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# Marital Contracts on the Fault Lines: A Liberal Inquiry

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## Abstract

The revolution in Western family law over the past 50 years—often described as ‘liberalization’—involves a decrease in the importance of fault-based factors alongside an increase in the significance of marital contracts. While these two trends generally complement each other, they may conflict when a couple seeks to assign economic consequences to sexual fault through a contract. Should such an agreement be legally enforceable? Which aligns more with a ‘true liberal’ perspective: advocating against fault or for the use of contracts? This paper suggests a new approach that goes beyond simply determining which trend should prevail. We illustrate how the perceived conflict between proponents of sexual liberalization and proponents of contractual liberalization could be resolved by identifying the underlying reasons that motivate each ‘camp’, proposing potential legal mechanisms and specific legal contexts in which broad agreement might be reached, and explicating the multidimensionality of family law liberalization.

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Keywords: *Family law; Marital Contracts; Marital Agreements; Fault in Divorce; Infidelity; Liberalization*

## Introduction

Over the past 50 years, a dramatic revolution has transformed Western family law in a process often described as liberalization.<sup>1</sup> Two of the main trends characterizing this phenomenon are a decline in the importance of fault-based criteria and a rise in the importance and centrality of marital agreements. Fault considerations, especially of the sort that can be considered ‘adultery’ or ‘infidelity’, have almost entirely lost their value in relation to the very possibility of obtaining a divorce,<sup>2</sup> and carry less weight even when determining the economic consequences of a

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1. See Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (University of Chicago Press, 1989); John Witte Jr, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Westminster John Knox Press, 1997); Winifred Holland, “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?” (2000) 17:1 Can J Fam L 114 at 122.
  2. See Lynn D Wardle, “International Marriage and Divorce Regulation and Recognition: A Survey” (1995) 29:3 Fam LQ 497.

divorce.<sup>3</sup> Marital contracts, which were formerly perceived as contrary to public policy, are now routinely enforced by all Western legal systems. Individuals are now entitled to stipulate the economic consequences of their divorce, and sometimes even to prescribe arrangements concerning their ongoing marriage.<sup>4</sup> Together, these two processes transformed the nature of family law.

The fall of fault and the rise of contract appear to complement each other within the liberalization of family law. The process of liberalization can be portrayed as a three-tiered process of privatization, individualization, and equality.<sup>5</sup> In terms of *privatization*, both the decline of fault, and most certainly the rise in the use and weight of contracts, reflect a shift from the perception of marriage as a public institution to one in which marriage is considered a private relationship regulated by the individuals involved.<sup>6</sup> In terms of *individualization*, the two trends indicate a transition from viewing the family as a unit to viewing it as a relationship consisting of two separate and autonomous individuals who have the right to separate from each other at will, as well as to privately negotiate the terms of their relationship.<sup>7</sup> In terms of *equality*, the two processes reflect a shift from a legal system based on traditional gender expectations and women's subordination to men, to one that rejects discriminatory historical norms and is committed to viewing both spouses as equal partners.<sup>8</sup>

However, there is a context in which these two trends are not complementary and are even conflicting. When a couple seeks to contractually assign economic consequences to sexual-fault-related considerations within their relationship, there appears to be a conflict between the two obligations of liberalized family

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3. See Ira Mark Ellman, "The Place of Fault in a Modern Divorce Law" (1996) 28 Ariz St LJ 773. See also American Law Institute, "Whether Marital Misconduct Should Be Considered in Property Allocations and Awards of Compensatory Payments" in *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Matthew Bender & Co, 2002) 42. For a similar trend in Canada, see e.g. *MT v J-YT*, [2008] 2 SCR 781, 2008 SCC 50.
  4. See Marjorie Maguire Shultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982) 70:2 Cal L Rev 204 at 213-16; Frederik Swennen, ed, *Contractualisation of Family Law—Global Perspectives* (Springer, 2015); Maria Neave, "Private Ordering in Family Law—Will Women Benefit?" in Margaret Thornton, ed, *Public and Private: Feminist Legal Debates* (1995) 145 at 146. See also Robert Leckey, "Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada" in Swennen, *supra* note 4, 93 at 110. For further discussion, see Section II and the text accompanying notes 24-29.
  5. See Shahar Lifshitz, "The Liberal Transformation of Spousal Law: Past, Present and Future" (2012) 13:1 Theor Inq L 15.
  6. See Jana B Singer, "The Privatization of Family Law" (1992) 5:5 Wis L Rev 1443; Carl E Schneider, "Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse" (1994) 1994:2 Utah L Rev 503.
  7. See Glendon, *supra* note 1 at 102-03; Janet L Dolgin, "The Family in Transition: From *Griswold* to *Eisenstadt* and Beyond" (1994) 82:4 Geo LJ 1519 at 1526; Elizabeth S Scott, "Rehabilitating Liberalism in Modern Divorce Law" (1994) 1994:2 Utah L Rev 687 at 687; Brenda Cossman, "A Matter of Difference: Domestic Contract and Gender Equality" (1990) 28:2 Osgoode Hall LJ 303.
  8. See Herma Hill Kay, "Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath" (1987) 56:1 U Cin L Rev 1; June Carbone & Margaret F Brinig, "Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform" (1991) 65:5 Tul L Rev 953 at 961-82; Jana B Singer, "Divorce Reform and Gender Justice" (1989) 67:5 NCL Rev 1103 at 1110-11.

law.<sup>9</sup> On the one hand, the agreement regulates the property relations of the couple in accordance with their wishes and values. On the other hand, the agreement engages in moral judgment of the couple's future marital behavior, a phenomenon that might be met with fierce opposition.<sup>10</sup> Should the parties be permitted to enter into such an agreement, enforceable by the legal system? Which trend deserves to prevail over the other?

One way to try to solve the dilemma is to determine the relative weight of the two processes and to decide in favor of the more important one in terms of their underlying value (for example, by deciding whether the value of privacy should trump the value of freedom of contract or vice versa). In this article, however, we suggest an attempt to resolve the dilemma not by 'arm-wrestling', but rather by exposing the reasons that lie behind each one of the opposing positions, and demonstrating that, on closer examination, the 'fall of fault' and the 'rise of contracts' positions might not fully clash.<sup>11</sup> Such an approach calls for a deep and intimate understanding of each one of these positions in isolation. For this purpose, Section I presents the 'fall of fault' in a default regime (absent a contract), through an analytical discussion of the liberal arguments rejecting fault considerations. Section II presents a parallel picture regarding support for the 'rise of contracts'. After an in-depth exploration of both positions, Section III brings them together to explore their points of convergence and the extent of their actual conflict. Finally, in Section IV, we discuss the practical implications of the discussion, focusing on two test cases in which the dilemma of fault agreements typically arises.

It is important to clarify: This paper does not deal with harshening the divorce itself by making it fault-dependent, an idea that was broadly discussed in the 1990s in the context of attempts to create a system of covenant-marriage.<sup>12</sup>

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9. Questions concerning other types of fault, such as violence or economic misbehavior, both relate to different prevailing legal norms and to a different set of considerations, and will therefore be omitted from the present discussion.
  10. In this spirit, a common approach in United States and Canadian law preemptively assumes that opposition to fault consideration automatically entails opposition to agreements that include such considerations. "[I]t is important to consider the purpose of the contract in question. It is not to enforce personal obligations such as the duty to remain faithful or the commitment to remain in the relationship. While people may feel that these obligations are part of the marriage 'contract', these are not the obligations that domestic contracts are meant to deal with." *D'Andrade v Schrage*, 2011 ONSC 1174, [2011] OJ No 859. See also "Terms requiring a judgment of marital misconduct in the allocation of financial remedies at divorce" in American Law Institute, *supra* note 3 at 1005 (§7.08 (b)). Conversely, some courts in the United States are still willing to uphold and apply agreements that include fault considerations—see e.g. *Lloyd v Niceta*, 284 A 3d 808 (Md Ct App 2022) [*Lloyd*].
  11. This perspective is inspired by mediation vocabulary. According to the basic principles of mediation, it is often possible to identify cases in which a conflict between opposing parties may be resolved in a way that fully expresses and protects the interests of both parties. For the canonical juice-peels allegory, see Deborah M Kolb, "The Love for Three Oranges Or: What Did We Miss About Ms. Follett in the Library?" (1995) 11:4 *Negotiation* J 339. See also Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed (Penguin, 2011).
  12. See Brian Bix, "The ALI Principles and Agreements: Seeking a Balance between Status and Contract" in Robin Fretwell Wilson, ed, *Reconceiving the Family: Critique on the American Law Institute's 'Principles of the Law of Family Dissolution'* (Cambridge University Press,

In contrast, we assume here a full transition to a mandatory regime of unilateral no-fault divorce, and inquire only the possible effect of sexual fault on the couple's *economic* rights while the separation itself is given.<sup>13</sup> By juxtaposing the two facets of family law liberalization—the 'fall of fault' and the 'rise of contract'—we wish to offer, in retrospect, a multidimensional understanding of this liberalization process and its nature.

### **Section I. Sexual Liberalization: The Fall of Considerations of Fault in Determining the Financial Consequences of Divorce**

In order to gain full understanding of the liberal case against considering fault in determining the couple's economic rights, it is helpful to open by understanding the more conservative view. After all, we assume here a legal terrain in which unilateral no-fault divorce is acceptable and available. In such a world, what could be the relevance of one's infidelity to the allocation of the partners' financial rights? What is the possible room for fault-based considerations in a no-fault divorce era? At first blush, one can think of two main reasons. The first is rooted in viewing the unfaithful party as responsible for the breakdown of the relationship. According to this view, if a party can be identified as responsible for ending the relationship (i.e., by damaging it to an extent that causes the other to justifiably end the marriage), this party should bear the costs of separation. Using the vocabulary of contract law, while modern law would not enforce the 'marriage contract' by ordering specific performance (namely the continuation of the marriage), it may still require the breaching party to compensate the other for failing to carry out the obligations of this contract. We would refer to this alternative hereinafter as 'fault as responsibility for the breakup'. An alternative reason does not focus on the role of infidelity in ending the marriage, but views it as a wrongdoing *per se*. While in the past the latter reason was associated with patriarchal and religious norms, its modern transfiguration focuses on deception and breach of trust. It reflects a burden on one spouse to obtain the other's consent to deviate from the norm of sexual exclusivity, or to terminate the marriage before moving to a new relationship.<sup>14</sup> We will refer to this alternative as 'fault as an independent wrongdoing'.

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2006) 372 at 377; Eric Rasmusen & Jeffrey Evans Stake, "Lifting the Veil of Ignorance: Personalizing the Marriage Contract" (1998) 73:2 *Ind LJ* 453.

13. Moreover, since our aim here extends beyond a decision on this discrete question, we will not address agreements that stipulate an economic outcome that could drive one of the parties into destitution, a consequence so serious that it could obscure any other considerations. For this reason, we will not address agreements that deprive a spouse from, e.g., the right for need-based alimony.
14. For the transition from an independent harm to harm based on a violation of trust and fidelity, see Michael J Wreen, "What's Really Wrong with Adultery" (1986) 3:2 *Intl J Applied Philosophy* 45; Don Marquis, "What's Wrong with Adultery?" in David Boonin & Graham Oddie, eds, *What's Wrong? Applied Ethicists and Their Critics*, 2nd ed (Oxford University Press, 2011) 209.

The liberal camp, which supports the exclusion of sexual fault from marital property law (at least as a default), ultimately rejects both of these alternatives. However, it is important to notice that this rejection can be based on several grounds, which are conceptually and ideologically distinct from one another. One possible argument focuses on the boundaries of the state's legitimate intervention. According to this view, one's intimate behavior is not the state's concern: It should not be subject to the majority's authority over the individual, or to the power of state coercion, but rather a matter of private morality or religion. For the state to properly implement the idea of responsibility for the relationship's breakdown, or of the concept of an independent wrong, the state has to hold a thick view about the norms of marital relationship, including norms of communication, friendship, emotional and physical intimacy, and their inter-relations. Given the diversity of views regarding this aspect of life, non-interference is required by the principle of state neutrality, both in the sense of exclusion of ideals from political justification and in the sense that the state should not take sides between different conceptions of the good.<sup>15</sup> Another possible line of reasoning lies in viewing personal happiness and fulfillment as the essence of marriage, hence opposing the idea of imposing a cost on a party who initiates the dissolution of the marital relations. According to such a view, the individual is not required, certainly not legally, to sacrifice his or her own happiness for the sake of another, hence each spouse has the right to dissolve the relationship at will. Accordingly, dissolving an unwanted marital relationship is a case of a legitimate 'efficient breach': There is nothing morally reprehensible in so doing, and no harm for which one must be held accountable or responsible.

The view of infidelity as an independent wrongdoing rests on a debatable moral position as well. First, the extent to which partners today mutually expect sexual exclusivity during marriage is doubtful, at least as a type of expectation that the parties perceive as a legal obligation.<sup>16</sup> Second, an individual's sexual behavior is widely seen as representing the core of his or her zone of privacy, about which the individual should not be required to account to anyone, and certainly not to the state, as long as it is voluntary and consensual. Third, from the

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15. Cf Jeremy Waldron, "Legislation and Moral Neutrality" in Jeremy Waldron, ed, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press, 1993) 143. Cf also Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) at 108-09.

16. For a sociological review, see Mark Regnerus, *Cheap Sex: The Transformation of Men, Marriage, and Monogamy* (Oxford University Press, 2017) at ch 5; Deborah Anapol, *Polyamory in the 21st Century: Love and Intimacy with Multiple Partners* (Rowman & Littlefield, 2010). For statistics demonstrating a growing trend towards willingness to engage in non-monogamous relationships, see Ethan Czuy Levine et al, "Open Relationships, Nonconsensual Nonmonogamy, and Monogamy Among U.S. Adults: Findings from the 2012 National Survey of Sexual Health and Behavior" (2018) 47:5 Archives Sexual Behavior 1439. For normative skepticism towards the moral value of monogamy, see Elizabeth Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence" (2004) 29 NYU Rev L & Soc Change 277; Natasha McKeever, "Is the Requirement of Sexual Exclusivity Consistent with Romantic Love?" (2017) 34:3 J Applied Philosophy 353; Harry Chalmers, "Is Monogamy Morally Permissible?" (2019) 53:2 J Value Inquiry 225; Hallie Liberto, "The Problem with Sexual Promises" (2017) 127:2 Ethics 383.

other spouse's perspective, insisting on fidelity might be associated with jealousy and possessiveness, reflecting a vice rather than a virtue.<sup>17</sup> Finally, even from a conservative social point of view that focuses on the institution of marriage and its stability, one could argue that a superior design of this institution would allow each spouse to 'take a breath of fresh air' through casual extra-marital intimate relationships, in order to allow the partners to maintain the stability of the truly important relationship of economic cooperation and raising children together. Such a design would prevent family breakdowns following a deterioration in sexual attraction between spouses and causing economic and personal harm to the children. Therefore, it may even be better for the law to encourage citizens to become indifferent to their partners' sexual conduct, precisely in order to stabilize and protect the family bond.<sup>18</sup> One who adheres to this kind of 'new morality' would thus oppose a legal regime that places financial sanction on what should be perceived as a tolerable behavior. More importantly, even without embracing or endorsing any of these controversial views, their existence within society opens the door again to a requirement for state neutrality as to different perceptions of a good life, or even for a state effort to facilitate pluralism in the expression of preferences and values, rather than to attempt to enforce uniformity. Indeed, common depictions of what we have termed 'the fall of fault' perceive it as reflecting a decline in the moral discourse of family law, or as a move towards neutrality regarding the morality of spousal relations.<sup>19</sup>

Adding to the reluctance to legally address infidelity is the concern for gender equality. Supervising sexual behavior is closely tied to patriarchal control, rather than morality or trust. Opening the door to regulation of sexual behavior could therefore tend to reinforce traditional gender roles, and consequently reimpose male control over female sexuality.<sup>20</sup> It might roll history back to a previous era in which marriage and divorce laws focused on monitoring sexuality (in the absence of contraception or genetic testing), against one of the great achievements of the struggle for gender equality. Together with prevailing social norms, tying property rights to sexual behavior can also have systematic, gender-based effects. Even a gender-neutral norm is thus prone to unequal implementation, ultimately policing female sexuality and restricting the resources available to women.

Ideological considerations are joined by a practical-pragmatic perspective focused on the well-being of the parties. Notwithstanding the wrongfulness of infidelity, it is advisable to channel betrayed parties to deal with it via non-legal

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17. This trend is related to the condemnation of the feelings of jealousy that may be experienced by the partner who was cheated on, and by presenting those feelings as ethically unfounded and doubtful. See Natasha McKeever, "Why, and to What Extent, Is Sexual Infidelity Wrong?" (2020) 101:3 *Pacific Philosophical Q* 515.

18. Cf Esther Perel, *The State of Affairs: Rethinking Infidelity* (Harper Collins, 2017) at ch 9, ch 14.

19. See Schneider, *supra* note 6.

20. For the double standard common in western society regarding adultery, see Deborah L Rhode, *Adultery: Infidelity and the Law* (Harvard University Press, 2016) at 25-30, 33, 41, 245, 256; Jean Duncombe et al, *The State of Affairs: Explorations in Infidelity and Commitment* (Lawrence Erlbaum Associates, 2004) at ch 6, ch 7.

channels, such as therapy, rather than through courts. Legal proceedings would only ‘scratch the wound’ and exacerbate the psychological harm, instead of alleviating it. Seeking justice and recognition in the courtroom could impede recovery and harm the real interests of the parties, as well as trample their right to privacy. A related point emphasizes the law’s inadequacy in achieving the desired goal of faithfulness. Faithfulness achieved solely by virtue of fear of legal sanction is deprived of any real value.<sup>21</sup> Therefore, the law is not the appropriate mechanism for meeting the parties’ real goal.

Finally, there are institutional considerations, arising from the need for institutional operation of the law and its enforcement. An outside observer cannot detect the person responsible for ending the marital relationship, or identify the wrongdoer, in a reliable way. The act of infidelity is often the ‘tip of the iceberg’ of the crisis in the relationship. In this regard, the need to maintain a legal system that hears evidence and establishes facts must also be taken into account. The legal system is likely to prove an unreliable forum for this task, and involves an invasion of the privacy of both parties. The legal system is thus uncomfortably placed in the position of a ‘Peeping Tom’ and is forced to address the intimate aspects of individuals’ relationships—a situation which is undesirable from the institutional perspective.

Looking back at the various arguments for the retreat from considerations of fault, we can now identify a number of different and distinct types of liberal views within this position. These types can be characterized by division into five main prototypes: The *first* type is *neutral-pluralist* liberalism, which focuses on the state’s shortcomings in resolving disputes about the perception of a good life, or on the need to enable different cultural groups to realize their values and traditions, respecting the divide between the private and the public. The next two types represent different shades of an ideological liberal position. The *second* type focuses on *liberty and autonomy*, stressing the values of individualism, authenticity, and self-fulfillment. According to this position, the state may promote a perception of the good, yet this conception must include the individual’s freedom to shape one’s life as one wishes.<sup>22</sup> The *third* type of sexual liberal approach focuses on the importance of *equality* and, in particular, *gender justice*. Consequently, this liberal stance insists that the institution of marriage and the norms governing it be sensitive to discrimination and the power discrepancies between men and women. Finally, the last two types of sexual liberal approaches do not rely on ideological commitment to the values underlying liberal philosophy. Rather, the *fourth* type supports the retreat from considerations of fault due to a *pragmatic* view regarding the inefficiency of such a regime in meeting the parties’ real ends and promoting their well-being. Similarly, the *fifth* type relies

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21. In that way, this argument is similar to Locke’s known argument regarding tolerance: see John Locke, *A Letter Concerning Toleration*, translated by William Popple, ed by Kerry Walters (Broadview Press, 2013). For a similar argument, see Lee-Ann Chae, “Trust and Contingency Plans” (2022) 52:7 Can J Philosophy 689.

22. See Raz, *supra* note 15.

on *institutional* factors, emphasizing the inability of the judiciary to properly deal with disputes about fault without putting its reliability and integrity in jeopardy.

To conclude, then, the sexual liberalization of family law, namely the exclusion of sexual fault from marital property law, can be explained through five types of justifications, which may express different positions in terms of both values and practice. Undoubtedly, these categories are not mutually exclusive: One person may hold positions associated with more than one type of liberalism proposed here. However, making the distinction between the different types leads to a more comprehensive and deeper understanding of this position, and its possible stand towards fidelity contracts, including the attempt to infuse sexual fault considerations into the financial consequences of parties through privately negotiated agreements. Before moving to this task, however, it is time to gain a closer acquaintance with the second trend of family law liberalization, which can be portrayed as contractual liberalization. This is where we turn now.

## Section II. Contractual Liberalization: The Rise of Agreements in Family Law

Traditionally, opposition to contractual regulation of family life was based on two main claims that may seem contradictory. According to the first position, private regulation or agreement is not suitable for family life, since the family, as a social-public institution, should be regulated by public norms and reflect public morals and convictions.<sup>23</sup> In contrast, according to the second position, family life is too private to be regulated by law, in two different respects: It derives from love and affection, rather than legal relations; and it is personal in a sense of protection from state intervention. Hence the law must stop before the threshold of the residential home.<sup>24</sup>

These views are not common anymore. Private agreements are now not only permitted, but some scholars have even suggested viewing contracts as a proper conceptualization of marriage itself.<sup>25</sup> This transition rests on several grounds. First, it is based on the state's retreat from the pretense of fully regulating family life, based on a respect for the right of individuals to shape their family life as they see fit and realize one's private view of the good without state coercion.

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23. See Brian Bix, "Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage" (1998) 40:1 *Wm & Mary L Rev* 145 at 146-48.

24. See Marsha Garrison, "Marriage: The Status of Contract" (1983) 131:4 *U Pa L Rev* 1039 at 1051; *Balfour v Balfour*, [1919] 2 KB 571; Stephen Hedley, "Keeping Contract in its Place—*Balfour v Balfour* and the Enforceability of Informal Agreements" (1985) 5:3 *Oxford J Leg Stud* 391.

25. See Martha A Fineman, "Contract, Marriage and Background Rules" in Brian Bix, ed, *Analyzing Law: New Essays in Legal Theory* (Clarendon Press, 1998) 183; Elizabeth S Scott, "A World Without Marriage" (2007) 41:3 *Family LQ* 537; Elizabeth F Emens, "Regulatory Fictions: On Marriage and Counter-marriage" (2011) 99:1 *Cal L Rev* 235. *Cf* Mary Anne Case, "Marriage Licenses" (2005) 89:6 *Minn L Rev* 1758; Jennifer M Collins, Ethan J Leib & Dan Markel, "Punishing Family Status" (2008) 88:5 *BUL Rev* 1327 at 1409-11.



Similarly, it relies on the importance of diversity and pluralism, acknowledging the need to not homogenize this realm of life as if one size fits all.<sup>26</sup> Second, the pro-agreement stance derives from the importance of autonomy, both in respecting the autonomy of each member of the family and in organizing family life in a way that advances the interests of the individual family members.<sup>27</sup> Allowing the parties to shape their relationship by negotiation recognizes their separate existence from one another, as well as the individual's right to establish his or her own life framework. Thirdly, the trend towards contracts also reflects a shift to a focus on promoting the well-being of the parties to the agreement, granting them priority in designing the arrangements they desire and adjusting the family framework to suit their specific needs in a more efficient way.<sup>28</sup> Finally, this position rests on a commitment to gender equality, which includes both a reluctance to base family norms on traditional fixed gender roles, and respect for women's ability to act as agents who can determine the nature of their family life through agreements.<sup>29</sup> Still, the perspective of gender relations has also raised some concerns, leading to a call to shape domestic agreements with caution, limits, and close regulation. Leaving the determination of family norms to negotiations might expose weak parties to disparities in bargaining power, ultimately transferring rights otherwise granted to women into the hands of men.<sup>30</sup>

A similar ambivalence and inconclusiveness accompany the question of enforcing agreements that seek to regulate the course of the ongoing marriage. On the one hand, disfavoring such agreements rests on the urge to leave such areas outside the jurisdiction of the law, stressing the way in which appealing to the state for enforcement inherently involves a public determination of norms that expropriates control of the contract from the parties to the agreement.<sup>31</sup> Similarly, a concern has been raised regarding the imposition of a world of individualistic-atomistic concepts on the intimate-in-nature marital relationship.<sup>32</sup> From another angle, some have claimed that

26. See Schneider, *supra* note 6.

27. See Naomi R Cahn, "The Moral Complexities of Family Law", Book Review of *In Defense of Single-Parent Families* by Nancy E Dowd and *The Divorce Culture* by Barbara Dafoe Whitehead, (1997) 50:1 Stan L Rev 225; John Enman-Beech, "Drawing Contract and Polyamory Together Or: How I Found the Limits of Liberal Legality in *Kimchi Cuddles Comics*" (2021) 36:1 CJLS 89 at 91, 96-97. See also Michael J Trebilcock & Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41:4 UTLJ 533 at 538.

28. See Lenore J Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* (Collier Macmillan, 1981); Mary Anne Case, "Enforcing Bargains in an Ongoing Marriage" (2011) 35 Wash UJL & Pol'y 225; Robert H Mnookin, "Divorce Bargaining: The Limits on Private Ordering" (1985) 18:4 U Mich JL Ref 1015 at 1018-19; Rasmusen & Stake, *supra* note 12.

29. For a review of Canadian legal precedents on the matter, see Luke Taylor, "Domestic Contracts and Family Law Exceptionalism: An Historical Perspective" (2020) 66:2 McGill LJ 303.

30. See Penelope Eileen Bryan, "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion" (1999) 47:3 Buff L Rev 1153. See also Gail Frommer Brod, "Premarital Agreements and Gender Justice" (1994) 6:2 Yale JL & Feminism 229.

31. See Morris R Cohen, "The Basis of Contract" (1933) 46:4 Harv L Rev 553 at 591. For an example of court intervention in marital contracts, see *DB v PB*, [2017] 2 FLR 1540.

32. See e.g. Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28:2 Osgoode Hall LJ 303; Marcia Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44:1 UTLJ 97.

the ongoing course of marital life may be sufficiently regulated through the option to leave an unwanted relationship, hence there is no need for the law to seek to manage the life of couples who fail to do so on their own, especially given the unsuitability of legal tools in effectively managing disputes in this area.<sup>33</sup> Such legal involvement is inherently prone to error and dysfunction. On the other hand, others have emphasized the need to permit legal recognition of agreements that govern the management of marital life from a feminist perspective. The support rests on the importance of applying norms of justice within the relationship, stressing that a domestic space that is beyond the scope of justice actually serves a traditional regime of female oppression by men.<sup>34</sup> According to this view, it is of feminist value to emphasize the nature of the family as being based on reciprocal exchanges, in a way that recognizes the value of domestic work traditionally considered ‘transparent’.<sup>35</sup> Removing the law from the domestic sphere undermines the role of norms of honesty, trust, and fairness, thus subverting its relational nature, rather than strengthening it.<sup>36</sup> This view also stresses the ways in which the law—that is, the determination of fundamental norms—might manage relationships in an indirect fashion outside the courts, by way of allowing for agreements and negotiations that may have therapeutic value or provide a basis for cooperation or mediation.<sup>37</sup>

Analysis of the abovementioned considerations about familial contractual liberalization reveals that, again, there are five main types of arguments, distinguished from each other in terms of their theoretical and normative underpinnings. The *neutralist-pluralist* approach focuses on the state’s duty not to interfere with personal decisions and emphasizes the importance of allowing for a variety of ways of life. The *autonomy-based* approach focuses on the importance of contracts as a mechanism for shaping the perception of spouses as separate individuals who autonomously determine their life frameworks. The *gender-equality* approach focuses on the impact of family agreements on the status of women, viewing the contract as a tool for female empowerment and liberation while voicing concerns about the hazardous implications of bargaining power divergence. A fourth, *pragmatic* approach focuses on the potential of the contractual tool to contribute to advancing the goals and well-being of individuals, while also expressing doubts and reservations about the suitability of the law as a tool for regulating day-to-day family conduct. Finally, a fifth approach views the debate through the lens of *institutional* considerations, questioning

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33. See Saul Levmore, “Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage” (1995) 58:2 *Law & Contemp Probs* 221. See also Elizabeth S Scott & Robert E Scott, “Marriage as Relational Contract” (1998) 84:7 *Va L Rev* 1225.

34. See Jeremy Waldron, “When Justice Replaces Affection: The Need for Rights” (1988) 11:3 *Harv JL & Pub Pol’y* 625 at 631-36. See also Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); Scott & Scott, *supra* note 33.

35. See Katharine B Silbaugh, “Marriage, Contracts and the Family Economy” (1998) 93:1 *Nw UL Rev* 65 at 93; Martha M Ertman, “The Business of Intimacy: Bridging the Private-Private Distinction” in Martha Albertson Fineman & Terence Dougherty, eds, *Feminism Confronts Homo Economicus: Gender, Law, and Society* (Cornell University Press, 2005) 467.

36. See Jill Elaine Hasday, *Intimate Lies and the Law* (Oxford University Press, 2019) at 214-15.

37. See Case, *supra* note 28.

whether the law should be used to advance public interests rather than private whims, and doubting the law's institutional capacity to operate within the family unit in a manner that can reliably determine facts, effectively enforce norms, and efficiently compensate for the type of damages normally arising from family conduct.

Indeed, as is already apparent to the careful reader, there is a clear symmetry between these five categories of considerations and the five categories of liberal arguments characterizing the fall of fault in the former section. A close examination of both the rise of domestic contracts and the fall of sexual fault reveals that each of these trends actually rely on differing lines of argument, profoundly distinct in terms of values and ideological commitment. At first glance, it may appear that when approaching the apparent clash between sexual liberalization and contractual liberalization over marital-fault-agreements, the lack of homogeneity within these two camps only adds to the complexity of the dilemma and renders its resolution more complex. However, the very fact that the different arguments supporting both approaches are genuinely distinguishable may open the door to a new strategy for resolving this apparent conflict. This is explored in the next section.

### **Section III. Conflict over Fault Agreements: Bridging Sexual Liberalization and Contractual Liberalization**

Having closely analyzed sexual and contractual liberalism, we now turn to examining the question of fault agreements—that is, agreements that seek to assign property implications to sexual fault on behalf of any of the parties. At first, this issue may appear to provoke a confrontation between those who oppose fault and those who are in favor of contracts. However, following the discussion in the previous sections, we have seen that each camp is characterized by different arguments corresponding to five archetypes of liberal thinking, among which there are surprising resemblances. For each type of liberal reasoning in one camp, there is a mirroring counterpart in the opposing camp: Arguments against fault based on state neutrality or pluralism mirrors the argument for marital contracts based on the same principles, and so on. On the fundamental level, the similarity between these counterparts is greater than the intellectual proximity between the liberal types within the same camp, namely those who share the same verdict on either sexual liberalization or contractual liberalization. The principled debate is, therefore, not about the bottom line of one's stand towards fault agreements. Rather, it relates to the foundations of one's liberal stand towards both sexual liberalization (i.e., the fall of fault) and contractual liberalization (i.e., the rise of contract). Consequentially, the proper way to discuss the normative status of fault agreements is to organize the discussion according to the reasons underlying these positions. To this end, in the discussion below we will first consider fault agreements vis-à-vis each of the five fundamental approaches in isolation. We will then group together the conclusions in an attempt to outline an overall,

integrated liberal position, as well as to evaluate the nature of family law liberalism(s).

### *1. Neutrality and Pluralism*

Approaching fault agreements through the lens of ‘Neutralist Liberalism’ demonstrates paradigmatically that upholders of contracts and opponents of fault are not necessarily two opposing views on the topic of fault agreements. The Neutralist arguments underlying the opposition to fault agreements are completely defused when the source of the norm supporting fault is found in the agreement between the parties, rather than imposed by the state. This is because the concern pertaining to the state’s inability to assess its citizens’ preferences becomes immaterial when the source of the norm is a preference expressed by the parties themselves. The contract is a tool for informing the state about one’s view, allowing minority groups to deviate from the common view rather than resorting to a default option imposed by the majority. Similarly, the concern that the state should not determine the elements of a proper spousal relationship does not apply when the source of the norms and values is not the state but the parties themselves. It seems, therefore, that from a Neutralist point of view, one should happily and enthusiastically embrace the contractual tool as an expression of pluralism and sometimes multiculturalism,<sup>38</sup> and as an exemplary expression of liberal commitment to one’s freedom to insist on adhering to one’s own opinions and beliefs even when they deviate from the majority group ideology.

A similar conclusion stems from the effect of the agreement on the very nature of fault considerations. While, traditionally, the legal regulation of sexual conduct was often seen as one of enforcing morality,<sup>39</sup> anchoring the regulation in a private agreement between the parties transforms it into a question of interpersonal promise breaking rather than private morality. Such change is consistent with the modern shift in the perception of the wrongfulness in cheating from adultery to infidelity, namely that of the breach of the spouse’s trust.<sup>40</sup> In this sense, the law’s position regarding infidelity is also neutral as to content. Infidelity becomes wrong in the eyes of the law solely because the parties have so stipulated, whereas a breach of trust in an intimate relationship is not a self-regarding action that is shielded from the state’s legitimate interference. The conclusion, therefore, is that in the eyes of a Neutralist liberal, the contract reverses the normative picture regarding fault, debunking any objections and offering new arguments in favor of taking such conduct into account when assessing the parties’ rights and duties.

Thus, instead of an internal clash between a commitment against fault and a commitment to agreements, there is no such conflict among Neutralists: The

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38. While pluralism might find value in the variety of institutions per se, a multiculturalist view would allow a variety of institutions only as a response to the reality of a multiplicity, which in itself might not be necessarily welcome.

39. See HLA Hart, *Law, Liberty and Morality* (Stanford University Press, 1963).

40. See Marquis, *supra* note 14.

neutrality-based opposition to fault vanishes when the source of the sexual restraints is the couple themselves, hence the Neutralists can commit fully to their support of agreements, including fault agreements, without a need to sacrifice any prior commitment. Thus, as long as such agreements properly reflect the genuine desires of the parties to them, the Neutralist-liberal position is united in its tolerant attitude towards fault agreements, and may even seek to support and encourage the existence of such an alternative.<sup>41</sup>

## *2. Perfectionist Liberalism and the Value of Liberty and Autonomy*

The second perspective explores the discussion from the point of view of 'Perfectionist Liberalism', which places an emphasis on ensuring and protecting personal liberty, autonomy, and self-fulfillment. This line of thinking opposes fault considerations due to its commitment to the partners' right to exit a relationship that is no longer desired, as well as to exercise sexual freedom, based on the individual's right to self-fulfillment.<sup>42</sup> Should this position change where the source for considering fault is the parties' agreement? We suggest a complex answer, which reveals an internal tension within Perfectionist thinking and within the value of autonomy in itself.

On one hand, the Perfectionist opposition to imposing burdens on separations, or to restricting the sexual freedom of the parties, derives from the scope and magnitude of the burden or restriction rather than from its source. Attaching a price to one's sexual conduct may actually act as a ban and, in fact, setting any price inherently judges otherwise legitimate behavior as wrong. Thus, the fact that the parties are interested in such an arrangement does not undermine the fundamental opposition to assigning financial results to one's sexual conduct. If fault is considered as a mark of responsibility for the breakdown of the marriage, fault agreements function as a penalty against the party who ends the relationship or is responsible for ending it. An agreement that seriously limits a spouse from exercising the right to exit the relationship is perceived, under this position, as excessive self-enslavement, since it surrenders a valuable basic liberty. This concern is aggravated due to this self-imposing restraint applying into the distant future, when tastes, perceptions, and positions likely change.<sup>43</sup> If so, the Perfectionist point of view, which supports agreements due to a commitment to personal autonomy, might object to such a restrictive agreement.

Similarly, according to the second understanding of fault as a wrongdoing per se, regulating the parties' behavior during marriage by imposing a legal price on an individual's sexual conduct may be considered an unjustified infringement of one's autonomy. Sexual freedom is an arena for a license to act according to one's

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41. Cf Lily Ng, "Covenant Marriage and the Conflict of Laws" (2007) 44:4 *Alta L Rev* 815 at 835.

42. See Carolyn J Frantz & Hanoach Dagan, "Properties of Marriage" (2004) 104:1 *Colum L Rev* 75 at 85.

43. See Melvin Aron Eisenberg, "The Limits of Cognition and the Limits of Contract" (1995) 47:2 *Stan L Rev* 211; Edna Ullmann-Margalit, "Big Decisions: Opting, Converting, Drifting" (2006) 58 *Royal Institute Philosophy Supplement* 157.

current preference, rather than according to a previous obligation.<sup>44</sup> Similar contexts that highlight the particular importance of sexual freedom for autonomy are cases in which a spouse seeks to examine his or her sexual orientation, or the way the law should see a priest's vow of chastity. According to this view, autonomy requires (as well as grants) each person a protected sphere of privacy, in which sexual behavior—just like freedom of thought—must be free of a need to report or account to any other, and most of all must be free of legal sanctions. In that sense, a binding agreement that limits the parties' sexual freedom somewhat resembles an agreement that demands complete transparency between the parties regarding all their conversations, correspondence, diaries, or even thoughts and private fantasies. While honesty and openness are an ideal, a healthy relationship also respects each party's right to a private sphere, enabling introspection, self-discovery, and exploration. In that spirit, it could be argued that placing a legal price on one's sexual behavior might be seen as hindering and eroding authenticity and individuality, and may undermine trust and respect between the parties. If this is so, then the liberal should oppose such a price, notwithstanding the fact it originates in the parties' consent. Certain freedoms are too important to restrict and surrender to others, even by a voluntary agreement.

Thus, unlike the Neutralist view, whose opposition fades once the source of the regulation is private, the Perfectionist view of fault should remain steadfast in opposing fault considerations, be their source as it may. From this perspective, the point in marital agreement is not on setting a boundary between the home and society (ensuring the home's privacy), but on eliminating the walls of the home and emphasizing the nature of the marital bond as a bond between two independent individuals (protecting the autonomy, as well as the privacy, of each partner). According to such a view, fault agreements do not promote autonomy, but rather manifest improper self-imposed restraints. Such an agreement, in contractual terms, may be considered a contract contrary to public policy, because it conflicts with the value of autonomy. Thus, the Perfectionist approach to marital contracts will not extend to fault agreements.

Admittedly, however, a different approach is also possible. A liberal position committed to the value of autonomy in the contractual context, or even to the separateness of individuals in the marital bond, may still reject the worldview that stresses the special importance of self-fulfillment in the sexual realm. Autonomy relates not only to self-fulfillment, authenticity, and constant choice, but also to the individual's ability to take on a commitment. This sense of autonomy as self-legislation may be hostile to the worldview of sexual liberalization, perceiving it as one focused on pleasure and submission to impulses and desires, in contrast to a truly autonomous position concerned with a life of commitment and restraint. In this perspective, true authenticity and self-fulfillment are attained through living in accordance with one's values and goals. Commitment,

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44. This position is reflected, for example, in the norms of reversing consent to sexual relations. See Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003) at 215; Liberto, *supra* note 16.

facilitated by a formal agreement, serves as a tool to resist temptations or weakness of will that could hinder this pursuit.<sup>45</sup> Accordingly, self-limitation might serve the self-interest of the partners by prescribing a mechanism built to help the parties avoid certain behaviors they both see as unbeneficial to their marital relationships. Such a mechanism does not infringe on the parties' autonomy, at least as long as each individual retains the right to terminate the marriage at will.<sup>46</sup> Therefore, a legal system that enforces such an obligation is actually respecting the autonomy of its subjects in this sense, resulting again in a possible dispute between the commitment to sexual liberalization and to contractual liberalization in a way that calls for a resolution between these opposing commitments.

The conflict between these two aspects or notions of the value of autonomy may lead to a nuanced Perfectionist stance on fault agreements. Such a view might distinguish between the two roles of fault as either a marker for responsibility for the breakup or as an independent wrongdoing. With regard to the first, it seems that Perfectionism should be hostile towards setting a price for exercising one's freedom of exit. On the other hand, the idea of sexual restraint is more sensitive to its source. Hence, a commitment to avoid infidelity, or to compensate a partner for a breach of trust, might be more acceptable if it stems from mutual consent. Likewise, a Perfectionist perspective might be sensitive to the magnitude of the financial sanction, distinguishing between a penalty that actually functions as a barrier and a price that still leaves room for choice. We return to these distinctions in the following chapter.

A final point relates to the role of law in shaping public perception of the institution of marriage. From a Perfectionist point of view, abandoning fault also serves an expressive end: the need to shift the focus of marriage from monitoring sexual morality to promoting mutual respect and support. In that sense, there is a difference between an arrangement originating in legislative default that applies to everyone and a case of arrangements between private spouses, especially if such agreements are uncommon. Thus, the Perfectionist approach can tolerate a limited scope of fault agreements as long as these do not threaten the prevailing public perception of family life, which is reflected in the default, fault-free legal regime. Still, as we will explain below, there might be a need to develop mechanisms to prevent the wide spread of such agreements in order to protect the social institution of marriage in its liberal perception.

In conclusion, the Perfectionist view offers two alternative views regarding sexual morality. One who subscribes fully to the worldview about liberty, self-fulfillment, and authenticity should oppose fault agreements. On the other hand, one might coherently hold a more conservative sexual morality, which stresses obligation and restraint, and thus dissent from the commitment to sexual liberalization and uphold the commitment to contractual liberalization by

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45. We would like to thank one of the anonymous reviewers for challenging us on this point.

46. See Elizabeth S Scott, "Rational Decision-Making about Marriage and Divorce" (1990) 76:1 *Va L Rev* 9. See also Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press, 2017) at 1-17, 41-48.

supporting fault agreements. Both views might be sensitive to the understanding of the role of fault (as either responsibility for breakup or independent wrongdoing), as well as to the social prevalence of the demand for such agreements.

### 3. *Feminism, Equality, and Gender Justice*

The previous section dealt with the Perfectionist point of view, defined around the centrality of liberty and autonomy. This section addresses another version of an ideological liberal view, which we term the Feminist point of view, whose main commitment is to equality and in particular to gender equality and justice within the family. How should such opposition to fault considerations change, when the source for considering fault is an agreement between the parties? Again, we offer a complex answer, which highlights an internal conflict within Feminist thought.

Recall that two main arguments underpinned the Feminist opposition to the consideration of fault. The principled argument opposed the placing of sexuality at the heart of the family relationship, in light of its patriarchal nature, as a matter focused on control and subordination (rather than chastity, fidelity, or morality). According to this approach, the opposition does not lie in the exact content of the legal norm but in its preoccupation with the sexual sphere, which is characterized as a realm of male domination over women.<sup>47</sup> A second and instrumental argument expresses the concern that taking sexual conduct into account could translate into the enforcement of traditional roles within the family, where the man is expected to support and lead, and the woman is expected mainly to carry out domestic tasks and be sexually faithful. To this, one must add the fear of applying sexual double standards, forbidding women from doing that which men are permitted to do. Accordingly, financial consequences of sexual fault will tend to result in female oppression, or could lead to proprietary harm to women.

Both arguments stand even when the source for considering fault is an agreement between the parties. The principled argument, rooted in a radical eschewal of organizing the law around sexual behavior, does not change following such an agreement, especially as we see the Feminist concern as a matter of class (namely: all women) that extends beyond the spouses' private zone. In fact, giving the parties the power to determine the content of their arrangement might actually exacerbate the problem of policing and control eschewed by this position. Likewise, the instrumental-consequential argument does not change, due to the fear that most of the demand to enter into such agreements will come from men seeking to control their wives' conduct. As a result, the wording of such agreements, or the manner in which they will operate in practice, might impose an asymmetrical obligation on men and women, reflecting sexual double standards: Men may demand 'fidelity clauses' more

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47. See Catharine A MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7:3 *Signs: J Women Culture & Society* 515 [MacKinnon, "Feminism, Marxism, Method"]; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) at 113. See also Chao-ju Chen, "Catharine A. MacKinnon and equality theory" in Robin West & Cynthia Grant Bowman, eds, *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 44.



than do women; men, more than women, may attempt to pry and uncover their spouses' sexual conduct; and, perhaps, even the courts will apply such norms differently in relation to men and women.<sup>48</sup> The concern for creating unfair agreements is heightened by inequalities in bargaining power between men and women.<sup>49</sup> Consequently, fault agreements may lead both to the enforcement of traditional roles and to financial harm to women. Thus, at first glance, it appears that the Feminist opposition to assigning financial consequences to sexual fault remains the same, if not intensify.

Alongside this view, however, one can think again of another possibility: a more moderate attitude towards sexuality, open to the Feminist support of contracts. Such a view rejects the vehement opposition to any reference to sexual fault within the law, as long as its source is the parties' agreement. Indeed, while the sexual realm is perceived by some as the linchpin of gender inequality and the subordination of women,<sup>50</sup> this view is rejected by others.<sup>51</sup> After all, women are not strangers to the importance of a strong and lasting relationship and to promoting faithfulness, loyalty, and commitment in their spousal partnership. Anchoring the norm in the parties' free consent in a way that prescribes the norm 'bottom-up' in accordance with the individuals' wishes, can be seen as a lever for changing traditional social perceptions and remedying them with the aid of the contractual tool. Provided that the norms themselves do not reflect gender injustice, and when it is assured that the agreement was entered into by the voluntary choice of both parties, such agreement can protect values of honesty and faithfulness within an intimate relationship without resorting to patriarchy.<sup>52</sup> Emphasizing fairness and contractual norms within the dwelling reflects the idea of obscuring the private-public distinction and respecting women's autonomy.<sup>53</sup> In this spirit, recognizing that husbands historically had more freedom to engage in sexual transgressions than wives, women might want to use such agreements as a means to level the playing field and dissuade their partners from being unfaithful, or as a way to gain recognition for the social expectancy from them, assuring reciprocity and even obtaining value.<sup>54</sup>

According to that view, then, the contract softens the principled problem regarding the regulation of sexual conduct, and adequate use of suitable contractual tools can protect the agreement from the perils of coercion or exploitation. A Feminist view may support the possibility of entering into fault agreements, subject to the need to monitor and regulate such agreements through proper oversight.

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48. Indeed, the definition of adultery itself might be sensitive to the views or even prejudices of the court. *Cf P(SE) v P(DD)*, 2005 BCSC 1290, (applying a conventional definition of adultery in the context of a same-sex intimate relationship).

49. See Bryan, *supra* note 30.

50. See MacKinnon, "Feminism, Marxism, Method", *supra* note 47.

51. See generally *supra* note 35.

52. See Hasday, *supra* note 36.

53. See *supra* notes 29, 32, and 36.

54. See Silbaugh, *supra* note 35 at 93, arguing that fault agreements will allow women to capitalize on the expectation of them to abstain from cheating on their partner.

The bottom line is, again, intricate, and includes two possible conclusions of the Feminist view, this time based not on the morality of sex but rather on the politics of sex.<sup>55</sup> A consistent worldview about the place of sexuality in the subordination of women will lead even the proponents of contractual liberalization to oppose fault agreements based on their principled commitments. On the other hand, a Feminist view might also coherently hold a more moderate view of sexuality (which rejects the ‘sex as a linchpin’ thesis), and support such contracts given possible legal mechanisms that can ensure their fairness, voluntariness, and unbiased operation. We shall return to the possible content of such mechanisms in the next section.

#### 4. Pragmatism

Recall that among the considerations underlying the liberal opposition to proprietary consequences for fault there were also Pragmatic considerations focusing on the inability of fault considerations to promote the interests and welfare of the parties. This is due to multiple factors: the invasiveness of the legal proceedings in terms of privacy; the inadequacy of proprietary compensation in bringing emotional relief; and the fact that dwelling on past infidelity is like scratching a wound and is best avoided. Moreover, from an ex-ante point of view, faithfulness only out of fear of financial sanction has no inherent value, and thus would not achieve the parties’ goal. Since state policy should promote the well-being of its individual citizens rather than abstract social values, the state should prefer a no-fault regime in family law.

How does this Pragmatic liberal position change when the desire to prescribe proprietary consequences to sexual fault stems from the parties themselves? The initiative of the parties, rather than the state, may affect the expected harm and benefit of the arrangement and the scope and legitimacy of state intervention. Thus, for example, an agreement can influence the way the legal proceeding would infringe the parties’ privacy: If privacy is grounded in control,<sup>56</sup> consent might blunt the infringement. Likewise, while fidelity based on compliance to state law achieves no valuable result, a personal obligation expresses a deeper commitment, which might also have a deeper behavioral effect. Moreover, even if it is indeed unwise to prescribe proprietary consequences to sexual fault, restricting the individual in the name of his or her own well-being seems incompatible with the liberal commitment against paternalistic policy purporting to know better than individuals on advancing their own interests against their own active choices. The individual’s opposing position is both a reason to doubt the state’s judgment and a reason not to frustrate the individual’s explicit preference (even if indeed unwise). It seems, therefore, that advocates of sexual liberalization based on Pragmatic considerations (on the strength of the individual’s well-being) are required to moderate their initial position once the consideration of fault stems from the parties themselves.

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55. This phrase echoes Catharine A MacKinnon, “Not a Moral Issue” (1984) 2:2 Yale L & Pol’y Rev 321.

56. See e.g. WA Parent, “Privacy, Morality, and the Law” (1983) 12:4 Philosophy & Public Affairs 269; Alan F Westin, *Privacy and Freedom* (Atheneum Books, 1967).

Upon further reflection, however, even a Pragmatist might tolerate paternalistic intervention in bad choices made by individuals, especially where there are special reasons to believe that the individual is limited in identifying the proper course of action or choosing the most suitable alternative.<sup>57</sup> Among such limits is the challenge to decide in advance about the outcome of a future action. The parties to a prenuptial agreement may be overly optimistic about their own desire for fidelity, or about the probability that the other spouse will prefer a different route in the future. Moreover, such undertaking purports to limit the action of a different future self, while sexual preferences might be dynamic over time.<sup>58</sup> In a similar vein, the parties might err in their assessment of the price accompanying the pursuit of compensation and of dwelling on the wound of violated trust. There might be a realm for paternalistic restriction at such a juncture.<sup>59</sup>

In conclusion, the Pragmatist position towards fault agreements is sensitive to the fact they stem from the parties' choice and tends to respect this choice. At the same time, it advocates securing the individual's welfare while balancing between giving weight to the individual's conscious and prudent choices and taking into account the limitations that may lead the individual to make the wrong choices. The result should be a willingness to subject such agreements to procedural oversight or to possible content-related restrictions while also recognizing and respecting the parties' right to decide on their own.

### 5. Institutional Considerations

The fifth perspective advocates for both sexual and contractual liberalism on Institutional grounds. How do these considerations change when the source for considering fault is the parties' agreement? The Institutional approach is concerned with the challenges that arise from executing fault agreements in the real world, including the need to hear evidence, establish facts, and enforce the agreements. To clarify, we can divide these considerations into two subgroups. The first group, discussed in section III.5.a, focuses on the ability to implement the agreement and achieve the benefits inherent in it. The second group, which we will deal with in section III.5.b, focuses on the indirect implications of resorting to such agreements in terms of their effect on the judicial system.

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57. See Eisenberg, *supra* note 43.

58. See e.g. Stephen B Levine, "The Nature of Sexual Desire: A Clinician's Perspective" (2003) 32:3 Archives Sexual Behavior 279; Dietrich Klusmann, "Sexual Motivation and the Duration of Partnership" (2002) 31:3 Archives Sexual Behavior 275; Chien Liu, "A Theory of Marital Sexual Life" (2000) 62:2 J Marriage & Family 363.

59. Another possible justification for a paternalistic approach is the fact that the restriction here does not aim to question the individual's values but rather helps the individual to adjust the means to suit his or her own ends (namely a marriage based on sexual exclusivity), and to avoid an erroneous choice that fails to acknowledge the absence of a rational connection between the chosen means and the desired end. It respects the value judgment of the individual, interfering only in the factual judgment. In that sense, in Gerald Dworkin's terms, it is a case of "weak" (rather than "strong") paternalism. Gerald Dworkin, "Paternalism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2020), online: <https://plato.stanford.edu/archives/fall2020/entries/paternalism/> at §2.3.

*a. Operational Considerations: Generalization, Identification, and Quantification*

When we presented the general case against fault considerations, we mentioned the difficulty of generalizing a uniform norm with respect to a diverse population, or correctly identifying the preferences of individuals. Likewise, it is hard to correctly identify the misconduct that should be considered and to attach the appropriate price to this behavior in terms of setting the proper amount of damages. This sort of objection seems to change when the parties themselves determine the relevance and content of fault, as well as its effect, in their privately negotiated agreement. In such a case, where a couple deviates from the default rule and expressly defines the couple's shared views on the matter, there is no need to generalize and no challenge of preference identification. In this respect, agreements can allow the law to carefully tailor its approach, applying different norms to different couples according to their own expectations, both as to the idea of marriage and to the way their separation should be adjudicated. Advocates of sexual liberalism due to the challenge of generalization and identification should therefore completely renounce this objection when the parties state their own preferences by way of contractual agreement.

The question of correctly defining and identifying misconduct within the parties' complex marital relationship is somewhat more complicated. This is true especially if one wishes to see the act of infidelity as synonymous with responsibility for the marital breakdown. Even if the parties want the court to identify the culpable party, an external evaluator is limited in both the fact-finding abilities and the adequate interpretation given to these findings. Yet this problem might be mitigated if the agreement itself deals with the problem of identification by accurately defining the conduct that the parties view as wrongful. Such definition can function in one of the following ways. First, the couple can use the agreement to set their red lines. Thus, although 'infidelity' is often the result of a complex set of circumstances in a relationship (the 'tip of the iceberg' argument), the parties may still stipulate that such conduct is unacceptable to them (in the same manner in which the law, rightly, refuses to address the circumstances that precede domestic violence), but see it as utterly inappropriate regardless of its context or background. According to a second and related line of argument, even if the parties do not deny the possible complexity surrounding infidelity, they may seek to set precise milestones that will allow the law to intervene in the conduct of the relationship, precisely to deal with identification difficulties. As taught by the neo-formalist school of thought in contract law, the parties might strive for an imperfect judicial determination as preferable in their eyes to completely ignoring the entire issue (as ignoring the issue may also imply error).<sup>60</sup> Thus, in those cases where the parties themselves have clearly defined what amounts

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60. For the neo-formalist justifications to textual interpretation of contracts, see Alan Schwartz & Robert E. Scott, "Contract Interpretation Redux" (2010) 119:5 Yale LJ 926.

to sexual fault in their eyes in a clear and observable way, the institutional difficulty involved in the identification problem is removed.

Another difficulty lies in the challenge of assessing and quantifying the damages, namely the misconduct's effect on the property outcome. If it is not appropriate to set a price for the dissolution of the relationship, and if infidelity as an independent tort does not carry any assessable damages, then sexual fault cannot affect the property outcome. At first glance, it appears that this problem, too, is mitigated once the parties themselves stipulate the terms of their agreement and attach a price to the misconduct as they see fit. Thus, in those agreements which expressly determine the extent of the proprietary consequences and do not leave this task to the court, it appears that the problem of assessment and quantification has been resolved. However, at second glance, there might be a concern that derives from general objection to penalty clauses and to liquidated damage clauses that function as a penalty.<sup>61</sup> The concern is that the compensation that the parties to the contract may prescribe will serve as a punitive mechanism for deterring parties from breaking up the relationship, which, as stated above, is *ex hypothesi* unacceptable. Thus, in order for the problems of assessment and quantification to be resolved, the parties themselves have to set the price attached to infidelity in a way that reasonably reflects the real damage associated with the misconduct.

#### *b. Efficiency and Integrity of the Legal System*

Adjudicating questions of sexual fidelity might burden the legal procedure in terms of time and resources. Worse, systematic unreliability in fact-finding, coupled with a need to examine the minutia of intimate relationships between couples that places the court in the embarrassing position of 'voyeur', might lead to distrust in the courts and contempt for the judiciary. These problems remain even if the origin of the norm is in a private agreement. While specific stipulations and definitions of the type described above can alleviate the difficulties of identification and partly mitigate the difficulty of voyeurism, there is admittedly a trade-off between invasiveness and reliability, meaning that operating less intrusively will increase the problem of reliability. For that reason, it seems that the Institutional opposition in this regard also applies to fault agreements. Furthermore, a central position in general contract law opposes *ab initio* dealing with trifles or with non-financial issues, emphasizing the nature of the contract as a public institution designed to advance public interests rather than enforcing private promises.<sup>62</sup> In the familial realm, even proponents of familial agreements were reluctant to attempt to regulate the conduct of the parties over the course of the marriage.<sup>63</sup>

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61. See *Whiten v Pilot Insurance Co* [2002] 1 SCR 595; Kenneth W Clarkson, Roger LeRoy Miller & Timothy J Muris, "Liquidated Damages v. Penalties: Sense or Nonsense?" (1978) 54 Wis L Rev 351. Cf *Restatement (Second) of Contracts* §§355, 356(1) (1981).

62. See Cohen, *supra* note 31 at 591.

63. See Brian H Bix, "Private Ordering and Family Law" (2010) 23:2 J American Academy Matrimonial Lawyers 249 at 259-60.

In conclusion, our discussion has demonstrated that part of the institutional challenges raised by fault consideration might be mitigated once the source of these considerations is in the parties' privately negotiated agreement. Accordingly, contractual mechanisms alleviate the operational challenges of generalization, identification, and quantification. On the other hand, Institutionalism objections based on efficiency or integrity of the legal system are less affected by the source for considering fault. Therefore, the Institutionalism perspective does not provide a clear verdict regarding the desirability of enabling fault agreements, yet the analysis highlights the complexity and nuances of this perspective.

## **6. Summary**

To summarize this section, let us collect the conclusions that emerge from each one of the distinct liberal perspectives and classify them into three main groups: support for fault agreements, opposition to such agreements, and an intermediate position that poses conditions for support for such agreements or limits support to certain circumstances. Starting with the Neutral-Pluralistic approach, an examination of the convictions underlying these positions led to an endorsement of fault agreements in a manner that reflects an alliance between sexual liberalization and contractual liberalization. In contrast, the scrutiny of both the Perfectionist and the Feminist perspectives led to a much more nuanced approach. At first glance, it seemed that from these perspectives the same considerations underlying opposition to fault are equally valid even when the source of the consideration of fault is an agreement between the parties. However, within both Perfectionism and Feminism, we also identified a possible divide, dependent upon the moral or political view of the sexual realm. The Perfectionist opposition that is rooted in the centrality of authenticity, self-fulfillment, and individuality was confronted with an opposing approach to autonomy, stressing self-obligation, restraint, and commitment. The Feminist opposition that stems from the political perception of sexuality as the linchpin of women's subordination was distinguished from other possible views, which see the keystone of discrimination against women in the exclusion of justice from domestic life. According to these views, contractual regulation of domestic life enhances the ability of spouses to enforce domestic obligations that have traditionally been perceived as based on altruism and affection, and to promote their own interests. Therefore, both of these variants of Perfectionism and Feminism should sometimes support fault agreements, depending on the specific content of the proposed agreement. Consequentially, these two positions actually belong to a third category: one of conditioned support.

Limited, conditioned support is dictated also by the members of the fourth, welfare-focused Pragmatist view, which supports such agreements only under supervision that will ensure voluntariness and protect individuals from harmful and misguided choices. Likewise, Institutionalism thinking—which focuses on operational considerations—supports agreements that successfully address these issues by specifying and clearly defining the concept of fault, the nature of the

misconduct, and the proper compensation, while being skeptical towards the effect of such agreements on the efficiency and integrity of the legal system. All that remains is, therefore, to outline possible general conclusions that take into account the full range of considerations, reflecting the multilayered view of liberalism. This will be the focus of the next part.

#### **Section IV. Conclusions, Decision, Implications**

We concluded the previous section with three positions, each derived from the fundamental commitments of each type of liberal approach characterized in the discussion. This section strives to integrate the various points of view in formulating an overall liberal position and to pave the way to practical conclusion. Towards this goal, we will explore the possibilities of settling the tensions and contradictions between the various perspectives, either by way of full-hearted support of a conclusion; an easy compromise (when various perspectives can converge around a conclusion they have no strong reason to oppose); or even what can be portrayed as a metaphorically painful compromise—i.e., an arrangement in which a party is willing to pay a price to achieve a solution agreeable to the other parties. Finally, as we shall see below, sometimes arrangements that serve one perspective will actually increase the price in the eyes of an opposing perspective. In these latter cases, there will be no alternative but to choose among the variants of liberalism.

##### ***1. Three Types of Mechanisms***

In an attempt to find as broad a common denominator as possible, we start our journey toward a general conclusion by exploring the optional conditions and limits that would make fault agreements acceptable, from the perspectives that fall under the umbrella of the third category: supporting fault agreements only conditionally. Seemingly, these conditions would be tolerable from the point of view that supports such agreements even unconditionally (in an easy compromise) and might even reduce and curb the opposition of the opponents (enabling a painful compromise). We suggest dividing these conditions into three main branches of possible regulation. The first two are the common pair of supervising the process of concluding the agreements and focusing on the content of the agreements.<sup>64</sup> A third method of regulation—which has thus far not been comprehensively discussed in the literature—focuses on the question of the prevalence of these agreements in a given society, as will be explained below. Let us discuss how such possible regulative methods are related to the underlying rationales of the various points of view.

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**64.** See Arthur Allen Leff, “Unconscionability and the Code—The Emperor’s New Clause” (1967) 115:4 U Pa L Rev 485. An example of the application of both procedural and content-based mechanisms can be found in *Lloyd*, *supra* note 10 at 15-22.

### *a. Procedural Mechanism*

The contract law toolbox as it relates to the formation procedure includes a number of possible tools. First, the conclusion of the contract can be conditioned on mechanisms that ensure that the parties are well aware of the content of their agreement, and that they have made the decision in a considered and responsible manner. Thus, for example, a requirement could be set for both parties to be provided with adequate information (including information on risks), an appropriate period of time to make a considered judgment, and even separate legal representation. Likewise, the validity of the agreement can be subjected to judicial approval that ensures the parties' voluntariness. Use of such procedural mechanisms stems from the Feminist concern about marital agreements exploiting power and information discrepancies between the spouses, thereby harming women. Likewise, their use also stems directly from the Pragmatist concern regarding erroneous decision-making and the need for moderate paternalistic intervention in order to cope with possible over-optimism and the difficulty of assessing the preferences of one's future self; the price of judicial intervention; or even the irrationality of an attempt to achieve fidelity through legal sanctions. From the Perfectionist point of view, by employing procedural mechanisms one can assume that only insistent couples—whose desire to enter into such agreements includes a willingness to meet the prices attached to the onerous approval process—will enter such agreements. In addition to reducing the prevalence of such agreements, procedural mechanisms also ensure that the agreement will reflect a well-thought-out autonomous decision and demonstrate the price of imposing restrictions on these couples. While not enlisting the support of the Perfectionists or blunting their initial opposition, a Perfectionist perspective prefers a world with procedural mechanisms over a world without it.

This is not true for the position arising from the Neutralist-pluralistic point of view. At first glance, this perspective—which supports fault agreements—might see the reinforcement of the parties' voluntariness through procedural mechanisms as redundant, yet not resistible. However, upon further reflection, an upholder of Neutrality and Pluralism may actually be wary of such procedural oversight. The libertarian desire to protect family life from top-down dictation of a particular perception of the good might raise the concern that, under the guise of procedural oversight, courts might seek to enforce their own view regarding the proper way of life. Thus, for example, a judge might refrain from approving an agreement, or all too easily find defects in the contracting process, when the agreement does not conform with the 'right' values. The Neutralist-pluralistic liberal might thus insist that procedural supervision will not seep into control of content.

### *b. Content*

Another approach to supervising agreements is focused on the content of the contract, whether at the stage of conclusion or at the stage of performance. For



instance, it is possible to examine the fairness of the agreement's terms, or to invalidate terms that are against public policy. In the context of fault agreements, various restrictions might be relevant. First, out of a concern for gender equality, a court can prevent unilateral implementation or sexual double standards, both in the terms of the agreement and in its enforcement. Such supervision may almost entirely remove the instrumental concern that fault agreements would enforce traditional gender roles or lead to adverse proprietary outcomes specifically for women. Even from the principled point of view, which focuses on placing sexuality at the center of the relationship as a patriarchal practice of control and subordination, adherence to equality may somewhat blunt resistance, making fault agreements more bearable from the Feminist point of view.

Second, out of concern for autonomy, there is a difference between an agreement that is burdensome to those seeking to exercise the option of leaving a relationship, and an agreement that only seeks to regulate the procedure for exiting (e.g., requiring the spouse seeking to dissolve the marriage to wait to establish a new relationship until after the first relationship has been properly dissolved). Similarly, the performance of the agreement can be circumscribed according to the degree of restriction on sexual freedom inherent in it, in a way that might invalidate, for example, a restriction on acts such as the realization of one's true sexual orientation, or acts that otherwise reflect deeper self-fulfillment or authenticity. In the same spirit, the level of infringement on one's autonomy might depend on the extent and nature of the fine imposed on the party violating the agreement. There is room for distinguishing between harsh and moderate property consequences (either relative or absolute); between a denial of an entitlement and a disapproval of a benefit; and so on. Relaxing the burden associated with a violation of the contract by way of lowering the sanction's severity addresses the instrumental concern for the effect of the agreement on one's behavior, and also mitigates the more principled concern, since it sets a more bearable price on one's choices.

However, it is important to note that, while content restrictions of various kinds may harness positions that originally expressed opposition to the agreements, the very supervision of the content may again provoke new opposition from the point of view that seeks for state neutrality. While a libertarian can come to terms with procedural oversight that leaves most of the decision in the hands of the parties themselves, oversight of the content of the contract reflects substantial state intervention based on public perceptions in a manner that would frustrate precisely what this position sought to achieve by resorting to private agreements. In this respect, it is not a tolerable price, but rather a price that undermines the principal goals and commitments underlying the Neutralist viewpoint. The question of content restrictions may thus provoke a dilemma that requires a resolution or determination, reflecting a controversy within the liberal tradition.

Another, different type of content-dependent constraint may cure, or at least weaken, Institutional opposition. A concern about discrediting the judicial institution (for engaging in trifles or such) may be dismissed where the parties do not seek judicial involvement, but rather prefer lack of such involvement

through the use of independent mechanisms of enforcement (such as deeds or trusts), or when the parties seek to settle their disputes before an arbitrator.<sup>65</sup> Similarly, the degree of judicial resources devoted to the agreements is also sensitive to the degree of detail with which the parties have defined the misconduct and its consequences. A high degree of detail, or an accurate definition of the prohibited conduct, may also reduce the extent of invasion and infringement of privacy, as well as the problems of knowledge and generalization discussed above. If so, limiting fault agreements to highly specific agreements, which saves the court the need to interpret, inspect, and evaluate the misconduct and its consequence, or even limiting agreements to those that do not require judicial involvement or public resources to enforce them, should weaken opposition based on institutional considerations. Such limitation is consistent also with the view of the Neutralist-libertarians, who aspire to leave the control of the agreements in the hands of individuals and to limit the scope of judicial involvement in determining the terms of the agreement according to public values.

While diminishing the concerns of the Institutionalists and gaining the support of the Neutralist-libertarian, these adjustments may exacerbate the Feminist concern, which may see over-detailing, or precise definition of misconduct, as a type of patriarchal policing and control. Even if worded symmetrically, such an agreement is suspected of operating asymmetrically along gender lines, arming domineering men with legal tools to limit their spouses' actions.<sup>66</sup> Similarly, the transfer of agreement enforcement to non-judicial mechanisms may exacerbate the Feminist fear of exploitation of power disparities, abandoning the arena to private fora in which parties may not be committed to equality. Finally, the very Institutional reluctance to engage in the relationship-intimate realm is in direct tension with the convictions that underlie the Feminist support of familial agreements governing ongoing behavior. In Feminist eyes, the institutional concerns are harboring patriarchal assumptions, according to which family matters related to the intimate sphere are less important and therefore unworthy of an allocation of public time and resources. In the same spirit, the idea that adjudicating the intimate sphere will lead courts into disrepute may be perceived as reflecting a masculine agenda that demarcates the personal-residential space as out of bounds, and contradicts the basic Feminist insight about the need to avoid separating the domestic space from norms of justice and fairness.

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65. For the special case of arbitration before religious tribunals, see the discussion at Section IV.2.a.

66. See the discussion at Section III.3. An interesting comparison can be drawn between sexual fault agreements and chastity clauses that negate and invalidate a woman's right to engage in intimate relationships even after divorce. Canadian law has disapproved of such stipulations. See e.g. *Family Law Act*, RSO 1990, c F 3, s 56; Malcolm C Kronby, *Canadian Family Law*, 10th ed (Wiley, 2010) at 20, 23,167.

*c. Scope and Scale*

Along with the possibility of supervising the formation of the contract or its content, another mechanism can make fault agreements more tolerable from additional perspectives. This mechanism, which indeed is not common in contract literature, focuses on the extent to which such agreements are prevalent in society, or could be prevalent in it.<sup>67</sup> To limit the prevalence of such agreements, one might consider either a quota of permitted agreements or a general attempt to reduce their appeal. Another alternative is to focus on how widespread such agreements might become (i.e., how slippery the slope towards widespread distribution really is, or how ‘contagious’ such agreements might be). If there is indeed a fear of widespread distribution, there may be reason to prevent them from the outset, even to a limited extent.

A wish to control the prevalence of fault agreements without completely eradicating them may correspond to a number of the perspectives that we have analyzed. A limited scope of such agreements does not affect the social institution of marriage or weaken the trend towards severing the traditional bond between marriage and the policing of sexuality. The expressive function of the law is served by the default, hence a liberal can tolerate a limited deviation from what is perceived as the appropriate model without a significant sacrifice of liberal principles.<sup>68</sup> From the Pluralist point of view, which is committed to the existence of different ways of life (whether in order to allow each individual a significant choice between alternatives, or to allow diverse cultural groups to live together), fault agreements are welcomed as an option among others. Such a view should not insist on a limited quota, yet might have concerns when there is a fear that one position will completely encroach upon the other, or—pursuant to the multicultural alternative—transcend the boundaries of the cultural minority group and affect the perceptions prevalent amongst the majority.<sup>69</sup> Thus, the pluralistic point of view will be sensitive to the fear that fault agreements might spread uncontrollably and adversely affect diversity or social relations.<sup>70</sup>

Even views that support the complete eradication of fault agreements on an ideological basis might tolerate a small amount of deviation from what is perceived as the desired situation, especially when this deviation rests on the position of a determined small group that might cause a confrontation if forced to abide by

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67. Although uncommon, one can find parallels in fields such as antitrust law, immigration policy, and zoning law.

68. See Carol Weisbrod, “On the Expressive Function of Family Law” (1989) 22 UC Davis L Rev 991; Carl E Schneider, “Moral Discourse and the Transformation of American Family Law” (1985) 83:8 Mich L Rev 1803 at 1827; Elizabeth S Scott, “Social Norms and the Legal Regulation of Marriage” (2000) 86:8 Va L Rev 1901.

69. Thus, for example, the possibility to create fault agreements might project onto other couples in a way that would turn marriage without a fault agreement into a declaration of infidelity. In certain cultural-social conditions, that in and of itself is enough to cause entire social circles to feel compelled to draft fault agreements, even if there was never any such demand.

70. This concern may stem from a society’s conservative nature, or from the nature and types of relationships between its different segments. For further elaboration, see the discussion around the case study of religious tribunals at the text accompanying note 77.

the majority's position. This last argument might persuade those who hold Pragmatic or Institutional views too. To conclude, then, in formulating the overall liberal position on fault agreements, there is a place for considering a mechanism based on limiting the scope and scale of such phenomena.

How can scope-based restrictions be implemented in practice? Ostensibly, the main route is to take the bull by the horns and prescribe a quantitative quota that will limit the prevalence of such agreements. But aside from the challenge of fairly distributing such a quota, the quota solution is inadequate in certain central respects. First, it does not filter those resorting to such agreements based on the intensity of their preference, and therefore may not solve the conflict with particularly insistent groups. Second, such a mechanism does not suppress demand. In fact, it may lead to the opposite result, whereby such agreements will be considered a coveted arrangement, and thus act against the expressive concern described above. Finally, it is incompatible with multicultural motivations, which seek to link the prevalence of the agreements to the relevant socio-cultural circles. In the latter respect, a desirable mechanism would allow for the use of such agreements only within the boundaries of the given minority group, whenever the boundaries of the group can be clearly identified. For these reasons, instead of a quota, the law can reduce the demand for such agreements by placing obstacles before those who want them—for instance, by imposing costs on the formation of these contracts through the procedural and content-based mechanisms mentioned above. If under the given social conditions there is a fear that such agreements will become a widespread norm, these costs might aim at achieving a more restrained result.

#### *d. Summary*

In this section, we have considered various mechanisms that can be widely supported by some of the typical liberal positions reviewed, despite their different starting positions, whether by circumventing their concerns or by alleviating them. Establishing procedural and content-related provisions for entering into fault agreements will create a sticky default that reflects public policy; serves as a nudge that will guide citizens towards the most adequate choice for them; addresses concerns about freedom of choice and the agreements' consequences; and inherently decreases the prevalence of such agreements. While different basic positions converge around these mechanisms, a few positions actually diverge, since a solution to one creates a new concern for the other. Not surprisingly, ideological ends tend towards divergence while the practical and Pragmatic considerations are, by their nature, more amenable to compromise, hence tending toward convergence. The next sub-section demonstrates these dynamics of both allowing for relative convergence around agreed-upon solutions and exposing fundamental ideological disagreements. This is achieved by analyzing two possible implications of our discussion in two practically significant contexts: agreements to adjudicate the separation before a religious tribunal, and 'reconciliation

agreements' (i.e., agreements that result from a crisis in the parties' relationship and are designed to facilitate the reconciliation of the parties).

## 2. *Two Implications*

### *a. Appeal to a Religious Tribunal*

Many Western democracies that include significant religious minorities must deal with parties' preference to settle family matters before religious tribunals (and by implication, in accordance with religious law).<sup>71</sup> This phenomenon has garnered a range of normative responses, ranging from strong opposition that excludes such tribunals from ordinary arbitration arrangements,<sup>72</sup> to an approach that respects the parties' preference and even willingness to enforce arbitration agreements,<sup>73</sup> through an intermediate position seeking to limit and monitor religious tribunals for compatibility with public policy.<sup>74</sup> Most of the discussion concerning this question has traditionally relied on general questions of: 1) church and state (in particular about disestablishment); 2) gender equality (given traditional norms regarding division of labor within the family); and 3) concerns about the voluntariness of seeking such arrangements in devout religious societies. Yet an appeal to allocate marital property in accordance with religious law typically exposes the parties, inter alia, to fault considerations. Thus, agreements referring to religious law are also a sub-case of fault agreements, and so it is helpful to also think of them from this point of view, isolating this aspect from the other aspects of the dilemma. Accordingly, we will discuss the case in light of the five main

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71. In the current discussion, we will not deal with a similar issue, which involves a religious authority as a mediator or such. We deal here only with appeals to religious tribunals that explicitly apply religious norms to the division of property between the parties. Similarly, we will not discuss civil enforcement of religious agreements, such as a *Ketubah* or *Mahr*. For an exploration of those topics, see e.g. Brian H Bix, "Marriage Agreements and Religion" (2016) 2016:4 U Ill L Rev 1665; Ann Laquer Estin, "Toward a Multicultural Family Law" (2004) 38:3 Family LQ 501 at 521-22; Marie Ashe & Anissa Hélie, "Realities of *Religio-Legalism*: Religious Courts and Women's Rights in Canada, the United Kingdom, and the United States" (2014) 20:2 UC Davis J Intl L & Policy 139; Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) 9:2 Theoretical Inquiries L 573.

72. See "The Promise and Perils of Religious Arbitration: New Research, Emerging Trends, and Practitioners' Perspectives" (3 March 2022), online: *Canopy Forum: On the Interactions of Law & Religion* canopyforum.org/the-promise-and-perils-of-religious-arbitration. For Canadian legislation opposing agreements that defer to religious arbitration, see Daphna Hacker, *Legalized Families in the Era of Bordered Globalization* (Cambridge University Press, 2017) at 95; Lorraine E Weinrib, "Ontario's Sharia Law Debate: Law and Politics Under the *Charter*" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (UBC Press, 2008) 239 at 250-58. For criticism of the legal recognition and credibility of arbitration arrangements in English law, see Samia Bano, "Islamic family arbitration, justice and human rights in Britain" (2007) 1 L Social Justice & Global Development J 2.

73. See *Avitzur v Avitzur*, 446 NE 2d 136 (NY App Ct1983); Ann Laquer Estin, "Embracing Tradition: Pluralism in American Family Law" (2004) 63:3 Md L Rev 540; Faisal Kutty, "The Myth and Reality of 'Shari'a Courts' in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings" (2010) 7:3 U St Thomas LJ 559 at 566-572.

74. See the overview and cases presented by Hacker, *supra* note 72 at 93-101; Leckey, *supra* note 4.

points of view we presented in the previous sections and the possibility of reaching a unified liberal conclusion.

Take the position we characterized above as Neutralist-pluralist. The desire of religious minority groups to be subject to a religious judicial process in their family affairs highlights the extent to which the question of fault in family law reflects a deep moral controversy or even a culture war.<sup>75</sup> This fact strengthens the demand that the state refrain from resolving this moral dispute, enable open discourse and various lifestyles, and allow minority groups a space to preserve their culture and values.<sup>76</sup> A different point of view arises from two main ideological directions: the Perfectionist that focuses on autonomous choices, and the Feminist that focuses on equality. These points of view will first seek to ensure that religious arbitration agreements will not insert content ‘through the back door’ that should have been subject to direct restrictions. The prism of fault agreements underscores the extent to which a discussion of property division rests profoundly on fundamental questions about the scope of sexual liberty and the right to leave a marriage. Moreover, from a Feminist point of view, the difficulty inherent in focusing on the parties’ sexual behavior is exacerbated in light of the tendency of religious norms to reflect sexual double standards, and in light of the prevailing practice of religious tribunals as comprising only men.<sup>77</sup> This opposition to religious norms serves also as an argument aimed against the qualification of religious tribunals as private arbitrators. Finally, a special sensitivity arises to the fate of those who are considered a ‘minority within a minority’—that is, the status of women within the minority group, who might thus be subject to a unique kind of oppression. Religious arbitration agreements might not therefore be better than a regular fault agreement, and might actually be worse.

A more complex position stems from the perspective that focuses on the expressive aspect of the legal norm regarding the nature of marriage as a social institution. In this respect, the fact that the fault-dependent norms are not an explicit part of the agreement, but arise from it indirectly, alleviates the difficulty. When such arrangement is prospectively limited to a minority group and implemented through private mechanisms rather than an official institution, this might even reinforce the nature of the main social institution that suits those who are fully part of the values of the majority community. However, from this point of view, one must beware of cases in which the influence of the religious model of the family might displace the general one. This is the case, for example, when the

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75. See Michael J Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford University Press, 2017) at Introduction & ch 2.

76. Yet a Neutralist approach that rests on a commitment to libertarianism may disapprove of agreements that do not reflect a personal and independent decision but rather stem from a commitment to one’s social group, or from self-subordination to the judgment of other forceful groups. We’ll return to evaluate and elaborate on this point later, while discussing the Pragmatic position.

77. But see e.g. Euis Nurlaelawati & Arskal Salim, “Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia” (2013) 51:2 *Al-Jami’ah: J Islamic Studies* 247; Wesam Shahed, “Reexamination of Islamic Laws: The Entrance of Women in the Sharia Courts” (2019) 28:1 *Mich St Int’l L Rev* 139.

group that relies on religious tribunals is large enough to influence the prevailing perception of what is right and acceptable, or when the borders between the social groups are fluid and easy to cross.

A complex position also emerges from the Pragmatist perspective, which focuses on the well-being of the individual and the proper limits of paternalistic intervention. On the one hand, the choice of a religious tribunal raises general doubts about the degree of voluntariness of the choice in the face of community or social pressure. Moreover, the fact that this is an overall choice that reflects an all-inclusive package of religious norms might not reflect a choice about the importance of fault in property relations, and in this respect, raises doubts as to whether the individual knows better than the state which alternative is preferable for him or her. However, on the other hand, it can be argued that comprehensive reliance on tradition actually reflects a deeper *animus contrahendi* in relation to the set of values and principles embedded in the traditional perception of marriage. Moreover, while the usual paternalistic opposition to fault agreements has relied, *inter alia*, on a concern of over-optimism or the regulation of a different future self, such arguments seem to demand more humility in the face of a model based on a tradition-anchored solution, which draws its rationale from what can be described as ‘the wisdom of the ages’, or cumulative, multi-generational experience.

Finally, from the Institutional perspective, there seems to be unreserved support for appealing to religious tribunals, at least as long as these procedures do not require excessive involvement by the courts. Such arbitration agreements do not require the courts to waste their time on what may appear to be ‘trifles’, nor do they require courts’ intrusion into the parties’ personal lives, ‘contaminating’ themselves with the intimate details of the spouses’ lives. Thus, there is no cost in terms of judicial time or institutional integrity. This position clearly reveals the inherent tension between the Institutional position and the Feminist position as described above, as it plainly demonstrates how considerations of efficiency and institutional integrity may lead to the abandonment of important areas of life to the unregulated field of unofficial judgment. More broadly, the test case of religious arbitration agreements illustrates the context in which the divide between the various liberal positions described in the article is exacerbated. In contrast, the next test case illustrates the possibility of a reverse dynamic.

#### *b. Reconciliation Agreements*

Along with prenuptial agreements and divorce agreements, a special case of marital agreements is reconciliation agreements—that is, agreements entered into in light of a crisis in the parties’ relationship following a decision to reconcile. In the present context, we will focus on situations where the cause of the crisis was infidelity by a spouse. In such cases, the parties may seek to prescribe, as a condition to reconciliation, that a sanction be attached to future infidelity, to deter the unfaithful spouse from such conduct and to give real effect to his (or her) undertaking not to follow this route again. While sometimes a property transfer is part

of the reconciliation process itself (as a condition for reconciliation or as compensation for past infidelity), our interest here is only in agreements dealing with the consequences of future infidelity. Again, this case is a special sub-case of fault agreements. The prevailing position in case law does not view reconciliation agreements as a special category, beyond a possible reservation regarding the very ability to conclude agreements postnuptially.<sup>78</sup> However, in this context of fault and fidelity, there are signs of a special and slightly different approach, demonstrating willingness to recognize fidelity as relevant to the conclusion of the contract.<sup>79</sup> In this spirit, we wish to demonstrate that in the special case of reconciliation fault agreements, the cumulative weight of a number of features may tip the scales towards a unique legal attitude in favor of such agreements.

Let us open with the Pragmatist point of view, which questioned the parties' ability to adequately anticipate, at the stage of entering into the marriage, how they would seek to act in the event of future infidelity. When it comes to a reconciliation agreement of the sort discussed here, the parties are no longer overly optimistic about the chances of maintaining monogamous fidelity in the relationship. Similarly, the parties may rely on their personal experience in deciding how to respond to such a breakdown in the relationship, including the question of whether or not to turn to the law in handling their pain. This is even more true when the content of the agreement is not aimed at a hypothetical future event but at a particular third party or similar circumstances. In such cases, it seems that the parties fully understand the alternatives they face; hence, it is hard to claim that the law protects the parties from their own misguided judgment by restricting fault agreements. There is still a place, however, to use proper procedural mechanisms to address the concern that such an agreement is entered into in the midst of a highly-agitated emotional state or out of momentary feelings of guilt, which can affect the parties' rational judgment.<sup>80</sup>

Similarly, such agreements are less problematic from an Institutional point of view. The parties' familiarity with the circumstances of the concrete occurrence of infidelity may help them more accurately define what they perceive to be misconduct. This could relieve the courts of the burden of interpretation and the need

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78. See Bix, *supra* note 12 at 377; Linda J Ravdin, "Postmarital Agreements: Validity and Enforceability" (2018) 52:2 Family LQ 245. See also *Spurlin v Spurlin*, 716 SE (2d) 209 (Ga Sup Ct 2011).

79. This is either by seeing a fidelity commitment as a consideration, as relevant to the bona fides of the spouses, or as relevant to classifying a threat to leave the relationship as duress (holding that a threat to do so is not coercive if preceded by infidelity by the other party). See *Dawbarn v Dawbarn*, 175 NC App 172, 625 SE (2d) 186 (NC Ct App 2006); Brian H Bix, "Agreements in American Family Law" (2013) 4 Intl J Jurisprudence Family 115 (referring to such cases as "sporadic, inconsistent, and unsettled," *ibid* at 122 [footnote omitted]); *Stevens v Stevens*, [2012] OJ No 511, 2012 ONSC 706, 109 OR (3d) 421; *In re Tabassum and Younis*, 881 NE (2d) 396 (Ill Ct App 2007); Ravdin, *supra* note 78 at 247-48, 263-65. See also *Lloyd*, *supra* note 10 at 15-21 (upholding the agreement despite a \$7 million penalty in the event of future infidelity, while declaring the possibility of finding such agreements unconscionable).

80. For the effect of guilt on adjustment and negotiation, see e.g. Judith G McMullen, "Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce" (2011) 19:1 Duke J Gender L & Pol'y 41 at 58; Nehami Baum, "'Separation Guilt' in Women Who Initiate Divorce" (2007) 35:1 Clinical Social Work J 47 at 48.



for invasive fact-finding. In addition, the scope of reconciliation agreements is, of course, more limited, as it depends on the occurrence of concrete circumstances. Thus, tolerating reconciliation fault agreements is not likely to excessively burden the courts, or substantially affect the general social perception of the institution of marriage or marital relationships. All of these perspectives tend therefore to converge in favor of supporting the possibility of entering into such agreements relative to ordinary fault agreements.

On the other hand, and in contrast to the previous case, ideological proponents have no special reason to oppose reconciliation agreements. On the contrary: A knowledgeable decision to recommit to a relationship is not very harmful to one's autonomy, as long as content-based oversight would ensure that the financial sanction is not too high in a way that might foil the parties' right to initiate divorce. To the extent that reconciliation agreements may be more prevalent following men's betrayal of women and not vice versa, reconciliation agreements should be more acceptable also from the perspective of gender equality, as their purpose is not to monitor women's behavior or to effectuate property transfers from women to men. At least as long as such agreements do not include excessive policing of spouses' behavior, and subject to proper assurance of their voluntariness, reciprocity, and fairness, reconciliation agreements might be tolerable for ideological liberals, despite their initial hostility towards fault considerations. Therefore, subject to the natural limit on scope and to proper supervision on the process of concluding the agreements and on their content, various liberal perspectives tend to converge in support of reconciliation fault agreements. Accordingly, the law should permit parties to enter into reconciliation fault agreements and enforce them.

## Conclusion

Our discussion and its conclusions pertain to three different levels. On the *first* level, we discussed the legal regulation of agreements that stipulate that a spouse who commits sexual infidelity will suffer property consequences. We have shown that the legality of such 'fault agreements' should not be decided in an arm-wrestling match between the 'fall of fault' and the 'rise of contracts'. Rather, we proposed to focus on the reasons behind these two evolutions in modern family law, demonstrating that fault agreements do not necessarily invoke a true dispute between opponents of fault and upholders of marital contracts. Accordingly, seemingly adversarial positions are sometimes revealed to not actually disagree, enabling a resolution of their conflict without renouncing their underlying convictions. In this spirit, we have shown that there is no real disagreement among those who are committed to liberalism for reasons of Neutrality and Pluralism, since the proponents of sexual liberalization of this camp should remove their objections to the relevance of fault once the source of considering fault is in the parties' agreement. In the opposite direction, we have shown how Perfectionist and Feminist advocates for contractual liberalization might see fault agreements as jeopardizing freedom and gender equality, and exposed bitter

debates within these perspectives about the ideological foundations underlying their viewpoint. Thus, seemingly rival parties are exposed as allies once we notice the reasons behind their positions. Yet the opposite is also true: Attitudes that were joined in supporting the fall of fault or the rise of agreements were revealed to be in deep controversy and to induce opposing positions regarding the legitimacy of fault agreements. Along with clarifying the ideological dispute, we also analyzed the complex ways in which Pragmatic and Institutional considerations are integrated into the normative picture. We offered a way to moderate the concerns regarding fault agreements through regulating the formation of fault agreements; monitoring their content; and paying attention to the existing and potential prevalence of such agreements in a given society. Two special cases—appeals to religious tribunals and reconciliation agreements—demonstrated trends of divergence and convergence among the various liberal positions. While the first case illustrated how difficult it is to point to a unified and clear solution to the fault agreements dilemma, we have argued for respecting and enforcing reconciliation fault agreements.

On the *second* level, the discussion revealed the multifaceted nature of the liberalization of family law. The historical coalescence around the processes of the fall of fault and the rise of agreements hides the diversification of the liberal position. The story of the liberalization of family law in the second half of the 20th century should be told as a story of different viewpoints that might indeed stand in tension with one another. Focusing on the unique case of fault agreements enabled us to distinguish between liberal positions based on various convictions and backgrounds. It reveals the gap between support for the ‘fall of fault’ out of Pragmatic and Institutional concerns, out of change in the social meaning of marriage, and out of a concrete, thick, ideological commitment to specific—and indeed, controversial—perceptions regarding the ethics and politics of sexuality. It uncovers the disparity between tendencies toward privatization and neutrality, taking the law out of the family, and opposite tendencies toward reclaiming public values and concerns in shaping the law. Together, it demonstrates how the process of family law liberalization is much more complex and nuanced than it seems at first glance. In this respect, studying the issue of fault agreements allows us to enrich the manner in which we understand and describe this important historical process.<sup>81</sup>

This intricate story also allows for a deeper normative discussion about the ways in which the liberal camp is required to formulate its views and standpoints. Especially when it seems that the liberal position in family law is undergoing a backlash in parts of North America, it is important to gain conceptual clarity about

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81. Early writing has claimed that the story of family law liberalization should not be comprehended as a story of privatization but as a moral-ideological change regarding underlying values. See Naomi R Cahn, “The Moral Complexities of Family Law” (1997) 50:1 *Stan L Rev* 225. Our position is different: We argue for the need for a multidimensional description of the liberalization process. As we have shown, processes of privatization (based on neutrality) may operate together with moral-ideological considerations and with other considerations. Moreover, among the moral and ideological considerations there is a need to identify different shades and different positions. These distinctions contribute to a thorough and accurate description of the liberalization process.

the nature of this position. Such deeper understanding will allow for a choice between a renewed formation of the liberal camp in the field of family law and a split into subgroups according to the issues at hand. To this end, on the *third* level, the test case of fault agreements can also be utilized to examine the feasibility of forming an inter-liberal coalition on additional subjects in family law and perhaps even beyond them. Our discussion demonstrates how sometimes apparent disagreement hides underlying consolidation and concurrence, alongside cases in which deep controversy is revealed in areas that seemed to be agreed upon.

In this spirit, we have shown that it is sometimes possible to formulate a quasi-consensual position in a theoretical way that uproots the conflict. On the other hand, in other situations, there is no way to avoid either a dichotomous decision or a give-and-take process of actual concessions. These, by their very nature, are not a matter for theoretical and abstract discussion but for a political process. Yet the inquiry into the different positions and their underlying rationales might serve political parties as they weigh the need for a compromise against the price of ideological concession. In this respect, the investigation into the normative status of fault agreements demonstrates the ability to form a broad liberal front, which, even if not all-encompassing, can help in addressing the controversies at hand.

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