

WHY MAKING FAMILY LAW IS HARD*

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Most Americans believe that our choice of family law rules matters. Canada's recent decision to embrace same sex marriage offers an especially vivid example, widely seen here as a development of immense importance, to be cheered or feared, depending upon one's views. The *New York Times* reported that

[s]ome critics of same-sex marriage say . . . Canada's move should be viewed as an assault on the traditional nuclear family and serve as a wake-up call to Americans.

"Marriage is the foundational institution of civilization," Ken Connor, president of the Family Research Council, said in a statement. Same-sex unions "devalue" the sanctity of marriage, he said.

"Unless the American people rise up to defend this indispensable institution, we could lose marriage in a very short time," Mr. Connor added. "What's happening in Canada is a warning to America."¹

Mr. Connor's concerns are not limited to political activists. Another *Times* article quoted Barbara Dafoe Whitehead, co-director of the National Marriage Project at Rutgers University.

"This is a big change," she said, speaking "of the frustration of people who have concerns but 'don't identify with the religious right or as anti-gay.'"

"There are important things at stake, but enormous reluctance to discuss them," she said. "The forces arrayed against a serious, thoughtful discussion of what it will do to the institution of marriage—"

She didn't finish the sentence. Perhaps she didn't think it was necessary.²

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1. Christopher Marquis, *U.S. Gays Who Marry in Canada Face Hurdles*, N.Y. TIMES, June 19, 2003, at A8.

2. Peter Steinfels, *Beliefs; Efforts to Redefine Marriage Stumble Over Same-Sex Unions*, N.Y. TIMES, June 21, 2003, at B8.

Not all family law topics receive such high profile coverage, of course, and some—how awards of alimony ought to be calculated, for example—draw sustained attention only from specialists. But while the number of participants in the debate varies, their conviction that their choice matters, that some choices are clearly right while others are clearly wrong, varies much less. It is this widespread belief that the choice of family law rule matters deeply that I want to examine here. My conclusion is that the outcome of many family law debates does not matter nearly so much as the debaters usually assume, and that when it does matter, it is often for reasons entirely different from those offered by the debaters. Family law, I will suggest, is often a futile tool with which to achieve the debaters' stated goals, whichever side of the debate they are on. In part, my message is one of caution. Caution for those who wish to use the law to further some particular vision of family policy. I speak of legislatures, appellate judges, regulators, and those who write model acts for influential bodies like the American Law Institute and the Commissioners on Uniform State Laws. Be careful. Things may not work out as you expect.

Let me first say what I mean by *family law*. Any legal rule that affects people in their role as a family member might be considered family law. This broad definition includes rules of tax law and welfare law that treat people differently depending upon a family relationship. I will draw some lessons from family law, so broadly defined. But my main concern is the private law of families, and that is where I will apply the lesson. I want to talk about the law of marriage and divorce, of child support and child custody, and of nonmarital cohabitation. It is a body of law that operates in a sphere rich with nonlegal obligations that people take seriously. Most of what we do for our parents, our children, our spouses, and our siblings is not governed by law. Yet these nonlegal obligations to our families are powerful. We may feel they constrain us far more than do our legal obligations. If that is the case, who needs law? What can it add? We do not, after all, have a *law of close friends*. But although social norms are undoubtedly even more powerful in family relations than among friends, they are still thought insufficient. Why is that? The short answer is straightforward: for families, unlike close friends, we sometimes want to buttress social norms that have become too weak to command compliance. And so we substitute legal commands for the faded ties of affection. Yet we surely know that law cannot *really* replace affection. It can, at best, sustain only a few of the functions normally maintained by the intact family.

One can of course ask of any body of law: why have it? As a general matter, it would seem that private law can serve either or both of two

functions. It may be instrumental, designed to affect people's behavior in some way that policymakers believe desirable. Here we are in the domain of law and economics, of incentives and deterrence. Or it may be retrospective, concerned less with changing what might happen in the future, than with changing the consequences of what has already happened, to make the outcome more fair. Here we are in the domain of law and philosophy. Many familiar legal policy debates draw on this distinction between instrumental rationales and fairness rationales. Criminal sanctions are a familiar example: do we set levels of punishment with an eye toward deterring criminals, or toward imposing on the offender his just desserts? Of course the law may serve both functions, but the conceptual distinction between them remains useful. I am about to suggest that it is difficult to formulate a family law rule that serves either purpose very well, and that is why family law is hard. Let me first talk about family law's possible instrumental purposes, and then later about fairness.

For Americans, using the law to shape family behavior presents special problems because of our long legal tradition of family privacy, which has both common law and constitutional components. Compare our law with some civil law rules. Until recently, French law barred parents from giving their child a name that was not on a government-approved list. Mexican statutes empower family courts to settle disputes between spouses about their employment. I suspect that neither rule would be constitutional under American law. What is more important, neither seems politically or culturally plausible. But this does not mean that Americans are less likely than others to have strong beliefs about family values. And because so much family law is statutory, rather than judge-made, citizens engage the political system to obtain family law rules that reflect their views. The American tradition of family privacy is thus in constant tension with a shifting majority's desire for rules that advance its vision of family. Regulation may triumph in one domain of family law while privacy advances in another, and regulation may advance and recede within domains, reflecting changes in the majority's balance of these competing values.

For example, some courts once doubted whether any single standard of wrongful domestic violence could reasonably be applied across social classes. Once all physical violence between intimates became widely regarded as wrongful, the law changed, and domestic violence is now unprotected by any family privacy doctrine.³ Over the same time period,

3. Which is not to say that the tension has been entirely resolved. Even here, the intricacies of intimate relationships may complicate and thwart the regulatory effort. *See*

the law's treatment of a woman's decision to terminate her pregnancy moved in the opposite direction, from a crime to a protected private behavior. A similar tug of war is taking place today between contending factions in the battle over same-sex marriage. This particularly American tension between the privacy tradition and the regulatory impulse is rich because in every such dispute, both camps proceed from the conviction that family life is fundamental—to individual happiness and to societal success. So we honor a deeply entrenched family privacy doctrine meant to allow each of us our own route to private happiness, while we also want public policies that will strengthen the family—policies which must presuppose a shared vision of family.

So that is the first problem with an instrumental rationale for a family law rule: we may be quite divided not merely about whether we like the rule's intended goal, but even about whether it is right to use the law to push people *either* way on the matter in question.

A second problem is that the law probably cannot achieve the goal anyway, because in the entire scheme of things, the law is a minor actor among all the factors that influence people in their intimate behavior. My colleague, Owen Jones, has proposed a principle he calls "the law of law's leverage," which says that some domains of human behavior are so affected by our biological heritage that they are less responsive than other domains to the kinds of incentives the law can provide. That rule could explain, for example, why it may be easier to persuade college students to use contraceptives than to persuade them to be celibate. But whether one sees nature or culture at work, what seems clear is that law is a less important causal agent in family relations than one might think from the heated debates over its content. No-fault divorce is a classic example. Some people simply assume that the adoption of no-fault divorce laws was an important reason why divorce rates rose during the second half of the twentieth century. A recent campaign in Arizona against no-fault divorce laws was based, as explained by its chief advocate, on the "fact" that "the government's decision to allow no-fault divorces a quarter-century ago . . . led to the sharp increase in the number of marriages that fail."⁴

But this "fact" is almost certainly false. I will spare you the full

Deborah Sontag, *Bad Love: Fierce Entanglements*, N.Y. TIMES, Nov. 17, 2002, (Magazine), at 52.

4. Howard Fischer, *New Marriage Ties that Bind Would Be Tight*, ARIZ. DAILY STAR, Feb. 11, 1998, at 1A (quoting Lee Munsil).

explanation of why.⁵ But Arizona is a fine example of some real facts. Our divorce rate essentially topped out in 1971. It then bounced around within a narrow range until 1980, when it began a steady decline. That decline has accelerated since 1995, and Arizona's divorce rate today is barely half the rate during the peak years of the 1970s.⁶ It has not been this low since the early 1960s. Here is the point: *all* of the steep rise in Arizona divorce rates occurred *before* our adoption of no-fault divorce, and *all* of the decline since 1980 has taken place under no-fault divorce laws. This Arizona story gives you a glimpse of why careful observers are skeptical of claims that no-fault laws increased the divorce rate. They believe instead that increased divorce rates arose from social and cultural changes, such as the increased proportion of women who felt financially able to leave an unhappy marriage. But the pace of cultural change slowed after the 60s and 70s, and the divorce rate also stopped rising. In fact, the declining divorce rates of the last two decades are unprecedented: there has never been such a prolonged period of declining divorce rates in all of American history.

Indeed, if there is a causal link between no-fault divorce and divorce rates, it may flow in the other direction. Perhaps the rising divorce rates of the mid-60s and early 70s brought the many problems created by fault divorce laws home to more couples, more lawyers, and more judges, thereby increasing the political constituency to change them. In other words, perhaps rising divorce rates caused no-fault divorce, rather than the other way around. I think that story is quite plausible, but also difficult to prove. Explaining how changes in political forces and social trends persuade legislatures to act is more the stuff of history than science.

So, I have now suggested that family law rules may not have their intended effect on people's conduct because that conduct is influenced by too many nonlegal forces. And I have also suggested that those social forces may be more likely to change family law rules, than the other way around. Consider another example: the impact of the law on marriage rates. It is an example that comes to mind at the moment because some of the American Law Institute's recommendations have come under attack from folks who argue they will discourage people from marrying. The head of an organization called the Institute for American Values recently made that

5. But for those who wish these details, see Ira Ellman & Sharon Lohr, *Dissolving the Relationship Between Divorce Law and Divorce Rates*, 18 INT'L REV. OF LAW & ECON. 341 (1998).

6. The National Center for Health statistics reports the Arizona divorce rates for 1990, 1995, 1999, 2000, and 2001, respectively, as 6.9, 6.6, 4.8, 4.4, and 4.2 divorces per 1000 people. NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Marriage and Divorce Rates by State: 1990, 1995, and 1999-2001*, at http://www.cdc.gov/nchs/data/nvsr/nvsr50/99_01mardiv.pdf (last visited Oct. 1, 2003).

claim on NPR's Talk of the Nation, and, more locally, the East Valley Tribune in Arizona called our recommendations a "grave error" because of the impact they would have on marriage.

Now there is indeed reason to be concerned about marriage rates. Measured most simply, as the number of marriages annually per 1000 unmarried women between 15 and 44, the American marriage rate declined from 140 in 1970, to 91 in 1988, to, most recently, the low 80s per 1000. That is a remarkably steep drop, and the ALI has not even gotten its proposals adopted anywhere yet. Now declining marriage rates are of course related to the increase in the proportion of children born to unmarried mothers. If one looks at children who are living with a single parent today, it turns out that nearly as many have parents who never married, as have parents who divorced. Clearly, then, if one begins with the view that single parent families are not good for child welfare, one must be as concerned with declining marriage rate as with the divorce rate. So the promotion of marriage has risen to the forefront of some political agendas. But what in fact should one do about it? This is indeed a question the Bush Administration has been asking.

The Bush Administration plans to spend over a billion dollars on pilot programs to promote marriage among poor people. The precise plans remain vague—they are seeking proposals for appropriate programs—but one of their motivations seems clear: they believe marriage is a cure for poverty. If unmarried mothers only married, they would not be poor, and they would not need public assistance. But once again, it would seem that the causal arrow may not be so simple. Of course, single motherhood is correlated with poverty, but it is too facile to assume that it is poverty's cause. The causal relation might be the other way around. Maybe, that is, poverty is the cause of the low marriage rate. Not necessarily the mother's poverty, but the poverty of her potential suitors. It may sound quaint or outdated, but the data are clear that a man's appeal as a marriage partner is heavily influenced by his earning potential. If a man cannot provide much support, why marry him? And if he can hardly support himself, *he* might be reluctant to take on others.

If poverty causes low marriage rates, then a program aimed at increasing those rates need focus on poverty rather than on the motivation to marry. In fact, there appears to be no decline in the American motivation to marry. The percentage of Americans between eighteen and twenty-nine who told interviewers that a happy marriage is part of the good life has been going up, not down: from 1991 to 1996 alone, it rose from seventy-two percent to eighty-six percent. So it appears that Americans *want* to marry as much as they ever have, and I assume that is true of poor women also. I doubt single

mothers need federal programs to persuade them to look favorably on suitors with an ample income and a generous disposition. What they need is help finding such men. But a billion dollars spent on federal matchmakers probably will not help much in finding them, because the real problem is that they are not there. And not only for women on public assistance.

Between 1979 and 1997, real weekly earnings actually *declined* for men at every economic level below the upper twenty percent of earners. In other words, if we put aside the lawyers, the doctors, the Enron accountants, and all the other folks who occupied the top fifth of the male economic tier, men between twenty-five and fifty-four earned less every week, in real dollars, in 1997 than they had earned in 1979. Moreover, the lower they were in the economic hierarchy, the steeper was the decline in their earnings. Men in the middle of the earnings distribution earned about ten percent less in 1997 than in 1979, but the bottom third saw an earnings decline varying from sixteen to twenty-one percent: the less they made in 1979, the steeper was their loss from then to 1997. So one would expect women raised in less fortunate economic milieus to have had a tougher and tougher time finding marriageable men. A recent study on marriage published by the National Center for Health Statistics is very suggestive on this point. It found that the probability that a cohabiting couple marry, when they remain together for five years, goes up with the couple's income. The effect is particularly strong among African-Americans, who have had the steepest declines in marriage rates: as African-American family income goes from under \$25,000 annually to \$50,000 or more, the chance of marriage between these cohabitants rises from thirty-nine percent to seventy-one percent.⁷

So my guess is that economic realities account for much of the decline in the marriage rate, and not only because some women *never* find a suitable partner. A decline in the *apparent* marriage rate also arises if men and women delay marriage in the hope of improved economic prospects. Unmarried men and women both earn more when they are older, so simply waiting to marry is one adaptive response to this economic pressure. And in fact, between 1976 and 1992 the average age at first marriage for American men and women shot up by *three* years—triple the one-year increase that had occurred during the preceding twenty-six years.

7. NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES CENTERS FOR DISEASE CONTROL AND PREVENTION, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, ser. 23, no. 22, at 14, fig. 7 (2002), at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf.

Now the social significance of the declining marriage rate may depend upon whether it reflects only delayed marriages, or a true increase in the proportion of people who will never marry. Demographers do not entirely agree on which of these two views is right. But whichever view is true, I am fairly confident that marriage rates change in response to the surrounding social and economic realities, not to changes in the law of marriage and divorce.

What about the law's impact upon conduct during marriage? Many believe progress requires a change in marital roles, but they have largely been disappointed in the law's achievements in this area. Some would say, of course, that America has not much tried. But consider Sweden, where the sharing of family responsibilities is an explicit goal of the law, backed up by numerous substantive provisions. Workplace childcare is more available than it is here, and the gender wage differential is much smaller. Since 1974 Swedish law has guaranteed employed parents paid leave time to care for their children. The program began with a guarantee of six months leave, at ninety percent salary, but by 1980 the guarantee was extended to twelve months. Parents can allocate their parental leave between them, and the Swedes clearly hoped that mothers and fathers would divide it evenly. But they do not. Half the fathers take no parental leave at all. Mothers average 347 days of parental leave; fathers average 31. These figures have remained essentially unchanged for ten years.⁸ One reason men do not take more leave time is the resistance of their wives, half of whom want it all for themselves.⁹ Some proponents of the Swedish system have begun to doubt it will ever achieve the goal of eliminating gender roles in marriage, because it appears to have had little impact on the differences in the average preferences of men and women.¹⁰

Now that I have argued that the law cannot have much impact on whether people enter or end their marriage, or on how they conduct it, let me backtrack a little. Could more aggressive legal reform have more impact? Of course. The problem is that any rule likely to have a large impact is also likely to be objectionable on other grounds. For example, women might invest more in market work and less on their family, if spousal support and marital property were abolished. Or men might spend

8. See generally Marianne Sundström & Anne-Zofie E. Duvander, *Gender Division of Childcare and the Sharing of Parental Leave Among New Parents in Sweden*, 18 EUR. SOC. REV. 433 (2002) (citing statistical trends regarding parental leave for child care).

9. *Id.* at 437.

10. Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 37-38 (2000).

more time with their children if those who did not had no right to see them after divorce. And we might reduce divorce rates with a rule that the moving party in any divorce action is ineligible for primary custody. But even though these provisions might work their intended effect, none are likely to be enacted. Nor should they be, because they are too unfair, whether to husbands, wives, or children. And that brings us to the second rationale for family law rules: fairness. The examples just given show clearly that fairness concerns set boundaries around our choice of family law rules. The problem is that those boundaries are very wide.

Family law rulemakers—both legislatures and appellate courts—have often dealt with these wide boundaries through the adoption of principles so broad that they leave trial courts free to make almost any choice. It is a convenient way to compromise contending claims where no obvious fairness principle compels a more certain rule. Marital property is divided “equitably,” children’s custody is decided according to what is “best,” and alimony is allocated as “needed.” But the variability and unpredictability produced by rules of this kind is itself a source of systemic unfairness. The fact that reasonable judges *can* differ on how to decide identical cases does not mean it is a good idea that they do.

Thus, the American Law Institute has recommended that family law rulemakers bite the bullet and make some choices by adopting more certain rules. In some cases we were bold enough to recommend just what the more certain rule should be; in other cases, we laid out a template that contains a few blanks, along with our view of how reasonable people might fill them in. And that approach reveals my bottom line. I believe family law rulemakers can do better by trying to be fair than by trying to set incentives for socially desirable intimate behavior. But sadly, not so much better. That is because any rule clear enough to provide reasonably consistent and predictable judgments must be chosen from among alternatives with equal or nearly equal claims to being fair. The bad news, then, is that no matter what choice one makes, one is vulnerable to attack that another choice is at least as fair. The good news is that anyone else’s competing choice is equally vulnerable.

Let me explore two examples: custody adjudications and alimony claims. I choose these two because they have historically been the most resistant to clear rules, and thus present the hardest task for the rulemaker. I will talk first about children. The ultimate principle that is supposed to decide custody disputes is the child’s best interests. We surely owe that to the children of divorce. It is, so to speak, what a fairness principle demands. But as has been observed repeatedly in American scholarship, the best interests principle offers an aspiration rather than a rule. It tells us what we

would like to achieve, not how to get there. As Dean Bartlett wrote in the ALI's discussion of custody, the best interests standard "tells courts to do what is best for a child, as if what is best can be determined and is within their power to achieve. In fact, what is best for children depends upon values and norms upon which reasonable people sometimes differ"¹¹

Of course, there are cases and there are cases. Opinions do not differ if the choice is between love and cruelty, cleanliness and filth, respect and exploitation. But those stark choices do not often come up. What is the relative importance of individuality and "fitting in," creativity and reliability, civility and honesty, sensitivity and achievement? How much current contentment should be sacrificed for the hope of a future reward? How important is it to instill religious belief in a child? Should the child have a strong cultural affinity? Which culture? And then there is the added problem, well-known to every parent, of the gap between deciding on the traits one wants to instill in a child, and succeeding in doing so. Parents may share the same values but differ on the best strategy for instilling them. Is it better to be firm and clear, or warm and flexible? I do not know that experts are all that helpful in resolving such disagreements. But it does not matter. If we were in a fantasy world in which everyone knew for certain just how to mold a child, the difficulty of the best interest standard would be worse, not better, for our relative incompetence in predicting how varying parental styles affect children conceals the standard's more fundamental problem.

Do a thought experiment. Imagine that psychologists really could tell us just how differently a child would come out under one custody arrangement as compared to another. Would we then be happy with a best interest standard that asked the judge to pick from among the child's possible alternative futures? The answer to that question is found in the enormous discomfort most people have with suggestions (probably fanciful) that advancing science might allow parents, aided by genetic engineers, to "design" their child's traits. A judicial engineer would surely be even less welcome than a parental one. But the discomfort we would have in entrusting core parental value choices to the varying preferences of diverse trial judges is in practice ameliorated by our intuition that the judge is even less likely than the parents to be effective in achieving them. As I once said in another context, "the law may be stupid, but at least it won't work."

11. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 2 (2002).

So while our desire to be fair to children may logically lead to the best interests standard, it does not operationalize that standard in any way that would decide very many custody cases. This is a particular problem because fairness to litigants is also usually thought to require a reasonably clear rule, yet the best interests standard seems to provide little guidance in designing one. I cannot here fully describe a solution to this problem, but I can capsule the approach we proposed for the American Law Institute. It presumes the child's interests would be served by allocating custodial time and responsibility between the parents in rough proportion to the time each spent in direct child care while their relationship was intact, except that it guarantees a reasonable amount of custodial time for the responsible breadwinner who performed the traditional father's role, even if he never spent much time in direct child care. Of course we recognize circumstances that would justify a court's departure from the proportionality presumption, but the rule specifies factual findings a court must make to invoke one of these exceptions. The overall package is thus designed to provide predictability and consistency in the large group of ordinary cases, but systematic flexibility to deal with others. Is this the only possible custody rule that reasonable people might think fair to both the children, and their parents? I doubt it. But after listening to ten years of debate among informed people on this and related issues, I am pretty sure it is at least as good as any other we might have offered, and I am pretty sure it is better than simply saying to trial judges, as we do today, "do what's right."

We have seen that the limitations of a fairness principle in helping design a child custody rule arise in part from our inability to predict the child's future. By contrast, limitations in our ability to determine a fair financial settlement between divorcing spouses arise in part from difficulties in understanding the couple's past. To communicate this larger point, I will look in some detail at a small example: the difficulty of using contract ideas to provide a basis for alimony.

The appeal of contract law to identify the fair financial package in marital dissolutions is that it lets the judge off the hook: she does not have to supply the standard of fairness, because presumably she is merely enforcing the quid pro quo that the contracting parties themselves signed up for. It is their deal, not the judge's; she is just holding them to it. And surely it is fair to make one person compensate another who reasonably relied on a promise the first person did not keep. In drafting rules for marital dissolution, then, we might imagine that our task is to guess the contract terms that newlyweds would think they had agreed to, and write them into the divorce law as, in effect, default contract terms that will apply to couples who have not made their own more customized deal overriding

them. But this approach will not work very well to explain the rules of divorce. I will illustrate why with a case decided a few years ago in California about an unmarried couple, *Friedman v. Friedman*.¹² It is a good case for this point because in most states the prevailing law for unmarried couples is already based upon contract. It essentially requires the judge to infer the terms of the couple's agreement and then apply those terms. I first want to show why this process does not work for a court deciding how to treat claims between a specific unmarried couple before it. Then I will use that to persuade you that inferring a marital contract also cannot work as a process for generating a general rule to apply to all couples, married or not. Where I am heading is the conclusion that the rulemaker cannot avoid choosing for herself the rule she believes fair, by claiming to rely on the parties' own deal. She must choose the fair rule, even though fairness judgments are, in this context, enormously difficult to make.

Now for the story of Terri and Elliott Friedman.¹³ They began living together in 1967. Children of the 1960s, they did not believe that marriage was necessary for the commitment they intended, and so they vowed instead to be "partners in all respects 'without any sanction by the State.'"¹⁴ They purchased property in Alaska as "Husband and Wife," had two children together, and in the late 1970s moved to Berkeley where Elliott attended law school and prospered.¹⁵ By the mid 1980s Terri, the homemaker throughout their relationship, became disabled with serious back problems.¹⁶ Their relationship deteriorated, and in 1992 Terri filed an action seeking, in effect, alimony.¹⁷ She lost because she could not make out any contract claim.¹⁸ The court could find no agreement between them creating obligations if their relationship ended.¹⁹ As Elliot said of Terri's support claim: "That was not part of our life. It was not part of what we were doing . . . [W]hen we split up, we split up."²⁰

Even those sympathetic to Terri's claims must concede that Elliot's description of the couple's understanding, when they first decided to live together, is entirely plausible. Young persons in their twenties, with no children, few responsibilities, and many prospects in front of them, may see

12. 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

13. The facts that follow are all taken from *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

14. *Id.* at 894.

15. *Id.* at 894-95.

16. *Id.* at 895.

17. *Id.*

18. *Id.* at 899.

19. *Id.*

20. *Id.* at 895.

little reason to bind themselves to lifetime obligations that could outlast their mutual affection. But for Terri, 1967 was then, 1992 is now. Much of a lifetime has passed. The question is whether the law should say that after twenty-five years together raising two children, Elliott can leave their relationship lucratively employed without any obligations at all to Terri, because she could not prove he had promised to help her if this happened. As wide as the plausible boundaries of fairness may be, I do not think this rule's insistence that obligations between unmarried intimates can only arise from contract, falls within them.

The problem with the contract rule is that it does not acknowledge that duties can arise from relationships themselves, apart from an exchange of promises that constitutes a contract. Employers and employees, landlords and tenants, hosts and houseguests, all have legal obligations to one another that arise even if they have no contract imposing them, and sometimes even despite a contract expressly disavowing them. Surely then the law might also find duties arising from marriage, and also from long-term intimate relationships that function like marriage. Promise is not the only source of duty in the law—torts teachers would otherwise be out of business—and it may not be the source of duty here. The Terris and the Elliotts of this world do not usually make contracts. When their relationship is going well no agreement seems necessary, and when it ceases going well, no agreement seems possible.

Now what if Terri and Elliott had married? Some would then say they have a contract that incorporates their state's divorce law. But that answer does not solve our problem. It is no help to say the contract's terms are found in the state's divorce law, because our question is what to put there. And we cannot decide what to put there by asking newlyweds what they have agreed to. When we ask, we find that most agree they love each other, and few consider making an agreement about what to do later if they do not.

Contract is by nature static. It is about binding people to a commitment made at an earlier time. Long-term intimate relationships are dynamic. Terri and Elliott are different people in 1992, after two children, than they were in 1967, and their expectations of one another, and perhaps of life, are now different. Our belief that married couples have obligations to one another arises from what we believe is fair when people share a life together, not on what they said to one another as newlyweds. Whatever understanding they had in 1967 has long since been amended. But we cannot expect a court, in 1992, to figure out when, how often, or to what. The law cannot make that kind of legal excavation a necessary part of deciding every alimony claim.

Nonetheless, I find that for many, the notion of a marriage contract as the basis for legal obligation is hard to give up. Perhaps the reason is that successful marriages are surely reciprocal, and that can easily seem like “contractual.” But contract involves more than reciprocity; it involves a bargained-for exchange. That difference is important to keep in mind. There is reciprocity when I pick up the tab at lunch with a friend. Perhaps he paid last time, or perhaps we have spent lunch discussing a personal issue on which I wanted his advice. Either way, I want to pay down my social debt. Contrast that social debt with the contract I have with the restaurant. When I ordered, the proprietor and I made a deal: if you bring me hamburgers, I will pay you the price shown on the menu. This deal is a discrete item, which does not mean that repeat customers will not develop a friendly relationship with their vendor. But that does not change their understanding about the bill for lunch. When I pay, I satisfy a legal debt, not a social one. Commercial actors can exchange all the civilities in the world, and may even be friends in other contexts, but business is business.

Now while marriages are quite obviously more like friendships than hamburgers, the fact that they also give rise to legally enforceable obligations confuses some into thinking they are more like hamburgers after all. The reciprocal nature of a successful marriage gives it a superficial resemblance to a bargained-for exchange, which makes it easy to think that this apparent exchange is the basis of marriage’s legal obligations. But we must remain clear about the difference. Lunch with my friend may leave me with sense of social debt that is real, but non-specific. I might reciprocate in many different ways, and gauging what is appropriate to offer or expect is an important social skill. Friendship involves communicating interest in and concern for one another’s welfare over a longer time horizon; opportunities to reciprocate may not present themselves in convenient sequence for turn-taking. My debt to the restaurant is not so open-textured. When the lunch bill is presented I owe \$23.37.

So contractual obligations are well-defined in both time and nature, while the reciprocities expected in close social relationships are not; contractual obligations are discrete; social obligations are embedded in a larger relationship on which they depend for their existence and meaning. The strength of a friendship may be inversely proportional to the extent to which either party feels a need to keep careful tabs on favors extended or received. In all these regards marriages are like friendships, only more so. If lovers have bargains, they are complex emotional bargains, and they themselves may not easily identify the quids and quos. Sociologists have found that even though wives almost always do much more of the housework, most of these wives say they believe this division of labor is

fair.¹⁸ Not equal—fair. How can wives believe this? Presumably because they see their relationship as a whole, not as a series of discrete transactions, and believe that in the relationship as a whole, both partners are contributing. They also see their relationship as existing over time, with a past and a future, in which the balance sheet need not tally day-by-day.¹⁹ Husbands undoubtedly make similar kinds of assessments. How else could so many traditional husbands who work long hours providing most of the family's income nonetheless treasure their marriage? It is the rare outsider who has a clear enough window into another couple's marriage to see how or why it works—or does not. We can be surprised when a marriage we thought we knew fails, and we are sometimes surprised that other marriages survive. To ask a court to learn and understand the details of every relationship, and perhaps to compare it to some model marriage, so as to gauge the fairness of financial claims at divorce, simply does not work.

Yet the law still needs a rule for allocating finances at divorce, and the rule ought to be clear, certain . . . and fair. It is a difficult task to write a clear rule that will produce a fair result between divorcing parties whose understandings we cannot know. That is why the law has avoided trying. ALI Reporters did not have that choice. Maybe it was foolhardy for us to take that task on, and maybe it is even more foolhardy to attempt to explain in a few sentences how we handled it. But I will try.

As with custody, we rely upon presumptions. And in the case of long-term relationships like Terri's and Elliott's, whether married or not, our presumptive result is fairly straightforward. First, divide the property acquired during the relationship equally. Then for alimony, we ask whether one party leaves the relationship with much less earning capacity than the other. If so, that lower-earning spouse has a claim against the other. The size of the required payments is proportional to both the gap in their earning capacity, and the duration of their relationship. In long marriages they top out, at a figure that approaches, but does not reach, income equality. The payments continue for a time period that is also proportional to the relationship's duration. All these principles are embodied in a rule that states a formula, so the rule yields an award of a particular dollar amount, and duration, once the basic variables of income and marital duration are known. As with custody, this clear rule has exceptions. Adjustments may be made under circumstances specified in the rule, and there is an escape hatch a court can rely upon in exceptional cases, after making appropriate

18. Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1977 (2000).

19. *Id.* at 1981–84.

findings. And there are many further details which I will skip over, but you get the idea.

I hope I have persuaded you that family law is hard because it is difficult to devise a rule that serves either an instrumental or a fairness rationale very well. But I hope you can also see that fairness concerns themselves require that we do the best we can in this effort. That best may be no better than a crude approximation of fairness. But that is the inherent limit of the subject matter. Law cannot replace affection in the regulation of relationships, and closely customized results that strike the right balance in every case are beyond its reach. We may come closer in some cases than others, and hopefully law can provide remedies that correct gross injustices that might otherwise result in some family dissolutions. It can, for example, make sure that de facto spouses like Terri have some recourse. And it can hopefully achieve its result with a minimum of iatrogenic injuries, and that means with a relatively streamlined process that parties can rely upon and usually predict. The reasonably accessible and efficient administration of rules that do little harm themselves, and yield a crude approximation of fairness, may seem a modest goal for the law. But I hope I have been able to explain today why I think we should be thrilled to achieve it.