante autonomy. This “has particularly acute costs in an environment in which extralegal mechanisms function suboptimally...captured most forcefully in the mandatory unilateral termination rule” and the problem of asymmetric investments between the spouses.¹⁹¹ Thus, conceptualizing marriage as property re-words Elizabeth Scott and Robert Scott’s critique of no-fault divorce laws, but does so by characterizing the problem as one of adequate signaling—signaling in property rhetoric.

C. Toward a More Sensitive Measure of Remedy

Modeling marriage as a property right—rather than as a contract right or a right to a share of a business partnership—better captures the way courts can equitably divide assets upon divorce. The economic language of contract and partnership imply that bright-line rules should be used rather than flexible standards. This is incorrect in practice¹⁹² and it overlooks the personal and sensitive nature of individual marriages. In contrast, a property approach to marriage does not visualize property allocation upon divorce as a type of damages—to be calculated by Expectation or some other equation. In order to illuminate the way the model of marriage can affect the remedy afforded to the spouses upon divorce, consider the three cases below. In each case, the aggrieved spouse financially and emotionally supported the other spouse through college to receive an educational degree. The three courts take very different approaches to dividing the asset—that is, the educational degree—upon divorce.

and his wife knows that he can divorce her in the future. He could write a prenuptial agreement that would be overwhelmingly to her favor, or otherwise try to place himself in a vulnerable position such that a divorce would harm him more than her. However, this might undercut the aspect of trust in the marriage.

¹⁹¹ Scott & Scott, *supra* note 11 at 1333–34.

¹⁹² In America, at least, divorce courts split property equitably—considering a variety of factors including need, misconduct, and contributions, often depending on state statute.

I. No Award to the Aggrieved Spouse—The Roberts Rule

In *In Re Marriage of Roberts*,¹⁹³ the couple was married in 1989. The following year, they mutually decided that the husband would attend Valparaiso University Law School, while the wife would work to support both of them.¹⁹⁴ The husband did quite well, graduated, and filed a petition for divorce.¹⁹⁵ The Court determined that a law degree is not property because it does not possess the common characteristics of property. It is a piece of paper with no value except for what the holder wishes to pursue with it, conditioned on the holder's own choices and talents. There seemed to be too much uncertainty about the value of the degree, and even if there was no uncertainty, the Court feared that any award would ultimately result in an award beyond the actual physical assets of the marriage.¹⁹⁶ However, the Court did decide that the enhanced earning potential could be considered in the calculation for spousal maintenance.¹⁹⁷ However, at the point the case was decided, the husband had just graduated and begun working, so they probably had very few assets to divide. So considering the large economic value of a law degree over time, this was probably small consolation to the wife.

This decision is objectionable on two grounds. First, our moral intuition tells us that we want the wife to be compensated for the law degree, considering her sacrifices and considering how soon after graduation the husband filed for divorce.¹⁹⁸ Moral intuition is especially relevant

¹⁹³ 670 N.E.2d 72 (1996).

¹⁹⁴ *Id.*

¹⁹⁵ The opinion notes that the husband graduated third in his class and served as editor-in-chief of law review. After he graduated, he began working with a large law firm in Chicago.

¹⁹⁶ See *Roberts*, *supra* note 193.

¹⁹⁷ *Id.*

¹⁹⁸ See Wilkinson-Ryan & Baron, *supra* note 10 at 335. Wilkinson-Ryan and Baron conducted an empirical experiment concerning moral intuitions about divorce in modern society. They found that, despite the “no-fault” regime, subjects still went felt strongly that their moral intuitions about fault should be applied. “In these experiments, we see that many people’s instinct is to punish, or at least disfavor, wrongdoers. Subjects expressed distress that, under the no-fault law, parties can breach a contract without repercussions... Subjects also worried that

here because in divorce settings, we do not see the kind of bargaining in the shadow of informal norms as we do in other settings.¹⁹⁹ As a result, it is important that we consider what the law is doing to those who are morally wronged.²⁰⁰

Second, from an economic point of view, the *Roberts* rule encourages opportunism in marriage because the wife gets nothing if the couple splits up. This provides an incentive for spouses not to support each other through marriage, which may have the effect of reducing overall utility of the marriage for the couple.

2. *Restitution—The Postema Rule*

In *Postema v. Postema*,²⁰¹ which also concerned a law degree, the court determined that the degree would be considered a marital asset because both spouses worked for it together—the husband in law school, and the wife in her contributions.²⁰² The court awarded the wife a fixed sum that represented her contribution to her husband’s acquirement of the degree. In other words, the court turned to a theory of restitution.²⁰³ A two step analysis is required: first, an

the permissible consideration of contributions should actually include contributions to the relationship itself, a factor excluded under the no-fault laws: ‘No-fault may make things simpler, but why award one party equal proceeds when the relationship was never equal to begin with. If you’re going to court, time should be given to evaluating each person’s contribution to a relationship and compromising.’ And, perhaps most commonly, the restriction of the law made subjects angry or frustrated: ‘In this case, the no fault is for the birds. Sam was ignorant in thinking he could get his own way once he was married.’ And, in fact, we know that more than a third of subjects in experiment 3 were willing to intentionally go against the legal rule in order to punish the wrongdoer, presumably when they determined that the law would yield an unfair result. This was somewhat surprising given that the instructions asked subjects to respond from the point of view of an impartial judge following no-fault rules, but some subjects apparently thought the judge would concur...” *Id.*

¹⁹⁹ See, e.g., ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (Harvard University Press 1991).

²⁰⁰ See, e.g., Wilkinson-Ryan & Baron, *supra* note 10 at 336 (“If everyone agreed that fault is important and the law is unreasonable, divorcing parties could make contracts with one another in accord with their shared moral intuitions... Our results suggest that this is not the case, even though the norm prohibiting marital misconduct appears to be quite universal. Subjects are certainly attuned to the informal norm, but they will turn to the legal rule when it is to their benefit to do so.”)

²⁰¹ 189 Mich. App. 89, 471 N.W.2d 912 (1991).

²⁰² *Id.*

²⁰³ See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001). Emily Sherwin notes that “[r]estitution is now acknowledged to be a component of our law, and

examination of the sacrifices, efforts, and contributions of the nonstudent spouse toward attainment of the degree.²⁰⁴ Second, given such sacrifices, efforts, and contributions, a determination of what remedy or means of compensation would most equitably compensate the nonstudent spouse under the facts of the case.²⁰⁵ An implication of this remedy is that women would be compensated for their sacrifices during marriage. Because women tend to make the sacrifices and contribute earlier on in marriage, while men tend to do so later, this type of award helps prevent the kind of opportunism that have concerned commentators.²⁰⁶ On the other hand, it is very difficult to calculate the value of non-monetary contributions. It has been argued that such calculations also, by nature, demean the contributions because market-rhetoric undermines the value of housework and care.²⁰⁷ Furthermore, it is unclear whether the amount recoverable under a restitution theory is the adequate amount of money to deter opportunism.

3. *Expectation Damages—The O'Brien Ruling*

unjust enrichment is generally understood to be the guiding principle of the field of restitution.” *Id.* at 2083–84. She also notes that “the principle of unjust enrichment can be understood in at least three ways. First, unjust enrichment can be interpreted as a principle of Aristotelian equity, providing correction when normally sound rules produce unjust results in particular cases. Second, unjust enrichment can be characterized as a “legal principle” incorporating a broad ideal of justice, from which courts can deduce solutions to particular restitution problems. Finally, unjust enrichment can be understood simply as expressing a common theme of restitution cases.” *Id.* at 2084. Sherwin also notes that she prefers conceptualizing unjust enrichment as a descriptive and organizational idea, because seeing it as a legal principle would “encourage[] judicial creativity” and her “own instincts about the ideal pace of legal change, particularly in private law, are conservative.” *Id.* at 2113. The court in *Postema* does not make clear what theory of restitution or unjust enrichment it is operating under. However, it does hold that the spouse who does not earn the degree should be compensated whenever the degree is the end product of a concerted family effort involving mutual sacrifice and effort.

²⁰⁴ See *Postema*, *supra* note 201.

²⁰⁵ *Id.*

²⁰⁶ See, e.g., Cohen, *supra* note 2 at 287 (“The shift in relative values between men and women over time has an important role to play in the formation of the marriage contract. At the time of formation, the marriage contract promises gains to both the par-ties who enter into it. Yet the period of time over which these gains are realized is not symmetrical. As a rule, men tend to obtain gains early in the relationship when their own contributions to the marriage are relatively low and that of their wives relatively great. Similarly, later on in marriage women tend as a general rule to obtain more from the contract than do men. The creation of this long-term imbalance provides the opportunity for strategic behavior whereby one of the parties, generally the man, might find it in his interest to breach the contract unless otherwise constrained.”).

²⁰⁷ See, e.g., Regan, *supra* note 9 at 2310 (“Reliance on property rhetoric thus creates the risk that caregivers who do not conform to this model will be further marginalized and their claims deemed even less worthy of financial recognition.”).

Contrast the *Roberts* and *Postema* rulings with that of *O'Brien v. O'Brien*.²⁰⁸ The court in *O'Brien*, like the court in *Postema*, ruled that the advanced degree is a marital asset. However, here the Court likened the situation to determining the valuation of lost earning potential in a wrongful death tort lawsuit.²⁰⁹ It awarded damages to the nonstudent spouse not only for the reimbursements of direct financial contributions she made, but also the value of the enhanced earning capacity it afforded the degree-holder. This is analogous to Expectation Damages. Of the three cases, the ruling in this case offers the most incentives for spouses to make sacrifices for each other's careers, but it restricts the freedom of the degree-holding spouse more strictly post-divorce.²¹⁰

4. *Analysis of Remedies*

The different ways that courts have tackled how to treat advanced degrees upon divorce reveal the ways they conceptualize marriage. The no-awards ruling in *Roberts* essentially held couples to their sacrifices during marriage, providing a disincentive for the supporting spouse. The restitution award in *Postema* provided a little more incentive for the supporting spouse to make sacrifices for her husband's education, but is a remedy that is difficult to calculate. Lastly, the expectation damages award in *O'Brien* provided high incentives for spouses to contribute to each other, but restricts the *ex-post* freedom of the degree-holder. None of the rulings discussed above are based on fault—in other words, on who committed adultery or was abusive. Instead, the courts were attempting to make sense of the institution of marriage; and we see that unlike in contracts, there is no true “meeting of minds”, and Expectation Damages is not the default.

²⁰⁸ 489 N.E.2d 712 (1985).

²⁰⁹ *Id.*

²¹⁰ It is very difficult to calculate the future value of an advanced degree. Furthermore, when the court awarded installments of payments, it limits the degree-holder's choices in his or her career.

By conceptualizing marriage as a property right, courts can approach the question of the advanced degree under a new framework. Instead of visualizing an imaginary contract that was breached—an imaginary contract without clear consideration and bargained-for benefits—and trying to sculpt a remedy of expectation or restitution into that contract, courts can recognize the spouse of having been deprived of a property right that was formerly hers.

We have already established above that a property rule is not the correct way to protect this property right, because of the problems with forcing spouses into unwanted marriages with each other. So this becomes more analogous to a case where someone is deprived of their property right—for example, *replevin*—but there is no way to return the property. For example, if the thief lost or destroyed the stolen object. The claim here then becomes one of something like for *trover*. When we think of the court’s work this way, they are essentially calculating the lost marriage to the spouse, and the amount of money that marriage was worth. It is in calculating *this* value that it makes sense for courts to consider equitable factors—the way they do in practice.

For individual assets to be divided, courts may turn to different remedies—restitution, expectation damages, etc. But that they do this only to further the general cause of calculating the amount of the lost property right of marriage to not only the aggrieved spouse, but to both spouses. This pulls us out of the contracts framework, or the partnership framework, because in America, divorce courts are not candidly awarding remedies that are consistent with contracts (expectation damages)²¹¹ or partnership dissolutions²¹² in any case.

²¹¹ Commentators have pointed out that no one knows what expectation damages would be, anyway, because couples are essentially promising “for better or for worse” that they would stay together. The value of a lifetime of love? *See also* Part IV.B.1.

²¹² *See* Part IV.B.2.

When partnerships or contracts dissolve, courts generally apply straightforward calculations of damages according to formulaic rules. This does not reflect the way courts do (and should) allocate property when a marriage fails. In contrast, when someone loses property, courts must evaluate the value of the property, which leads to a more open-ended and personal remedial measure.

V. CONCLUSION

Commentators have modeled marriage as a monarchy, a democracy, a commitment, a status, a tort-doctrine-like duty, a promise, a contract, and a partnership. The most popular of these now are the contract and partnership models. Yet both of these models lack consistency in view of modern no-fault divorce.

This Article has offered a new way to think about marriage. The evolution into no-fault divorce laws render many of the old models of marriage problematic. My property model of is more consistent with our conception and treatment of marriage and divorce as compared to other models. It captures the personhood aspect of marriage. In terms of remedial options, it is not only more sensitive toward the sensitive aspects of divorce, but is a more accurate reflection of what courts are doing in practice. Furthermore, it facilitates a smoother transition from pre-1800 to now—rather than picking a series of disjoint models (Status, Commitment, Duty, Contract, Partnership), I can present a smooth transition from inalienable property to alienable property, changing alongside with society's psychological and social values.

Making sense of what marriage is will lead us to a more sensible idea of what divorce allocations should look like. Modern conceptions of no-fault divorce have bred widespread criticism and moral objections.²¹³ Conceptualizing marriage as a property right solves the notional problems with the contract and partnership models—for example, the fact that couples

²¹³ See, e.g., Wilkinson-Ryan & Baron, *supra* note 10 at 335.

do not truly bargain for the legally binding aspects of marriage and instead recite completely non-binding vows). This conception not only accurately reflects what courts do in practice today, but it gives them room to develop in the future in a way that is nuanced, personal, and equitably directed at spouses.