

# Paternalism in the Law of Marriage

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## I. WHO SHOULD DEFINE A MARRIAGE?

"If contractual marriage is a meeting of the minds, then we should be glad that Jeff Stake and Eric Rasmusen are not applying for a license."<sup>1</sup> Kathryn Abrams is right; Eric's mind and mine never did meet on some important points. But her line bears repeating not just because it is clever. It exemplifies an important aspect of the traditional view of marriage; it reflects the common notion that it is society's prerogative to decide what constitutes a good marriage. Professor Abrams did not say that society should prevent or discourage our collaboration, but in her view the differences between Eric and me are too deep for society to be glad about our joining forces.<sup>2</sup> Never mind that Eric and I might be perfectly happy to share the production of an article in spite of important differences. In the traditional view, it is not for us to decide whether we should form a partnership. Society sets the criteria.

It is amazing how deeply entrenched this notion remains. At a small dinner table of lawyers and biologists attending the 1998 Gruter Law and Biology conference, Ira Ellman, who is well-known for his family law writings<sup>3</sup> and his influential position with the American Law Institute, brought up the topic of divorce law. In the ensuing discussion, nearly everyone present, scientist and lawyer alike (the predictable exception being a free-thinking economist<sup>4</sup>), appeared to assume that if we were clever enough in writing the law (and applying it later) we could create rules for marriage and divorce that would be appropriate for everyone. The discussion exposed a nearly universal assumption that it should be up to society, rather than private parties, to define "marriage." Is it impossible for people to assume that there is *no* right answer? Is it impossible for people to assume that there is no correct or even best way to look at marriage?

The point of our paper,<sup>5</sup> of course, was that while society holds the power to define marriage, it ought not continue to exercise that power as fully as it does.

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1. Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 517 (1998) (responding to Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998)). From the absence of Eric's name on this response, Professor Abrams might be tempted to respond that the marriage between Eric and me has already failed. In fact, the explanation is that Eric is already on to other projects. ["I agree with what Jeff says in this reply, but he wrote it."—E.R.]

2. If we had agreed more fully, society could be happy about our "marriage." But why is our disagreement a problem? She points to no harm done by our failure to agree.

3. *E.g.*, Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

4. David W. Barnes, of the University of Denver (Well, OK, I admit he is a law professor too.).

5. *See* Rasmusen & Stake, *supra* note 1.

Instead, appropriately limited legislation should delegate power to couples, allowing them to personalize their legal relationship in ways that are not currently allowed. We did not argue that any and all marital agreements should be enforceable. We included a substantial discussion of the limits we would put on private ordering.<sup>6</sup>

The basic argument for private ordering is simple. Behavior during marriage depends partly on incentives. The rules of marriage and divorce create incentives. If one set of rules applies to all couples, all married people face the same set of incentives (however complex and contingent). However, couples differ in what they want out of a marriage and how they want each other to behave during their marriage. Some hope their marriage will join together two lives while they retain a fierce financial independence.<sup>7</sup> Other couples may want to merge more completely, gaining some financial security from their marriage. Alternatively, some couples might include one person that desires security and one that wishes to provide it. Different couples need different packages of incentives. Therefore, some couples would benefit from the law's enforcement of rules tailored to their hopes and aspirations.

## II. DISCRETION PREVENTS PREDICTION

It is tempting to characterize the debate as being between individual decisionmaking made *ex ante*, people choosing what is best for themselves, and societal decisionmaking made *ex post*, judges making decisions about what is best for people with the benefit of hindsight. Since hindsight is usually better than foresight, judicial decisionmaking would seem to be superior. But that characterization of the issue misses an important point: law sets the level of discretion within which judges operate. If they have narrow discretion, they cannot tailor a solution to the past behavior and present needs of the couple. Conversely, if judges have wide discretion, they can tailor solutions for divorcing couples; they can reach a just result. But that same judicial discretion makes the behavior of the judges unpredictable to people who are married or contemplating marriage. When judges have discretion in cases of divorce, people cannot structure their marital behavior in safe reliance on the law. Because judges have the discretion not to award spousal support, people take costly (and often needless) steps to protect themselves against the possibility of future penury. A partner wanting to invest in homemaking has no way of getting the assurances needed to allow him or her to make that investment safely.

The response by Abrams and discussion among my several dinner table mates indicate how hard it is for people to think of the rules of marriage as something for couples to control. It is ironic that Abrams, a notable critic of patriarchy, should fall into the same mode of paternalism traditional in law—wise old persons telling us all what is good for us.

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6. *See id.* at 484-89.

7. This is the "Type A" personality couple.

## III. "PATERNALIST," C'EST MOI?

Another twist in this irony is that Abrams accuses *us* of paternalism. In her section entitled "Interrogating Protection," she says, "Their protection is, in the first instance, paternalist: it seeks to save smart women from foolish choices by rendering more secure the traditional, gender-differentiated role they had sought in the first place."<sup>8</sup> We can interrogate her claim through a hypothetical.

Suppose the law refused to enforce loan repayment agreements made by husbands who have borrowed money from their wives and, as a result, few wives made loans to their husbands. And suppose further that I were to argue that the law should be reformed to make those repayment agreements enforceable. Would Abrams accuse me of trying to save smart wives from their foolish choices not to lend money? Such an accusation would make no sense. How could it be a foolish choice not to lend money when the law refuses to enforce repayment agreements? Equally important, it would not be foolish to refrain from lending money even if the law did enforce loan agreements.

This hypothetical situation is not so far from the status quo. Many women today refuse to play the traditional role, a role which calls on them to put all of their efforts into team-making with much of their compensation to come much later in life. In the past, they stayed home to take care of children, supported their husbands' careers by helping with both substantive and social aspects of their jobs, and worked futureless jobs to provide the tuition, room, and board for their husbands' educations. Such efforts can be good investments, sensible loans to the marital enterprise. Women still make these "loans," but many feel compelled to curtail these investments in favor of their own careers. If that is what they would rather do, that is as it should be. But if they pursue a career against their preferences in order to achieve life-long income security, we have a problem. The problem with the law today is not that women are making foolish choices. Most (if not all) women make smart choices among the available options, but the law gives them too few options. Eric and I want to give women the option of actually getting legally enforceable security from husbands who promise security. Because there is no "foolish choice" being made by women today,<sup>9</sup> our proposal could not "save" women from such a choice. It seems to me that the more "paternalist" position is the one that denies to women the legal ability to make enforceable bargains about their marriages.<sup>10</sup>

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8. Abrams, *supra* note 1, at 527-28.

9. I admit I am perplexed by Abrams's contention that we are trying to save smart women from foolish choices. In the discussion above, I assume that she is referring to the women who choose market employment, which I certainly do not see as a foolish choice. It is also possible that Abrams thinks I am trying to save women who choose homemaking, but I do not think that is a foolish choice either, and I do not understand why the women who choose that would be the "smart" women. Perhaps my perplexity helps to show that I lack whatever intent she attributes to us.

10. It is true that we are somewhat paternalistic in that we would place some limits on marital contracts, just as the law of ordinary contracts is somewhat paternalistic.

Ultimately, Abrams is concerned that our proposal does not guarantee protection for women. Although her concern for women is well justified, guaranteeing protection was not our goal. Our goal was to increase fairness and efficiency in marriage, to make marriage more comfortable for all couples, and to make marriages fit people rather than the other way around.

#### IV. WHY DOES ABRAMS MISCONSTRUE OUR ARGUMENTS?

It is a common rhetorical tactic to attribute evil motives to the opposition, but it seems more likely that Abrams has just mistaken our position. This might have happened for any of a number of reasons. Perhaps Abrams thinks we harbor the common presumption that naturalness is akin to goodness. If so, that could explain why she interprets us as desiring to guide women into traditional marriages. But if that is her presumption, she is wrong. I doubt that a traditional marriage is "natural." More important, I do not think that what is "natural" has any moral force.<sup>11</sup> What *is* (whether natural or not) has no claim to what *ought* to be.<sup>12</sup>

Maybe Abrams reads too much into our admitted concern for the plight of women. She says that we made "arguments for protection."<sup>13</sup> On this point we may not have made ourselves plain enough. We do not wish to argue that the *law* should protect women. We did say the current law offers them little protection and that they could probably better protect themselves. But there is an important distinction between a desire to let women protect themselves through legal agreements and a desire for society to protect women. That distinction becomes critical when determining the accuracy of the "paternalist" charge. We want women to be able to protect themselves the same way homeowners do when they buy insurance or farmers do when they buy options to sell their pork bellies. If it is not paternalistic to enforce the insurance and option contracts, it is not paternalistic to enforce an alimony agreement. If we were trying only to protect women, our analysis would have been different.<sup>14</sup> Women may (probably will) end up with more security if our proposed reform is implemented but, if so, they will have provided it for themselves.

Perhaps the source of Abrams's confusion as to our motives is our acceptance of the predictable consequences of improving the lot of women that choose traditional roles. It is true that we want to render traditional marriage more secure for women who want that security. Put generally, Eric and I want women to have more ways

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11. For that reason, I was insensitive to the potential discomfort I might cause some readers by referring to some crimes as "crimes against nature." I apologize for our using that phrase.

12. It would be difficult, however, to determine what *ought* to be without assuming something about what *is*, such as that there are humans living on an Earth of limited resources.

13. Abrams, *supra* note 1, at 519.

14. For one thing, we would be obligated to wrestle with the question whether it is reasonable to think that the law, which is still made and applied disproportionately by males, has much chance of protecting females well. Moreover, we would have to discuss why the men in power would do a better job protecting women than would women, as advisors in the contracting process.

of achieving security (if they want it<sup>15</sup>). Our proposal is designed to allow couples to achieve other goals as well. For example, both to create incentives against fault and to satisfy a sense of justice, a couple may want to empower a court to determine who is at fault.<sup>16</sup> We want women who choose homemaking to be better off according to their own standards and we want them to be allowed to achieve the gains from promissory exchanges. On the other hand, I would not turn back the clock to the old law. That law was ill-suited to the hopes and aspirations of many women and couples.

I would predict that allowing homemakers increased security via premarital agreements would increase the number of women choosing homemaking. Based on that, Abrams probably suspects, correctly, that we consider an increase in homemaking to be an acceptable consequence of making secure homemaking a viable option. But my acceptance of the outcome does not mean that I desire it. It may stretch credulity for me to say that I am neutral on that issue, but I sincerely think I do not care.<sup>17</sup> I care about whether the law should offer choices, but in the absence of externalities I do not care which options women (or men) choose.

Anyway, our motives and preferences should be irrelevant. A proposal made by one with ugly motives is easier to ignore, but in the last analysis the proposal should stand or fall on its merits. What are those merits? It is certainly possible that finding legal space for traditional marriages would be harmful. If traditional marriage is an option, some will probably take it and that might lead to bad consequences. It is even possible that the mere existence of the option would be harmful even if no one chooses it. Those are possibilities that we attempted to address in our paper.

#### V. WHAT IS OUR BURDEN OF PROOF?

Unfortunately, confusion on our goals leads to confusion about the burden of proof we bear. If we were to begin with the paternalistic assumption that the law should protect women, we would have to make a case that our proposal would protect them better than the current law and better than any other likely reform. If we were to argue that women or couples should choose a traditional marriage, we would bear a burden of showing that traditional marriage is better for women, couples, children, or society. Perhaps because Abrams assumes that we are making an argument that women should choose a traditional option or that we are trying to "save" and "protect" women, she also assumes that we are obliged to present the kinds of evidence that would show the traditional option to be better than the

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15. In the movie *THE WEDDING SINGER* (New Line Cinema 1998), Holly tells Robbie to his surprise that security is important to *all* people. We do not assume so much. However, we do assume that there are at least some women who both want security and want to invest in household production.

16. See generally AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995) (finding that parties to a divorce sometimes want the law to determine fault, but that lawyers explain that fault is irrelevant).

17. Evidence that Abrams thinks I care about the marital choices people make (as opposed to the choices they have) appears in her footnote three. "If Stake is, in fact, the 'liberal' that he claims to be, he may be getting more than he bargained for in this particular authorial union." Abrams, *supra* note 1, at 518 n.3.

modern regime. Abrams criticizes us for presenting inadequate evidence to support various claims because she reads us as claiming more than we did.

#### VI. OUR CLAIMS WERE OVERSTATED

Expecting us to attempt to present convincing evidence,<sup>18</sup> Abrams takes issue with our statement that “parents often do a better job educating and nurturing their children than temporary caretakers.”<sup>19</sup> She says,

Can such benefits really be claimed from a gendered<sup>[20]</sup> division of labor in the family? The answer is far from clear. Though many parents, overwhelmingly mothers, derive satisfaction from greater involvement in the education and nurturance of their children,<sup>[21]</sup> there is little evidence that suggests that preschoolers who go to day care, or school-age children who return home before their parents, experience emotional or developmental deficits, or underperform in subsequent life challenges.<sup>22</sup>

Our claim was not nearly as strong as Abrams makes it out to be. Even if parents often do a worse job, it can also be true, as we said, that they often do a better job. Moreover, it is certainly possible that some parents will know that parental care is superior for their own children.<sup>23</sup> We did not offer evidence on the point because

18. Abrams acknowledges that our employment of a “choice” framework enables us “to achieve these results with far less argumentative exertion than they would be obliged to undertake were they to argue outright for a reinvigoration of traditional family roles,” Abrams, *supra* note 1, at 518, but then criticizes us for not exerting ourselves.

19. Rasmusen & Stake, *supra* note 1, at 484.

20. We did not claim that benefits stem “from a *gendered* division of labor.” Abrams, *supra* note 1, at 529 (emphasis added). Benefits can arise from any specialization, whether gendered or not. Specialization occurs in both traditional and non-traditional households. In a marriage of a male and a female any division of labor will by necessity be a division by sex and, in the real world today, most couples would assign more child care to the mother. I would be just as happy if it were otherwise. Our argument defended specialization, not gendered specialization.

21. It is not clear what Abrams means by “greater involvement.” Greater than what? I agree with her if she means that most primary caregivers are mothers and that they derive satisfaction from it. I would disagree, however, if she means that most fathers do not derive additional satisfaction from additional involvement.

22. Abrams, *supra* note 1, at 529.

23. The study by Margaret O’Brien Caughy et al., *Day-Care Participation As a Protective Factor in the Cognitive Development of Low-Income Children*, 65 *CHILD DEV.* 457 (1994), cited by Abrams in footnote 35, indicates that some groups of children are likely to develop better in reading and math with parental care than with day-care, Abrams, *supra* note 1, at 529 n.35.

There are other ways in which children might benefit from having a parent at home. For example, there is evidence that the number of hours worked by mothers is inversely and significantly related to the affection children have for their fathers twelve years later. See PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK* 253 tbls.3.4, 3.5 (1997). Moreover, divorce has negative consequences for children, including later unhappiness in marriage. See, e.g., *id.* at 260 tbl.4.6. Our proposal should increase specialization within marriage and increase investment in marriage-specific skills. As Mark Ramseyer points out, this increases the payoff from staying married relative to divorcing and decreases the risk of divorce. J. Mark Ramseyer, *Toward Contractual Choice in Marriage*, 73 *IND. L.J.* 511, 515 (1998). But compare Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 *INT’L REV. L. & ECON.* 325 (1998), with Ira Mark Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and*

for us to be wrong it would have to be true that children rarely receive better care from their parents than from day-care employees.

Abrams expands our claim to attack it, but in doing so misses the central point of our push to privatize the rules of marriage. It might be only a minority of couples that would think that they would care for their children better than a non-relative. Privatization allows a minority to live their desired lives without forcing a change in lifestyle on the majority. Once again, Abrams appears to make the mistake of thinking that we, flowing in the strong current of tradition in family law, are trying to set a standard or norm for everyone to follow when instead we are swimming upstream. We want to let people choose for themselves whether to stay at home and care for children or engage in market production, even if only a small minority think they would give better care than a temporary caregiver.

Moreover, contrary to Abrams's implication, we made no claims about deficits, emotional, developmental, or otherwise, arising from non-parental care. Within a wide range, which I imagine Abrams would happily grant, it is up to parents to decide whether day-care or parent-care is best for their children. As long as there is no strong scientific evidence that parent-care is harmful, both choices should be allowed. Our point is that the law ought to facilitate, rather than impede, parental choice.

Abrams says that "the benefits to children from legal support of the traditional family form may, in fact, be illusory."<sup>24</sup> Indeed, they may be. But that says little. If the benefits to children are *in fact* all illusory, then it is right to discourage parents from making that choice, as current law does. But if some benefits might accrue to some children, then parents ought to have the legal option to seek those benefits and to trade off some other interests in doing so.

Abrams also says that Eric and I "assume[] a unity of interest between at least some subset of mothers and children."<sup>25</sup> That is wrong. There are good reasons, including some biological, to presume that mothers and children do not have a "unity" of interest. For that reason and others, we agree that children cannot protect themselves, and therefore must be protected by the state. We do not propose to change current law regarding children (support, neglect, abuse, custody, visitation, parental authority, adoption, etc.) whether their parents are single, married, or divorced.

As a final example of Abrams's misconstruction of our points, consider our speculation that liberalizing divorce law may have widened the attractiveness of conservative religion. Abrams responds, "This claim strikes me as dubious . . . . [T]heir evidence does not demonstrate that the support of religious communities is being sought out by irreligious members of traditional families who would

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*Divorce Rates*, 18 INT'L REV. L. & ECON. 341 (1998), regarding empirical evidence on whether unilateral no-fault affects divorce rates. Recognizing these connections, a couple contemplating marriage might rationally think that contractually requiring mutual agreement before divorce would increase the happiness of their children.

24. Abrams, *supra* note 1, at 519.

25. *Id.*

otherwise have little interest in affiliating with these communities."<sup>26</sup> But what was our "claim"? We said merely that conservatization was a "curious possibility."<sup>27</sup> A "claim" that something could be true does not require evidence that it is true. Moreover, it is true that people can visibly increase their costs of divorce by associating themselves closely with an organization that will ostracize them if they initiate a divorce. Because associating with such an organization might be a sign of willingness to make a marital commitment, it would not be irrational for persons looking for others willing to commit to look for them in such organizations.<sup>28</sup> If there are no legal avenues to marital commitment, people might find other roads.

#### VII. WHAT IS THE QUESTION AND WHAT ARE THE MERITS OF THE CASE?

Professor Abrams says "the question is not 'Is the traditional family form so objectionable we should prevent couples from choosing it?' It is, rather: 'Is the traditional family form so valuable that we should risk these consequences in order to reinvigorate it?'"<sup>29</sup> This shift in the question is a deft rhetorical move which, if accepted, indeed leads to different policy analysis. But is her characterization of the issue correct? I think not. The difference between *allowing* traditional marriage and *reinvigorating* it lies at the heart of the fight between private choice and governmental control. Reinvigoration suggests (although it does not necessarily require) a *purpose* of increasing the frequency of traditional marriage. As Abrams recognizes, I have no such goal.<sup>30</sup> Merely allowing people to construct the kind of marriage they want suggests a different purpose, one of keeping my and society's notions of "proper" relationships out of the picture.

Setting aside the rhetorical move, Abrams is right that consequences could convince us that the benefits of allowing private choice are not worth its costs. But Abrams does not give us evidence that women in traditional marriages are worse off than women in market production. In terms of leisure time available to them, the evidence is just the opposite.<sup>31</sup> She does say that enforcing these agreements will "send a signal that women's growing autonomy in relation to family should be reconsidered, and that more institutional support should be given to family forms

26. Abrams, *supra* note 1, at 527 n.29. It is not clear to me why Abrams presumes that we assume that "irreligious" people would be the ones attracted to fundamental religions. It seems to me much more likely that the people drawn in would be those who are already religious.

27. Rasmusen & Stake, *supra* note 1, at 463.

28. In principle, non-religious organizations could play the same role. For example, a "Married for Life" society could similarly threaten ostracism for those who ask for a divorce. And the society could require membership dues, which would be used to create a fund to support members who were divorced without their consent. One important threat the society could not make, however, would be the threat of eternal damnation.

29. Abrams, *supra* note 1, at 519.

30. Abrams, *supra* note 1, at 518 n.3.

31. For a review of the evidence that there is a more equal division of leisure time between husbands and wives when women work in the home than when they work for wages in addition to working in the home, see Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 519 (1998).



entailing greater dependency for women."<sup>32</sup> She presents no evidence for the puzzling contention that enforcing the family-related agreements of women (which assumes they have the capacity to contract for themselves as autonomous persons) will send a signal that their growing autonomy regarding family matters should be reconsidered. Rather, enforcing individualized agreements instead of imposing predefined family relationships helps women to achieve autonomy. As for the signal regarding institutional support, Eric and I do want more legal enforcement of agreements and that enforcement could give legal institutional support to relationships that involve female "dependency." The next, and missing, step in the argument against free choice for women is the explanation of when and why "dependency" is harmful.

#### VIII. IS DEPENDENCY BAD?

Abrams's discussion of "dependency" reveals great antipathy for it, although it is somewhat ambiguous as to what sorts of dependency are bad. Her underlying assumption could be that women should not be dependent on men. If that is her position, I cannot join. Self-sufficiency is outmoded. It was popular with the hippies of the sixties and maintains a following in the survivalists of today. But life is better, with greater safety and more time for leisure and possibly even increased job satisfaction, when we specialize in production and trade for things we do not produce.<sup>33</sup> Suppose I can milk a cow at one gallon per hour and bake a loaf of bread in a half-hour. Being a better worker, Eric can milk a gallon in one-half an hour and bake a loaf in twenty-five minutes. Suppose also that each of our families needs three loaves of bread and two gallons of milk per day. Avoiding dependency on Eric, I can provide these staples with three and one-half hours of work per day. Eric will work two hours and fifteen minutes. If we accept interdependency, I can bake for three hours, Eric can milk for two hours, we can trade three loaves for two gallons, and we will each have saved some time for stitching our clothes, patching our roofs, or playing with our children. Interdependence is not a bad thing.<sup>34</sup>

It would be possible to train ourselves initially to be self-sufficient, preserving our potential for independence, and then become specialists as well. But that would be a waste of time. Almost all of us are heavily dependent on others in many ways. We need people for emotional, physical, and financial security. Let's accept it. Once we accept interdependence and specialization, it makes little sense to spend time learning self-sufficiency, except as a form of leisure.

Abrams says that society values dependence—and interdependence—even less than it did in the heyday of the traditional family.<sup>35</sup> Even if that unsupported statement is true, society's bias against interdependence can hardly be a reason to prevent people from choosing it, except under an assumption of extreme

32. Abrams, *supra* note 1, at 518.

33. The benefits of specialization are not limited to capitalist economies.

34. In addition to increasing peacetime happiness, interdependence also makes it harder for us to go to war.

35. Abrams, *supra* note 1, at 519.

paternalism. Surely legally enforceable financial interdependence is not so bad for couples or society that we should prevent couples from choosing it.

Since interdependence is generally sensible, perhaps only a special form of dependence troubles Abrams. I presume that she does not mind wives and husbands being emotionally dependent on each other. She might be bothered, however, by the prospect of wives being financially dependent on their husbands. The question then is whether being financially dependent on a husband is any worse than being financially dependent on employers and bankers, who are also often men. I think so. Dependence on husbands is worse than dependence on male fiduciaries. A husband-dependent wife takes a large gamble with her future. She depends on his beneficence and has no legal recourse if he breaches his obligations. She cannot sue her husband for breach of his duties the way she can sue her banker. The status quo is bad for women who choose interdependence.

The position against choice presented by Abrams reduces the security of women in order to give them an incentive to be independent. This is not an accidental result. Women will never be fully independent if they can be secure without working; providing security to women will necessarily reduce their incentives to develop careers. Anyone who wants women to be independent must oppose security for interdependent women. This position is very paternalistic (or maternalistic)<sup>36</sup> because such a person does not want women to get what they want, but wants women to get what is good for them. Unfortunately, the consequences of the position go beyond mere paternalism. It would be one thing for society to provide a carrot for women to seek independence. The position taken by Abrams against security via traditional marriage uses the stick of insecurity to influence the behavior of women. And look at the cost! Some women in fact suffer insecurity so that others will enjoy[?] independence.

Of course, Abrams does not want any women to feel insecure. She recognizes that we are in what Margaret Jane Radin would call a double bind.<sup>37</sup> In Abrams's view, women choose dependence on men because it is the best of some bad options. These women's options are poor because of current background conditions, including the market rewards for women's labor, the low level of community support for children and mothers, and the social norms encouraging women to play certain roles.<sup>38</sup> According to Professor Radin, if one argues for foreclosing a bad choice, such as prostitution, on the grounds that the choice is only attractive when background conditions make other choices worse, then one has a responsibility to

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36. Perhaps "parentalist" would satisfy the criterion of sex neutrality, although I am not sure sex-neutrality is called for in this instance.

37. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1916-17 (1987).

38. I am reminded of the short story by KURT VONNEGUT, JR., *All the King's Horses, in WELCOME TO THE MONKEY HOUSE* 84 (1968). In that story, Colonel Bryan Kelly's family will be killed by a Communist guerrilla leader, Pi Ying, unless Kelly plays a game of chess in which the members of Kelly's family and 12 American soldiers are pieces in the game. As the game progresses, Kelly is faced with the abominable option of sacrificing his son, Jerry (a king's knight), to save the rest of the captives. *See id.* at 95-96. The world of limited options created by Pi Ying is a far cry from just or happy. However, neither justice nor happiness would be served by further constraining Kelly from making the awful sacrifice that might save the others. Likewise, it does not increase justice or happiness to reduce the options available to women.

advocate for a change in the background conditions.<sup>39</sup> And indeed, Abrams argues for changing those conditions,<sup>40</sup> although she has not put forth in her brief response any concrete proposal for change. Abrams rightly says that if background conditions were improved, the availability of better choices would make homemaking much less attractive.<sup>41</sup>

I am no defender of the status quo. But, however bad, the status quo is the status quo. The one thing that can be said for it is that it is possible. The same cannot be said for the preconditions to Abrams's solution to the insecurity of women. There is no realistic possibility of soon changing the fundamental social and economic fabric of the United States in the ways that would be necessary to substantially improve women's options, and foreclosing options just makes the situation worse.<sup>42</sup> Put another way, I am happy to concede that our proposal would create a world that is worse than a utopia Abrams can imagine. It may be a second best solution, but it is better than any alternative that has a decent chance of becoming reality.<sup>43</sup>

Rather than trying to make women financially independent of their husbands, the realistic solution is to give women recourse for breaches of their husbands' promises. If we enforce the agreements between men and women, women will not be at the mercy of their husbands because women can sue them, just like their bankers, when the men fail to live up to the deals they have made.<sup>44</sup> The refusal of the law to intervene in disputes (in any domain) advantages the physically powerful and independent. Conversely, increasing the scope of enforceable law benefits those with less muscle.

#### IX. DIFFERENCES IN "BARGAINING POWER" JUSTIFY LITTLE

Abrams says, "The proposed regime appears likely to enforce many marital contracts that are the product of inequalities in bargaining power,"<sup>45</sup> and later, "inequalities of power among cross-sex, or heterosexual, couples, mean that we may rightly be suspicious of the terms on which [their] differences are resolved."<sup>46</sup> There are a number of responses to this. One is to interrogate the concept of

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39. "[J]ustice requires that we consider changing the circumstances that create the dilemma. We must consider wealth and power redistribution." Radin, *supra* note 37, at 1917.

40. See Abrams, *supra* note 1, at 522-23.

41. See Abrams, *supra* note 1, at 521.

42. As Radin says, "[M]arket-inalienabilities are unjust when they are too harmful to personhood in our nonideal world." Radin *supra* note 37, at 1937.

43. Perhaps "impracticable" best describes her solution. Her goal may be higher, but the chances of achieving it are so much lower that my lower goal has a higher expected value.

44. Because most husbands' pockets are shallower than bankers', women with a cause of action against their former husbands will not be perfectly secure. But many will be more secure than if they did not have a cause of action. Moreover, women who "lend" to their husbands can reduce the risk that their husbands will not be able to repay at the time of divorce (or after). One way women can make the loan safer is to negotiate an agreement that the husband will repay the loan (with more than half of his income) as soon as he has a job rather than at the time of divorce. This will work best if courts enforce contracts for repayment during marriage.

45. Abrams, *supra* note 1, at 518.

46. *Id.* at 520.

“bargaining power.” This widely used phrase lacks a well-accepted definition.<sup>47</sup> It can be used to express a number of possible differences between two parties to an agreement, including differences in physical power and economic strength or position. Defined by reference to ability to bargain, it could refer to a difference in information, mental acuity, skill at perceiving self-interest, facility for ignoring interests of others, training in negotiation, or even capacity to enjoy the bargaining process. In the alternative, “bargaining power” could refer to the position of the bargainer, rather than her abilities. Perhaps the person with the most economic assets has the greater bargaining power. I prefer to think that the person with greater “bargaining power” is the person who would gain less utility from the deal and is correspondingly less eager to make any concessions. For example, a person’s bargaining power could be measured by the difference between the other party’s reservation price and most recent offer. If I offer to sell you my car for \$11 and my reservation price (the least I would take) is \$10, you do not have much power to improve the bargain. Assuming each of the various possible definitions, one could argue about whether men have greater “power” than women and whether that difference makes a convincing normative justification for a judge to ignore the agreed exchange. On the average, men do have more physical strength than women. It is not clear, however, how that power difference would result in an unfair bargain if the power was not used against the woman at the time of bargaining.<sup>48</sup>

But we do not have to argue that women have the same or greater “bargaining power” or that bargaining power is a nearly useless concept in order to argue that women would be better off if their bargains were enforced. First, obviously, bargains can be good for both parties even when the gains from trade are shared unequally, which must be the vastly more frequent case. One of the points Robert Axelrod makes is that in situations where cooperation between two persons can lead to gains, envy by one of the two can lead to reduced cooperation, to the detriment of both parties.<sup>49</sup> A person can do very well by cooperating often even if he gets less than the other party in every one of his cooperative relationships. Arguments based on “unequal bargaining power” fail to recognize that it is often much more important that the parties cooperate than that they split the gains down the middle, if that were even possible.

Second, in any divorce or continuing marriage, bargains are and always will be struck, both expressly and impliedly. The key issue for women is whether women would be better off with judicial enforcement of bargains struck later in marriage or at divorce than with bargains struck earlier in marriage or before. Viewed in Abrams’s terms of “entrenching inequality,”<sup>50</sup> the issue is whether there is more inequality at the time of the initial agreement or later. We need to ask, then, whether

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47. See Wax, *supra* note 31, at 543 (citing ALAN WERTHEIMER, *EXPLOITATION* 64-68 (1996), to the effect that “‘bargaining power’ is rarely understood or precisely defined”). Wax discusses bargaining power as a function of the attractiveness of outside options and the psychological or strategic advantages that determine how gains from trade are divided.

48. If physical power had been exercised during bargaining we and most judges would have no trouble ignoring the agreement.

49. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 110-12 (1984).

50. Abrams, *supra* note 1, at 520.

there are any ways in which the bargaining power of women increases during marriage or at divorce.

Perhaps women have a greater deficit in sophistication at the time of marriage. Do men develop an ability to look out for themselves earlier in life, with women catching up later, after the usual time of first marriage? If so, it might serve the interests of women to refuse, as the law now sometimes does, to uphold agreements made by young couples. I think the premise is false. I see no evidence in my law students that young men are more mature or sensible.

Another consideration is the ability to be ruthlessly self-interested during bargaining. Some might argue that women are less likely to be ruthless, but that does not matter. The question is whether their *deficit* in ruthlessness, if they have one, will wax or wane during marriage. I see no reason to believe that husbands' devotion increases more during marriage than the devotion of wives. If that is correct, then this other-regarding-preference factor does not support the view that informal agreements made during marriage would be better for women than contracts made before marriage.

It is a closer case at divorce. It is possible that women's deficit in ruthlessness is smaller at divorce than at the time of marriage. If so, then this is a reason to believe that enforcing premarital contracts would worsen the condition of divorced women.<sup>51</sup> There are a couple of counterpoints, however. For one, in many marriages there are children. Mothers may generally have a stronger attachment to their children and may feel that minor children would do better with maternal custody. If so, they might be more willing than fathers to trade away their own security for custody. In addition, if women care more about the feelings of their children, they might be less willing to be ruthless in bargaining because making their father feel bad might make her children feel bad. Mothers might be more anxious to be fair for the sake of the children. In cases involving children, women could be less likely to fend well for themselves than they would have been before marriage. The interests of their children would often be served by women continuing in otherwise unhappy marriages or agreeing to otherwise disagreeable terms of divorce. In marriages without children, women may become more involved with and committed to their partners and may find it harder to be ruthless even in the context of divorce.

It has been suggested to me that women could help themselves by changing their preferences to be less intertwined, less other-regarding. There is no reason, however, to believe that such a change would make women happier. We can assume for the sake of argument that women who cared less about others would assert their own interests more fully during bargaining. We can also assume that their stronger assertion of interests would result in their acquiring more assets or an otherwise more favorable division of the gains from trade. And we can assume that under either preference set, before or after the change, having more material goods yields more happiness. Although the change would make men less happy, those assumptions are not enough to imply that women would be happier. We cannot, at least with theory alone, compare the situations because women would have different

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51. By this light, law reform may have started backwards, where women need it least. Freedom of contract applies in the context of contracts regarding the consequences of divorce. Yet divorce is the situation where women might be most able to protect themselves.

preferences. Women could be less happy being selfish and rich than they were being unselfish and poor.

Other-regarding considerations are not the only important factor in the bargaining inequality. Even if the ruthlessness gap narrows over time, in other ways the bargaining position of women weakens. Until the miracles of modern medicine give women equal power to start families at an advanced age, women's options to remarry will diminish faster over time than do men's. Having poorer options outside the marriage could lead to weaker bargaining power within it. For these reasons, it is possible that, with the help of other women (including counselors), women could make deals that would put them in a better position than they currently enjoy (or don't).

Finally, being able to describe circumstances in which a woman's bargaining power deficit diminishes with age does not justify a conclusion that all youthful bargains ought not be enforced. The conclusion better serving the interests of women would be that we ought to restrict non-enforcement of early agreements to those circumstances where women gain relative bargaining power with time. Even if those cases are not rare, they should not undermine enforcement of all agreements. Only if the bargaining power of women increases during marriage and divorce in the overwhelming majority of cases should we take the blunderbuss approach of refusing to enforce all agreements relating to marriage.

In sum, whether women are better off bargaining early depends on the net effects. If, over time, women lose more bargaining power than they gain, early agreements entrench a lesser inequality than a woman will suffer later. Considering only my self interest from halfway behind the veil,<sup>52</sup> if I were to choose whether to cut a deal with my wife at age 25 or when we are both 55, I would choose the latter without much hesitation. Assuming divorce was likely and that its grounds and terms could be negotiated in advance, it would surprise me if most women would advise their daughters to wait until later in life to hammer out the important details.

Abrams argues that men can get *out* of premarital bargains because their wives have lost bargaining power.<sup>53</sup> I think not. Assuming, as she does for this argument, that a woman loses relative bargaining power with time, how can she possibly be worse off with an initial entitlement that she negotiated when she had more power than she would be without that legally enforceable entitlement? How much it will improve her lot at divorce is hard to say, but it is inconceivable to me that having an enforceable agreement will not help her in some way. Even if she chooses to trade away some of her contractual rights in return for something else (such as custody), at least she has something to trade away. An innocent woman deals from a position of greater strength when she has the power to veto a divorce (for example) than if she does not have that power.

Amy Wax devotes much attention to the question of bargaining power.<sup>54</sup> In explaining why men have more bargaining power, she emphasizes men's longer reproductive life and greater opportunity to go a "second round" in marriage. She

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52. By "halfway behind the veil," I mean that I know myself to be a male, but know nothing else.

53. Abrams, *supra* note 1, at 532.

54. Wax, *supra* note 31, at 541-43.

discusses why premarital bargains may be detrimental to men's willingness to marry and to the marriage market for women. Although premarital contracts may stem the decline in bargaining power that follows after women make the first investment, widespread use of these contracts might move the marriage market to a new equilibrium in which women will have to wait even longer to marry and will have to settle for less desirable husbands. Nevertheless, Professor Wax agrees with me that the best time for women to bargain is at the outset of marriage and that, even given a biological, social, and cultural background that is on average tilted against women (that is, given gender inequality as a fact of marriage), we ought to remove arbitrary impediments to women's maximizing their security through contract.

Abrams is right that discrimination and segregation on the job, as well as the expression of social norms relating to women's roles, make market production less attractive than it would be without those harmful behaviors.<sup>55</sup> The current legal regime, which makes household production unattractive by making it insecure, has the salutary effect of equalizing downward so that all choices look bad. If we make household production more secure, it will look better. The important thing to keep in mind is that it will *look* better because it will *be* better.<sup>56</sup> Women will choose household production because they predict that it will make them happier. I cannot accept the argument that we ought to keep homemaking women in miserable insecurity so that women will choose instead to work discriminatory and unfair jobs.

#### X. BAD WAGES FOLLOW BAD ALTERNATIVES

In her argument against enforcing agreements that make marriages more financially secure for women, Abrams points to differences in wages as evidence that men and women do not have equal bargaining power. A difference in wages for equal work, equal marginal product, could be due in part to the fact that marriage is less secure for women than for men. Suppose that, for whatever non-legal reason, women are generally more reliable mates than men. If men are more willing to divorce their spouses when a better mate appears to be available, women cannot rely as heavily on their spouses for financial support as can men. If that is the case, men can hold out for larger wages, with less fear of losing their jobs because their wives will still support them even if they lose their jobs. He would not live as affluently, but the husband who tells his boss to "stuff it" probably will not starve. Women, on the other hand, will take the same job at a lower wage because holding out for a greater wage is doubly dangerous. If a wife becomes unemployed, she increases the chances that some other woman will look more attractive to her

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55. Abrams, *supra* note 1, at 520.

56. Abrams says, "Perhaps the greatest danger of this proposal is its explicit message that female dependency can be made secure in a society where this is no longer feasible (if indeed it ever was)." Abrams, *supra* note 1, at 533 (parenthetical in original). Surely no reasonable reader would read Eric and me to say that all the sources of insecurity can be abolished by the enforcement of a well-written premarital agreement. We merely contend that enforcing some premarital agreements can make women who choose homemaking more secure than they are now and, for them, that might be an important improvement.

husband, increasing the chances she will be on her own without a job.<sup>57</sup> Thus, if men are socially or innately less reliable spouses, the legal insecurity created by unilateral divorce law lowers the reservation price for women selling their labor to employers more than it does for men. In employment situations where wages are set by employers bargaining with employees over how to divide the gains from trade (that is, where employees are not paid their marginal product),<sup>58</sup> the lower reservation price of women could easily result in lower wages.

It is thus possible that women's wages are lower than men's in part because of the weaker position from which they bargain with employers. That is not, however, a sufficient reason to oppose our proposal for allowing contracting on the terms of marriage and divorce. Indeed, by increasing the reliability of husbands more than wives, contracts that require mutual consent for divorce could raise the minimum for which women are willing to work and thereby increase women's wages.

As another possibility, suppose that a woman thinks that the next best alternative to her paying job is homemaking while her husband thinks that the next best alternative to his paying job is a different paying job, with homemaking not even close. Suppose also that a contract eliminating the possibility of unilateral divorce will increase the financial security of the homemaking option. In such cases, the contract would increase the employment reservation price for the woman, but might not for her husband. If she is currently paid less than men for the same work and both are paid below marginal productivity, she can increase the amount she demands from her employer without her employer hiring men to do her job because the men would be even more expensive. The wife's wages could increase if she demands more for her time. Once again, we see that a contract dealing with the grounds for divorce could improve the position from which a wife bargains and increase her market wage. In sum, if women's marriage options are better, and if women want financial security and can get it through an enforceable no-unilateral-divorce contract with a husband, there is a possibility that women will demand more for their labor and their wages will rise.

As a third possibility, suppose that men and women are not perfectly substitutable in employment, but are instead two different factors in production. Then, all else equal, the greater the supply of women, the lower their marginal product. By decreasing the security of marriage, unilateral no-fault divorce increases the supply of women. This shifts the women's labor supply curve to the right and decreases their equilibrium wage. A fourth possibility is that women are more risk averse than men. If so, they would forego some wage increase for a reduced chance of total unemployment.

There may be ways of empirically testing these theoretical mechanisms by which divorce law might affect wages. First, as both of the first two scenarios above

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57. One might argue that there is another potential reason for women to bargain less strongly. Women might perceive that their income would drop more than their husbands', after divorce, so even with the same chance of divorce, its expected cost is higher. But this factor, that women are more worried about divorce, cuts both ways. Women would be more eager to have a job and so might bargain weakly, but they would also be more concerned that the job pay well because they might rely on it entirely. It is not clear what the net effect would be.

58. Economists and lawyers might differ in their opinions regarding how often wages are below the employee's marginal productivity.



depended on the assumption that wages were below marginal productivity, we should see a greater difference between the wages of women and men in industries or jobs where wages are set by individual bargaining. Conversely, we should see less of a sex difference in occupations where there is a large supply of basically fungible employees. We might expect to see a lower wage difference where there is lower asset specificity and, as a first cut, that might be where employers are larger companies. Second, it is possible that some states provide more security in homemaking by giving the homemaker more property or alimony at divorce. I would predict that in those states, women's wages are higher.

#### XI. OUR DIFFERENCES REGARDING RENEGOTIATION ARE MORE PERSPECTIVAL AND JUDGMENTAL THAN ANALYTICAL

Even on the point that divides us, the point that made us fodder for Abrams's comedic cannon, Eric and I are not as far apart as Abrams seems to think. I acknowledge that giving couples the power to commit themselves irrevocably can have some incentive benefits for their marriage;<sup>59</sup> it might even improve the chances that the marriage will be a happy one. On the other hand, Eric agrees that if the marriage does not work out it is possible that the parties would be happier either single or married to others. In other words, even after marriage there may be gains from trade; there are efficient divorces.<sup>60</sup>

One difference between Eric and me lies in how much we think *akrasia* is a problem. Like Greg Alexander,<sup>61</sup> I believe the source of the desire to divorce is weakness of will much less often than it is a change in preferences or recognition of an initial mistake or simple opportunism. But even assuming *akrasia* is a problem, I think there are good ways of increasing the costs of divorce that will create the desired incentives without raising the price of divorce to infinity. For example, a couple could create a divorce penalty for themselves by setting an irrevocable trust that would be paid to a charity upon their divorce. Another way to reduce the net gains from divorce is to reduce the benefits of divorce rather than raising its costs. The benefits of divorce can be reduced by imposing a delay before it becomes effective. Although either approach can be made to reduce the net gains from divorce to whatever (non-negative) level the parties desire, I prefer the former technique over the latter. The delay reduces net social utility while the trust payment is a mere transfer, it reduces utility of divorce to the couple without reducing net social utility. If irrevocable trusts are available, couples do not need to bar divorce entirely in order to control for their weakness of will.<sup>62</sup>

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59. There are harmful incentives too, however, such as the incentive to manufacture evidence of fault for the purpose of defrauding judges.

60. In an earlier article, I noted a difference between "incentive effects" and "status effects" of judicial decisions. See Jeffrey Evans Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447 (1991). As is clear from the point here, decisions by persons other than judges can have "status" and "incentive" effects.

61. Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 506-07 (1998).

62. Note, however, that any impediment created to prevent inefficient divorce can also deter efficient divorce, such as by couples for whom the marriage was a mutual mistake.

Another difference between Eric and me is our judgment as to whether parties have enough information to make a "no-divorce-allowed" choice wisely. On this point, I am admittedly paternalistic (although no more so than the current law). Many people marrying for the first time cannot see just how wrong a marriage can go and how miserable a couple can be. I might be willing to allow persons who have been divorced to choose an irrevocable marriage, although I doubt they would do so.<sup>63</sup>

#### CONCLUSION

Current law allows opportunism after marriage.<sup>64</sup> This possibility of opportunism can have important consequences for the investment of couples in their marriage.<sup>65</sup> Women (and men) could reduce the potential opportunism if they could hold each other to contracts,<sup>66</sup> that is to say, if they were freer to define their own marriages.

The current law presents a menu of options to people contemplating marriage, but there is only one item on the pages titled "grounds-for-divorce" and "terms-of-marriage." The issue we raised is whether to offer more entrées on those pages. Scholars (and state legislatures) have made numerous proposals, but they cannot agree on one "best" law for everyone because there is no such thing. The menu of options should include all of the serious proposals. Since almost anything that can be written into law can be written into an agreement, one way to offer all of the good proposals is to allow private contracting. Those who argue against putting items on the menu, against private contracting, need to make the paternalistic case that people will choose badly for themselves. As long as a couple does not cast negative externalities on us, why should we care about how they structure their relationship? The heavy burden lies with those who oppose freedom of contract to say why marrying parties ought not be allowed to vary their agreements according to their preferences and aspirations.

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63. It would be an interesting study to see whether persons who have been married and divorced would seriously entertain the thought of an irrevocable marriage.

64. Current law allows inefficient divorces as well as efficient divorces.

65. See Ramseyer, *supra* note 23, at 515.

66. On this point, Alexander says that men who are asked to agree to a contract restricting exit will look for a "different, more 'pliable' partner." Alexander, *supra* note 61, at 508. I think it is a good result of our proposal that men who will not commit will end up marrying women who do not consider commitment to be essential.