

Reconstructing Family: Constructive Trust at Relational Dissolution

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[D]ivorce law seems in danger of forgetting both the rhetoric and the remedies for addressing good and bad marital conduct and abuses of trust in intimate relationships.¹

—Barbara Bennett Woodhouse

INTRODUCTION: DECONSTRUCTIVE TRUST

Intimate relationships are, first and foremost, relationships of trust. Family building demands the surrender of individual autonomy in favor of mutual reliance and care. It may nevertheless be unsurprising, in a society that celebrates self-interest and downplays community accountability, that family law reform efforts in recent years have largely neglected the emotional consequences of long-term cohabitation for the individuals involved. With all the talk of valuing women's housework, moving beyond the patriarchal institution of marriage, and recognizing the legitimacy of privately ordered lesbian and gay partnerships, the human elements of family are often left by the wayside.

Given the dominant conception of family as an amalgamation of distinct individual interests, contract law has been the primary vehicle of restructuring the legal relationship between intimate partners.² Contract is well suited to protecting partners' autonomy, and its emphasis on voluntary assumption of responsibilities has facilitated legal regulation of those families that fall outside the traditional boundaries of heterosexual marriages. The embrace of contract represents an important concession:

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¹ Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2527 (1994).

² The perceived transition of marriage from status to contract was part of a general societal shift noted by Sir Henry Maine in the mid-nineteenth century: "[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*." HENRY MAINE, *ANCIENT LAW* 165 (Raymond Firth ed., Beacon Press 1963) (1861) (emphasis added).

traditional family law cannot accommodate non-normative relationships, both because state legislatures have been slow to expand statutory definitions of family and because family law is doctrinally wedded to its patriarchal origins.³

On the whole, however, contract is poorly equipped to structure relationships between intimate partners. The contractual model presumes parties with equal bargaining power, dealing at arm's length.⁴ In a relationship of interdependence, built on divergent duties and earning power, it is doubtful that the dependent party has bargained for any legally cognizable benefit. Moreover, focusing on the intent of the parties effaces the human backdrop to contractual agreements. Unequal bargaining power in the family setting arises not only from disparate education and earning power, but also from disparate emotional involvement. To suppose that a mother faced with the prospect of losing her children or her means of sustenance can contract freely is to discredit the most fundamental of human bonds and to recognize the full extent of modernity's power to alienate, sever, and exclude. Contract has become the dominant mode of rationalizing inequality. People are simply free, the argument goes, to make bad choices.

Many feminists are concerned that the rejection of contract in the marital context would represent a return to the status-based notion of marriage, pursuant to which the husband provided for his wife's needs in exchange for love, support, and housework.⁵ Contract law, they urge, envisions husband and wife as equal autonomous partners who can regulate their entitlements from marriage.⁶ More radically, some celebrate contract as a means of eradicating marriage altogether; individuals who wish to share rights and responsibilities may enter into an agreement to do so.⁷ Proponents of contract claim that public law regimes rely on the coercive power of the state to impose normative values of sharing and nurturing on the family; only by recognizing the family as comprised by individuals can pure privacy and autonomy be recognized.⁸ In response, I would

³ Martha M. Ertman notes, "In its various forms, the naturalized model of intimate affiliations contributes to race, sex, gender, sexual orientation, and class hierarchies. Due to these hierarchies, those deemed naturally inferior are economically and socially marginalized within intimate relationships." Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 80-81 (2001). Ertman lauds the privatization of family law for its departure from these marginalizing categories and offers business models as a means of structuring intimate relationships.

⁴ For a feminist discussion of how "inequality of bargaining power can subvert the bargaining process," see Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247, 1264 (1999).

⁵ See discussion *infra* Part I.A.

⁶ See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1231 (1998).

⁷ On the tensions between privatization and progressive politics in the context of gay and lesbian relational contracting, see Nancy Ehrenreich, *A Trend? The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1242-43 (1996).

⁸ See Elizabeth S. Anderson, *Women and Contracts: No New Deal*, 88 MICH. L. REV.

argue that given the reluctance of this country's governments to exercise state responsibility for the needy, it is in the public interest to encourage small communities, whether structured as "couples" or otherwise, to assume responsibility for the nurturing and sustenance of children and of the economically or physically disadvantaged.

Although there is near universal approval for the legal attentiveness to the "best interests" of children,⁹ there is a staggering reluctance to allow a determination of the most equitable and beneficial arrangement with respect to two adults. In the end, feminists must accept that paternalism¹⁰ comes in many forms, and we cannot fool ourselves into "freely" accepting oppression by reasoning that to do otherwise—to allow the state to protect the socially underprivileged party—would be to relinquish free will. Abandoning contract entails relinquishing individual rights in favor of shared family responsibilities and community trust.

The contractualization of family law has led to the sterilization of the family. As the legal mode of conceptualizing marriage (d)evolves, so too does its language: "Vocabulary changes from words of intimacy to the language of commerce (for example, profit and investment) and self-interest. Spouses become parties, participation becomes contribution, and divorce becomes dissolution."¹¹ It is appropriate, then, that one of the most powerful tools for reconceptualizing the increasingly impassive legal notion of the family in human terms bears the name "constructive trust." The potential for rhetorical playfulness is limitless: constructive trust is constructive in the lay-sense of productive, helpful, or beneficial to constructing meaningful relationships; and yet trust, in the "partnerships" of the day, has become constructive in the legal sense of constructed, fraudulent, artificial—in short, fictitious. And so we are left simply with trust as a construct, a working model of human interaction, that fundamental element of intimacy that we sacrifice to expediency and to which we all aspire.

In general terms, constructive trust is an equitable remedy imposed on a party who has wrongfully obtained the property of another.¹² The court redistributes the property in order to mitigate unjust enrichment.¹³

1792, 1806 n.33 (1990).

⁹ The "best interests of the child" standard is widely employed in adoption, custody, and guardianship cases. See 3 Fam. L. & Prac. (MB) § 32.01(1)(b), at 32-15 (Oct. 2000) ("The universal standard used to guide judges is 'the best interests of the child.'").

¹⁰ Perhaps the surrender of contractual autonomy called for in abandoning the contractual model would better be termed maternalism—after all, it is the mother, not the father, who is so often penalized by her commitment to interpersonal relationships over self.

¹¹ Sanford N. Katz, *Marriage As Partnership*, 73 NOTRE DAME L. REV. 1251, 1257 (1998).

¹² 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* 304 (4th ed. 1989) ("A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.").

¹³ *Id.*

Constructive trust was first employed as a family law remedy in the 1970s, in the context of non-marital relationships.¹⁴ At that time, judges hoping to achieve a just distribution of non-marital shared property through contract law faced two substantial obstacles. The first was a formalistic hesitance to recognize the legitimacy of contracts pertaining to non-marital intimate relationships, which purportedly rested upon “meretricious”¹⁵ consideration.¹⁶ The second, of a far more substantive nature, was the inadequacy of contract law to accommodate individuals who were subject to manipulation by their partners.¹⁷

The ramifications of the unequal bargaining power between relational partners are twofold. First, contracts between parties of disparate earning potential are likely to be substantively unfair: the contractual framework benefits the party who is less willing to “trust”—the party who is economically suspicious and already anticipates the breakdown of the relationship, often the partner who is in the superior bargaining position. Second, contracts rarely protect the weaker party. The reality is that most individuals do not enter into explicit contractual agreements before engaging in intimate relationships.¹⁸ Until constructive trust arrived on the scene, there were virtually no equitable or family law remedies accessible to non-marital couples at dissolution, and there was therefore little incentive for the wealthier party—usually the more sophisticated party and the only one likely to seek legal protections—to draft a contract in the first place. Given the historical complications surrounding the application of contract law to non-marital relationships, equitable remedies were the only available option.

The equitable remedy of constructive trust may have developed out of practical necessity, but its implications for judicial understanding of

¹⁴ See discussion *infra* Part II.C.

¹⁵ Early non-marital contracts were often invalidated on the basis that they provided financial compensation for sexual services and were therefore akin to prostitution. The ironic similarity of such contracts to the institution of marriage (the “marriage contract”) largely escaped critical notice. See 6 Fam. L. & Prac. (MB) § 65.02, at 65–66, 65–67 (Apr. 1994).

¹⁶ See discussion *infra* Part I.A.

¹⁷ See discussion *infra* Part II.C.

¹⁸ Because most partners rely on vague promises to care for each other, many courts have sought remedies not based on explicit contracting. See generally Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1171 (1992). Bowman and Cornish note that the infrequency of express non-marital contracts may be due in part to the broad misconception that common-law marriage is valid in most states. *Id.* at 1171 n.35. See also *Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979) (“Parties entering this type of relationship usually do not record their understanding in specific legalese. Rather . . . the terms of their agreement are to be found in their respective versions of the agreement, and their acts and conduct in the light of the subject matter and the surrounding circumstances.”); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979) (“[I]t is unlikely that most couples who live together will enter into express agreements regulating their property rights.”). Moreover, most people are unaware that marital legal protections are unavailable to unmarried partners. See Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 77 n.1 (1990).

the family were pervasive. Constructive trust emerged as an alternative to the rigid, privacy- and autonomy-based contractual model. The doctrine of constructive trust allowed courts to develop an inclusive notion of family, based on the rights and responsibilities that the parties to an intimate relationship exercise with respect to one another.¹⁹ For the first time, courts recognized the extent to which the notion of contracting for familial rights and responsibilities is a legal fiction. Rather than demanding that the parties explicitly manifest their contractual intentions, they began to impute to intimate partners what amounts to a contractual duty of good faith and fair dealing akin to that of a fiduciary relationship.²⁰ This presumption of fair dealing is the basis for constructive trust.

This Article is divided into two principal Parts. In the first, I offer a critique of the increasingly contractual nature of family law. Because courts have only recently begun to adjudicate the dissolution of non-marital relationships, my historical analysis focuses primarily on divorce cases. Substantial attention is devoted to sex-based power disparities inapplicable to same-sex marriages, a growing contingent of those relationships traditionally classified as “cohabitation.” However, the harmful effects of the contractualization of family law have by no means been limited to dissolution of adult relationships: they pervade decisions regarding inheritance, adoption, child custody, disability, medical decision-making, and even some tort claims. I have done my best to touch on these categories where relevant, within the limitations of this Article, but I believe that the principles established in the context of relational dissolution carry over into every aspect of family formation and interrelation. In the second Part, I turn to the doctrine of constructive trust and its potential implications for the way we understand relational dissolution. I begin by reviewing the history of constructive trust in the family law arena. I then outline my proposal for the application of constructive trust to all intimate relationships. Finally, I explore the meaning of damages and unjust enrichment in property distribution at dissolution. In the conclusion, I challenge the contractual notion that public ordering of the family impedes identity formation and decisional autonomy.

I. BREACH OF CONTRACT, BREACH OF TRUST

Before turning to a more detailed analysis of constructive trust and its applicability to family law, it will be useful to outline the theoretical and political underpinnings of the contractual model of marriage and to highlight the shortcomings of contract in the family law setting. This Part therefore opens with a brief historical account of the contractualization of family law. It then turns in greater detail to the primary models of re-

¹⁹ See discussion *infra* Part II.C.

²⁰ See discussion *infra* Part II.B.

lational contracting, including pre- and post-marital contracts as well as settlement agreements, and exposes the inadequacy of contract law at the dissolution of same-sex and other non-marital partnerships.

A. *The Marriage Contract*

The history of marriage and marital dissolution has often been described as a transition from status to contract.²¹ The increasing prominence of contract doctrine in the context of family disputes had become apparent by the mid-nineteenth century.²² In an 1851 opinion, Justice Semmes wrote for the Supreme Court of Florida: “I know of no reason why the word contract, as used in the [C]onstitution, should be restricted to those of pecuniary nature, and not embrace that of marriage, involving as it does, considerations of the most interesting character and vital importance to society, to government, and the contracting parties.”²³ The transformation, however, was a gradual one. Although philosophers and legal scholars had long discussed marriage, like government, in contractual terms, such references were predominantly descriptive. The nineteenth-century legal conception of marriage is typified by the 1887 decision of the United States Supreme Court in *Maynard v. Hill*,²⁴ in which marriage was envisioned as an “institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”²⁵ Marriage was “something more than a mere contract,”²⁶ and it was far removed from a notion of private bargaining by autonomous individuals. In fact, the effect of marriage was precisely the opposite of that of a contractual bargain. It effaced identity and selfhood in favor of a merged spousal unit (with all of the attributes, including name and domicile,²⁷ of the husband), subject to public regulation and manipulation.

The courts’ refusal to enforce even written contracts between spouses stemmed from reluctance to intrude into marital privacy²⁸ and

²¹ See *supra* note 2 and accompanying text.

²² On the transition from “patriarchalism” to “contractualism” in the nineteenth century, see MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 19 (1985).

²³ *Ponder v. Grahams*, 4 Fla. 23, 45 (1851).

²⁴ 125 U.S. 190 (1887).

²⁵ *Id.* at 211.

²⁶ *Id.* at 210–11.

²⁷ The common law attribution of the husband’s domicile to the wife was codified in the RESTATEMENT OF CONFLICT OF LAWS §§ 26, 27, 30, 34, 40 (1934). The rule changed in most states over the course of the 1970s and 1980s, and the Restatement was revised in 1986 to allow married women to retain their domiciles. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (1986).

²⁸ The common law doctrine of nonintervention dictates that courts rarely adjudicate marital conflicts. For a critical perspective on judicial nonintervention, see Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women’s Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117, 121–22 (David Kairys ed., 1982). Nevertheless, there was always some regulation of marital relations, and particularly of

unwillingness to alter the pre-established marital duties laid down by the state.²⁹ To the extent that marriage was regarded as a contract, it was a contract of adhesion par excellence. Its terms were firmly gendered and non-negotiable. The husband, as the prototypical patriarchal head of household, was responsible for supporting his family;³⁰ the wife, tied to the private sphere, was legally bound to provide housework, childrearing, and sex.³¹ Well into the twentieth century, courts refused to honor contracts regarding the distribution of property or inheritance, claiming that support obligations and housework are intrinsic to the marriage contract and thus cannot serve as consideration.³²

It is striking that such arguments are alive and well today, though in purportedly gender-neutral form.³³ In *Borelli v. Brusseau*,³⁴ a 1993 California appellate case, plaintiff sought specific performance of a promise

marital property, as described by Sir William Holdsworth: “No legal system which deals merely with human rules of conduct desires to pry too closely into the relationship of husband and wife But some rules it must have to regulate the proprietary relationship of the parties.” 3 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 404 (1909).

²⁹ Many courts dispensed with theoretical justifications and simply clung to the legal formalism that contract between spouses was impossible, since husband and wife were treated as a single unit for purposes of the law. At marriage, a woman ceded her independent legal status to her husband. The legal ramifications of this merger were manifold: in addition to the impossibility of contract, tort, and even criminal actions (including prosecutions for rape and abuse) between spouses, husbands were responsible for torts committed by their wives, spouses could not testify against each other in court, and husband and wife could not constitute a criminal conspiracy. The doctrine was partially abrogated in the mid-nineteenth century with the Married Women’s Property Acts. Nevertheless, many of the legal restrictions endured, albeit less conspicuously, throughout the twentieth century. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1462–63.

³⁰ The duty of support was governed by the doctrine of necessities and was largely limited to food, clothing, shelter, and medical care. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (holding that public policy bars court from inquiring into husband’s financial allowance to his wife except in cases of abandonment or separation).

³¹ See generally LENORE WEITZMAN, *THE MARRIAGE CONTRACT* (1981); Singer, *supra* note 29, at 1456. The rigid gendered separation of marital duties into financial support (husband) versus homemaking as well as “conjugal society” and companionship (wife) explains why only husbands had a cause of action for loss of consortium at common law; the rule against double recovery barred a wife from recovering for loss of her husband’s financial support, which was the only duty owed her.

³² Singer, *supra* note 29, at 1457. Katharine Silbaugh suggests that the notion that lack of consideration could be inferred from such a sweeping pre-existing legal duty was consistent with the formalist tendency in early twentieth-century contract law, which has virtually disappeared from all aspects of contract law except marriage. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 32 (1996).

³³ See Silbaugh, *supra* note 32, at 32. Silbaugh notes that while a spouse’s duty of support is subject to the same pre-existing duty constraint, the effect of the rule is to penalize homemakers: “To say that neither the support nor the service obligation is subject to contract is not to say parallel things. Whether or not there is an agreement as to service, the benefits of whatever housework is performed will, as a practical matter, be shared; it is not feasible to perform housework for oneself without providing a benefit to all members of a household. The same is not true for support; as long as there are sufficient funds available to provide necessities—food and shelter—no support needs to be given from a spouse with cash to the other spouse.” *Id.* at 34.

³⁴ 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

of property made to her by her deceased husband in exchange for her promise to care for him after he suffered a stroke. The appellate court affirmed the trial court's dismissal of the suit on the basis of "the long-standing rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case."³⁵ While the court's insistence on a wife's pre-existing duty to care for her husband is facially gender neutral (both spouses, the court emphasizes, are entitled to emotional and physical support), it is the husband who most often has property to shield and the wife who most often has the "free time" to devote to the care of her husband.

For those concerned with the patriarchal rules of marriage as prescribed by the state, the privatization of marriage—the substitution of a private contractual agreement for the regulated institution that was marriage—seemed all too easy a solution. Anything was preferable to the ossified assumptions at work in *Maynard v. Hill*, and so nineteenth- and early twentieth-century feminists sought to reduce the "something more than a mere contract" described by Justice Field to "mere contract," pure and simple. In explaining the non-interventionist policy of the courts with respect to marital conflict, Susan Moller Okin critically observes that "[t]he courts' refusal to enforce explicit contracts between husband and wife"³⁶ is attributable to the rigidity of publicly stipulated marital roles as well as judicial "reluctance to intrude into a private community supposedly built upon trust."³⁷ The implication, it seems, is that trust is in fact foreign to such private communities—marital trust is imputed, supposed, and constructive. Marital partners should be treated as distinct individuals, dealing at arm's length. The principal shortcoming of the marriage contract is its failure to adhere to liberal contract doctrine.

There is no question that the increased privatization that accompanied the abandonment of state constraints over marriage had positive consequences for generations of women: wives were afforded the opportunities to own property, to sue their husbands for rape and abuse, to retain their identities, and to contract with their spouses and with others. The campaign for recognition of spousal contracts has been successful. The terms of the marriage contract are far more flexible than they were in

³⁵ *Id.* at 20. California law disallows manipulation of the state-imposed duties and obligations of marriage except with regard to property. "[A] husband and wife cannot, by a contract with each other, alter their legal relations, except as to property." CAL. FAM. CODE § 1620 (West 1994). The property exception reveals a deep-seated notion in U.S. culture that property is sheltered from the other responsibilities of marriage: an individual is within his right to withhold property (beyond the common law "necessaries") from his spouse.

³⁶ SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 122 (1989).

³⁷ *Id.*

the mid-twentieth century, and the state is far more willing to recognize spouses as individuals with distinct needs and concerns.³⁸ Pre-marital contracts have become common. The Uniform Premarital Agreement Act allows prospective spouses to contract for “any . . . matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”³⁹ The provision is intended to encompass choices as to careers, place of residence, and even childrearing, in addition to the more standard fare of property division and support obligations.⁴⁰ At divorce proceedings, the old presumptions that services proffered during marriage are donative rather than contractual are far less determinative.

Nevertheless, fervor over the new freedom for married women has begun to give way to recognition that contracts are hardly more likely than the state to protect a weaker party.⁴¹ Setting aside for the moment the law’s preferential treatment of traditionally male financial contributions over homemaking and childrearing, discussed at length in the following Section, most pre-marital and settlement contracts are simply bad deals for one of the spouses. Given a backdrop of disparate earning power, education, and legal sophistication between most marital partners, the long-awaited freedom of contract in the marital context has amounted to freedom to contract away one’s rights.⁴² Rather than abandon the notion of community trust in favor of contract, I would argue that family law should seek to foster and facilitate trust by ensuring that intimate relationships are governed safely and justly, from inception to dissolution.

B. No-Fault Divorce and the Alimony-Property Distinction

One of the principal defects of the contractual model of marriage is the incompatibility of contract, as a body of law premised on assuring non-breaching parties the benefits of their bargains, with the current no-fault divorce regime, under which there is no judicial determination as to which party breached. A contractual basis for dividing property seems to demand an allocation of fault. While breach may not be laden with moral blame (such is the innovation of “efficient” breach), contract law dictates that the breacher compensate the innocent victim—historically, most often the dependent and virtuous wife. To be fair, the incongruities do not exclusively favor the weaker party. Divesting a non-breaching (and therefore contractually innocent) but economically independent spouse of up

³⁸ See Singer, *supra* note 29, at 1462–63.

³⁹ UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8), 9C U.L.A. 43 (2001).

⁴⁰ *Id.* § 3 cmt. at 43–44.

⁴¹ See, e.g., Singer, *supra* note 29, at 1540–41.

⁴² For a discussion of the proposition that pre-marital agreements are likely to favor independent spouses, see *infra* Part I.C.1.

to half of his property is disingenuous; saddling him with continuing support payments is blatantly inconsistent with contractual remedies. Perhaps it is this irreconcilable conflict between no-fault divorce and alimony, traditionally paid by the breaching husband to his injured wife in fulfillment of his promise to support her, that has led to the latter's fall from favor with the advent of the contractual marriage. This Section therefore traces the decline of alimony and the concomitant rise of no-fault divorce, and suggests that despite the shortcomings of the latter, a return to fault cannot achieve equitable distribution. Rather, as a marked departure from the contractualization of marriage, no-fault divorce paves the way for a property-based public law distributional scheme.

Before turning to a discussion of the transition from alimony to property, it should be noted that there are two distinct manifestations of contract in marriage. The first, the conceptualization of marriage as a contract governed by state default terms, may be incompatible with no-fault divorce, but the second, the recognition of private contracting as an alternative to public norms, is not.⁴³ The individualistic impulse as it has developed in family law has displaced contract where the two are in conflict: namely, where a contractual notion of marriage would demand alimony and therefore continued responsibility to one's partner. What is interesting, however, is that the facilitation of contractual manipulation of the marriage relationship is so strong that some states have expressly allowed parties contractually to elect a return to (contractual) fault in lieu of the no-fault, individualistic but non-contractual alternative.⁴⁴

It should by now be clear that financial redistribution at divorce more closely resembled contractual remedies prior to the contractualization of marriage, when marriage was governed by state rather than by private terms. Property was awarded primarily on the basis of title.⁴⁵

⁴³ The two developments are of course closely related. The former can be envisioned as an effort to align default terms more closely with the intent of most parties. However, while parties to a commercial contract might bargain for no damages, or even for payment to the breacher by the innocent party, the notion that such a framework would be employed as a default damage rule is risible. In fact, it is uncertain whether such contracts would even be enforced in a non-marital context, or would rather be voided for imposing an unlawful penalty. A partnership model calling for equal distribution of assets and losses is a closer analogy, and has often been proposed as a model for family law. See generally Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 136-41 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

⁴⁴ In Louisiana, for instance, couples may choose to enter either a standard no-fault marriage or a "covenant marriage" that allows divorce only after a two-year separation or demonstration of fault. H.B. 756, Reg. Sess. (La. 1997). Cf. Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 *STAN. L. REV.* 607, 618 n.86 (1997). See also Mary Corey, *States Explore Making Breaking Up Hard to Do*, *BALT. SUN*, May 19, 1997, at 1A.

⁴⁵ Non-titled property was generally awarded to the spouse who had provided the capital, usually the husband. See LAWRENCE J. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 4-5 (1983). A limited number of states sought to compensate a wife who had supplied much of the capital for property in her husband's name through the doctrine of "special equities" or through a resulting or constructive trust. See BRETT R. TURNER, *EQ-*

Alimony awards, based on the family's pre-divorce standard of living, were the dominant means of spousal support.⁴⁶ Premised on the duty of the husband to provide support for his wife, alimony was the obvious remedy for "breach" of the state-prescribed marriage contract.⁴⁷ Alimony was justified on the basis that "it places the obligation to support a spouse who is in need upon the party who has undertaken to share the responsibilities and pleasures of such spouse by entering into the solemn compact of marriage, rather than upon the state."⁴⁸

The attribution of fault is inextricable from alimony in its traditional form.⁴⁹ While it is possible to divvy up property without recourse to determinations of fault—who was the *victim* of the breach, in standard contracts parlance—on the implied-contract basis that the parties were both contributing to common accumulation of property, such a justification is more attenuated in the context of alimony.⁵⁰ Given the contractual rationale for alimony, awards were usually indefinite, terminating upon the recipient's remarriage (at which time her new husband assumed responsibility for her support) or at the death of either party.⁵¹ Moreover, because they were based on the husband's actual capacity to provide for his former wife as he would in marriage, the awards were subject to court modification in case of changed circumstances.⁵²

The rules began to change in the 1960s and 1970s, steadily progressing toward wider distribution of property at the expense of support payments. The original Uniform Marriage and Divorce Act ("UMDA"), promulgated in 1970, proposed that "marital property"—presumptively "all property acquired by either spouse after the marriage and before a decree of legal separation . . . regardless of whether title is held individually or by the spouses in some form of co-ownership" barring gifts, inheritance, and interest⁵³ on previously acquired property—be justly dis-

UITABLE DISTRIBUTION OF PROPERTY 8–9 (2d ed. 1994).

⁴⁶ At common law, alimony emerged as the right of an innocent wife to support during "divorce a mensa et thoro" ("divorce from bed and board"). See Woodhouse, *supra* note 1, at 2535.

⁴⁷ See generally Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

⁴⁸ 2 CHESTER F. VERNIER, *AMERICAN FAMILY LAWS* § 104 (1932).

⁴⁹ Even in today's no-fault divorce regime, some states continue to consider fault in the context of maintenance awards. See, e.g., FLA. STAT. ANN. § 61.08 (West 1997); GA. CODE ANN. § 30-201 (Harrison 1980). Fault may be considered in determining a spouse's eligibility or liability with respect to alimony, and it may influence the amount of the award. Some jurisdictions consider only the fault of the party seeking an award. Woodhouse, *supra* note 1, at 2536.

⁵⁰ Alimony here is to be distinguished from a notion of a dependent spouse's share in the income of the wage-earning spouse on an equitable basis.

⁵¹ See generally 5 Fam. L. & Prac. (MB) § 52.02 (Apr. 2001).

⁵² *Id.*

⁵³ Community property states generally treat income from separate property as non-marital. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 4.04 cmt. A, at 108 (Proposed Final Draft Pt. 1, 1997) [hereinafter PRINCIPLES OF FAMILY DISSOLUTION LAW]. Equitable distribution states often consider such income to be marital. The American Law Institute's ("ALI's") *Principles* classifies interest

tributed in consideration of the circumstances of the marriage.⁵⁴ Many states have adopted some form of the UMDA by judicial decision or, more commonly, by statute.⁵⁵

On the other hand, alimony, once relatively common, has given way to “rehabilitative maintenance” reserved for exceptional cases. The UMDA, for instance, provides that a court may award maintenance for either spouse without reference to marital misconduct, but only in cases of need.⁵⁶ It entreats the court to “provide for the financial needs of the spouses by property disposition rather than by an award of maintenance.”⁵⁷ The new trend is symptomatic of the desire to allow spouses to “move on,” as independent individuals, after divorce. To the extent that the UMDA allows maintenance in limited circumstances, it seems to be less concerned with the welfare of the dependent spouse (whose living conditions after divorce need bear no relation to pre-divorce lifestyle) than with keeping divorcees off the welfare rolls.

One of the harshest effects of the current scheme, which privileges the spouses’ autonomy, contractual and otherwise, over continuing familial obligation, is that it consistently undervalues the dependent spouse’s labor in the home. By advocating maintenance only when the dependent spouse “is unable to support himself through appropriate employment,”⁵⁸ the UMDA penalizes those spouses who chose to forego

on separate property as marital only if it is the product of the non-owning spouse’s labor.

⁵⁴ UNIF. MARRIAGE & DIVORCE ACT § 307, 9A1 U.L.A. 289, 240 (1987).

⁵⁵ See 3 Fam. L. & Prac. (MB) § 35.02, at 35-3 (Oct. 1999). The revised version of the UMDA went so far as to authorize courts to distribute the great “hotchpot” of marital property without regard to the means of acquisition. UNIF. MARRIAGE & DIVORCE ACT § 307, 9A1 U.L.A. 289, 240 (1987). Most states either adhere to the original § 307 and divide marital property only or take the middle ground and distribute non-marital property only as equity demands. *Id.* § 307 cmt. (“[A] number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A, preferring to adhere to the distinction between community property and separate property, and providing for the distribution of that property alone . . .”).

The ALI’s *Principles* advocates an incremental approach based on the duration of the marriage: all separate property is eventually recharacterized as marital property subject to equal division. See PRINCIPLES OF FAMILY DISSOLUTION LAW, *supra* note 53, § 4.18, at 238–39. Both the UMDA and ALI call for consideration of financial misconduct with marital assets, despite their rejection of fault. *Id.* § 4.16. Under the ALI’s *Principles*, appreciation of, and income from, separate property is “treated as having been acquired at the same time as the underlying asset”; it is therefore subject to division only once the requisite time has passed. Moreover, a spouse can reserve gifts or inheritances received during marriage as separate property upon written notice. *Id.* § 4.18.

⁵⁶ UNIF. MARRIAGE & DIVORCE ACT § 308, 9A1 U.L.A. 446 (1998).

⁵⁷ *Id.* at 447.

⁵⁸ *Id.* at 446. Although the UMDA does make an allowance for a “custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home,” the language suggests that a healthy child of average “condition or circumstances” does not trigger the exception. *Id.* Moreover, a parent who has been out of the workforce for decades may lose her right to maintenance when her children reach majority. Some states do allow women indefinite access to spousal support in such cases, often on the basis that she does not have the skills or experience to secure

their careers in order to assume responsibility for housework and childcare. Although courts have begun to acknowledge homemaking and child-rearing contributions in the context of property distribution, most dependent partners cannot survive on property payments alone and are therefore forced to re-enter the job market at dissolution. Family law thus creates a perverse incentive for both partners to remain in the labor force, even when such an allocation of earning capacity is economically inefficient, since a spouse who chooses to remain at home bears the risk of seeking employment years later with little experience and a substantially lower income than would be achieved through steady advancement.⁵⁹ More importantly, for the purposes of this analysis, the UMDA discourages families from making *socially* “efficient” choices—collective decisions encompassing not only financial calculations, but considerations of care and love.

The transformation of the legal rules surrounding property division and alimony largely corresponds to the development of no-fault divorce. The latter movement was launched with California’s promulgation of the Family Law Act of 1969, which authorized courts to grant divorce decrees only on no-fault grounds.⁶⁰ In 1970, the UMDA sought to replace the various fault-based grounds for divorce, most notably adultery, abandonment, and cruelty, with the no-fault notion of “irretrievable break-

“appropriate employment” (in keeping with her current standard of living and social status) within the meaning of the UMDA. *See, e.g.*, *Rosenberg v. Rosenberg*, 497 A.2d 845 (Md. Ct. Spec. App. 1985) (approving trial court’s decision that alimony was appropriate because the former wife of wealthy oil executive would “never become sufficiently self-supporting to allow her to continue the lifestyle she shared with her husband for over thirty years”). This rule, like many of the guidelines for property distribution and support, would seem to penalize those women who are already worse off—a low family income and standard of living is often possible to maintain through unpleasant employment. However, there does not seem to be a clear solution to this dilemma, given that the wage-earning spouse is often employed in similar conditions.

⁵⁹ *See generally* Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 *BUFF. L. REV.* 1153, 1155–56 (1999) (“[M]any fail to realize that marriage may seriously compromise a wife’s ability to participate in the labor market. Wives tend to subordinate their careers to those of their husbands and to assume the bulk of homemaking and childcare responsibilities. Even fewer realize that the wife loses income for each year she stays out of the work force, that her market work during marriage has little to no effect on her financial well-being after divorce, and unless she remarries, she will suffer long-term economic costs attributable to divorce. Judges typically underestimate a wife’s financial vulnerability and need for spousal maintenance.”).

Moreover, the UMDA penalizes individuals who choose to work in relatively low-paying jobs, as compared with those of their spouses, because as partners, the spouses have deemed their collective salary sufficient to support their family at the desirable level. In such circumstances, the spouse earning a lower wage, who may have foregone a more lucrative career with the expectation that she would continue to contribute to and benefit from the total family income, will be left unable to afford her former standard of living. She will not, however, be deemed unable to support herself through appropriate employment pursuant to the UMDA.

⁶⁰ Specifically, divorce was permissible on grounds of “irreconcilable differences” and “incurable insanity.” LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 238–53, 269–77 (1980).

down” (though it ultimately reintroduced fault to a limited extent in order to secure ABA endorsement).⁶¹ As of 1990, approximately fifteen states are pure “no-fault” states.⁶² Fifteen more consider fault only in distributing property.⁶³ The majority of jurisdictions allow both fault and no-fault grounds for divorce, or consider fault without imparting it “excessive weight.”⁶⁴ The revised section 308 of the UMDA calls for the complete abandonment of fault in divorce proceedings, urging courts to do justice “without regard to marital misconduct, and after considering all relevant factors.”⁶⁵

Although the rejection of fault may be partially responsible for the fall into disfavor of maintenance awards and may in fact have exacerbated the disparate living standards of wives and husbands following divorce, a return to fault is neither likely nor desirable. To begin with, it is often difficult to determine who “breached” and is therefore at “fault.” Acts like adultery and abandonment traditionally considered to rise to the level of fault often arise from years of marital tension and unhappiness. A true determination of fault would require a thorough inquiry into the conduct of both spouses over the course of the marriage. Fault grounds “place too much emphasis on particular kinds of endings and undervalue elements of conduct during marriage, such as economic partnership, shared parenting, emotional support, and sacrifices for the common good.”⁶⁶ Moreover, fault exacerbates the effects of gender stereotypes, doubly penalizing a spouse who is economically dependent and nevertheless commits an act, most commonly adultery, that constitutes fault. Under a contractual scheme, such an individual, as the breaching party, would not be entitled to financial support.

Rather than returning to fault, it would seem more fruitful to locate an alternative justification for support awards. Apportionment of the wage-earning spouse’s income is not incompatible with no-fault divorce. The distributional scheme must simply be premised on something other than breach of contract. The ALI’s *Principles*, more generous than the UMDA in its endorsement of spousal support, adopts one such alternative in calling for payments to individuals married to spouses of “significantly greater wealth or earning capacity [as] compensation for the reduced

⁶¹ *Id.* at 269–77.

⁶² Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 43, at 6, 211–12 n.18.

⁶³ See *PRINCIPLES OF FAMILY DISSOLUTION LAW*, *supra* note 53, § 4.18, at 16–18.

⁶⁴ See, e.g., *McDougal v. McDougal*, 545 N.W.2d 357, 362 (Mich. 1996) (“[F]ault is an element in the search for an equitable division, . . . not a punitive basis for an inequitable division.”).

⁶⁵ Some states have adopted § 308 without the fault exclusion, on the basis that a “just” result demands consideration of fault. See Woodhouse, *supra* note 1, at 2537; see, e.g., COLO. REV. STAT. § 14-10-114 (1993); DEL. CODE ANN. tit. 13, § 1512 (1993); MINN. STAT. ANN. § 518.552 (West 1992); MONT. CODE ANN. § 40-4-203(2) (1992).

⁶⁶ Woodhouse, *supra* note 1, at 2546.

standard of living he or she would otherwise experience, if the marriage was of sufficient duration that equity requires the loss, or some portion of it, be treated as the spouses' joint responsibility."⁶⁷ Nevertheless, the ALI proposal remains tied to compensation for *loss*, akin to expectation damages—a remedy that may be contractually sound, but fails to acknowledge that the dependent spouse is entitled by right to an equal share in her partner's financial wealth.

Practically speaking, the current model of equitable distribution of assets—which considers spouses' contributions to the marriage and to the marital property, as well as projected incomes and need—integrates the traditional functions of property division and support payments into a single award. This has been achieved in part through the division of intangible property including educational degrees, pensions, and professional good will, discussed at length below.⁶⁸ However, the reluctance to award maintenance usually leads to starkly disproportionate standards of living post-dissolution. It penalizes in particular those economically dependent spouses unfortunate enough to be part of the vast majority of families, whose income-earning potential represent their principal assets. Consequently, it discourages a spouse who would otherwise do so from giving up her economic earnings in favor of homemaking and childcare. The lesson of family law reform over the past decades must be that trust is foolhardy. Only income-earning labor is rewarded.

C. *The Limits of Contract*

The foregoing discussion of relational contracting in a no-fault divorce regime was directed at the theoretical inconsistencies of the contractual model as well as the inadequacies of current distributional schemes, contractual or otherwise. With the ideological backdrop of the marriage contract now in place, we turn to a more detailed critique of contract law as it has been applied to the family both by legal scholars and by judges. The real cost of the shift to contract is its tendency to exacerbate disparities of wealth and bargaining power in the vast majority of intimate partnerships. Moreover, many couples still choose not to enter into contractual agreements, often based on their willingness to trust that both partners will act in their mutual interest, even at the unfathomable eventuality of dissolution. The following touches upon the shortcomings of relational contract in some of its most common forms.

⁶⁷ See PRINCIPLES OF FAMILY DISSOLUTION LAW, *supra* note 53, § 5.05, at 280.

⁶⁸ See discussion *infra* Part II.D.

1. Premarital Contracts

Although some courts do inquire into the substantive fairness of premarital agreements,⁶⁹ the current tendency, in keeping with a broader deferral to private contractual autonomy, is to consider premarital contracts in the same manner as any other contract—reviewing only for unconscionability, fraud, and duress. This approach is typified by the Uniform Premarital Agreement Act (UPAA),⁷⁰ which advocates the permissibility of premarital agreements with respect to property distribution, maintenance, and “any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”⁷¹ Pursuant to the UPAA, a premarital contract is invalid only if the dependent party “did not execute the agreement voluntarily,” or if the agreement was unconscionable at the time of execution.⁷² Ex-post unconscionability, it seems, is acceptable.

The degree of “autonomy” permitted by the UPAA and the many states that have adopted it is staggering. Courts will generally enforce any agreement so long as the dependent party does not become a public charge.⁷³ Most states honor premarital agreements pertaining to property distribution.⁷⁴ Many permit contractual limitations or preclusion of spousal support.⁷⁵ Realistically speaking, many premarital agreements produce in the dependent party a status akin to indentured servitude, calling for full domestic services with no share in the product of her labor and no employee benefits or severance pay.

The potential for abuse is all the more acute given that the standard for unconscionability has proven to be quite high. In *Simeone v. Simeone*,⁷⁶ for example, the Pennsylvania Supreme Court justified its decision not to inquire into the substantive fairness of a premarital agreement—presented to plaintiff on the eve of her marriage to a man sixteen years her elder—on the basis that “women nowadays quite often have substantial education, financial awareness, income, and assets.”⁷⁷ To look beyond basic contractual rules would be to submit to a “paternalistic ap-

⁶⁹ See, e.g., *Buettner v. Buettner*, 505 P.2d 600 (Nev. 1973); *In re Marriage of Greenwald*, 454 N.W.2d 34 (Wis. Ct. App. 1990); *Norris v. Norris*, 419 A.2d 982 (D.C. App. 1980); *In re Marriage of Spiegel*, 553 N.W.2d 309 (Iowa 1996); *Warren v. Warren*, 523 N.E.2d 680 (Ill. Ct. App. 1988).

⁷⁰ UNIF. PREMARITAL AGREEMENT ACT § 3, 9C U.L.A. 43 (2001).

⁷¹ *Id.* § 3(a)(8).

⁷² *Id.* § 6.

⁷³ *Singer*, *supra* note 29, at 1475.

⁷⁴ See 5 Fam. L. & Prac. (MB) § 59.01, at 59-5 (Oct. 1991) (at least thirty-three states have recognized the validity of premarital contracts by case law or statutes).

⁷⁵ Sixteen states have adopted the UPAA, whose language arguably permits such limitations. *Id.*

⁷⁶ 581 A.2d 162 (Pa. 1990).

⁷⁷ *Id.* at 165.

proach.”⁷⁸ What is particularly troublesome is that the *Simeone* hands-off mindset seems to be gaining adherents even in jurisdictions, like California, that have traditionally tended toward equitable remedies. In April of 1999, a California appellate court called for strict scrutiny of contracts signed without legal representation by one of the parties. It voided an agreement signed by a non-native spouse on her wedding day, without counsel, at her husband’s threat to cancel the wedding.⁷⁹ Responding to the *Simeone* opinion, Judge Lambden wrote for the majority:

We need not engage in the debate regarding paternalism and chauvinism in order to observe that women still have not achieved economic parity in the workplace and frequently have greater responsibility for sustaining the home; it is also undisputed that women generally earn less income than men. For the purposes of our discussion here, it is obvious that enforcing agreements that waive community property rights will often disadvantage women, as well as men, and may ignore the contributions of both spouses to the marriage, whether or not they are employed outside the home.⁸⁰

The far-reaching implications of this opinion, with its critical analysis of the real inequities of premarital agreements and its insistence on review for substantive and procedural fairness, were stifled by the California Supreme Court in its 2000 reversal of the appellate court.⁸¹ The Supreme Court found that the agreement was voluntary, strict scrutiny was unnecessary, and neither unequal bargaining power nor unjust results are valid concerns.⁸²

Before turning to other contractual developments in the family law arena, it is worth mentioning the growing trend to permit “post-marital” contracts, signed during the course of a marriage to account for unforeseen circumstances (generally, one of the spouses has achieved unanticipated financial success in the workplace or has come into unexpected independent wealth). These agreements are often upheld, despite the fact that family law “default rules”—or even a valid pre-marital contract—would otherwise govern the terms of divorce.⁸³ It is symptomatic of the privatization of family law that these agreements impart more significance to parties’ autonomous bargaining than do commercial contracts. In the latter context, such contracts would likely be struck down as impermissible midstream renegotiation, de-

⁷⁸ *Id.*

⁷⁹ *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783 (Cal. Ct. App. 1999).

⁸⁰ *Id.* at 795.

⁸¹ *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000).

⁸² *Id.*

⁸³ *See generally* 1 Fam. L. & Prac. (MB) § 9.02 (Oct. 1997).

void of fresh consideration and bordering on duress.⁸⁴ Post-marital contracts are particularly damaging to intimate relationships because they can arise after years of cooperation and “specialization” with respect to marital tasks. The dependent spouse may have relied on the eventual success of her partner or a likely inheritance. Once the independent spouse proposes the contract, however, the dependent spouse is left with a choice between signing the contract and preserving her family on the one hand and abandoning the marriage on the other.

Finally, it might be argued that the newfound legitimacy of explicit pre-marital contracts buttresses the notion that non-negotiated marriages are contracts, and that the role of the courts is simply to augment the express or implied promises by the parties. Family law has taken on a predominantly gap-filling function.

2. *Settlement*

In her comprehensive critique of settlement at divorce, a practice which in conjunction with default now resolves between ninety and ninety-five percent of divorce cases,⁸⁵ Penelope Eileen Bryan outlines a number of financial, social, and psychological conditions—exacerbated by the indeterminacy of divorce law and the patriarchal and individualist biases of the courts as well as disparate quality of legal representation—that lead to bad bargains for most divorcing women. Divorce settlements, she concludes, “restrict rather than enhance women’s life choices by leaving them impoverished and embittered.”⁸⁶

At first glance, it would seem that divorce settlements would be less problematic than other family-related contracts, in that trust is no longer a consideration. With intimacy out of the picture, both parties should be able to negotiate at arm’s length, particularly since the dependent spouse can always fall back on divorce law if she is unhappy with her partner’s offer. Such an idealized conception of settlement is naïve, however, given that very few spouses can make the clean break necessary for detached bargaining.⁸⁷ Moreover, settlements are especially vulnerable to substan-

⁸⁴ In commercial contract law, renegotiation of contract is often deemed coercive. Moreover, there is no consideration for the second bargain. *See, e.g.*, *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902); *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181 (W.D. Tenn. 1974); *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971).

⁸⁵ *See* Bryan, *supra* note 59, at 1155–56.

⁸⁶ *Id.* at 1170.

⁸⁷ Divorce has devastating implications for both mental and physical health. Divorced people are more likely than married, widowed, or never-married people to exhibit symptoms of mental illness and to be admitted to psychiatric facilities. LENORA J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 349 (1985). Penelope Eileen Bryan attributes women’s disadvantages at settlement in part to these “psychological factors,” in addition to “socialized tendencies” such as naïve trust. Bryan, *supra* note 59, at 1180–81.

tive unfairness because courts have no incentive to question their validity. In reviewing a pre-marital agreement upon challenge by one of the parties, a court hears evidence on why the contract should be void. Not so in the case of settlement agreements. Typically, both parties unequivocally endorse the contract, and the court simply offers its official seal. Even were a court to examine the agreement for fairness, it would look only so far as unconscionability.⁸⁸

For the purposes of this Article, the most relevant defect of divorce settlement is that it assumes two rational self-interested parties at negotiation.⁸⁹ Although courts often encourage familial interdependence, exalting the selflessness of the homemaker who cares for her children and spouse without compensation, such a party is penalized at settlement negotiations.⁹⁰ A party who values the welfare of the family above her own financial situation post-divorce surrenders personal bargaining power, absorbing the concerns of other family members into her bargaining agenda. Moreover, the scope of the negotiations (most settlements encompass custody, property division, and spousal support)⁹¹ means that a dependent party may sacrifice property or support in favor of child custody, even in cases where the court would award custody to her regardless.

The impact of bad settlements can be devastating not only for the “losing” spouse, but for the family in general, and dependent children in particular.⁹² If a non-wage earning spouse wins custody of her children at the expense of financial security, the custodial parent and the children will be subject to increased physical and psychological strain. The custodial parent may be forced to move to a significantly smaller and less comfortable home, potentially transferring her children from their school and friends, and to cut back expenditures on food, clothing, and recrea-

⁸⁸ “The terms of the separation agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties . . . that the separation agreement is unconscionable.” Bryan, *supra* note 59, at 1170.

⁸⁹ Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, in *THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES* 364, 367–68 (John M. Eekelaar & Sanford N. Katz, eds., 1984).

⁹⁰ See *infra* note 120 and accompanying text.

⁹¹ The UMDA authorizes settlement agreements with respect to property, maintenance, support, custody, and visitation. UNIF. MARRIAGE & DIVORCE ACT § 306, 9A1 U.L.A. 249 (1998).

⁹² See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 86–111 (1987); WEITZMAN, *supra* note 31, at 323–56; Richard Neely, *The Primary Caretaker Rule: Child Custody and the Dynamics of Greed*, 3 *YALE L. & POL’Y REV.* 168 (1984); Singer, *supra* note 29, at 1550.

tion. The results have been tempered to some degree by the adoption of uniform child custody standards,⁹³ but ill effects remain.⁹⁴

3. Cohabitation

The enforcement of contracts between unmarried intimate partners has become the norm. Since the 1970s, there has been a dramatic departure from the traditional legal sentiment that non-marital contracts are void as against public policy.⁹⁵ The dissolution of non-marital relationships was the origin of constructive trust precisely because courts were unable to apply contract law in protecting the rights of dependent partners. When equity demanded, they turned to equitable doctrines,⁹⁶ particularly in facilitating the distribution of property accumulated during the relationship with joint funds. Today, in keeping with the growing emphasis on private ordering of intimate relationships, courts tend to enforce non-marital contracts even more unreservedly than the marital variety.⁹⁷

On the whole, non-marital contracts are accepted as written.⁹⁸ *Wilcox v. Trautz*,⁹⁹ decided in 1998 by the Supreme Judicial Court of Massachusetts, is representative.¹⁰⁰ Plaintiff and defendant separated after living together for twenty-five years. When plaintiff became involved in another relationship, defendant had an agreement drafted whereby all property accumulated during the relationship was to be divided by title alone. He instructed her to sign the agreement or leave their home. The court explicitly recognized the validity of contracts entered into by adults in contemplation of cohabitation, except where sexual conduct forms the dominant consideration of the agreement.¹⁰¹ However, it held that “[a]n

⁹³ Over the past two decades, Congress has enacted a series of laws mandating child support, including the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, the Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403, the Child Support Enforcement Act of 1992, Pub. L. No. 102-537, 106 Stat. 353, and the Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645. Nevertheless, recent studies have documented the continued ill effects of divorce on children. See, e.g., Bryan, *supra* note 59, at 1155-56.

⁹⁴ See, e.g., Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 29 (1990) (discussing the psychological and economic impact of divorce on children).

⁹⁵ See discussion *infra* Part II.C.

⁹⁶ Courts also used common-law and putative marriage. Most states abolished common-law marriage beginning in the late nineteenth century, either judicially or by statute. Thirteen states and the District of Columbia continue to recognize common-law marriages entered within their borders. Bowman & Cornish, *supra* note 18, at 1169 n.27.

⁹⁷ See, e.g., *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998).

⁹⁸ See generally Perry, *supra* note 18, at 77.

⁹⁹ *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998).

¹⁰⁰ On the enforceability of non-marital contracts, see 6 Fam. L. & Prac. (MB) § 65.02(2) (Apr. 1994).

¹⁰¹ *Wilcox*, 693 N.E.2d at 145.

agreement between two unmarried parties is not governed by the threshold requirements that apply to an antenuptial agreement,”¹⁰² and therefore the safeguards and substantive fairness inquiry afforded the latter need not be applied to contracts between cohabitants, which were to be governed by contract law alone.¹⁰³ Although defendant earned a substantially higher salary than plaintiff throughout their relationship, the court concluded that there was “no evidence that during the course of their relationship, plaintiff was the ‘weaker’ of the two cohabitants, or that she had been dissatisfied with the way they managed their affairs.”¹⁰⁴ It continues, in a footnote:

We recognize that unmarried parties who enter into these agreements may not necessarily share equal bargaining power, and disparities in bargaining power are more likely to arise when an agreement is negotiated long after the parties began cohabiting. Although one could argue that such disparities existed between the parties here, and was based [sic], at least in part, on the traditional gender roles assumed by the parties, this alone does not invalidate the agreement. In any event, such disparities do not always exist, and the gender of the parties does not necessarily dictate which party is in a more financially secure position.¹⁰⁵

The circumstances under which the agreement was signed (sign-or-be-homeless) certainly tend toward duress, with the parties subject to a disparity in bargaining power not only with regard to financial means and legal sophistication, but in emotional terms as well. As such, the court leaves one wondering whether there is any substantive unfairness sufficient to “invalidate the agreement”¹⁰⁶ in favor of an equitable result. While it may seem satisfactory to respond that non-married partners willingly subject themselves to such rigid contractual interpretation by choosing not to marry, it may be more accurate to presume the opposite—that unmarried independent partners often refuse marriage precisely to protect their assets. In such cases, the dependent spouses are left doubly vulnerable: without legal protection, and without familial trust.

¹⁰² *Id.* at 147.

¹⁰³ “[T]he agreement between the plaintiff and the defendant is enforceable so long as it conforms with the ordinary rules of contract law, and a court is no more entitled to inquire into its fairness and reasonableness than it is in respect to contracts generally.” *Id.* The opinion did note that a contract by a non-married couple with children would be constrained by the children’s best interests. *Id.*

¹⁰⁴ *Id.* at 148.

¹⁰⁵ *Id.* at 148 n.8.

¹⁰⁶ *Id.*

4. Same-Sex Partnerships

The difficulties that plague the enforcement of contracts between non-marital heterosexual partners affect same-sex partnerships in equal measure, with the added burden that marriage is not an option for same-sex couples. Although such relationships are immune to sex-linked disparities in earning potential and social power, unequal bargaining power can be just as significant a concern with respect to the social, class, racial, and educational backgrounds of the partners.

Given the legal refusal to recognize same-sex marriage, there is no mechanism by which lesbian and gay partners can subject themselves to equitable judicial determination of their rights at dissolution. As discussed above, contractual agreements between unmarried partners are not subject to substantive fairness analysis.¹⁰⁷ In the context of same-sex partnerships, equitable measures such as implied contract and constructive trust have largely been ignored as well. In *Seward v. Mentrup*,¹⁰⁸ for instance, an Ohio appellate court held that the trial court had no authority to divide property amassed by a lesbian couple upon dissolution of their relationship “in the absence of a marriage contract or other agreement,”¹⁰⁹ irrespective of the fact that the parties envisioned their relationship as “similar to a marriage.”¹¹⁰ Moreover, plaintiff’s claim that defendant was unjustly enriched by plaintiff’s contributions to improvements on their home failed because she had benefited from the improvements as well.¹¹¹

Nevertheless, equitable decisions (purportedly based on contractual notions) are not foreign to litigation between separating same-sex partners. In *Ireland v. Flanagan*,¹¹² decided twenty years ago by an Oregon appellate court, plaintiff brought suit seeking a one-half interest in a house in defendant’s name that they had jointly occupied during their relationship, on the basis that they had agreed to share all of their assets. The trial court found that plaintiff’s contribution of nearly one-third of the down payment, as well as her investments in repairs and improvements, were gifts to defendant.¹¹³ After affirming the district court’s determination that the partners had viewed their relationship as carrying a “moral obligation” to provide for each other,¹¹⁴ the appellate court held that the relevant factor was the parties’ intent to pool their resources for their mutual benefit.¹¹⁵ Defendant was entitled only to an offset of \$1,500

¹⁰⁷ See discussion *supra* Part I.C.3.

¹⁰⁸ 622 N.E.2d 756 (Ohio Ct. App. 1993).

¹⁰⁹ *Id.* at 758.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 627 P.2d 496 (Or. Ct. App. 1981).

¹¹³ *Id.* at 499.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 500.

based on her greater contribution toward the down payment.¹¹⁶ Barring legalization of same-sex marriage, such equitable remedies premised on financial and emotional interdependence constitute the most promising means of regulating the dissolution of lesbian and gay relationships.

II. CONSTRUCTING TRUST

In light of the myriad ill effects of contract in the family arena, it is time to set out an alternative basis for the regulation of familial decisionmaking, from family formation to dissolution. It seems appropriate, given the goal of establishing a legal framework for facilitating fruitful familial relationships, to begin with the equitable doctrine most obviously suited to such an endeavor: constructive trust. This Part begins by examining the doctrine of constructive trust as it has developed in property and partnership law. It then reviews the judicial application of the doctrine of trust to relational dissolution. Finally, it develops my proposal for the extension of constructive trust to all intimate relationships as an alternative both to contract and to traditional family law.

A. *Family Property*

The private-law companion to contract is economics. The dominant marriage reform agenda has always centered largely on economic interests, advocating such concessions as women's autonomy over independently acquired property, equal access to marital property and bank accounts during marriage and, most recently, post-dissolution gender equality with respect to standard of living. Inevitably, such financial considerations must enter the equation; real lives depend on it. Nevertheless, it is my contention that the fair distribution of property accumulated over the course of a relationship cannot be achieved through economic analysis alone. Such focused treatments of marriage and domestic partnership inevitably stop short of real reform, because intimacy simply cannot be understood in financial terms. The reality is that financial reliance on one's intimate partner is induced not by promises, but by trust.

It may thus seem odd that this Article advocates the expansion of property doctrine, vis-à-vis constructive trust, in conceptualizing intimate relationships. The problem with the present model, however, is less the preference for property awards per se than the narrow legal conceptualization of property. This inadequacy of current property-based distribution schemes, which arises from the legal reluctance to assign distinct economic value to anything but tangible assets, has two primary manifestations: the undervaluation of housework and the refusal to divide intangible assets such as pensions, professional degrees, and future income. The

¹¹⁶ *Id.*

latter is a principal focus of this Section, but it is worth noting at the outset that I suggest the allocation of income pursuant to the doctrine of constructive trust in part because, as an abstract equitable remedy, it may more easily be stretched to accommodate those crucial assets traditionally barred from valuations of marital property. Recognizing a dependent spouse's equitable share in the family's total income, and enforcing a family's decision as to the allocation of marketplace and home labor, might restore to family decisionmaking a crucial sense of security and justice. Increasing numbers of jurisdictions, perhaps implicitly recognizing the inconsistency of their commitment to just distribution of property and their devotion to the parties' autonomy, have turned to equitable remedies such as implied contract, reliance, and constructive trust to justify property and support awards to the dependent spouse.

With respect to the valuation of housework, however, it is far from clear that simple reclassification in economic terms will lead to equitable or desirable results. Unlike future income, housework is not based on the accumulation of property; rather, it is a necessary element in the everyday functioning of family life. The effort to resolve the disparity in value accorded to wage versus domestic labor at divorce by imparting economic value to the latter has been legally and socially ill-fated. Courts have proven unwilling to enforce premarital contracts that pre-assign dollar signs to housework,¹¹⁷ and where they do designate financial worth, they generally settle on the market rate: the replacement cost of child-care, cooking, and cleaning.¹¹⁸

Given the conceptual and legal barriers to the economic valuation of housework, an alternative model seems to be in order. Perhaps the desirable end is not the quantification of women's work in the home in economic terms, but rather the eradication of economics as a measure of

¹¹⁷ See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 19–20 (Cal. Ct. App. 1993).

¹¹⁸ The legal problems surrounding the valuation of domestic services are not unique to marital dissolution. In the context of torts, for instance, the problem often arises as to compensatory damages recoverable by an injured homemaker, usually calculated in terms of the replacement cost of a third party for similar services. See, e.g., *Sander v. Geib, Elston, Frost, P.A.*, 506 N.W.2d 107 (S.D. 1993) (awarding damages for wrongful death based on the pecuniary value of decedent's homemaking services). This estimation generally applies even to women who have foregone salaries well in excess of the "market value" of their labor, despite the necessary conclusion that these women value their role in the home more highly than the (often much higher) wages they would have earned in the marketplace. Moreover, while it may be possible to assign a *minimum* market value to domestic work for those women who have rejected outside employment, it is often the case that they would have rejected salaries far higher than those offered to them. Furthermore, many women marry directly after completing their schooling, without seeking employment outside the home; absent documented offers of employment, any assessment of earning potential would be purely speculative. Aside from the administrative difficulties of a scheme modeled on foregone income, the real danger is that such a program would necessarily value housework in proportion to a family's economic wealth and education. Classification of work by middle versus working class women would favor the former, despite the inevitability that housework in a poor family—with less outside assistance, fewer household appliances, and often more children—is more labor-intensive.

what is fundamentally a relationship of love, cooperation, and trust.¹¹⁹ To that end, it is worth asking whether there is a kernel of truth in the reasoning of the California appellate court that decided *Borelli v. Brusseau*.¹²⁰ In rejecting a contract premised on the provision of nursing services by a wife to her husband as void as against public policy, the court concluded: “Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.”¹²¹ *Borelli* reflects a real and perhaps insurmountable bias in family law—one that touches a deeper social sentiment in the United States. Ironically, the human elements that I hope to reintroduce into family law are precisely those “family values” so often lauded in conservative discourse: responsibility, emotional involvement, love, trust. Nevertheless, one wonders if there may be something to the notion that some elements of family life are beyond economic valuation, if there were only a way to sidestep the inequitable results associated with such rhetoric. This Section concludes that constructive trust, as an equitable doctrine premised on a fiduciary relationship between intimate partners, constitutes such an alternative.¹²²

B. Definitions

Unlike other equitable remedies such as implied contract and resulting trust, constructive trust is imposed “by law,” independently of the

¹¹⁹ This is not to say that housework should continue to be economically undervalued as it has been—the representation of traditionally undervalued domestic “duties” as productive employment may be an important intermediate step in raising esteem for what is traditionally “women’s work.” Nevertheless, it is my contention that dependent partners would be better off if courts were to reward domestic contribution as a separate category—as evidence, perhaps, of economic and emotional commitment warranting equal distribution—rather than pigeonhole it neatly into the categories of economic work that systematically undervalue human relationships.

¹²⁰ 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

¹²¹ *Id.* at 20.

¹²² Perhaps the most compelling objection to presumptive equal distribution of collective property is its discouragement of casual cohabitation and family-building, given the threat that an economically well-situated individual who contributes to the well-being of his partner might later be found economically responsible for her continued care. This argument, often cited in opposition to the recognition of reliance interests and equitable estoppel in the realm of contract, presumes that people will act more guardedly in order not to be penalized by their generosity. See generally Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980). In reality, however, it seems likely that the injustice suffered by those who enter into dependent relationships without protection outweighs the potential reduction in such relationships to begin with. I argue that a collective property model would allow those who are genuinely committed to partnership to divide their responsibilities—wage-earning as well as domestic—as they deem best; those who suspect their relationship will be temporary would do better to maintain and develop their own wage-earning skills and share domestic tasks. Ultimately, the current contractual scheme can only penalize the weaker partner.

intent of the parties.¹²³ The difference between constructive and resulting trust amounts to a difference between truly equitable as opposed to quasi-contractual remedy. While the latter is based on the intent of the parties, the former is designed to redress injustice and fraud, though the result will likely be precisely the opposite of that intended by the constructive trustee. A California appellate court explains: “[Resulting trust] has been termed an ‘intention-enforcing’ trust, to distinguish it from the other type of implied trust, the *constructive* or ‘fraud-rectifying’ trust. The resulting trust carries out the inferred intent of the parties; the constructive trust defeats or prevents the wrongful act of one of them.”¹²⁴ This distinction is a potent one in that it expressly frees the court from contractual analysis.

Constructive trust is most commonly invoked upon breach of a fiduciary obligation, defined as a duty of loyalty.¹²⁵ The precise meaning of loyalty is of course amenable to interpretation, but the general sense is that a fiduciary must not elevate personal interests over those of the beneficiary.¹²⁶ Because a finding of fiduciary duty is a prerequisite to constructive trust in many states, fiduciary relationships should be distinguished from the “confidential” variety more commonly imparted to familial structures.¹²⁷ In the case of a confidential relationship, a transaction between parties will not generally be invalid unless it is based on the abuse, usually by fraud or undue influence, of a specific confidence invested in one of the parties by the other. The party seeking legal redress must prove actual reliance, *vis-à-vis* dependence or coercion.¹²⁸ Conduct between parties in a fiduciary relationship, conversely, incurs certain consequences as a matter of law. The beneficiary need not prove reliance on the fiduciary. Furthermore, in a contested transaction between fiduciary and beneficiary, the former bears the burden of demonstrating that the transaction was fair.¹²⁹

The successful application of constructive trust thus demands that fiduciary duty include those relationships perhaps most worthy of loyalty: intimate familial relationships. Accordingly, one obstacle to the expansion of constructive trust as a remedy in relational dissolution cases is

¹²³ Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 912.

¹²⁴ *Martin v. Kehl*, 193 Cal. Rptr. 312, 318 (Cal. Ct. App. 1983) (labeling the case a “classic case of a resulting trust”).

¹²⁵ RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

¹²⁶ Scallen, *supra* note 123, at 909.

¹²⁷ *Id.* at 907 (explaining the distinction between confidential and fiduciary relationships). In some states, like California, a finding of a confidential relationship gives rise to fiduciary duties. See Carol S. Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 HASTINGS L.J. 229, 237 n.34 (1982) (discussing the doctrine of fiduciary duty in confidential relationships under California law).

¹²⁸ AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 2.5, at 43 (4th ed. 1987).

¹²⁹ See *id.* § 2.5, at 43–44.

the reluctance of many courts to find fiduciary relationships in adult partnerships. While a number of states have found fiduciary relationships between marital partners,¹³⁰ none are likely to extend the doctrine to encompass same-sex or unmarried partners. The characteristically restrictive interpretation of fiduciary duties is expressed by the refusal of the California Supreme Court in *In re Marriage of Bonds*¹³¹ to interpret the Uniform Premarital Agreement Act as extending the statutory fiduciary relationship between spouses to the relationship of imminent spouses who signed a pre-marital agreement on their wedding day: “The Uniform [Premarital Agreement] Act was intended to *enhance* the enforceability of premarital agreements, a goal that would be undermined by presuming the existence of a confidential or fiduciary relationship.”¹³² The strained notion that spouses owe each other the consideration and loyalty associated with fiduciary duty upon the recitation of wedding vows (and receipt of official state approval), but not when defining their long-term responsibilities for marriage or when living together as family betrays a fundamental discomfort with infringing on individual autonomy in any but the most limited circumstances. Eileen Scallen comments on the limitations of constructive trust in the commercial context: “American commercial cases often reflect a concern that in an ‘arm’s length’ commercial transaction, even if trust is solicited and assumed, each party should nonetheless follow Emerson’s admonition and ‘trust thyself.’”¹³³ The same emphasis on self-interest pervades family law.

It is tempting but equally dangerous to swing too far in the opposite direction, extending the concept of fiduciary duty to encompass all intimate relationships or, more pointedly, any contract between sexual partners. Fiduciary duty should reflect the ongoing relationship of two or more individuals in the course of their growing emotional, financial, and social interdependence over time. Although a finding of constructive trust is not constrained by the parties’ intent, fiduciary duty should not be imputed lightly.¹³⁴ It is my contention that a case-by-case inquiry will sufficiently protect the autonomy of those parties who neither rely on each other nor wish to do so.¹³⁵ Because the determination can be made

¹³⁰ Many states, however, have found no fiduciary duty between spouses. *See generally* G. G. Bogert, *The Law of Trusts and Trustees* § 482, at 300–11 (rev. 2d ed. 1978) (“Mere kinship does not of itself establish a confidential relation Rather, the existence of a confidential relationship must be determined independently of a preexisting family relationship.”). This is one attraction of the partnership model of marriage. Section 21 of the Uniform Partnership Act defines partners as fiduciaries. UNIF. P’SHIP ACT § 21, 6 U.L.A. 608 (1995).

¹³¹ 83 Cal. Rptr. 2d 783 (Cal. Ct. App. 1999).

¹³² *Id.* at 831.

¹³³ Scallen, *supra* note 123, at 920.

¹³⁴ *See id.* at 919 (“Given the extraordinary remedies available for breach of a fiduciary duty, the solicitation or acceptance of a fiduciary relationship should be an essential component of liability.”).

¹³⁵ A decision to disclaim fiduciary duty and thereby insulate one party’s earnings or

on an equitable basis, taking into account such factors as the length of the relationship, the legal sophistication of the parties, and the partners' allocation of income-generation and household tasks, the result will arguably be far more reliable and just than any blanket rule premised on express or implied contract.¹³⁶

Rolle v. Rolle,¹³⁷ a 1987 New Jersey case, offers a salient model. The court held that although the marital property statute could not be expanded to encompass property acquired in contemplation of marriage consistently with legislative intent, equitable remedies such as constructive trust would remain available "since they are not founded in contract but rather in conduct."¹³⁸ The court explained:

Since such remedies are grounded in equity, their applicability would depend upon the facts and circumstances of each particular case. The factors to be weighed by a trial judge would include, as examples only, the duration of the relationship, the amount and types of services rendered by each of the parties, the opportunities foregone by either in entering the living relationship, and the ability of each to earn a living after the relationship has been dissolved. These remedies may be cumulative or exclusive. Decisions concerning the complexities that might arise upon application of these principles must be determined on a case by case basis.¹³⁹

Recognizing all of the objections to judicial discretion in the interpretation of broad standards, often to the disadvantage of women, I nevertheless feel that given general guidelines, factual findings as to the "just outcome" are more likely to reflect the interests of the weaker party than are inquiries into the intent of the parties—particularly given the capacity of the party with superior bargaining power to convince the weaker party to "intend" something that is patently disadvantageous to her. Courts assess the substantive fairness of premarital contracts on a regular basis, despite their reluctance to do so, and there seems little reason that they

property from distribution must be mutual (i.e., there will be a fiduciary duty if the decision is not conveyed to the other party or the other party objects, but if the parties decide together to retain independence, then it is valid).

¹³⁶ Any guidelines would emphasize the diversity of intimate relationships meriting legal protection. Also, it should be noted that attempts to contract out of a fiduciary relationship would be subject to rigorous inquiry into substantive fairness, both at time of entry into the contract and at dissolution. On the whole, though such contracts might be given some weight, they would be far from dispositive, particularly in cases of pronounced unequal bargaining power between partners.

¹³⁷ 530 A.2d 847 (N.J. Super. 1987).

¹³⁸ *Id.* at 851.

¹³⁹ *Id.* at 852.

should be incapable of extending their consideration to relationships for which no express contracts were established.

C. Constructive Trust at Work

Constructive trust has gained acceptance over the past decades as a mechanism of last resort in assisting highly sympathetic parties with strong equitable cases. Despite the rising availability of constructive trust in relational dissolution cases, however, the doctrine in most jurisdictions requires either fraud or breach of fiduciary or confidential relationship. As discussed above, non-marital relationships do not fall within the latter categories in most states.¹⁴⁰ This Section traces the evolution of constructive trust as it has been applied to relational dissolution and highlights some prominent cases that employ the doctrine.

The application of constructive trust to the distribution of property at relational dissolution owes its prominence to the celebrated case of *Marvin v. Marvin*,¹⁴¹ decided by the California Supreme Court in 1976. Justice Tobriner, writing for the majority, held that a non-marital partner might be entitled to an equitable share in property accumulated during the relationship—either on the basis of express contract, barring meretricious sexual services as consideration, or alternatively by means of equitable theories such as constructive trust.¹⁴² *Marvin* offers a remarkably robust synopsis of the tensions between contract and equity that plague

¹⁴⁰ See discussion *supra* Part.II.A.

¹⁴¹ 557 P.2d 106 (Cal. 1976).

¹⁴² The California Supreme Court's advocacy of equitable remedies was apparently less unequivocal than it might seem. The case was remanded to the trial court for a determination of whether the parties had entered into either an express or an implied contract. The trial court found no such contractual obligation on defendant, who had financially supported plaintiff during a seven-year period of cohabitation while plaintiff provided homemaking services, but it did award \$104,000 "rehabilitative alimony" as an equitable remedy. 5 FAM. L. REP (BNA) 3077, 3085 (Apr. 24, 1979). The appellate court reversed the award, writing:

[T]he special findings in support of the challenged rehabilitative award merely established plaintiff's need therefor and defendant's ability to respond to that need. This is not enough. The award, being nonconsensual in nature, must be supported by some recognized underlying obligation in law or in equity. . . . [I]n view of the already-mentioned findings of no damage (but benefit instead), no unjust enrichment and no wrongful act on the part of defendant with respect to either the relationship or its termination, it is clear that no basis whatsoever, either in equity or in law, exists for the challenged rehabilitative award.

Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (Cal. Ct. App. 1981). This reasoning seems to be irreconcilable with both the spirit and the letter of Justice Tobriner's opinion—and particularly with Tobriner's admonition in a footnote to *Marvin*: "Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise." *Marvin*, 557 P.2d at 123 n.25.

family law, and many of the most compelling arguments for constructive trust were first raised in the opinion.

Ironically, *Marvin* is best known for its legitimization of relational contracting. The court dispensed with the historical problem of meretricious consideration in short shrift, reasoning that a party could contract within the context of a non-marital relationship so long as the relationship was represented as an exchange of financial services for homemaking (rather than sexual) services.¹⁴³ After *Marvin*, the enforcement of express non-marital contracts became a signature element of California law, and many states soon began to follow suit.

Nevertheless, the *Marvin* decision recognized that relational contracting was not the only means of distributing shared non-marital property. Acknowledging the scarcity of express contracts (particularly given the reluctance of courts to enforce them), the opinion instructed lower courts to evaluate the “nature” of a relationship in determining the just distribution of relational property: “[W]e conclude that the mere fact that a couple have not participated in a valid marriage ceremony cannot serve as a basis for a court’s inference that the couple intend to keep their earnings and property separate and independent; the parties’ intention can only be ascertained by a more searching inquiry into the nature of their relationship.”¹⁴⁴ *Marvin* repudiated the notion that homemaking services are gratuitous and forced judicial recognition of non-financial contributions to intimate relationships: “[t]here is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift.”¹⁴⁵ What made the opinion truly radical, however, was not its acknowledgment that homemaking represents a concrete contribution to a relationship. Rather, what was revolutionary was the court’s refusal to envision homemaking as a *financial* contribution in its own right, as so many modern courts and commentators have done. The financial approach merely justifies unequal distribution on a new basis. “The better approach,” urged the court, “is to presume . . . ‘that the parties intend to deal fairly with each other.’”¹⁴⁶

Although it was the California Supreme Court’s decision in *Marvin* that first attracted widespread interest in constructive trust, the doctrine

¹⁴³ “The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services.” *Marvin*, 557 P.2d at 113.

¹⁴⁴ *Marvin*, 557 P.2d at 117 n.11. The implications of such a judicial inquiry into the nature of an intimate relationship are troubling, but I argue below that they are better than the alternative. In *Martin v. Kehl*, 145 Cal. App. 3d 228, 238 (Cal. Ct. App. 1983), a California appellate court held that no inquiry into the “intent” of the parties need be made: if it can be demonstrated that plaintiff relied on defendant’s support or is in any way justly entitled to a share in his earnings, then constructive trust should apply.

¹⁴⁵ *Marvin*, 557 P.2d at 121.

¹⁴⁶ *Id.*

had first surfaced in Washington more than a decade earlier.¹⁴⁷ The first attempt by the Washington Supreme Court to invoke constructive trust was ill-fated. In a 5-4 decision, the court upheld the presumption that parties intended to distribute their property on the basis of title.¹⁴⁸ A constructive trust would arise only if fraud, breach of fiduciary responsibility, or similar conduct could be demonstrated by clear and convincing evidence. The majority cautioned that the court “should not invent a legal concept or misapply a time-honored equitable theory of constructive trust because of compassion over the woman’s supposed predicament.”¹⁴⁹ In 1974, however, the Court of Appeals applied constructive trust in the case of partners who had been married abroad and had divorced before coming to the United States, supposedly to facilitate immigration.¹⁵⁰ When they arrived, they continued to live together but did not remarry, and all property was titled to the former husband.¹⁵¹ The Court of Appeals advocated a finding of community property, but it restricted its holding to equitable division of the property on the basis of constructive trust, in light of clear unconscionability. Although the Washington Supreme Court initially limited the doctrine of constructive trust to “relatively long-term, stable meretricious relationship[s] in which the partners appear to hold themselves out as husband and wife,”¹⁵² in 1984 it explicitly authorized the “just and equitable disposition of property” accumu-

¹⁴⁷ Constructive trust has been most prominently employed as a remedy at marital dissolution in England, where Lord Denning, Master of the Rolls, launched a campaign in the early 1960s to expand the use of equitable remedies in divorce cases to prevent formalistic injustices. Prior to the statutory termination of property distribution based on title with the Matrimonial Proceedings and Property Act of 1971, dependent spouses had little legal protection. Lord Denning adopted an equitable finding at divorce of what was “fair and just in all the circumstances.” *Hine v. Hine*, [1962] 3 All E.R. 345, 347. The House of Lords soon stifled the promising beginnings of constructive trust with its decision in *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175, that judges have no discretion to “vary agreed or established rights to property in an endeavor to achieve a kind of palm tree justice.” *Id.* at 1220–21 (Lord Hodson). Nevertheless, subsequent cases gradually recovered ground and extended the revised doctrine to non-marital partners who have mutually contributed to the accumulation of property. For a history of constructive trust in the relational context in the Commonwealth and in the United States, see Robert L. Stenger, *Cohabitants and Constructive Trusts—Comparative Approaches*, 27 J. FAMILY L. 373 (1988–1989). The Supreme Court of Canada has explicitly authorized the application of constructive trust to non-marital partners. In 1980, the court held that a woman was entitled to half of the assets amassed in the course of a long-term non-marital relationship, despite the man’s greater contribution to the “material fortunes of the joint enterprise,” because “each started with nothing, and each worked continuously, unremittingly and sedulously in the joint effort.” *Becker v. Pettikus*, [1980] 2 S.C.R. 834. Ten years later, in *Rawluk v. Rawluk*, the doctrine was held to have been incorporated into Canada’s Family Law Act. [1990] 1 S.C.R. 70, 72.

¹⁴⁸ *Humphries v. Riveland*, 407 P.2d 967 (Wash. 1965) (en banc).

¹⁴⁹ *Id.* at 975.

¹⁵⁰ *Omer v. Omer*, 523 P.2d 957, 961 (Wash. Ct. App. 1974). *Omer* is cited by the California Supreme Court in *Marvin* in justification of the application of constructive trust. See *Marvin*, 557 P.2d at 122.

¹⁵¹ *Omer*, 523 P.2d at 960.

¹⁵² *In re Estate of Thornton*, 499 P.2d 864, 866 (Wash. 1972).

lated by cohabitants in a “long-term, stable, nonmarital family relationship.”¹⁵³

Ironically, though the principal result of the doctrine of constructive trust at relational dissolution has been to recognize the wife/homemaker’s contribution to a long-term relationship, constructive trust owes its force largely to judicial efforts to redeem the interests of capital-producing husbands tricked out of their assets by their apparently conniving wives. One such case, *Sharp v. Kosmalski*,¹⁵⁴ introduced constructive trust to New York in 1976. Plaintiff alleged that defendant’s retention of property that he had conveyed to her violated a relationship of trust and confidence. Plaintiff, who had relied on defendant for assistance and compassion following the death of his wife, proposed marriage to defendant, named her as sole beneficiary in his will, gave her access to his bank account, and eventually transferred to her sole interest in his house. Defendant ejected plaintiff from the house shortly after the transfer of title, leaving him near-penniless.¹⁵⁵ The Court of Appeals held that constructive trust was justified in the case of a confidential relationship in order to prevent injustice, even absent an express agreement regarding property division.¹⁵⁶ The court was unrestrained in its endorsement of equitable principles:

This case seems to present the classic example of a situation where equity should intervene to scrutinize a transaction pregnant with opportunity for abuse and unfairness. It was for just this type of case that there evolved equitable principles and remedies to prevent injustices. Equity still lives. To suffer the hands of equity to be bound by misnamed “findings of fact” which are actually conclusions of law and legal inferences drawn from the facts is to ignore and render impotent the rich and vital impact of equity on the common law and, perforce, permit injustice. Universality of law requires equity.¹⁵⁷

Given this resounding endorsement of equitable doctrine in the face of injustice, it is interesting to note the role that unequal bargaining power played in this opinion. The court emphasized that plaintiff was uneducated—he had attended school only through eighth grade—whereas defendant, sixteen years younger than plaintiff, was a savvy school-

¹⁵³ *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (en banc).

¹⁵⁴ 351 N.E.2d 721 (N.Y. 1976).

¹⁵⁵ *Id.* at 722–23.

¹⁵⁶ *Id.* at 724.

¹⁵⁷ *Id.*

teacher.¹⁵⁸ One wonders whether the court would have been so struck with the disparity had the partners' sexes been reversed.¹⁵⁹

Constructive trust has been invoked with some success by lesbian and gay partners seeking legal recognition of their interests in jointly acquired property.¹⁶⁰ The first states to recognize constructive trust in the context of same-sex partnerships were Georgia and Arkansas. In 1979, the Georgia Supreme Court decided *Weekes v. Gay*,¹⁶¹ affirming a finding of implied trust in property held by plaintiff's deceased partner against the decedent's heirs, despite recorded legal interests to the contrary. One year later, in *Bramlett v. Selman*,¹⁶² the Arkansas Supreme Court found that defendant had established a constructive trust for his partner upon receipt of funds used to purchase a house.¹⁶³ The court upheld a finding

¹⁵⁸ *Id.* at 722.

¹⁵⁹ California and New Jersey were also eager to extend constructive trust to protect the property interests of men. In *Martin v. Kehl*, 145 Cal. App. 3d 228 (Cal. Ct. App. 1983), an oft-cited case, the court imposed a constructive trust on defendant for a house in her name toward which her then-boyfriend and later husband contributed half of the down payment, with an alleged understanding that defendant would make the monthly payments in lieu of rent and that plaintiff would retain a one-half interest in the property. The opinion noted that while constructive trust ordinarily requires a finding of a fiduciary relationship or fraud, an oral promise is sufficient in light of the flexible, equitable nature of the doctrine, the purpose of which is the avoidance of unjust enrichment. In *Coney v. Coney*, 503 A.2d 912 (N.J. Super. Ct. Ch. Div. 1985), plaintiff husband sued for interest in the marital home, which was in his wife's name allegedly because his divorce from his previous wife had not yet been finalized at the time of purchase. Plaintiff claimed to have provided the down payment for the property (at the time, he was steadily employed as a truck driver, while she was on public assistance); defendant claimed the down payment consisted of \$2,000 given to her by her father, but the court found this allegation to be unsubstantiated. The court struggled to find that the home was joint marital property, acquired "in contemplation of marriage" and therefore "during the marriage" for the purpose of the statute, despite the fact that the parties only married seven years later, and it divided the interest in the home equally between the two parties. *Id.* at 917. It noted, however, that even were the property not equitably distributable under the divorce statute, plaintiff had a remedy under resulting and constructive trust, among other theories. *Id.* at 917-18. Because "[m]ost unwed persons who choose to cohabit likely do so 'in ignorance of the (financial) consequences of either marriage or non-marriage' and 'with absolutely no thought given to the legal consequences of their relationship,'" the law should presume that they intended to deal fairly with each other and impose a constructive trust or other equitable remedy to prevent unjust enrichment or impoverishment. *Id.* at 918 (quoting *D'Ippolito v. Castoro*, 242 A.2d 617, 619-20 (N.J. 1968) (Pashman, J., concurring)).

¹⁶⁰ The first state to authorize the use of constructive trust irrespective of the duration or "marital" façade of the relationship was Iowa. In *Slocum v. Hammond*, 346 N.W.2d 485 (Iowa 1984), the Iowa Supreme Court granted no relief to a woman who periodically served as homemaker to defendant and assisted in working on his house, but had refused his marriage proposal, chosen not to sign her name to title, and retained substantial independence. Significantly, the court established a category of constructive trust based on "equitable principles other than fraud" and found that she had not proven unjust enrichment by clear and convincing evidence. *Id.* at 493. Although the court had found "nothing in this situation that would invoke the conscience of an equity court," *id.* at 493, the path was clearly paved for more sympathetic plaintiffs.

¹⁶¹ 256 S.E.2d 901 (Ga. 1979).

¹⁶² 597 S.W.2d 80 (Ark. 1980).

¹⁶³ Plaintiff claimed he had conveyed the money to defendant to shelter it from divorce proceedings with his ex-wife, with the understanding the title would be transferred to his

of a confidential relationship between the two partners: "All homosexual involvements are not as a matter of law confidential relationships sufficient to support a constructive trust, but a court of equity should not deny relief to a person merely because he is a homosexual."¹⁶⁴ In both *Weekes* and *Bramlett*, relief was premised on actual financial contribution. Nevertheless, the implications of such early decisions with regard to the legal legitimacy and protection of same-sex partnerships have not yet been recognized.¹⁶⁵

Today, separating spouses turn to constructive trust, with various degrees of success, on a relatively frequent basis. Some states have been more open to the doctrine than others. In Texas, for instance, even financial contribution is insufficient basis for imposing a constructive trust if it occurred outside of or prior to marriage.¹⁶⁶ In a recent decision, the Texas Court of Appeals held that a woman who had paid the balance of her husband's mortgage one month prior to their wedding was not entitled to reimbursement of that money.¹⁶⁷ The opinion noted that "[a]lthough a relationship of trust and confidence can arise from a personal relationship, there must be sufficient evidence that a fiduciary relationship was created. There is no evidence to support the granting of a constructive trust."¹⁶⁸ Fortunately, such instances of patently unjust adherence to traditional family law doctrine are on the decline.¹⁶⁹ Courts are often willing to impose constructive trusts in the context of insurance policies and pension benefits, and those cases are by far the most common.¹⁷⁰ To date, however, few states have demonstrated a willingness to consider the doctrine in cases of non-financial contribution by a dependent unmarried partner. Most will impose constructive trusts only in the context of property transfer.¹⁷¹

name following the divorce; he later informed his attorney of the transaction and conveyed \$2,000 dower interest in the property to her. *Id.* at 82.

¹⁶⁴ *Id.* at 85.

¹⁶⁵ See also *Hanselman v. Shepardson*, 1996 WL 99377 (S.D.N.Y. Mar. 7, 1996), in which the court found that plaintiff's action to reclaim an interest in real property against his partner of fifteen years could go forward on a theory of constructive trust. Plaintiff had allegedly included defendant's name on the deed in order to provide him financial security should plaintiff die. He claimed that defendant had promised to remove his name from the deed should they no longer live together.

¹⁶⁶ *In re Marriage of Loftis*, 40 S.W.3d 160 (Tex. App. 2001).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 165.

¹⁶⁹ More common is the refusal to impose a constructive trust if the parties have entered a pre-marital agreement. See, e.g., *Martin v. Martin*, 787 So. 2d 951 (Fla. Dist. Ct. App. 2001) (holding that imposition of a constructive trust was improper in part because the parties' pre-marital agreement did not designate funds from which a constructive trust could result).

¹⁷⁰ See, e.g., *Browning v. Browning*, 784 So. 2d 1145 (Fla. Dist. Ct. App. 2001); *Cosby v. Cosby*, 750 N.E.2d 1207 (Ohio Ct. App. 2001). Bankruptcy proceedings also implicate the doctrine with some frequency. See, e.g., *In re Rueff*, 259 B.R. 895 (Bankr. C.D. Ill. 2000).

¹⁷¹ See, e.g., *Osborne v. Osborne*, 978 S.W.2d 786, 791 (Mo. Ct. App. 1998)

D. The Problem of Intangible Property

The theoretical framework of fiduciary duty and constructive trust transfers rather neatly from commercial to family relationships, but the parallel extension of damage rules to the family setting is a bit more problematic, since the distribution of assets at dissolution does not obviously correlate to economic harm. Fortunately, the intrinsic flexibility of constructive trust, as an equitable doctrine, allows some maneuvering. The usual remedy for constructive trust is disgorgement of unjustly obtained profits, premised on unjust enrichment.¹⁷² Disgorgement may result in damages even when the beneficiary has suffered no loss,¹⁷³ suggesting that damages for breach of constructive trust are based not on reliance or even economic contribution, models often proposed as justifications for property awards at divorce, but rather on right. The beneficiary has a right in that which the trustee would retain. This aspect of constructive trust is particularly appealing, since it eliminates the need to prove the economic value of housework or contribution to payments for property titled to one's partner.

Any distributional scheme must also address what is perhaps the thorniest problem relating to the calculation of "damages" (property distribution and support) at dissolution: intangible property. Valuations based solely on tangible property almost invariably undercompensate the dependent spouse, since most families lack significant tangible property, if they have any such assets at all. For the majority of couples, earning capacity, in conjunction with pensions and employment benefits, constitutes the primary asset.

Several states have begun to confront this challenge in the form of graduate and professional degrees.¹⁷⁴ For example, in *Postema v. Postema*,¹⁷⁵ a Michigan appellate court awarded plaintiff an equitable interest in her husband's law degree. Plaintiff had postponed her schooling and taken on a full-time job in order to support her husband while he at-

¹⁷² 5 SCOTT & FRATCHER, *supra* note 128, § 462.1. In addition to disgorgement, punitive damages may also be awarded; the extraordinary nature of punitive awards demonstrates a legal recognition that breach of trust carries moral consequences as well as the standard financial ones.

¹⁷³ Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432 (1993).

¹⁷⁴ Most states have only awarded such an interest in cases where the non-student spouse contributed financially toward the earning of the degree. *See generally* 3 Fam. L. & Prac. (MB) § 36.03. A number of critics have noted that the trend toward including degrees at property division expresses a middle class bias by excluding from its purview "working class couples who do not own large amounts of property and do not have professional degrees to divide up." Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 576-77 (1990). However, this problem is mitigated by the classification of all non-marital assets, including future income, as property for the purposes of distribution. *Id.* at 577.

¹⁷⁵ 471 N.W.2d 912 (Mich. Ct. App. 1991).

tended law school. During this period she had also assumed the majority of the household responsibilities. The court held that the degree, which was earned by means of a “concerted family effort,”¹⁷⁶ was a marital asset to be divided upon divorce: “The goal of a trial court with respect to the division of the marital estate is a fair and equitable distribution under all of the circumstances.”¹⁷⁷ The court rejected the argument that the advanced degree should be considered in the context of alimony and emphasized that it should be deemed marital property for the purpose of distribution.¹⁷⁸

The principal advantage of constructive trust over more restrictive schemes like equal property division and income sharing¹⁷⁹ is that it allows the court to allocate property more fairly, on a case-by-case basis. With respect to non-marital relationships, the latter models are simply politically unfeasible and may in any case sweep too broadly. Because most cohabital relationships entail cooperation and joint decisionmaking, my proposal entails a presumption of equal division of all property, including tangible property, acquired in the common interest during the course of a long-term intimate relationship.¹⁸⁰ The share of the property

¹⁷⁶ *Id.* at 916.

¹⁷⁷ *Id.* at 915.

¹⁷⁸ “Unlike alimony, however, the principles underlying an award of compensation based on the attainment of an advanced degree are neither rooted in nor based on notions of support [W]here a concerted family effort is involved, a spouse’s entitlement to compensation constitutes a recognized right; it is not dependent upon factors related to the need for support.” *Id.* at 917.

¹⁷⁹ Income sharing proposals bear some resemblance to the property-based model I have offered; the most notable difference is that income sharing payments vary over time in response to real changes in earning and lifestyle by the parties. Jane Rutherford writes:

Income sharing refers to a system in which the incomes of the former couple would be added and divided by the number of people to be supported. Each member of the family would receive an equal share. Income sharing differs from traditional permanent alimony in at least two respects. First, income sharing does not take the form of a fixed award of a specific dollar amount. Indeed, income sharing is not fixed at any given time. Instead, it recognizes the inevitable changes inherent in the passage of time. Rather than fixing a specific award that can only adapt to changed circumstances by court order, income sharing creates a formula that automatically adjusts to changed circumstances. Such income sharing should continue at least until remarriage, if not indefinitely Second, . . . [i]ncome sharing is not based on need, pre-divorce standard of living, prior contributions, or fault. Instead, it represents a conscious effort to achieve equality between spouses who have divided their labors during marriage. If spouses have not divided the labor, either because they were not married long enough, or because they did not have children, then income sharing should not apply.”

Rutherford, *supra* note 174, at 578.

¹⁸⁰ Although a presumption in favor of equal distribution may detract somewhat from the flexibility of constructive trust as an equitable remedy, it is warranted in light of the difficulties of demonstrating emotional interdependency and intangible contributions to a relationship. The presumption might be overcome by a positive showing that the parties maintained independent finances and lifestyles such that neither partner depended on the support of the other; alternatively, a degree-earning partner might retain sole interest in her

held in constructive trust for the beneficiary by the party who “earned” it would not vary on the basis of financial or even homemaking contribution. Rather, it would be presumed, by virtue of their partnership, that both parties had promoted the common good of the relationship and were therefore entitled to an equal share of the present value of any property, including advanced degrees, careers, and any commercial goodwill or reputation developed during the relationship; payments would be made incrementally¹⁸¹ if the independent party lacked sufficient funds to pay at the outset.¹⁸²

The significance of intangible property is all the more pronounced given that maintenance awards have fallen into disfavor. In contrast with alimony, a constructive trust model eliminates the need to guess at the intent of the parties. Rather, it evaluates the relationship between them to ascertain whether it was one of interdependent trust or mutual self-interest. In the former case, the intent of the parties is irrelevant as to the distribution of their property and earning potential upon divorce. If we are to foreground the importance of the continued survival and livelihood of relationships built on human emotional interchange, growth, support, and trust rather than merely on financial stability, we must look beyond

degree upon demonstrating that her partner in fact interfered with her education. Another potential concern is that parties will refrain from entering mutually beneficial relationships if they cannot protect independent wealth. If this were deemed a compelling consideration, one might also make allowances for relationships in which: (1) the partners earn equal incomes and have equivalent household responsibilities; (2) one party brings to the marriage inherited or previously earned wealth; or (3) both parties understand that the wealthier party desired to devise the bulk of his wealth to his children from a previous relationship. Otherwise, property acquired before the relationship would be distributed to the extent that the partners considered it available for joint use during the relationship or relied upon it as a contingent means of income should the need arise. As a practical matter, a presumption of equal distribution has the additional perk of mitigating the disadvantage of the dependent spouse with respect to legal fees.

¹⁸¹ The present valuation approach may at first glance seem harsh for a party who is required to make continued payments but remarries. However, it must be understood that the payments to his former partner simply do not belong to him. What differentiates this proposal from income sharing and similar support proposals is that the payments, though spread out to allow for lower assets, are disgorgement rather than support payments.

¹⁸² Jane Rutherford notes: “There is an immediate problem in trying to determine the present value of future earnings. No system of valuing such ‘new property’ can account for fortuitous changes that occur in every marriage This problem may result in one spouse receiving a windfall. The cost in terms of expert witnesses to prove the present value of future income may also be prohibitive.” Rutherford, *supra* note 174, at 576. While these objections are well-taken, they can be answered. First, calculations of the present value of future income are routinely made in the context of personal injury and other tort litigation. Although determining present value can prove costly, so too is continued court supervision and possible additional litigation, which is necessary without present valuation. Second, the response to the windfall critique is that it cuts both ways. Such contingencies are built into any calculation of future damages or earnings; the figure awarded represents the average. Finally, although continuous payment adjustment could create more precision in a particular case, the escalating legal fees and administrative costs, coupled with continual intrusion into private lives, associated with this scheme seem unwarranted and harmful.

the economic contribution of either party during the course of the marriage. If we are to allow that volunteer work and contribution to the community by those who can forego salaried employment are desirable to society, we cannot later discard them as economically valueless. Indeed, property distribution at dissolution of a familial partnership must acknowledge that raising children and working to improve one's community are valuable socially even if not economically.

E. Why Trust?

Constructive trust offers a number of compelling advantages over the contractual distribution of property at the dissolution of intimate relationships. It is a flexible, equitable doctrine amenable to judicial manipulation in the interest of just results. It is less susceptible to disparities between partners with respect to wealth, legal sophistication, and emotional involvement. It recognizes that relationships inevitably change over time—whether through the birth of children, the onset of illness, or simply new life aspirations and experiences—and it accommodates those changes. Where contract promotes the autonomy of the individual, constructive trust celebrates the interdependence and mutual commitment of family.

It may be less apparent, however, that the foregoing advantages cannot be accomplished through more conventional reform proposals, such as extending traditional family law to alternative families, or through more radical current proposals, such as income sharing, that eliminate judicial discretion altogether in favor of universal equal distribution. The answer must be that constructive trust is a compromise that is at once legally feasible and ideologically powerful. Courts are accustomed to turning to constructive trust as a last resort, when traditional legal doctrine has failed them. By applying constructive trust only to those relationships that fall outside normative categories, courts have exacerbated the difference between marriage and other intimate relationships, highlighting that the latter are not “families” within the meaning of the law. Even those judges who are willing to expand family law to encompass alternative families are legally powerless to do so: given that most state legislatures have explicitly limited “spouses” and “marriage” to their traditional meanings, any change would require legislative action. By encompassing all modes of familial relationships in a single doctrinal framework, constructive trust can blur the boundaries between legally sanctioned marriage and marginalized modes of intimacy that currently fall within the legal category of cohabitation. Family law, conversely, may simply be bound too tightly to its patriarchal history and to the rigid categories and presumptions that governed the relationship of marriage until the advent of contract.

It should nevertheless be noted that many of the advantages to constructive trust are practical in nature, and equitable distribution might indeed be accomplished through the reform of current family law doctrine, should substantial legislative change become politically feasible. Under such circumstances, constructive trust could be used to inform family law determinations (in conjunction with other equitable doctrines, including implied contract) rather than replace them. In the long term, such a combination might in fact offer an advantage over constructive trust alone: clear guidelines for distribution would reduce administrative costs and caseloads,¹⁸³ as well as the likelihood of judicial abuse. For now, however, any such radical legislative rewriting of family law seems unlikely. Constructive trust provides a short-term remedy. At the very least, it offers a clean break from a legacy of mistrust and provides a powerful vocabulary for change.

On the opposite front, proposals such as income sharing and equal distribution cannot respond to the particularities of given relationships. Rather, like all rules, they are bound to be over- and under-inclusive. However, the prospect of generalized, inflexible authority is particularly ominous in the context of the family for the same reason that the expansion of family law is undesirable: a rule that treats all families the same will tend to normalize vaguely “marital” relationships and exclude the rest. Perhaps this rigidity explains why proponents of income sharing and similar schemes have rarely advocated their extension to non-marital relationships. In any case, such radical reform proposals, which create new legal relationships and duties, would require legislative action. In the end, constructive trust is more politically viable, more easily implemented, and more responsive to the realities of divergent relationships. Moreover, it forces a reassessment of what constitutes family and why families function.

CONCLUSION

One of the most potent critiques of public-law regulation of the family is its tendency to define family in relation to heterosexual norms

¹⁸³ Docket pressures are a real obstacle to the elimination of pre-marital contracts and settlements. Under the constructive trust scheme, informal “settlements” would therefore still be acceptable for non-married couples who choose to separate, as long as neither party initiates legal action. While this may propagate the distinction between legally sanctioned and non-legally sanctioned families, it seems impractical to force dependent non-married partners to litigate. Education, outreach, and legal services might at least serve to encourage litigation in the event of unjust informal distributions. It might be argued in the interest of parity and administrative costs that similar agreements be allowed between marital partners, but given the overwhelming evidence that settlement favors the independent spouse, I would not endorse any such proposal. Finally, costs will be high only in cases of contentious divorces. Particularly in those states that require the independent spouse to pay attorneys’ fees for both spouses, parties will have an incentive to keep litigation short.

of marriage. This criticism pervades all of family law. The New York Court of Appeals' 1989 decision in *Braschi*,¹⁸⁴ celebrated for extending the definition of family to include gay couples for the purposes of New York housing law, was simultaneously chastised for its inquiry into the intimacies of the couple's relationship; the court based its decision on the extent to which the two men resembled a traditional married couple. A similar objection was raised in the wake of *Bowers v. Hardwick*¹⁸⁵ with respect to Justice Blackmun's bold condemnation of the majority; notable queer theorists responded that by legitimating the "sexual deviance" of those gay and lesbian couples who acted and appeared "straight," the state would necessarily cast aside models of intimacy and sexuality that did not conform to the traditional model of marriage. The threat to decisional autonomy and identity formation is not limited to same-sex partnerships: public law is hesitant to recognize any family not composed of two monogamous partners who meet the marriage mold.¹⁸⁶

Perhaps it is a weak answer that a case-by-case inquiry into the roles of each party to a relationship would mandate an inquiry into gay and straight, normal and deviant relationships in equal measure. I believe that in time, public norms can grow to accommodate alternative lifestyles, particularly with some judicial guidance. Even assuming the status quo, however, it must be asked whether private law ultimately fares any better.

The distributional scheme I suggest in this Article should not be limited to the nuclear family. Instead, it is meant to recognize the commitments of all individuals who commit themselves to care for each other in the context of an intimate relationship—whatever the nature of that relationship, whomever between. Catharine MacKinnon surmised with respect to same-sex marriage that "it might do something amazing to the entire institution of marriage to recognize the unity of two 'persons' between whom no superiority or inferiority could be presumed on the basis of gender."¹⁸⁷ Constructive trust facilitates the application of public structures irrespective of gender, number, and sexuality. One must ask what such an expansion might mean for the institution of the family. Imposing a public obligation of care on private relationships has the potential to explode not only the traditional definitions of family, but also the ominous protection of inequality in the private sphere. "Family law," wrote Craig Christensen in a recent article on the legal ordering of gay

¹⁸⁴ *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

¹⁸⁵ 478 U.S. 1039 (1986).

¹⁸⁶ *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding village zoning ordinance that limited occupancy of one-family dwelling to traditional families related by blood, adoption or marriage, or to groups of not more than two). *But see Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (overturning ordinance that allowed only married couples and their children to live together).

¹⁸⁷ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 27 (1987).

and lesbian families, “is public law.”¹⁸⁸ I would extend the statement: family law, like property law, is public law. If we feel that the state has a role to play in the structuring of the family—not in the realm of private choices and identity formation, but rather in the ordering of just relationships and separations free from abuse, manipulation, and fear—it seems that a legal structure premised on trust is the best-suited model.

¹⁸⁸ Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1363 (1997).