

RELATIONAL CONTRACT AND OTHER MODELS OF MARRIAGE[©]

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This article proposes relational contract as a model for analyzing marriage under Canadian law. In contrast, in *Bracklow v. Bracklow*, the Supreme Court of Canada recognized two “competing” models of marriage and three models of spousal support. The difficult policy issues in the law of spousal support relate not to a tension between different models but instead go to compensation, including reliance and expectations. This article uses relational contract to critique *Bracklow*, considering the challenges in defining models. The Court’s basic social obligation model and its non-compensatory support are unjustifiably broad, and its compensatory support is too narrow. In assessing the extent to which competing models give couples flexibility in customizing their relationships, the article discerns in *Bracklow* the emergence of new notions of public order in the sphere of marriage and a sense of not only procedural, but also substantive, justice.

Cet article propose une analyse de l’institution du mariage en droit canadien se basant sur un modèle «relationnel» du contrat. Dans l’arrêt *Bracklow c. Bracklow*, la Cour suprême du Canada a reconnu deux modèles supposément opposés du mariage, ainsi que trois modèles de l’obligation alimentaire entre les époux. Toutefois, selon l’auteur, les questions de politique juridique les plus difficiles dans le domaine des obligations entre époux ne proviennent pas de l’opposition de différents modèles de la relation mais plutôt de la question de la compensation, entre autres, des sacrifices (*reliance*) et des espérances légitimes de chacune des parties. Le modèle relationnel mène à une critique de *Bracklow* et les difficultés plus générales en définissant des modèles. Ainsi, dans *Bracklow* le modèle de l’obligation sociale fondamentale et les justifications non-compensatoires sont trop étendus, alors que les justifications compensatoires sont trop étroites. L’auteur discerne dans *Bracklow* l’émergence de nouvelles notions relatives à l’ordre public dans la sphère du mariage qui permettent de rejoindre, au-delà de la justice procédurale, une justice substantive.

I.	INTRODUCTION	2
II.	MARRIAGE AS RELATIONAL CONTRACT	7
	A. <i>Definitions</i>	7
	B. <i>Concerns about Marriage</i>	11
	1. Spousal support	11
	2. Changes during relationships	18
	3. Marriage and society	20
	4. Unmarried couples	25
III.	LEGAL MODELS IN <i>BRACKLOW</i>	27
	A. <i>Conceptual Challenges</i>	28
	B. <i>Boundary Issues</i>	37
	1. Justice and the limits of contract	37
	2. The borders of marriage	40
IV.	CONCLUSION	44
I.	INTRODUCTION	

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A dispute over spousal support is a contest between stories. Even under a regime of no-fault divorce, each spouse attempts to convince the trial judge of the merits of his or her narrative of the failed marriage—what was agreed, given, retained and owed. The statutory factors and objectives that trial judges must balance do not lead to precise accounting entries; they are merely considerations for the judge in characterizing the marriage and its lasting enforceable obligations. While the story of each marriage is unique, patterns emerge and recur, both in informal story-telling about marriages and in decided cases. Such patterns assist counsel and judges in imposing order on a couple's understandings and misunderstandings of the past, and help policy-makers draft default rules.

A marriage may be viewed as a close emotional and financial union in which the spouses commit to being each other's life partner. As they live together, spouses become deeply intertwined in mutual dependence and care; indeed, whether their relationship has a religious or a secular foundation, their individual identities are more or less subsumed under that relationship. Consequently, if marriage breaks down, it is difficult for spouses to disentangle themselves. Even after divorce, one spouse may be required to support the other, and while this is often viewed as a burden, it may also be understood as simply a foreseeable consequence of the original obligation, which was undertaken freely. Within such a model, it is impossible for one spouse to know at the outset or even during the marriage the extent of the obligations assumed towards the other spouse in the event of marriage breakdown; the mutual obligation assumed on marriage has the potential to cover needs that arise even after termination of the marriage, as in the event of illness.

Another view, strikingly different, is that of marriage as a partnership between two equal, independent individuals who unite to pursue common goals and personal satisfaction, but who retain distinct identities and interests. While there may be much sharing and collaboration, if the marriage ends, the parties expect to reassume their independent status and continue their separate lives. The termination of marriage is thus an occasion for settling accounts and liquidating obligations. Subsequently, no further debts can arise. Their obligations acquitted, the parties may move on, establish new relationships, and assume new family responsibilities.

While divorcing spouses may disagree about elements of the story of their marriage even if they agree on its basic narrative, conflict intensifies when the spouses clash over their relationship's fundamental structure. The trial judge then has to accept the story of one spouse or the other, or integrate parts from both into the court's official story of the marriage, perhaps adopting a more flexible structure that falls between the two basic patterns.

In *Bracklow v. Bracklow*,¹ the Supreme Court of Canada affirmed that Canadian law recognizes the two patterns mentioned here as essential to its approach to questions of marriage and spousal support. The Court accepted these patterns as two “competing” theories of marriage, calling the first the “basic social obligation” model and the second the “independent, clean-break” model.² These theories give rise to different post-marital support obligations. The support flowing from the basic social obligation model is “non-compensatory,” and that associated with the independent, clean-break model is “compensatory.”³ Justice McLachlin (as she then was) also noted that both models of marriage and their corresponding spousal-support theories permit individual variation in contract, providing a third basis for a legal entitlement to support that is apparently unattached to a marriage model.⁴ According to the Court, the trial judge’s task is to balance these models and the relevant statutory factors and to strike a balance that “best achieves justice” in each case.⁵ It is understandable that the Supreme Court did not elevate one theory over the other: together the two theories represent a permanent tension in family law between the individual and the family unit, between independence and dependence.

Yet maintaining these two competing models as the Court’s approach is unsatisfactory. The effect of two parallel, judicially recognized models is to preclude the possibility of genuine argument between the separating parties because the applicant and respondent spouses need not refute each other’s arguments. Instead, relying on different models, both may be correct. One spouse may say, “You assumed an obligation to support me for life”; the other may say, “We married as individuals and we exit the marriage as individuals, I owe you nothing more,” and both positions find authority in the law. The trial judge thus chooses between positions that clash not in legal substance, but in radically different desired outcomes.⁶

¹ [1999] 1 S.C.R. 420, McLachlin J. [hereinafter *Bracklow*].

² See *ibid.* at 434–35. The basic social obligation model is also referred to as the “mutual obligation” model. See *ibid.* at 436.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.* at 438–9.

⁶ A good example is the quantum decision *Bracklow v. Bracklow* (1999), 181 D.L.R. (4th) 522 at 525–6, 529–530 (B.C.S.C.), Smith J.

Scholars have, however, developed a model of marriage as relational contract⁷ that integrates the important concerns which the Supreme Court seeks to protect in recognizing both the social obligation and independent models. Viewing marriage in such terms does not resolve disagreements about important aspects of marriage, but it does provide a rhetorical space in which arguments must clash, and both parties can no longer be fully and irreconcilably correct. Relational contract would provide a more flexible and complex pattern for the story of a marriage than does the maintenance of a tension between two approaches lying at opposite ends of a spectrum (as the Supreme Court also recently tried to with equality rights).⁸ Then the relational contract of a particular marriage, assessed subjectively or objectively, would be at stake as well as the precise kind of relational contract and the limits on private ordering that legislatures and courts wished to promote in Canadian family law.

This article argues that relational contract is the best model for understanding current Canadian marriage. It begins by addressing marriage as relational contract on a theoretical level. After briefly sketching the model, the article tests it against the current law of marriage in Canada—both federal law and the civilian and common-law provincial regimes—and the major concerns of commentators and the courts. It argues that relational contract explains the current regime of spousal support better than models of civil wrong or unjust enrichment, and frames more clearly the difficult policy decisions not yet fully addressed by Parliament. While it does not provide instant solutions, relational contract offers “increased clarity”⁹ and an analysis for addressing the important concerns, such as women’s poverty after divorce, that underlie the social obligation model. Unlike the latter, however, relational contract is not contradictory as a source of obligations in light of contemporary marriage and

⁷ See e.g. L. Cohen, “Marriage, Divorce and Quasi Rents; Or, I Gave Him the Best Years of My Life” (1987) 16 J. Legal Stud. 267 at 267-68. On relational contract more generally, see e.g. I.R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980) at xii-xiii, 10-35 [hereinafter *New Social Contract*]. For a Canadian perspective, see the work of J.-G. Belley, “L’entreprise, l’approvisionnement et le droit. Vers une théorie pluraliste du contrat” (1991) 32 C. de D. 253 at 258 [hereinafter “Une théorie pluraliste du contrat”], who recognizes the “importance centrale” of Macneil’s theory, though he situates it slightly differently, within legal pluralism.

⁸ Endorsement of a relational contract model might be akin to the Supreme Court’s recent development of a unified approach to equality. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, integrating the two major approaches to equality and that of Justice L’Heureux-Dubé.

⁹ See H.O. Hunter, “An Essay on Contract and Status: Race, Marriage and the Meretricious Spouse” (1978) 64 Va. L. Rev. 1039 at 1097, on the limited utility of models such as status and contract. As categories, status and contract may, in fact, be “rhetorically entangled” and “mutually interdependent.” See J. Goldberg-Hiller, “‘Making a Mockery of Marriage’: Domestic Partnership and Equal Rights in Hawai’i” in C. Stychin & D. Herman, eds., *Law and Sexuality: The Global Arena* (Minneapolis: University of Minnesota Press, 2001) 113 at 118-19.

no-fault divorce. Relational contract is better than the competing models in *Bracklow* at accommodating the changes that transpire during long-term intimate relationships and that potentially render one spouse economically vulnerable relative to the other. The proposed model also assists in understanding the ambiguous status of marriage both as an institution in which society is implicated and as a private relation. This complex positioning is evidenced in the acceptance of prenuptial contracts and separation agreements modifying default rules, palliated by the caution that courts demonstrate in their enforcement. Insights about potential errors in contracting within the relational contract of marriage militate for continued caution. Furthermore, the extension of some marriage obligations to unmarried couples also proves consistent with the relational contract model.

Next, the article applies the relational contract model to critique the Supreme Court's models of marriage in *Bracklow*. At the same time, this article explores, more generally, potential difficulties in using legal models in adjudication. The *Bracklow* judgment is problematic in a number of respects. It illustrates the importance of adequately defining competing models. Specifically, concerning spousal support, the argument is that the Supreme Court's competing models are not distinct enough to be analytically useful. Moreover, the basic social obligation or non-compensatory model is unjustifiably broad given the current no-fault divorce regime. The compensatory model, as set out, is too narrow, and would benefit from the insights of what compensation can mean viewed from a relational contract perspective. The competing models in *Bracklow* raise questions of the boundaries of their application, as do legal models more generally. First, a competition between models suggests a regime of choice and considerable freedom by parties to craft their own terms, but *Bracklow* is a reminder that there are always limits on private ordering. Indeed, the judgment indicates the emergence of a new conception of an untouchable public order core of substantive, as opposed to procedural, justice that cannot be contracted out of. Second, as the application of the *Bracklow* judgment to both married and unmarried couples attests, legal models do not necessarily reify distinctions, as would be expected, but may instead blur them by influencing decision making concerning similar but nevertheless distinct institutions. In other words, they are not easily confined to the situation for which they were articulated. Finally, the article considers the lessons from this analysis.

It is appropriate here to note some limitations of this article. First, though it is a criticism of the social obligation theory, which is related to a status concept of marriage, this article is not a recital of any "linear evolution" of

marriage from status to contract.¹⁰ Today, the position of marriage between these two poles is at best “equivocal,”¹¹ and while the argument is that relational contract provides a superior model for marriage as that institution has developed, the status quo was not inevitable and marks no culmination. Second, this argument is limited to marriage and spousal support within Canada, referring to what may be a unique combination—for example, the factors in the *Divorce Act*¹² and Canada’s comparatively advanced recognition of unmarried couples. The relational contract model has not necessarily been “forming underneath everything that grows.”¹³ This article deals only peripherally with the question of child support, while recognizing the difficulty of sustaining distinctions between spousal and child support,¹⁴ and does not attempt to treat same-sex relationships in any depth. Lastly, this argument is grounded on a position of skepticism concerning the power of family law to dramatically improve people’s lives. Replacing the two competing models of marriage and the three theories of support entitlement with relational contract would neither eradicate post-divorce poverty nor equalize unequal relations between spouses. Yet while a relational contract view of marriage provides no “obvious or optimistic” solutions,¹⁵ this article seeks to show that it would nevertheless provide a single, clearer, and more sensitive model. Relational contract would acknowledge the potential for serious inequality in intimate relations and offer a reasonably coherent legal framework, both for future policy debates and for the thousands of unhappy couples fighting in court.

II. MARRIAGE AS RELATIONAL CONTRACT

¹⁰ See e.g. M. Minow, “Forming Underneath Everything That Grows: Toward a History of Family Law” [1985] Wis. L. Rev. 819 at 826, who challenges such “traditional” histories of family law as “deeply flawed.” See *ibid.* at 834.

¹¹ See e.g. J. Carbone, “Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman” (1990) 43 Vand. L. Rev. 1463 at 1469.

¹² R.S.C. 1985 (2d Supp.), c. 3, s. 15.2. For example, one important respect in which Canada differs from the United States, the world’s greatest producer of academic literature on contract, marriage, and divorce, is the comparative inattention paid in Canada to the evolution towards no-fault divorce. American journal articles on the subject—many fiercely critical—are too numerous to mention.

¹³ This image for legal patterns developing unseen comes from Minow, *supra* note 10.

¹⁴ See *Francis v. Baker*, [1999] 3 S.C.R. 250 at 275-6 for judicial recognition of the practical difficulty of isolating child support and child expenses.

¹⁵ See Cohen, *supra* note 7 at 303, who finds it difficult to suggest “with any conviction” a definitive solution to the marriage problem. But for the less cautious view that identifiable changes to statutory family law could potentially benefit spouses, “their children, and society at large,” see M.F. Brinig, “Contracting around No-Fault Divorce” in F.H. Buckley, ed., *The Fall and Rise of Freedom of Contract* (Durham, N.C.: Duke University Press, 1999) 275 at 279.

A. *Definitions*

Theorists struggle to define relational contract. American scholar Ian Macneil does so by contrasting it with discrete or transactional contracts, in which no relation exists between the parties other than the “simple exchange of goods.”¹⁶ The paradigm of such discrete contract is the transaction of neo-classical microeconomics. While both discrete and relational contract involve such exchange, the latter is notable because it includes significant elements of “non-economic personal satisfaction.”¹⁷ Macneil has devised lists of characteristics that distinguish relational contracts from more shallow transactions, for example, “commencement, duration, and termination; measurement and specificity; planning; sharing versus dividing benefits and burdens; interdependence, future co-operation, and solidarity; personal relations among, and numbers of, participants; and power.”¹⁸ Charles Goetz and Robert Scott have identified relational contract by the parties’ inability to reduce the arrangement to “well-defined obligations.”¹⁹ More simply, and much later in the theory’s development, Melvin Eisenberg observed that a relational contract involves “not merely an exchange, but also a relationship, between the parties.”²⁰ Yet this short definition fails to recognize that defining “relational contract” is a challenge chiefly because “contract,” “exchange,” “relationship,” and even “parties” are words with contested, contingent meanings. Eisenberg’s definition thus incorporates a number of other unresolved debates. In particular, his suggestion that it is a yes-or-no question whether a contract is only an exchange or an exchange combined with a relationship ignores Macneil’s argument that exchanges within society fall on a spectrum between pure discrete transaction and pure relation, themselves both heuristic fictions.

The argument in this article, however, does not depend on the outcome of such disagreements within the literature on relational contract; there is

¹⁶ See *New Social Contract*, *supra* note 7 at 10. On some of the terminological difficulties in defining relational contract theory, and his own admittedly too-late efforts to replace some of his own terms, see I.R. Macneil, “Relational Contract Theory: Challenges and Queries” (2000) 94 *Nw. U.L. Rev.* 877 at 892-97.

¹⁷ See I.R. Macneil, “The Many Futures of Contracts” (1974) 47 *S. Cal. L. Rev.* 691 at 723.

¹⁸ See I.R. Macneil, “Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a ‘Rich Classificatory Apparatus’” (1981) 75 *Nw. U.L. Rev.* 1018 at 1025 [footnote omitted, hereinafter “Economic Analysis of Contracts”]. Other slightly different lists appear elsewhere in his work, but this one is typical.

¹⁹ See C.J. Goetz & R.E. Scott, “Principles of Relational Contracts” (1981) 67 *Va. L. Rev.* 1089 at 1091.

²⁰ See M.A. Eisenberg, “Relational Contracts” in J. Beatson & D. Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) 291 at 296 [hereinafter “Relational Contracts”].

considerably more consensus around at least the basic notion of marriage as relational contract. For example, Cohen writes that upon marriage the spouses exchange promises to deliver a “lifetime stream of spousal services.”²¹ In reliance on these promises, each party invests in assets specific to this marriage and forgoes other opportunities and activities. In the relational contract literature, investments made specifically for the marriage and that are not transferable, such as a decision to leave a career and to raise the children, are identified as “idiosyncratic.”

The marriage contract is highly relational in this sense. The letter of its obligations and exchanges cannot be set out completely at the beginning, or at least it is inefficient to attempt to do so, and the commitments made initially do not, except in a vague, hortatory way, exhaust everything the parties expect to occur within the relationship. Indeed, Cohen observes the striking “lack of explicit detail.”²² Moreover, beyond the gaps in promise, much of a marriage relation is likely to be what Macneil calls “non-promissory,” arising not from the parties’ promises but “otherwise from the relation itself.”²³ He means that the relationship’s content simply develops from the parties’ interactions during its life.

More specifically, this article uses relational contract to mean a relationship between two individuals in which they seek not only economic, but also non-economic and emotional support. The relationship is notable for the source of its obligations: a mixture of promise, though the nature of the intimate relationship lived over time is such that it is impossible to express exhaustively all the obligations *ex ante*; tacit agreement, with obligations arising from the parties’ interaction; and at times, statutory imposition. The relationship is founded upon a shared project, which includes the maintenance of a household, often the raising of children, and given the human need for companionship, a deep interest on the part of each party in the continuation of the relationship itself. Given their commitment to the relationship’s continuation, the parties in such relational contracts are typically optimistic and do not make decisions that take into account the statistical probability of the relationship’s rupture. In the event the relationship ends, the notion of the shared enterprise leads to a calculation of losses using a measure of reliance and expectation. Since losses are shared, damages within a relational contract are not necessarily premised on one party’s breach. In this sense, the end of a marriage may almost be viewed

²¹ See Cohen, *supra* note 7 at 267.

²² See *ibid.* at 272, where Cohen suggests that this vagueness makes a marriage contract like an employment contract.

²³ See *New Social Contract*, *supra* note 7 at 28.

as a superior force, since, although it is not statistically unforeseeable when contemporary marriages are viewed collectively, it is an outcome that neither party expected on entering that relationship. This model will be developed further in the course of this article. Like other legal models, it does not contain concrete policy outcomes. It is a methodology that provides an orientation and a means of organizing the design of systems and legal rules.

Viewing marriage as relational contract is sometimes criticized for reducing everything to economics and failing to account for the affective aspects of intimate relationships.²⁴ It is possible that the contractualizing of marital obligations such as fidelity may trivialize them; I am admittedly less comfortable than some law and economics theorists with computing sexual relations as merely one more good contributing to a family's welfare, to be exchanged among utility maximizers.²⁵ Indeed, many would find it unromantic to characterize the marriage market as a forum in which self-interested individuals exercise preferences and contract for long-term economic alliances. Yet some discussion of relational contract attempts to include non-economic aspects of marriage. For example, Elizabeth Scott and Robert Scott describe marriage *qua* contract as a deep emotional commitment.²⁶ Macneil draws parallels between contractual relations and what sociologists call "primary relations," where parties respond to each other as whole persons, with deep and extensive communication, and where personal satisfactions are paramount.²⁷ More generally, relational contracts differ from transactional contracts in that the former recognize that the preservation of the relationship itself is one objective of the parties,²⁸ that partners are not fungible, and that contract is not a casual way of recognizing marital love. Any objection about relational contract's lack of romance might resonate less with civilians, already accustomed to dissecting the substance of conjugal relationships in connection with the codified *obligation de faire vie commune*.²⁹

²⁴ See e.g. M.C. Regan Jr., *Alone Together: Law and the Meanings of Marriage* (New York: Oxford University Press, 1999) at 162–87, on the risks of "property rhetoric."

²⁵ See e.g. E. Landes, "Economics of Alimony" (1978) 7 J. Legal Stud. 35 at 40.

²⁶ See e.g. E.S. Scott & R.E. Scott, "A Contract Theory of Marriage" in Buckley, *supra* note 15, 201 at 202, 208.

²⁷ See "The Many Futures of Contracts," *supra* note 17 at 722–23.

²⁸ See "Une théorie pluraliste du contrat," *supra* note 7 at 283.

²⁹ Art. 392 C.C.Q. See also the discussion in N. Kasirer, "What Is *Vie Commune*? Qu'est-ce que *living together*?" in *Mélanges Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) 487 at 495 [hereinafter "What Is *Vie Commune*?"] on the tension between rationalism and sentimentality in defining marital duties.

It is also necessary to highlight the usage of two words. When relational contract theorists discuss “contract,” they mean a relation lived over time. As noted, this article does not contrast marriage as relational contract with marriage as status; today no one really argues that legal marriage is entirely a status relationship imposed by the state, although remnants of such thinking persist. It is also easy to confuse legal marriage with marriage as a religious sacrament. In contrast to relational contract theorists, those closer to the status notion of marriage use “contract” not for the relation itself, but rather for the act of promising that forms the contract, constitutes the legal relationship and invokes state recognition.³⁰ This distinction is sometimes imprecise when discussing marriage, though the distinction is clearer in discussing unmarried cohabitation. Relational contract theorists may see unmarried cohabitants as living a relational contract; status theorists may see them as having no contract at all.

“Marriage” is prone to similar confusion and uncertainty. In this article, “marriage” refers to the relationship lived by the parties, and “wedding” to their initial state-sanctioned promising ceremony. This distinction, too, is more important for unmarried than married couples: unmarried couples may well live what looks like a marriage, though they have had no wedding. But even in a marriage context, the distinction assumes significance in cases of short marriages, where the wedding *qua* ceremony presumably carries the same weight as always, but the relationship lived over time may reasonably carry much less.³¹ The article turns now to how relational contract accommodates the serious concerns about marriage that emerge from the case law and doctrine.

B. *Concerns about Marriage*

1. Spousal support

Alimony or spousal support after divorce embarrasses theorists because it has little *prima facie* justification. The positivist answer—that Canadian spouses can get an order for alimony because the *Divorce Act* says they can—offers little aid in interpreting statutes.³² The literature on spousal support,

³⁰ See C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass.: Harvard University Press, 1981) at 21. For this notion of promise as constituting a marriage, see e.g. *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 450, Gonthier J., dissenting [hereinafter *Miron*].

³¹ See e.g. *Droit de la famille—2071*, [1994] R.J.Q. 2933 (Sup. Ct.), justifying a derogation from the equal division of the family patrimony under art. 422 C.C.Q.

³² Chouinard J. articulates this positivist view, distinguishing the statutory alimentary obligation after divorce from the marital alimentary obligation during mere separation from bed and board, in *Messier v. Delage*, [1983] 2 S.C.R. 401 at 408.

particularly under no-fault divorce regimes, is too vast to be summarized here. This section suggests why two legal models sometimes associated with spousal support—civil wrong and unjust enrichment—are inappropriate and indicates how relational contract at least frames questions or possibilities.

Analyzing a marriage breakdown according to the current regime as a civil wrong is of limited use for several reasons.³³ First, none of the possibilities leads to a satisfactory characterization of the compensable fault. Although one party's behaviour may have precipitated the end of the marriage, the current statutory regime of no-fault divorce suggests that a court will not inquire into marital "misconduct."³⁴ In any case, few would advocate a return to a fault regime where spouses spy on each other to amass evidence proving the other's perfidy.³⁵ Next, it is difficult to equate the act of seeking a divorce with negligent or faulty conduct, particularly given its statutory facilitation.³⁶ A more complex, but ultimately insufficient act, is the facilitation by the economically superior spouse of the other spouse's specialization in domestic labour, for example, that resulted in the latter's economic disadvantage on conclusion of the relationship. The deterrence connotations of such a characterization as a civil wrong giving rise to damages are inappropriate. Damages suggest that the defendants had a duty to act otherwise but instead engaged in "socially undesirable conduct."³⁷ Such a value judgment is contrary to society's interest in stable and productive marriages. Family law's role is surely not to discourage men and women from making sacrifices for the good of a marriage. Indeed, such idiosyncratic investments may be essential to the success of long-term relationships: by making it impossible for the the parties to walk away without suffering some loss, deep investments encourage them to stay together. While society may endorse the idea that either spouse should be able to support him- or herself if necessary, there is no social consensus that it is the law's role to

³³ See Justice Boyle's interpretation of *Moge v. Moge*, [1992] 3 S.C.R. 813 [hereinafter *Moge*] in *Bracklow v. Bracklow* (1995), 13 R.F.L. (4th) 184 at 188 (B.C.S.C.) [hereinafter *Bracklow* (trial)]. The Court of Appeal would have preferred a "different choice of words" but saw no error in the trial judge's analysis. See *Bracklow v. Bracklow*, [1997] 8 W.W.R. 696 at 700 (B.C.C.A.), Proudfoot J.A. In contrast, *Bracklow* rejects the tort analogy, but such analysis has persisted enough that it merits comment.

³⁴ *Divorce Act*, *supra* note 12, s. 15.2(5). See the discussion of the relationship between tort and no-fault divorce in an American context in I.M. Ellman & S.D. Sugarman, "Spousal Emotional Abuse as a Tort?" (1996) 55 Md. L. Rev. 1268 at 1285.

³⁵ This is not to suggest that there are never instances in marriages where tort and assessment of personal loss are strikingly appropriate and compensation is owed by one spouse as a wrongdoer. For example, abuse and mental cruelty amounting to criminal conduct should clearly give rise to tort damages.

³⁶ *Divorce Act*, *supra* note 12, s. 8(1).

³⁷ See Ellman & Sugarman, *supra* note 34 at 1287.

deter spouses from staying home to raise children. A no-fault regime, based on the risk principle,³⁸ may have social utility and come closer to capturing the statutory spousal support scheme, but is far removed from the classical fault model.

Second, the causal connection sometimes required in spousal support cases between the marriage breakdown and the financial difficulties of the applicant spouse is rarely set as high as under civil liability regimes. Judges seek some link, but do not require direct causation satisfying the civil standard of proof.

Third, spousal support awards are not set, like damages, to compensate fully. Though it is worth little, a successful plaintiff can get an award for civil liability damages from a penniless defendant. In contrast, the *Divorce Act* requires consideration of the resources of each spouse, indicating that a court is unlikely to award spousal support which, while merited as compensation, outstrips the respondent spouse's ability to pay.³⁹

Fourth, a relationship as intimate as that between spouses pushes the utility of a civil fault regime to its limits.⁴⁰ In the civilian system, civil responsibility requires only fault, causation, and prejudice. By contrast, common-law tort requires at least a duty of care linking the plaintiff and defendant. Nevertheless, both civilian and common law civil fault apply clumsily in this context because of the parties' interconnectedness and the prospective character of the spousal support frequently sought. Damages awarded for personal injury are prospective in the sense that they indemnify for future lost earnings that the plaintiff would have earned had he or she never encountered the defendant. They may be characterized, then, as relating to expectations. In contrast, what is frequently at issue in divorce cases is not the earning power of the homemaker wife had the husband not committed the fault, but rather the benefits she would have derived had he stayed in the marriage and continued to generate the majority of the household's income. The fault model poorly accommodates a wrongful act that frustrates the expectation of a future benefit accruing from the defendant.⁴¹ In a way suggestive of contract,

³⁸ See e.g. J.-L. Baudouin & P. Deslauriers, *La responsabilité civile*, 5th ed. (Cowansville, Qc.: Yvon Blais, 1998) at paras. 131ff.

³⁹ *Divorce Act*, *supra* note 12, s. 15.2(4).

⁴⁰ Although the facts are evidently different, *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753, perhaps indicates tort's conceptual constraints in a context where, at least historically, as with marriage under the common law, there was a legal unity of personhood.

⁴¹ This difficulty lies at the core of conceptual troubles with an action in tort action brought with one for breach of an employment contract and led to the requirement of a separate actionable wrong. See *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701 at 734.

civil wrong thus comes closer to penalizing non-performance of an obligation rather than fault.

Finally, even if it is possible to cram the facts into it, the civil wrong model is simply unconvincing. Given spouses' commitment to the relationship, they do not act in the forward-looking, prudent way of the reasonable person;⁴² rather, they commit deeply, even rashly, to a life together and the pursuit of shared goals. As evidence of the unsuitability of the civil wrong characterization, it teaches little about how, empirically, married couples behave. In contrast, relational contract literature not only provides a model that accounts for the legal results currently observable, but also further illuminates the conduct of married couples.

The equitable doctrine of unjust enrichment appears better suited to the project than the civil wrong. It provides for restitution when one spouse is impoverished, the other is correspondingly enriched, and there is no juristic justification. Accordingly, when a marriage ends, the spouse who has worked for money may owe the homemaker spouse for unpaid labour performed in the home or for improvements made to property. The compensation may be determined according to a value-received or a value-retained approach, though the Supreme Court prefers the latter, and the remedy is frequently proprietary, in the form of a constructive trust.⁴³

Yet unjust enrichment proves inadequate for modelling the current support regime. The market tends to devalue domestic labour of the sort that women have traditionally performed at home. Thus even a generous market assessment of one spouse's enrichment may not reflect the extent to which Parliament wishes the other spouse compensated for her impoverishment.⁴⁴ Moreover, even if valuation were considered fair, it is impossible for courts to create a "notional ledger" to record every service rendered; the *quantum meruit* approach leads to the "futile invocation of a spectral accountant."⁴⁵ However, such a straight compensation approach is not reflected in current Canadian spousal support. Similar to the case of civil fault, the stipulation that courts

⁴² Perhaps the prudence of the negligence-avoidance mentality is more visible in the early stages of dating, when invitations and the days between phone calls are counted and the value of gifts calibrated, although such conduct may be characterized more persuasively as a courtship signalling game. See E. Posner, "Family Law and Social Norms" in Buckley, *supra* note 15, 256 at 260.

⁴³ See e.g. *Peter v. Beblow*, [1993] 1 S.C.R. 980 [hereinafter *Peter*]. The civil law stipulates that the measure is value retained (art. 1495 C.C.Q.).

⁴⁴ See the discussion in Regan, *supra* note 24 at 171. But see McLachlin J.'s optimism in *Peter*, *ibid.* at 993-94, that the Supreme Court of Canada now values domestic labour.

⁴⁵ See the comments in R.E. Scane, "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991) 70 Can. Bar Rev. 260 at 281.

consider the “condition, means, needs and other circumstances” of the parties⁴⁶ requires a much subtler assessment than full restitution to the extent of the value retained under unjust enrichment. Furthermore, while unjust enrichment doctrine speaks of “expectations,”⁴⁷ those expectations relate to the assumption that past labour would be compensated, and not to the extent of future support or exchange between the parties. Unjust enrichment’s retrospective restitution (if judges follow its principles, instead of simply pursuing substantive justice⁴⁸) is not broad enough to recognize the future discount of a wife’s earning potential resulting from her absence from the labour market. Finally, although the concept of unjust enrichment is distinct from its possible remedies,⁴⁹ it remains closely linked conceptually with the constructive trust, and as such is more likely to assist property-owning claimants whose spouses own property than claimants whose spouses do not. For example, the value-retained model does little to recognize a future obligation to assist the economically disadvantaged middle-aged spouse with few assets except her husband’s earning power. An unjust enrichment determination may, in a number of cases, parallel that achieved by the current statutory and jurisprudential law, but an appropriate legal model will apply more generally than does unjust enrichment.

Furthermore, civil wrong and unjust enrichment characterizations polarize a divorce dispute between a claimant, on the one hand, and the respondent and his (typically) property on the other. Relational contract looks to the gains and losses of both parties, not as against another party, but rather as a result of the joint endeavour.⁵⁰ Characterizing a woman’s financial disadvantage as the result of the relationship, which she herself helped to structure, rather than of particular behaviour by the man, presents her less as a victim, provided it is not taken to an extreme that blames her for her current financial precariousness. Such a characterization positions the woman as reclaiming her investments from a failed

⁴⁶ *Divorce Act*, *supra* note 12, s. 15.2(4).

⁴⁷ See *e.g. Peter*, *supra* note 43 at 990.

⁴⁸ See Justice McLachlin’s comments in *ibid.* at 987.

⁴⁹ *Ibid.* This distinction is clearer in the civil law, where, unlike in the common law, the codified principle appears abstractly from particular cases. See art. 1493 C.C.Q.

⁵⁰ The notion of a joint venture is discernible in the regime of the family patrimony, which includes certain property irrespective of which spouse owns it. See art. 414 C.C.Q. Compare the equalization of matrimonial property under the *Family Law Act*, R.S.O. 1990, c. F.3, s. 5 [hereinafter *FLA*], which still makes one party claim property clearly owned by the other party.

enterprise, rather than as seeking the man's property. The focus is on the gains and losses from the relationship itself.⁵¹

Relational contract is a broad model that provides a number of ways to analyze spousal support. Some of them purport not to be contractual, but may seem to be so ultimately.⁵² One contractual approach does not rely on the relational character of marriage and operates even within a contractual transaction: upon marriage, X promises Y that, in return for investments or sacrifices that Y will make, such as giving up a career to raise their children, X will support Y. When X and Y marry they also make a number of other promises. It is, of course, possible to recast this scenario as a mutual promise that X and Y will provide for each other. In a vast number of cases, however, when the parties specialize—the traditional arrangement sees one in homemaking, the other in paid work, though a subtler specialization is more common—it is clear who is becoming economically vulnerable for the couple's mutual benefit. In such circumstances, there is an air of fiction in the characterization of the support obligation as mutual, as there is with promise theory generally.

Other notions more dependent on the relational aspect of marriage come closer to describing the current state of the Canadian statutory regime of spousal support. It is possible to suggest that in marrying the parties establish expectations as to what will happen if the relationship ends, irrespective of fault. Alternatively, it may be more satisfactory to provide restitution for a woman's career sacrifices in the interests of the children or the husband's career.⁵³ After all, the wife's foregone opportunities in the labour market may well constitute the "major lost cost" of the marriage as a joint endeavour; indeed, if during the marriage the husband made investments chiefly in his own earning power, they are presumably not lost costs at all, but rather portable assets that survive the marriage.⁵⁴ This raises calculation questions as to whether a debtor spouse should compensate for past earnings foregone by the other spouse, for her lost earning capacity, or both.⁵⁵ Such restitution can be framed without requiring proof of fault or full compensation at market prices, as spreading the costs or investments made in the relationship that

⁵¹ See e.g. N. Duclos, "Breaking the Dependency Cycle: The *Family Law Act* Reconsidered" (1987) 45 U.T. Fac. L. Rev. 1 at 27.

⁵² See e.g. I.M. Ellman, "The Theory of Alimony" (1989) 77 Cal. L. Rev. 1 at 13--33, denying that his theory of compensating the wife for her lost earning power is contractual. But for the argument that Ellman's position is, in fact, contractual, see Carbone, *supra* note 11 at 1468-71.

⁵³ See e.g. J. Carbone & M.F. Brinig, "Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform" (1991) 65 Tul. L. Rev. 953 at 986.

⁵⁴ See Landes, *supra* note 25 at 44-45.

⁵⁵ See the thorough discussion in Ellman, *supra* note 52 at 49-81.

crystallize on its termination. Until divorce or at least separation, the sacrifices presumably are made as the result of a “lifestyle preference” for the benefit of both spouses.⁵⁶ Relational contract makes familiar the “social policy” notion of parties’ sharing risks and losses so as to limit individual “catastrophic losses,”⁵⁷ and while it is clearly no longer public policy to save a marriage at all costs, it is probably still a policy objective to discourage casual divorce. Accordingly, it is better that the wife’s losses be shared, rather than compensated fully, so that the end of the marriage imposes costs on both spouses. This responds to the concern that full compensation not render the wife “largely indifferent,” at least economically, to sustaining or terminating the marriage.⁵⁸ While some commentators are wary of expressing marriage obligations in the contractual language of economic entitlement and compensation, such sharing of costs and losses could well lead to spousal support payments much more generous than those with which Canadian applicants are familiar, addressing what is for many commentators a key policy imperative.⁵⁹ The factors in the *Divorce Act*, however, limit full compensation. Since a court considers the applicant’s circumstances as well as the respondent’s,⁶⁰ it is not simply a matter of the applicant demonstrating losses per se. Perhaps the expectation is that the contract between the parties will provide for some temporary equalization between their respective financial positions on divorce.

Given the possible alternative characterizations of spousal support, casting the problem in relational contract terms generates no automatic answers. It does, however, provide a powerful vocabulary and range of possibilities, many of which are absent from the Court’s definition of compensatory support in *Bracklow*. As will be discussed below, the Court’s compensatory model, while considering career losses and sacrifices, was narrow enough to necessitate the basic social obligation model. The factors in the *Divorce Act* fit reasonably well into analysis of marriage as relational contract; there is mutual exchange and investment of energy and assets in the relationship, which develops over time. Indeed, the nuanced account of marriage resulting from a relational contract model better accords with the dynamic

⁵⁶ See *ibid.* at 71.

⁵⁷ See D.A. Farber, “Contract Law and Modern Economic Theory” (1983) 78 Nw. U.L. Rev. 303 at 335-36.

⁵⁸ See the discussion of this notion in the principal Canadian article treating marriage as relational contract, M.J. Trebilcock & R. Keshvani, “The Role of Private Ordering in Family Law: A Law and Economics Perspective” (1991) 41 U.T.L.J. 533 at 557.

⁵⁹ For example, Scott & Scott (*supra* note 26 at 239) suggest that, if specialization of labour involving domestic tasks is performed for the benefit of both spouses, the spouses would predictably agree *ex ante* to “greater protection against financial loss” than the law currently awards to the spouse staying at home.

⁶⁰ *Divorce Act*, *supra* note 12, s. 15.2(4).

relationship between support regimes and property division under provincial law.⁶¹ Relational contract assists in recognizing the respective gains and losses of parties upon divorce, though as a model it, of course, cannot answer policy questions as to how fully those losses should be compensated, or how reliance and expectations will be identified and assessed. The competing marriage models in *Bracklow* obscure the work that remains to be done, because Parliament and society agree neither on the extent to which the law should spread the losses realized when a marriage ends nor on which expectations should be legally recognized as reasonable. Making these determinations requires, among other things, a sophisticated behavioural understanding of how the economic position of spouses relative to one another alters during the course of their marriage.

2. Changes during relationships

Relational contract accounts well for incremental change in obligations within marriages. Macneil observes that much change in ongoing contractual relations comes about “glacially,” through small, day-to-day adjustments.⁶² In contrast, the social obligation model seems less equipped to accommodate a relationship, such as the Bracklows’, that changes over time.⁶³ Instead, this model often characterizes a marriage once and for all at the time the marital obligations were first assumed, using promise theory to look at the responsibility consensually undertaken for the other spouse. The social obligation model and the clean-break model suggest that a marriage is fundamentally one or the other, not that parties might develop greater mutual reliance over time and that incremental alterations can amount to radical changes to the nature of the relationship. In contrast, relational contract is alert to the possibility of new, legally enforceable obligations calcifying in the interstices of lived interaction.

Particularly during a long marriage, the parties may gain or lose ground relative to the other. Such changes are probably unintended, though given the statistics on female poverty after divorce, they are clearly not unforeseeable.⁶⁴ Indeed, assuming the specialization of labour typical within marriages, where

⁶¹ On the subtleties and challenges of this relationship, in particular concerning pensions, see Justice LeBel’s dissent in *Boston v. Boston*, [2001] 2 S.C.R. 413 at 445ff. [hereinafter *Boston*].

⁶² See I.R. Macneil, “Contracts: Adjustment of Long-term Economic Relations under Classical, Neo-classical, and Relational Contract Law” (1978) 72 Nw. U.L. Rev. 854 at 895 [hereinafter “Long-term Economic Relations”].

⁶³ The Bracklows began by splitting household expense strictly and moved over time towards less precise sharing as it was “more of a marriage” (*Bracklow*, *supra* note 1 at 425).

⁶⁴ See *e.g.* *Moge*, *supra* note 33 at 854, where Justice L’Heureux-Dubé observes the grim economic effects of divorce.

generally both parties do not perform identical functions inside and outside the home, it would be unusual if the parties maintained their original relative positions. Relational contract recognizes that changes after divorce all too often lead to poor economic conditions for women. While the vocabulary sounds callous, Cohen is accurate when he states that over time women lose value in the marriage market relative to men. He means that a divorced woman's chances of remarriage are significantly less than those of a divorced man.⁶⁵ While each spouse makes investments during the marriage that yield mutually enjoyed goods, in many "traditional" marriages the husband's investments in his career and earning power survive the marriage, while the wife's are idiosyncratic "sunk" costs (often in the form of a decision to relegate her career to a lower priority than her husband's for the sake of household tasks and child rearing).⁶⁶ Relational contract theory accommodates this reality, recognizing the tremendous importance of sunk costs, those investments that cannot be recovered and transferred.⁶⁷ The result may be to make the wife less willing than the husband to terminate the relationship.⁶⁸ Even when parties begin as equals, then, the choices made and specialization of labour assumed may "lock" some people into positions, raising concerns of power, exploitation, and dependence.⁶⁹

These relational contract insights may yield concrete legal or interpretive rules.⁷⁰ For example, courts frequently use marriage duration to calculate the extent of dependence and the level of spousal support subsequently required. *Bracklow* would lead judges to characterize a marriage from the outset as following one of the models and to assess the impact of the marriage's length accordingly. In contrast, relational contract would prompt judges or legislators to expect that a marriage would change during its lifetime, not just in the arithmetic extent of economic disadvantage suffered, but qualitatively. Certainly the model of a marriage between two independent economic units is most plausible for a brief union. More specifically, Parliament might legislate a rebuttable presumption that

⁶⁵ See the detailed analysis of this idea in Cohen, *supra* note 7 at 278–87.

⁶⁶ See the discussion on the increase in the husband's human capital during the marriage as compared with the wife's in Trebilcock & Keshvani, *supra* note 58 at 552–56. While the benefit to the children of having had one parent at home presumably outlives the marriage, that benefit yields no immediate financial return to the homemaker spouse.

⁶⁷ See R.W. Gordon, "Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law" [1985] *Wis. L. Rev.* 565 at 570.

⁶⁸ *Ibid.*

⁶⁹ See S. Macaulay, "An Empirical View of Contract" [1985] *Wis. L. Rev.* 465 at 469.

⁷⁰ Other commentators have used the relational contract model to hypothesize default rules. See *e.g.* Scott & Scott, *supra* note 26 at 211ff.

after a certain duration marriages would be presumed to have generated certain expectations and interdependencies.

In identifying idiosyncratic investments and sunk costs, relational contract theory provides checks against blind reliance on a strict notion of equality.⁷¹ Such a notion may be a well-intentioned reaction against the historic concept that the wife was inferior and melded her legal personality into her husband's. Yet the parties, while perhaps equal before the law, are not economically equal if one has made costlier sacrifices than the other. Indeed, the suggestion has been made that in divorce the parties may stand in inherently unequal positions.⁷² Relational contract realizes that only rarely are parties to a marriage self-sufficient atoms. Its account of changing economic power dynamics between the parties thus acknowledges some of the concerns of feminist scholars, and makes it possible to consider the status of marriage as an institution and society's interest in regulating bargaining within it.

3. Marriage and society

The extent to which the law permits private ordering by the parties to determine their marriage model depends on the relationship between marriage as an institution and the interests of society. Society's interest in marriage is perhaps more forcefully articulated within the civilian tradition than in the common law. The civil law, for example, observes that the way in which marriage and divorce are regulated produces the signification that society wishes to assign the relation between private life and citizens.⁷³ Moreover, even from a perspective favouring private ordering, society retains important social interests in the process of marriage and divorce negotiations, and the fairness of their outcomes.

Indeed, it becomes evident that even in intimate relationships, the very notion of "private" ordering outside the law is illusory. As Macneil notes, society is the "fundamental root" of contract;⁷⁴ it may be necessary, then, to set aside the

⁷¹ On the limitations of liberal feminism and formal equality in the divorce context, see A. Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 749 at 763.

⁷² See M.L. Fineman, "Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce" (1989) 23 Fam. L.Q. 279 at 299. Relational contract provides a helpful counterbalance even to legislative rhetoric on equality, as in the *FLA*, *supra* note 50, Preamble.

⁷³ See I. Théry, *Le démariage: justice et vie privée* (Paris: Odile Jacob, 1993) at 10.

⁷⁴ See *New Social Contract*, *supra* note 7 at 1. See also J. Carbonnier, *Flexible droit: pour une sociologie du droit sans rigueur*, 10th ed. (Paris: L.G.D.J., 2001) at 260–62.

abstraction that views a contract as relating only to the two so-called parties.⁷⁵ In any case, private ordering always presupposes state enforcement and falls back onto state-made default rules.⁷⁶ Nevertheless, there is a suggestion within the literature on marriage as relational contract that marriage, until the parties turn to the divorce courts, is somehow outside “[l]aw’s domain.”⁷⁷ Perhaps this suggestion flows from the observation that parties to a relational contract tend to resolve conflicts internally, contemporaneously with the exchange.⁷⁸ More precisely, though, the law is always present, and even happy families are “rife with rules of everyday law.”⁷⁹ The constant presence of the law may be more visible under civil law, where the very organization of Book Two of the *Civil Code of Québec* indicates that marriage falls within the *ius commune*;⁸⁰ in contrast, the common law provinces have no *Happy Marriages Act*. Nevertheless, the application of spousal support to economic factors and not the marriage’s “emotional and social benefits”⁸¹ should not be taken as an indication that the law is not present in the exchange and enjoyment of those benefits. Even if during their marriage spouses perceive that they occupy a non-legal space of merely “social and relational norms,”⁸² it is clear to others, particularly to gays and lesbians to whom the institution is unavailable, that spouses occupy a privileged position saturated with law.⁸³ The better view, then, is that spouses operate always within law, but do not

⁷⁵ See S. Rials, *Velley et les idoles: petite introduction à la philosophie du droit de Michel Velley* (Paris: Quadrige, 2000) at 45.

⁷⁶ For further argument against the notion of a private domain respecting the family, see, discussing child support, R. Buchanan, “Deadbeat Dads in Global Perspective: A Comment on Mary Jane Mossman” (1997) 46 U.N.B.L.J. 89 at 93, noting the “surprising amount” of proactive state action required by privatization and deregulation.

⁷⁷ See Scott & Scott, *supra* note 26 at 202. For a critical discussion of the view that intimacy should keep law out of sentimental matters such as marriage, see N. Kasirer, “Honour Bound” (2001) 47 McGill L.J. 237 at 248--9.

⁷⁸ See “Une théorie pluraliste du contrat,” *supra* note 7 at 286. But see B. Yngvesson, “Re-Examining Continuing Relations and the Law” [1985] Wis. L. Rev. 623, suggesting that parties in long-term relations do in fact litigate while continuing their exchange and that their reliance on informal methods of dispute resolution is overstated.

⁷⁹ See N. Kasirer, “Testing the Origins of the Family Patrimony in Everyday Law” (1995) 36 C. de D. 795 at 801 [hereinafter “Family Patrimony in Everyday Law”].

⁸⁰ See arts. 365ff., 493ff. C.C.Q.

⁸¹ See *e.g.* Moge, *supra* note 33 at 848.

⁸² See Scott & Scott, *supra* note 26 at 202.

⁸³ See *e.g.* M. Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999) at 107 noting the weight of the legal force and cultural normativity of marriage as a public institution, not a private relation. He also comments on the legal status of marriage as always enforceable against third parties. See *ibid.* at 117. But see “Family Patrimony in Everyday Law,” *supra* note 79 at 817,

usually turn to legal enforcement mechanisms until the relationship has deteriorated and is effectively over.⁸⁴ The law relating to marriage may be viewed as a house. Its entitlements shelter the spouses and its doors offer an exit from the relationship. Just as the enclosed space within a house, though not timber or brick, is still house, the space within a marriage is law.

This view of the importance of law even within marriages leads to the established Canadian approach to contract varying the terms of a marriage. The law changed with relative speed from declaring unenforceable prenuptial and separation agreements altering certain terms of a marriage to upholding them most of the time,⁸⁵ subject to protective measures respecting children and the general regime of contract, including the doctrine of unconscionability.⁸⁶ The *Divorce Act* and provincial family legislation provide default rules around which the marrying parties contract.⁸⁷ Default rules theory provides that the parties are “implicitly committing” themselves to the jurisdiction of a legal system that will use the “background rules” of contract to fill gaps in their agreement.⁸⁸ There is implicit consent when the parties had the option of contracting out of background rules but did not do so. Contract theorists do not oppose the state’s involvement in implementing such rules, although they may criticize them for producing unintended or unjust consequences.⁸⁹

Since marriages and negotiations before and during them operate within law’s domain, the courts have a significant interest in them. Thus, although parties may deviate to some extent from the default rules, contract theory alerts

where Kasirer writes that de facto unions are themselves subject to “intense regulation despite the apparent absence of rules.”

⁸⁴ Indeed, Belley argues that a relational contract becomes a transactional contract when it ends, the parties retaining nothing but “la précision et l’esprit de liquidation de ceux pour qui le voyage est terminé.” See “Une théorie pluraliste du contrat,” *supra* note 7 at 291.

⁸⁵ See *e.g.* D.G. Duff, “The Supreme Court and the New Family Law: Working through the *Pelech* Trilogy” (1988) 46 U.T. Fac. L. Rev. 542 at 551–2. See *Pelech v. Pelech*, [1987] 1 S.C.R. 801 [hereinafter *Pelech*]; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; and *Caron v. Caron*, [1987] 1 S.C.R. 892.

⁸⁶ There are admittedly a number of such measures by which courts resist enforcement of agreements (see *e.g.* D.A.R. Thompson, “When Is a Family Law Contract *Not* Invalid, Unenforceable, Overridden or Varied?” (2001) 19 C.F.L.Q. 399). The uncertainties that Thompson notes probably indicate an inconsistency between judicial treatment of support contracts and the Supreme Court’s emphasis on the importance of finality elsewhere in family law, as in *Van de Perre v. Edwards*, [2001] S.C.R. 1014 at 1024–5.

⁸⁷ Compare the regime of the family patrimony and compensatory allowance rendered imperative by art. 391 C.C.Q.

⁸⁸ See R.E. Barnett, “The Sound of Silence: Default Rules and Contractual Consent” (1992) 78 Va. L. Rev. 821 at 828.

⁸⁹ See *e.g.* Trebilcock & Keshvani, *supra* note 58 at 551, commenting on the “inadequacy” of default entitlements that differ from those that “rational parties would have chosen *ex ante*.”

courts to the necessity of enforcing such agreements cautiously because of the possibility of “contracting failures.”⁹⁰ Contract theorists have identified a number of factors associated with marriage that may produce such failures, and that militate for caution in enforcing agreements and might rebut a presumption of enforceability. One is the cognitive shortcomings of parties beginning long-term relations. Another factor that limits the parties’ ability to contract rationally is that typically they are “unduly optimistic,”⁹¹ at least in light of the sobering statistics on marriage breakdown. A third is that promissory expression is always “fragmentary” in the sense that parties can never anticipate *ex ante* every contingency or deal with every detail of the intended performance and relationship.⁹² Finally, some scholars suggest that women may have a “bargaining disadvantage” that bears upon them in negotiations before marriage and on divorce,⁹³ perhaps because such negotiations occur “in the shadow of powerful cultural expectations.”⁹⁴

Relational contract’s sharp awareness of potential problems in private ordering confronts Parliament with policy choices, such as the balance it wishes to achieve between subjective and objective appreciations of how the parties have structured their relationship. A more subjective approach would press judges to read the facts scrupulously, seeking evidence in the parties’ conduct of their intentions. Specifically, relational contract theory would alert a judge to obligations never expressly created, to the likelihood that parties would share responsibility for sunk costs, and to the compensatory protection of generous conceptions of reliance and expectations. By contrast, a more objective approach might implement general default and even imperative rules, such as a universal sunset clause of five or ten years in contracts restricting support obligations, based as much on the assumption that relationships change over

⁹⁰ See Trebilcock & Keshvani, *supra* note 58 at 550.

⁹¹ M.A. Eisenberg, “The Limits of Cognition and the Limits of Contract” (1994–95) 47 *Stan. L. Rev.* 211 at 251–52.

⁹² See “The Many Futures of Contracts,” *supra* note 17 at 726–27.

⁹³ See *e.g.* C.M. Rose, “Women and Property: Gaining and Losing Ground” (1992) 78 *Va. L. Rev.* 421 at 433.

⁹⁴ See A.L. Wax, “Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?” (1998) 84 *Va. L. Rev.* 509 at 585. But see C. Martin, “Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law” (1998) 56 *U.T. Fac. L. Rev.* 135 at 159 for the negotiation theory argument that systemic disadvantages experienced by women result not from “immutable gender differences” but rather from their position as support claimants within the Canadian legislative framework. Martin’s argument is useful insofar as it emphasizes the difficulties of the claimant, but it is perhaps better viewed as an addition to, rather than a turn away from, earlier arguments focusing on gender disadvantages; for example, Wax’s “cultural expectations” are not linked to biology.

time as on the empirical data that parties in deep relationships do not accurately project their present relationship into a less happy future. Presumably parties, again advised by counsel, could renew the agreement for a further period. Another objective rule might be the interpretive presumption that major decisions, such as those relating to one party's career, were made jointly for the benefit of the relationship and thus for both parties. Such an approach might assist in characterizing the economically stronger spouse's career potential, possibly including professional degrees obtained, as an asset of the joint endeavour.

By recognizing the potential contracting difficulties, relational contract avoids blind enforcement of agreements governing intimate relationships. This caution is critical because automatic enforcement would augment the "persistent tendency" to simply replicate market failings within the sphere of the family.⁹⁵ Such replication would be a risk if relational contract were less sensitive to the behaviour of trusting parties in long relationships. But the theory's recognition of cognitive impediments and power imbalances indicates that preferring it as a marriage model would not be a step backwards for those traditionally less well served by family law. Indeed, because relational contract integrates the concerns addressed by the Supreme Court's marriage models, it can replace the competition between models and operate satisfactorily as a default conceptualization. It is possible to strike an appropriate balance of concerns within relational contract. A further advantage of relational contract is that it accounts well theoretically for legislative and jurisprudential treatment of affective partners who are unmarried.

4. Unmarried couples

Increased legislative and judicial recognition of unmarried couples has come so quickly that the impact on marriage remains inadequately explored. Yet marriage cannot be unaffected by the recognition of some of those obligations between individuals who have exchanged none of the statutorily defined promises framed with formalities set out in legislation and the *Civil Code of Québec*. Indeed, in the eyes of neo-classical contract theorists, unmarried individuals may well have no enforceable contract at all. Yet if an unmarried

⁹⁵ See F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497 at 1530.

cohabiting couple is subject to the same support regime as a married couple under provincial law, the wedding adds much less than it once did.⁹⁶

Relational contract analysis yields at least two positions respecting the relation between married and unmarried couples. Some theorists see deeper contract analysis as strengthening the obligations of marriage and distinguishing it more sharply from other relationships.⁹⁷ For example, Scott and Scott view a cohabitation relationship as a “more limited undertaking” in which the parties are at liberty to terminate unilaterally without lingering obligations.⁹⁸ But this distinction no longer exists in Canadian law. Subject to the statutory requirements, spouses may unilaterally seek termination of their marriage by the court,⁹⁹ and even unmarried couples cannot necessarily exit their relationship without the court recognizing continuing obligations.¹⁰⁰ It is thus difficult to maintain a clear distinction between married and unmarried couples.

The position most internally consistent is that relational contract analysis reduces distinctions between married and unmarried couples. Robert Scott has written that in relational contract the terms are not knowable or able to be articulated at the start of the relationship, and Macneil alerts us to the unavoidable gap between the terms of a particular promise and its contractual performance. The gap between these two is the “shadow” or non-promissory part of the contractual relation.¹⁰¹ Thus, even obligations that flow not from the terms of their wedding vows but from the relation they have lived bind married couples. Similarly, relational contract theory recognizes tacit assumptions that, if mutual, can serve the same “planning function” as express mutual consent.¹⁰²

⁹⁶ See e.g. *FLA*, *supra* note 50, ss. 29ff. The significance of the family property legislation applicable only to married couples increases proportionately with a couple’s wealth aside from wages. The differences between married and merely de facto spouses are significantly greater in Quebec.

⁹⁷ See e.g. Brinig, *supra* note 15 at 279, praising the Louisiana covenant marriage. For Trebilcock, a contract analysis includes signalling concerns respecting formation and the matching of parties seeking relationships. He thus favours “more sharply differentiating marriage” from other intimate relationships as a means of producing greater clarity in the search for partners. See M.J. Trebilcock, “Marriage as a Signal” in Buckley, *supra* note 15, 245 at 251.

⁹⁸ See Scott & Scott, *supra* note 26 at 214.

⁹⁹ *Divorce Act*, *supra* note 12, s. 8.

¹⁰⁰ Even where unmarried cohabitation is virtually invisible to the *ius commune*, courts are “unwilling” to subject vulnerable de facto spouses to strictly commercial assumptions when applying the general regime of obligations. See D.M. Hendy & C.N. Stonebanks, “Strangers at Law? The Treatment of Conjoints de Fait in the Civil Law of Quebec and the Development of Unjust Enrichment” (1995) 55 R. du B. 71 at 103.

¹⁰¹ See “The Many Futures of Contracts,” *supra* note 17 at 731.

¹⁰² *Ibid.* at 773.

Relational contract does not require a clear beginning or a moment of promise. Rather, the exercise of choice through contract is an “incremental process” in which parties accumulate information and gradually agree to more and more.¹⁰³ Indeed, there is often “much shading of commencement,” making it difficult to say when the relation began.¹⁰⁴ It thus becomes difficult to distinguish marriage from cohabitation. If a wedding is an exchange of promises that leads to other, non-promissory obligations flowing from the lived relation, a promise between cohabiting parties—to live together or to buy a house—might also serve as the initial promise onto which they will subsequently graft non-promissory and tacitly assumed elements. Even the initial promise may be tacit.

A difficulty for those who would defend a bright line between marriage and cohabitation is that economic analysis of marriage erases any such distinction. Both married couples and unmarried cohabitants may exchange goods and specialize in tasks in an economically efficient way; such activity is perhaps revealing of “household formation,” but says little about matrimony.¹⁰⁵ This overlap is apparent in the civil law, where doctrine recognizes that the *vie commune* marking marriage can equally mark de facto unions, the difference being that *vie commune* is the essence of unmarried relationships.¹⁰⁶ Assuming that unmarried people do not begin living together without some sort of agreement—they must at the very least have agreed to move in together—assessing relationships in terms of exchange suggests that the distinction between married and unmarried couples is one only of degree. Yet even such a distinction is not determinative, since some unmarried couples invest far more deeply in their relationship than do some married couples.

The response that courts respect freedom of contract by honouring the parties’ deliberate choice not to marry¹⁰⁷ is problematic. For one thing, it is no longer good law, even more so after the holdings in *Miron* and *M. v. H.*¹⁰⁸ For another, this position elevates one act, or rather a non-act, to superiority over the hundreds of choices of varying magnitudes made and the interdependencies developed when two people cohabit. Macneil says that in contract relations, obligations arise out of the ongoing processes of the relation. The relation per se

¹⁰³ See “Economic Analysis of Contracts,” *supra* note 18 at 1041.

¹⁰⁴ See *ibid.* at 1028.

¹⁰⁵ See e.g. W. Bishop, “Is He Married?: Marriage as Information” (1984) 34 U.T.L.J. 245 at 246.

¹⁰⁶ See e.g. “What Is *Vie Commune*?”, *supra* note 29 at 518.

¹⁰⁷ The minority took this position in *Miron*, *supra* note 30 at 451--52.

¹⁰⁸ [1999] 2 S.C.R. 3.

not only defines the content of obligations mutually agreed, but in fact also “creates” obligation.¹⁰⁹ It is difficult to assert, then, that cohabitants make no relationship-specific investments that would result in compensable loss upon termination of the relationship. Relational contract takes such created obligations into account, and given family law in common-law provinces, so must any contemporary Canadian theory of marriage. There is, admittedly, an important public and symbolic dimension to marriage that the law may choose to recognize, but that dimension is not reflected in the factors listed in provincial legislation for determining support. Given its utility in analyzing the current regime of recognition of unmarried couples, spousal support, and the other concerns discussed above, relational contract appears to be a model well-suited for characterizing Canadian marriage, and thus for structuring a consideration of the models of marriage articulated by the Supreme Court.

III. LEGAL MODELS IN *BRACKLOW*

Defining legal models in any context poses difficulties. The challenge that the Supreme Court undertook in *Bracklow*, however, was particularly complex because the law of spousal support was previously, in the words of one judge, a “jurisprudential embarrassment.”¹¹⁰ Spousal support requires models both flexible enough for legally characterizing “an almost infinite number of situations and life experiences”¹¹¹ and also structured enough to assist trial judges. Given these requirements, *Bracklow* merits study, not only for its substance, but also for its capacity to serve as a case study for the questions raised more generally in the use of legal models.

A. *Conceptual Challenges*

Bracklow is indicative of both the difficulty of defining models appropriately and of the conceptual murkiness that may follow when analytical models are insufficiently distinct. This section first assumes that there are, in fact,

¹⁰⁹ “The Many Futures of Contracts,” *supra* note 17 at 786.

¹¹⁰ See *Keller v. Black* (2000), 182 D.L.R. (4th) 690 at 705 (Ont. Sup. Ct.). In the same passage Quinn J. describes as “unnerving” that a trial judge and an appellate court could be so wrong on the law of family support as to precipitate the Supreme Court’s unanimous reversal in *Bracklow*.

¹¹¹ *Boston*, *supra* note 61 at 447.

three distinct theories of spousal support in the judgment,¹¹² and then shows that the theories collapse upon one another, even within the Court's reasons.

These theories, at least as set out, are problematic. Superficially, the names of the models of marriage and theories of support have limited utility. It is perhaps obvious that the negative label "non-compensatory" does not pin down this model, leaving it free to be anything else. Given that this model is contrasted with both compensatory and contractual theories of support, it seems justifiable to assume that "non-compensatory" is meant to be neither compensatory nor contractual; it would otherwise be a subcategory of a broader notion of contractual compensation. Its alternative name, "basic social obligation," is only marginally better, leaving unstated what is basic about the obligation and what "social" means in this context. The model's potential breadth and the support to which it gives rise have not escaped the notice of trial judges.¹¹³

More substantively, marriage has changed so much that the social obligation theory is no longer even internally consistent. This theory is predicated on society's commitment to lifelong marriage. Once, however, marriage is not for life—divorce is available with relative ease (legally, though of course not emotionally) and without incurring societal condemnation—it is not obvious why the support obligation engendered by lifelong marriage would survive.¹¹⁴ There is little foundation for holding that, once marriage itself is altered from a lifelong commitment to one terminable on petition by a spouse, the corresponding obligation of spousal support can survive in some circumstances, only slightly reduced. Justice McLachlin's "broad strokes"¹¹⁵ overlook the important theoretical link between social obligation and fault, and that the possibility of alimony was

¹¹² The reasons do not indicate that there is no overlap between the theories, but suggest that they are distinct. See *Bracklow*, *supra* note 1 at 436 (the models of marriage representing "markedly divergent philosophies, values, and legal principles").

¹¹³ In *Arruda v. Arruda* ([1999] B.C.J. No. 2296 at para. 34 (S.C.), online: QL (BCJR) [hereinafter *Arruda*]), Boyle J., the trial judge in *Bracklow*, queried whether the case was one for compensation, for contract, or for the "clean-up and catchall 'basic social obligation' model".

¹¹⁴ Regan notes that alimony developed historically when divorces were "rarely granted" and was continued without explicit justification after divorce became more readily accessible. See *supra* note 24 at 44. Eekelaar observes the short pedigree of the lifelong support obligation flowing from marriage; support obligations in nineteenth-century England were based on de facto economic dependence. See J.M. Eekelaar, "Family Law and Social Problems" (1984) 34 U.T.L.J. 236 at 241-42. This history reduces the persuasive authority of the social obligation model's exchange of promises as giving rise to support entitlement, as de facto dependence aligns more closely with some calculations within relational contract compensation.

¹¹⁵ *Bracklow*, *supra* note 1 at 436.

often viewed primarily as the husband's deterrent from breaking his marriage vows.¹¹⁶

The Court overestimates the necessity of the social obligation theory in adequately compensating spouses who have made sacrifices. If a court accepts some of the compensation possibilities outlined in the discussion on spousal support above, even cases of post-divorce illness, such as *Bracklow*, may be seen as compensatory. A court would compensate for the reasonable expectation of future support, or more specifically the expectation that the sick party would not be ill and poor immediately after the marriage while the other spouse was financially better off. Absent such expectation between the parties *ex ante*—and in *Bracklow* the trial judge found no such explicit or implicit agreement—there is no way of justifying support merely on the vestiges of a model of marriage that society no longer endorses. Retaining the social obligation model, however, spares the Supreme Court the possibly embarrassing task of articulating precisely the sorts of contractual expectations it is prepared to recognize as reasonable and compensable.

While the social obligation theory in the judgment is too big, the compensatory theory is correspondingly too small and simplistic. For example, the potential raised by the Court for a support obligation specifically characterized as “lifelong”¹¹⁷ would already be included in a broader conception of compensation. Justice McLachlin's pithy statement, “There are no magical cut-off dates,”¹¹⁸ stands alone if understood to mean that the applicable compensation principles will determine an ex-spouse's obligations, which will not necessarily be lessened by a limitation period. As discussed above, during an intimate relationship, married or unmarried, one party may make relationship-specific investments, the sunk costs of which cannot foreseeably be shared fairly by the other party during a fixed period within his lifetime. In such cases, the debtor party may never cease owing support. This is all that “lifelong obligation” need mean. Many obligations unrelated to marriage may turn out *ex post* to have been lifelong, or at least to have outlasted one of the parties; this can be the only sense in which Justice McLachlin means “lifelong.” Characterizing a mortgage not discharged on death as lifelong adds little to the analysis; linking such a contract to the life of one or both parties is irrelevant. “Lifelong” needlessly evokes wedding vows, while the source of spousal support really lies in the lived patterns of the relationship, with or without a

¹¹⁶ For a good summary, see Regan, *supra* note 24 at 45–46. See also the discussion of the connection between support and fault in C.J. Rogerson, “Spousal Support after *Moge*” (1996–97) 14 C.F.L.Q. 281 at 287–88.

¹¹⁷ *Bracklow*, *supra* note 1 at 452.

¹¹⁸ *Ibid.*

wedding. If compensating the wife for her idiosyncratic investments in the relationship or for her losses takes the rest of the husband's life, so be it; what a court awards then is spousal support determined by compensation principles, not by the marriage vows. Similarly, a court awarding an elderly wife "lifelong" support would not mean that the husband, if he won the lottery, could not discharge his obligations by purchasing an annuity to pay the support owed. Indeed, *Bracklow* is sympathetic to the idea of discharging the support obligation by a lump payment,¹¹⁹ consistent with the Court's recognition of successive relationships and the new obligations they bring.¹²⁰ Characterizing obligations as potentially lifelong detracts from a richer appreciation of the possibilities of compensatory support.

Furthermore, the Court's statement that it is "well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union"¹²¹ is significantly less complex than the current regime. *Moge* advanced the law in this area, but the law does not require restitution in the sense of full compensation owed to both spouses for any missed opportunities. A wife who chose lower-paying jobs for the sake of the marriage but is nevertheless employed and self-sufficient at the end of the marriage is unlikely to be awarded compensation for the difference between her chosen career and the one foregone, though she might be entitled to support on other statutorily recognized grounds, such as contributions in raising the children. The point is that the law does not recognize unconditional, internally unlimited compensation.

Similarly, Justice McLachlin's depiction of the clean-break model, in which a payment is made in liquidation of obligations owed to the poorer spouse and the parties proceed to autonomy, is too narrow. The clean-break model is not inherently unfair; "clean-break" need not result in fifty-five-year-old uneducated homemakers living on the street after thirty years of marriage.¹²² How the parties achieve a clean break is itself not fixed, but is rather a function of the policy determination by the legislatures and courts as to which losses are compensable and how fully. Compensable losses could be linked to household labour performed, foregone wages, lost earning capacity, reliance, expectations, or any combination of these factors; there would be no clean break, then, until discharge of the outstanding obligation, however assessed. The tough policy decisions thus lie

¹¹⁹ *Ibid.* at 451.

¹²⁰ See *ibid.* at 452.

¹²¹ *Ibid.* at 420.

¹²² On the distinction between compensatory and clean-break theories, see D. Goubau, "The Clear and Clouded World of Spousal Support in Canada" (2001) 18 C.F.L.Q. 333 at 339.

within compensation, not a tension between compensation and another model. The Court's binary opposition between compensatory and non-compensatory support obscures that what to compensate is always a question of policy. The debate is best framed as a compensation dilemma, and it need not rely on historical notions of marriage.

The Court offers only a cursory depiction of the contractual basis for entitlement. Most of the judgment suggests that the justices are thinking only of express contracts, as in the *Pelech* trilogy. Once it is recognized that contract law, and relational contract theory in particular, is more complex and provides variations, it becomes difficult to maintain a theoretical division between this source of obligations and the other two competing models of support. Justice McLachlin herself recognizes this overlap briefly in the judgment's historical section, where she notes that statutes require courts to take into account support agreements between the parties, whether "express or implied."¹²³ Regrettably, she never returns to this notion of an implied contract concerning support. Had she given more weight to implied contracts, there would have been much less work for the non-compensatory support model. This alternative would have been preferable, because courts are better at filling in terms of a contract based on the parties' behaviour than at calculating how much support "need" requires, once it is recognized that the objective is not necessarily to satisfy that need fully.¹²⁴

Perhaps Justice McLachlin paid little attention to the definition of contract because if she had, Mrs. Bracklow would have received nothing. The reasons state that subject to judicial discretion, the parties may enhance, diminish, or negate the obligation of mutual support "by contract or conduct."¹²⁵ Any generous reading of this statement would give weight to Justice Boyle's findings of fact at trial. Instead, the judge's finding that there was "no express or implied agreement" between the Bracklows respecting mutual support¹²⁶ serves as the basis for Justice McLachlin's holding that the trial judge erred in law in his misconception of the default presumption of "mutuality and interdependence."¹²⁷ Yet the trial judge's other findings are surely sufficient to rebut even Justice McLachlin's "correct" presumption, notably that the Bracklows had an arrangement, "spoken or unspoken," that apart from household expenses each would pay his or her own

¹²³ See *Bracklow*, *supra* note 1 at 432.

¹²⁴ See *ibid.* at 451.

¹²⁵ *Ibid.* at 450.

¹²⁶ *Ibid.* at 430.

¹²⁷ *Ibid.* at 433.

way.¹²⁸ If this unspoken arrangement fails to rebut the presumption, Justice McLachlin's possibility of the parties' negating the obligation of mutual support by conduct is slight indeed.

It is in this sense—in recognizing what the parties established by words or conduct—that in some circumstances relational contract may limit support obligations. In contrast to some relational contract theorists, who see a contract model as leading to covenants and undertakings deeper than those generally recognized by statutory regimes,¹²⁹ this article suggests that a contractual analysis—looking to reasonable expectations, reliance, and interdependence, and setting aside the sweeping language of marriage vows and the historical background of the social obligation model—may lead to obligations that are at least limited. That Mrs. Bracklow, after the marriage ended, would rely on Mr. Bracklow if permitted to do so does not mean that the two of them developed such dependence specifically through their relation.

The individual definitions aside, a further problem is that the models, as set out, are not distinct enough to aid judges.¹³⁰ Justice McLachlin deliberately simplifies the models and the issues; the result is a judgment much shorter and less embedded in doctrine than, for example, *Moge*, which gives rise to a nagging sense that much has been swept aside. Even within her reasons the non-compensatory model comes uneasily close to being contractual, as when she writes that the mutual obligation model of marriage stresses the interdependence created by marriage.¹³¹ Interdependence is not exclusively a contractual concept, but it plays a significant role in relational, if not neo-classical, contract theory.¹³² More fundamentally, the rationale for the mutual obligation theory is itself contractual, the theory postulating that each spouse agrees to marriage and all it

¹²⁸ *Bracklow* (trial), *supra* note 33 at 187. The judge also found that the terms of the particular marriage were not of the kind where a wife, by agreement or implication, gives up her ability to earn income outside the home in return for the husband's support (*ibid.* at 189). Compare *Droit de la famille—3169*, [2000] R.J.Q. 2538 at 2541 (C.A.), in which the parties had established during their life together a *modus vivendi* “basé sur l'idée de soutien mutuel plutôt que d'indépendance.”

¹²⁹ See *e.g.* Brinig, *supra* note 15 at 279, on the need for a “right to fetter divorce rights”. Scott & Scott (*supra* note 26 at 209, 241) criticize current divorce law for foreclosing the “freedom to make binding commitments” and limiting couples interested in “substantial commitment.” It is perhaps an exaggeration to suggest that the commitment of standard marriage, even under no-fault divorce, is insubstantial.

¹³⁰ But see C. Davies, “Spousal Support under the *Divorce Act*: From *Moge* to *Bracklow*” Case Comment (1999) 44 R.F.L. (4th) 61 at 62, arguing that *Bracklow* is important because it draws a “clear distinction” between compensatory and needs-based support.

¹³¹ *Bracklow*, *supra* note 1 at 436. See also *ibid.* at 437.

¹³² See *e.g.* Macneil (“Economic Analysis of Contracts,” *supra* note 18 at 1033), who links interdependence with future co-operation and solidarity, arguing that it often generates its own momentum.

entails, “including the potential obligation of mutual support.”¹³³ The resultant loss of individual autonomy violates no premise of equality because each party voluntarily cedes autonomy,¹³⁴ in a conception strikingly contractual. In Justice McLachlin’s view, the mutual obligation model recognizes the difference between theoretical and actual independence, and that there may be a mutual obligation of support “absent contractual or compensatory indicators.”¹³⁵ Given that the mutual cession of autonomy and assumption of responsibility is contractual, however, this mutual obligation of support does not arise and endure absent contractual indicators, but rather precisely from the marriage contract. Another notion borrowed from contract in the development of the Court’s non-compensatory model is that a support obligation may flow “from the *marriage relationship* and the *expectations*” of the parties on marriage.¹³⁶

Justice McLachlin is concerned not to appear to ground a support obligation in the status of marriage alone; she specifies that it is not the “act of saying ‘I do’, but the marital relationship” that may generate the obligation of non-compensatory support.¹³⁷ Yet the close factual analysis that applying such a statement requires is, again, profoundly contractual; it hangs on the parties’ behaviour towards one another during the relationship. This analysis situates the entitlement in the expectations and tacit assumptions between the parties, which Macneil argues arise during any relation under the “basic contract interests” of restitution, reliance, and expectation.¹³⁸

In contrast, truly non-compensatory and non-contractual support would exist in the air, and could be executed on evidence of one spouse’s ability to pay. Support can only be truly non-compensatory if the court specifies that the award is made independently of any compensable expectation or contractual term on the part of the receiving party.¹³⁹ In contrast, “non-compensatory support” under *Bracklow* is deeply rooted in a relational contract, and if the Supreme Court acknowledged the breadth of potential compensation suggested in doctrine, it could characterize as compensatory even what it appears to mean by non-compensatory

¹³³ *Bracklow*, *supra* note 1 at 437.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid* at 445–46, citing *Story v. Story* (1989), 65 D.L.R. (4th) 549 at 566 (B.C.C.A.), Proudfoot J.A., concurring [hereinafter *Story*], cited in *Moge*, *supra* note 33 at 844–45 [McLachlin J.’s emphasis].

¹³⁷ *Bracklow*, *ibid.* at 450.

¹³⁸ See “Long-term Economic Relations,” *supra* note 62 at 898.

¹³⁹ Such support, to be purely non-compensatory, would probably have to be entirely prospective, with no retrospective component. On the difficulty of determining non-compensatory support, see Goubau, *supra* note 122 at 344.

support.¹⁴⁰ Assessing whether instances of non-compensatory support are better classified as compensatory is important because, while many such cases could be effortlessly recharacterized, an important few probably could not. In such cases, a support obligation may be unfounded. Indeed, given the marriage arrangement between Mr. and Mrs. Bracklow, theirs is probably one such case.

The “competing” models blend further because of the uncertain relationship between claims made and rebutted under them. The Court is vague as to the circumstances in which a negative finding under one model would obviate a successful claim under another. Justice McLachlin says that compensatory factors may be “paramount” where the economic loss is discernible.¹⁴¹ But where it is impossible to determine the extent of the economic loss of a “disadvantaged spouse,” need and standard of living will prevail.¹⁴² If the compensatory and non-compensatory theories of support entitlement are distinct, it is baffling that accounting difficulties encountered while applying one theory would automatically activate another theory. The limiting requirement in the adjective “disadvantaged” is ambiguous, as the Court does not specify whether it requires only relative disadvantage as between the spouses or a causal link between the conditions of the privileged and the disadvantaged spouses. The imprecision around the competing models opens the possibility that trial judges might, problematically, find no compensation owed, and nonetheless turn to need and standard of living.¹⁴³ The result may be that applicants always gets two or three kicks at the spousal support can.

Just as the categories collapse into each other within *Bracklow*—in the recognition that both compensatory and non-compensatory support are, ultimately, contractual, once this word signifies more than “expressly contractual”—so confusion also prevails in subsequent cases attempting to follow the judgment. Trial judges show considerable discomfort in applying the *Bracklow* models.¹⁴⁴ A

¹⁴⁰ On the risk that non-compensatory support will lead to judicial sloppiness and less rigorous compensatory *Moge* analysis, see D.A.R. Thompson, “Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative” (2000–1) 18 C.F.L.Q. 25 at 64 [hereinafter “Rules and Rulelessness”].

¹⁴¹ *Bracklow*, *supra* note 1 at 440.

¹⁴² *Ibid.*, citing *Ross v. Ross* (1995), 168 N.B.R. (2d) 147 at 156 (C.A.), Bastarache J.A.

¹⁴³ See *Boston*, *supra* note 61 at 451–52, where Justice LeBel recognizes this possibility, admitting that even when compensation concerns might otherwise predominate, courts may use the means and needs of the parties because they supply the only available numbers.

¹⁴⁴ Support has been awarded based on a “mix” of compensatory and non-compensatory grounds. See *Sowa v. Sowa* (1999), 256 A.R. 341 at 344–45 (Q.B.), Mackenzie J. A master has observed that categorizing spousal support based on distinct models is “not useful” because the categories so often overlap. See *Dainard v. Dainard*, [1999] B.C.J. No. 2740 at para. 34 (S.C.), Master Nitikman, online: QL (BCJR).

number of judgments support the proposition that the factors for analyzing non-compensatory support are better characterized as contractual.¹⁴⁵ If the basis on which the parties entered the marriage sounds only in non-compensatory, non-contractual support, contract as a source of obligation is virtually eliminated.

Part of the problem may be that the models of marriage and spousal support were not meant to coexist. Justice McLachlin credits an article by Carol Rogerson with having identified the two “competing” theories of marriage and post-marital obligation.¹⁴⁶ She does not, however, mention that Rogerson¹⁴⁷ separates the models for analytical purposes, but notes that they are not “pure” models, and that under existing legislation all three models “interact and modify each other.”¹⁴⁸ For Rogerson, separation is useful because “ultimately a choice has to be made” as to which model underpins spousal-support law.¹⁴⁹ In other words, Rogerson views the coexistence of the three models as a problem that will prompt judges and legislators to use them for assistance in articulating important concerns, eventually picking one model as a conceptual foundation. It is significant that the scholar who wrote the leading studies on the subject believed, at least in 1989, that the uncertainty caused by competing models is

¹⁴⁵ Two factors that are best understood as contractual appear in the post-*Bracklow* analysis of non-compensatory support. First, the parties may have had an agreement of mutual support or of support of the vulnerable spouse on marriage. See e.g. *Tyerman v. Tyerman*, [1999] B.C.J. No. 2327 (S.C.), Shaw J., online: QL (BCJR) [hereinafter *Tyerman*], where the trial judge begins the non-compensatory analysis correctly, noting that in appropriate cases the wife’s needs and inability to support herself will play a “significant role” in determining spousal maintenance, but slides immediately into the language of contract, finding that the parties married on the understanding that Mr. Tyerman would be Mrs. Tyerman’s sole source of financial support for the rest of her life (*ibid.* at para. 30). See also *Arruda*, *supra* note 113 at paras. 37, 38, finding a “basic social obligation” based on the “expectations and promise” of the marriage on entry; and *Da Costa v. Da Costa* (1999), 46 R.F.L. (4th) 355 at 361 (B.C.S.C.), where Justice Boyle finds an understanding of support of the homemaking wife as the foundation of the marriage. Second, the parties may have conducted themselves during the marriage so as to make clear the obligation of support. See e.g. the conduct of the parties in *Tyerman*, *ibid.*; and the “*modus vivendi*” in *Droit de la famille—3169*, *supra* note 128 at 2541. For a comprehensive overview of the post-*Bracklow* jurisprudence, see C. Rogerson, “Spousal Support Post-*Bracklow*: The Pendulum Swings Again?” (2001) 19 C.F.L.Q. 185 at 219-51 [hereinafter “Spousal Support Post-*Bracklow*”].

¹⁴⁶ See *Bracklow*, *supra* note 1 at 434. Justice McLachlin refers to Rogerson throughout the reasons. *Ibid.* at 438, 443, 446, 447, citing “Spousal Support after *Moge*,” *supra* note 116; C.J. Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act*, 1985 (Part I)” (1991) 7 C.F.L.Q. 155.

¹⁴⁷ C.J. Rogerson, “The Causal Connection Test in Spousal Support Law” (1989) 8 Can. J. Fam. L. 95.

¹⁴⁸ *Ibid.* at 107.

¹⁴⁹ *Ibid.*

unsustainable.¹⁵⁰ In fact, cases after *Bracklow* demonstrate trial judges' difficulties when critical issues lie across competing models.¹⁵¹ The categories are confusing and not easily applied, and they obscure the main question of how much courts are prepared to order compensated. As such, they suggest the limited utility of competing models that raise questions about the extent and flexibility of their application, both to individual parties and to other similar legal relations.

B. *Boundary Issues*

1. Justice and the limits of contract

Bracklow's menu of three competing theories of spousal support applying to different factual situations may suggest considerable flexibility for particular couples, but the judgment reveals significant constraints on private choice. Indeed, *Bracklow* shows a conflict between the articulated acceptability of private ordering and the case's outcome. The Court reiterates the position from *Pelech*, without citing the trilogy, that parties may disavow financial interweaving by explicit contract or clear structuring of their life together.¹⁵² But by essentially rejecting the trial judge's finding of the Bracklows' arrangement of independence,¹⁵³ Justice McLachlin derogates from this principle, suggesting that the Court's "institutional encouragement"¹⁵⁴ of negotiation and private ordering has diminished. Though this result may be attributed narrowly to the trial judge's ostensible error in conceiving

¹⁵⁰ Cossman, in contrast, bases her criticism on the Court's having "confused" Rogerson's models of spousal support and conflated theories of marriage with theories of spousal support. See B. Cossman, "Developments in Family Law: The 1998-99 Term" (2000) 11 S.C.L.R. (2d) 433 at 447-48, n. 49. Rogerson herself has characterized the Supreme Court's transposition of her models as "very jumbled and almost unrecognizable." See "Spousal Support Post-*Bracklow*," *supra* note 145 at 201.

¹⁵¹ See e.g. *Dubreuil v. Dubreuil*, [1999] B.C.J. No. 1389 at para. 54 (S.C.), Martinson J., online: QL (BCJR) ("no simple answer" to question of spousal support entitlement and quantum); and *Moen v. Schultz* (2000), 190 Sask. R. 223 at 2228-29 (Q.B.), Baynton J. (principles in *Bracklow* "easy to state but much more difficult to apply"). For strong criticism of the decision because of the difficulties it poses for appellate and trial judges, see "Rules and Rulelessness," *supra* note 140 at 55.

¹⁵² See *Bracklow*, *supra* note 1 at 434. Justice Wilson's position in *Pelech* has never been universally shared, and the authority of the trilogy has been questioned. See *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370, L'Heureux-Dubé J., concurring. It is nevertheless surprising to see it not even cited in *Bracklow*. On recent judicial treatment of *Pelech*, see J.D. Payne, "An Overview of Theory and Reality in the Judicial Disposition of Spousal Support Claims under the Canadian Divorce Act" (2000) 63 Sask. L. Rev. 403 at 429. See also *Miglin v. Miglin* (2001), 53 O.R. (3d) 641 at 654ff. (C.A.), Abella J.A., leave to appeal granted (2001), 203 D.L.R. (4th) vi (S.C.C.)

¹⁵³ *Bracklow*, *ibid.* at 452-53.

¹⁵⁴ See J.-G. Belley, "Une justice de la seconde modernité: proposition de principes généraux pour le prochain *Code de procédure civile*" (2001) 46 McGill L.J. 317 at 345, discussing negotiated justice.

the default allocation of responsibility, his finding was clear enough that it ought to have rebutted even the correctly articulated presumption of mutual support. Given the considerable, even excessive, deference to findings of fact by trial judges that has recently marked the Supreme Court's approach to family law,¹⁵⁵ this rejection of what is arguably the crucial finding from trial suggests a more general reluctance by the Court to permit parties to avoid support payments.

This disconnect between principle and result reveals ambivalence about freedom of contract within marriage. At a high level of abstraction, *Bracklow* may be seen as constituting, with *Chartier v. Chartier*¹⁵⁶ and *M. v. H.*, a trilogy expanding the private support obligation of individual family members.¹⁵⁷ Yet the distinction between *Bracklow* and the other cases is as striking as their common stance of privatization. In *Chartier* and *M. v. H.*, the Court assimilated de facto relationships with de jure relationships giving rise to enforceable support obligations. As it was reasonable in both cases to suppose that no family law applied, none of the parties had attempted consensually to alter a default support regime. In contrast, in *Bracklow*, in the context of the legally recognized relationship par excellence, the Court refused to accept tacit private ordering that would have limited the parties' obligations. *Bracklow* does not raise the recognition of new types of relationships for the applicability of a statute, but rather the boundaries of contract, the extent to which, in civil law terms, spousal support obligations reveal an untouchable public order core.

Indeed, Justice McLachlin's comments may indicate the emergence of a new notion of substantive justice within marriage. Evidence of such change from the Supreme Court may lie in the unanimity of the trial and Court of Appeal judges, all overturned. The Supreme Court's references to justice, fairness, and equity throughout the judgment, and its exhortation to trial judges to pursue these ideals in each situation,¹⁵⁸ may thus be disingenuous. The difficulty was not that the trial and appellate judges followed other objectives, such as formalistic application of

¹⁵⁵ See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at 526. In "Spousal Support Post-*Bracklow*," *supra* note 145 at 225, Rogerson observes that the deference doctrine effectively immunizes highly individualized and discretionary decisions from appellate review.

¹⁵⁶ (1998), [1999] 1 S.C.R. 242 [hereinafter *Chartier*].

¹⁵⁷ See Cossman, *supra* note 150 at 435. On privatization more generally, see e.g. S.B. Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 9:1 Can. J. L. & Soc. 39. She argues that the courts' privatization of support will let society "off the hook" in dealing with the entrenchment of women's roles and economic dependence. See *ibid.* at 69.

¹⁵⁸ See *Bracklow*, *supra* note 1 at 438-9, 440, 442-4, 453-4. Indeed, such abstract notions are probably much less helpful than a specific decision of quantum would have been. Given all the information on the record, and that the parties had been in litigation for five years, it is surprising that the Supreme Court refused to specify quantum and a duration. See "Rules and Rulelessness," *supra* note 140 at 59.

precedent, but rather that they did not have the benefit of the Supreme Court's evolving, still inchoate, conception of justice and of how to measure justice in marriage.

Justice McLachlin's language indicates that this notion is rooted in normative principles beyond the privatizing concern to reduce the state's obligations, which she also recognizes.¹⁵⁹ She notes that the mutual obligation model places the primary burden of support for a needy partner unable to attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, in recognition of the "potential injustice of foisting a helpless former partner onto the public assistance rolls."¹⁶⁰ Yet the justification for this allocation does not seem to limit itself to the mutual obligation model; indeed, it indicates a broader, underlying conception of justice. First, "foist" assumes that the support obligation falls *prima facie* on the partners, since one can only foist onto somebody else a responsibility already his or hers. In an inquiry as to the existence of an obligation, then, the sentence precludes the possibility that there is no obligation. Second, "injustice" is meaningful only in relation to someone, but Justice McLachlin does not specify a potential injustice to whom or why. This vagueness raises at least two possibilities. The potential injustice may be one to individual spouses, but there is no explanation as to why injustice would arise if informed parties had agreed not to support each other. Alternatively, or conjunctively, the potential injustice may be to society itself. The comment that the default presumption of mutual support comports with Canadian society's "reasonable expectations"¹⁶¹ indicates the public interest in spouses' caring for each other, perhaps in return for society's benefits conferred on married couples.¹⁶² The existing statutory limits on *ex ante* private ordering affecting children already demonstrate a legislative concern about third-party effects from contracting about marriage.¹⁶³ What seems new, however, is the implicit characterization of the community as a third party, with a legitimate interest in the private ordering between spouses beyond the policing of merely procedural justice.¹⁶⁴ It seems now that waiving spousal obligations may be

¹⁵⁹ Bracklow, *ibid.* at 437–8.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.* at 433.

¹⁶² A less persuasive alternative is that Justice McLachlin means "reasonable expectations" as an objective touchstone for interpretation of a particular marriage arrangement: members of society expect that if they were married, they would be provided for, if necessary, by their respective spouses.

¹⁶³ See *e.g.* *Divorce Act*, *supra* note 12, s. 15.1; and *FLA*, *supra* note 50, s. 52(1)(c).

¹⁶⁴ Although the process/substance distinction has been questioned and in certain contexts may require at least complication, it remains useful for present purposes. See *e.g.* D. Dyzenhaus & E. Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193 at 196.

substantively unfair to the community. At a time of government cutbacks, such a new notion of substantive justice may well accord with the mores of many members of society, but delineation of its extent is required. The judgment does not indicate whether the concept will intervene whenever a support claimant, if unsuccessful, would require public support, or only on particularly compelling facts, such as illness and permanent disability. At the very least, it is difficult to reconcile the notion with the dictum in *Bracklow* about parties' ability to waive obligations. The concept of justice limiting contract requires further elaboration by the Court, particularly given its potential application to couples not traditionally recognized as married.

2. The borders of marriage

Proponents of relational contract differ in their estimation of the potential of default rules and legally imposed obligations to fortify marriages. Some theorists think better-structured family law could save marriages, or at least reduce the incidence of marriage breakdown in the "less permanent world" of no-fault divorce;¹⁶⁵ others think contract, or any law, can do little to save doomed relationships and, instead, should simply help parties dissolve their relationship on fair terms.¹⁶⁶ Opposition between these two positions is probably false, as good marriages benefit from legal structures that prevent too-easy exit during the inevitable lows of any long relationship, and such structures cannot save bad marriages. What matters here, however, is the effects on the position of marriage in Canadian society, not of positive law and legal institutions, but of the judgment's articulation of models.

Many observers interpret Justice McLachlin's reasons and her competing models as reinforcing the sanctity of marriage,¹⁶⁷ presumably meaning marriage's position as the sexual relationship most recognized by law. They point to reinforcements in statements such as "Marriage, while it may not prove to be 'till death do us part', is a serious commitment not to be undertaken lightly."¹⁶⁸ But what is evident from a reading of the entire judgment is not any re-enforcement of the unique status of marriage, but rather the further blurring of the line between married and unmarried couples, and the imposition of potentially greater burdens of support on the unmarried support

¹⁶⁵ See e.g. Brinig, *supra* note 15 at 275-76, who believes that no-fault divorce has "spawned substantial social problems." See *ibid.* at 275.

¹⁶⁶ See "Relational Contracts," *supra* note 20 at 302.

¹⁶⁷ See e.g. J.G. McLeod, "Annotation" on *Bracklow v. Bracklow* (1999) 44 R.F.L. (4th) 5 at 9.

¹⁶⁸ *Bracklow*, *supra* note 1 at 452.

debtor. *Bracklow* thus indicates that legal models may simultaneously reinforce and unsettle the border between the legal institution modelled and related institutions.

It is possible to read the judgment as restricted to support between married partners “because of the facts.”¹⁶⁹ Justice McLachlin probably had the circumstances in mind as she chose her words, but she did not limit her comments to support between married spouses. Her use of “marriage” is fluid. First, she uses the term to signify both relationship and wedding.¹⁷⁰ Second, she sometimes uses “marriage” to mean not only the three years after the wedding, but also the four years of unmarried cohabitation.¹⁷¹

This usage matters because during the close factual analysis that she says is so critical in balancing all relevant factors, Justice McLachlin refers to the total length of the relationship. She writes, “While the *combined cohabitation and marriage of seven years* were not long, neither were they (by today’s standards) very short.”¹⁷² This is troubling because it is unlikely that she would make a similar statement about just three years of marriage; even by today’s standards, a three-year marriage is brief.¹⁷³ Despite her comments about marriage, she grounds the support entitlement, in part, on a period of unmarried cohabitation. Her view of the combined time does not indicate that the three years of marriage weighed more heavily, or that the wedding represented a threshold requirement making the four years of cohabitation count more retroactively under provincial law. It was the total length of lived intimate relationship that mattered, not the wedding.

The Court’s reliance on the years of unmarried cohabitation is significant for those who believe that increasing recognition of unmarried couples somehow threatens the institution of marriage. Another concern less

¹⁶⁹ McLeod, *supra* note 167 at 9.

¹⁷⁰ When Justice McLachlin examines the loss caused by the “marriage or marriage breakup,” she means marriage as relationship. See *Bracklow*, *supra* note 1 at 443. Elsewhere, however, when she contrasts the “bare fact of marriage” with the “the relationship” (*ibid.* at 445), “marriage” must mean the wedding. Similarly, when she says “[m]arriage ... is a serious commitment”, that commitment is likely the wedding, because the significant undertaking associated with a marriage is the wedding; time after the wedding is the working out of that undertaking. See *ibid.* at 452.

¹⁷¹ See *ibid.* at 425. McLachlin J.’s focus on the entire period of cohabitation has been noticed judicially (see *Droit de la famille—3169*, *supra* note 128 at 2541) and extrajudicially (see M.-J. Brodeur, “Les effets de l’arrêt *Bracklow*: un support privé pour l’ex-époux en remplacement d’un régime public d’assurance-maladie?” in *Développements récents en droit familial (2000)* (Cowansville, Qc.: Yvon Blais, 2000) 1 at 46).

¹⁷² See *Bracklow*, *ibid.* at 453 [emphasis added].

¹⁷³ Statistics Canada reports that in 1998 the average duration of a marriage ending in divorce was 13.7 years across Canada, 15.1 years in Quebec, and 12.8 years in British Columbia (survey of 69,088 people, Publication #84F0213XPB).

grounded in morality is that the “valuable benefit” of marriage as a “signal” is further reduced.¹⁷⁴ From a signalling perspective the institution of marriage is valuable for what it tells prospective partners willing to enter it; it also permits society to make presumptions based on persons’ marital status and apply these to an “extraordinarily varied” set of decisions.¹⁷⁵

The judgment is also important from the perspective of unmarried cohabiting persons. Justice McLachlin does not comment on the “current practice” of applying the principles developed in respect of married couples to determine support for unmarried couples under provincial family law,¹⁷⁶ but some trial and appellate judges have read her silence as tacit approval for doing so.¹⁷⁷ Such laws recognize spousal support obligations between unmarried persons, initially opposite-sex and now also same-sex.¹⁷⁸

The current law is particularly problematic because the family legislation now applicable to same-sex couples may rely, after *Bracklow*, on the social obligation model of marriage. The full privileges of marriage remain restricted to opposite-sex couples, because of the institution’s firm grounding in the legal tradition.¹⁷⁹ Nevertheless, where courts detect the possibility of easing the burden on the public purse,¹⁸⁰ it seems that they will find that the *inter partes* obligations of support associated with marriage are less deeply rooted and can, in fact, be successfully transplanted to same-sex couples. It is probably inappropriate to interpret provincial family law as it applies to same-

¹⁷⁴ See e.g. Bishop, *supra* note 105 at 261.

¹⁷⁵ See *ibid.* at 258.

¹⁷⁶ See McLeod’s comments, *supra* note 167 at 9.

¹⁷⁷ See e.g. *Arruda*, *supra* note 113, where Justice Boyle states at para. 34 that *Bracklow* governs all family cases where support is claimed. See also *Russell v. Russell* (1999), 180 Sask. R. 196 at 227--28 (C.A.), Jackson J.A. (*Bracklow* applying to provincial family support legislation); *Henderson v. Scarborough*, [1999] B.C.J. No. 1960 at para. 27 (S.C.), Grist J., online: QL (BCJR), cited with approval in *Frederkind v. Frederkind*, [1999] B.C.J. No. 2476 at para. 31 (S.C.), MacKenzie J., online: QL (BCJR). A Quebec judge has also used *Bracklow* in determining support under art. 511 C.C.Q., which is conceptually distinct from the *Divorce Act* support. See *N.A. v. J.L.*, [2001] J.Q. No. 2743 at para. 78 (Sup. Ct.), Sévigny J., online: QL (QJ), aff’d (13 March 2002), Montreal 500-09-011123-015 (C.A.).

¹⁷⁸ See e.g. *Family Relations Act*, R.S.B.C. 1996, c. 128, ss. 1(1) “spouse,” 87ff., as am. by S.B.C. 1997, c. 20, s. 1(c) [hereinafter *FRA*]; *FLA*, *supra* note 50, ss. 29ff., as am. by *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, 1999, S.O. 1999, c. 6, s. 25(2).

¹⁷⁹ See *Egan v. Canada*, [1995] 2 S.C.R. 513 at 536, La Forest J. See also Cory J.’s insistence that same-sex support obligations have “nothing” to do with marriage. *M. v. H.*, *supra* note 108 at 48. For Parliament’s defensive assertion that marriage remains the union of “one man and one woman”, see *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1), and *EGALE Canada v. Canada (A.G.)*, [2001] 11 W.W.R. 685 (B.C. S.C.)

¹⁸⁰ See *M. v. H.*, *ibid.* at 76.

sex couples—perhaps to unmarried opposite-sex couples too—on the basis of the social obligation model of marriage. In moving from a traditional, religiously based notion of dependence and dominance to one of equal mutuality between consenting spouses,¹⁸¹ this model has already undergone breathtaking change. It seems incongruous that the same model should govern unmarried spouses who have never undertaken even the “serious commitment” of marriage,¹⁸² having merely lived together for a statutory threshold period that varies by province. A solution is that the obligations of the *FRA* or *FLA* on unmarried couples might be less. Unlikely as this might seem, Justice McLachlin would probably be uneasy applying provincial legislation to an unmarried couple on the basis that cohabiting two years or more, “while perhaps not ‘till death do us part,’” is a serious commitment not to be undertaken lightly.

Justice McLachlin’s alternations between “marriage,” “marital relationship,” and “relationship” conceal the fact that the terms are not always interchangeable. For example, reference to the expectations of the parties on marriage appears inflexible.¹⁸³ Transferred to a cohabitation context, it is unclear whether it would mean the expectations that the parties had when they moved in together, or two or three years later, since cohabitation, as an informal relational contract, need have no moment of formally, publicly exchanged consent and formation equivalent to a wedding. *Bracklow*, then, uses analytical steps that do not logically apply to unmarried couples to reach conclusions that bind them. The effect is to impose obligations of marriage on persons who are not privy to the institution’s full benefits and privileges, and who never made the same undertaking.

When Justice McLachlin says that marriage is not to be taken lightly, she seems to mean the wedding. But if she would not replace “marriage” (as wedding) with the closest equivalent applicable to unmarried couples, that is, cohabitation past the statutory threshold, then, at least concerning unmarried couples, she seems to mean that something other than the mere formal promising is a serious commitment. At least concerning unmarried couples, she must mean something like this: Developing a deep exchange relation on economic, sexual, and emotional levels, and generating reliance, expectations, and interdependence over time should not be undertaken lightly. The next question is whether Justice McLachlin means marriage as wedding when she discusses why married couples are subject to the potential of substantial,

¹⁸¹ *Bracklow*, *supra* note 1 at 434, 437.

¹⁸² *Ibid.* at 452.

¹⁸³ See *supra* note 136 and accompanying text.

lifelong obligations. It is not impossible that, under the same provincial statute, married persons would owe obligations because they had had a wedding, and cohabiting persons would owe similar obligations because they had developed an intimate, economically entwined relation. Such parallel foundations for obligations are nonetheless untidy. Indeed, the sense emerges from Justice McLachlin's reasons that, even for married couples, it is not the wedding that matters, but the relationship.¹⁸⁴ When the same obligation arises for unmarried couples from the relationship, and for married couples from the *marital* relationship, the adjective seems to add little. This difficulty recalls the relational contract observation that analysis of marriages often becomes analysis of households, yielding the conclusion that the only legal differences brought about by weddings relate not to the essential nature of the particular relationship, but only to the statutory provisions and privileges that ought to apply. Avoiding this conclusion requires the concession that provincial family legislation applies less stringently to unmarried couples. If, however, the legislation does apply equally, discussion about the burdens that brides and grooms assume on their wedding day can only be icing on the cake of their contractual relation. Thus, because the notions of responsibility in the models transcend marriage, *Bracklow*, instead of reinforcing any sanctity of marriage, effaces to some degree the line between married and unmarried couples.

IV. CONCLUSION

The law post-*Bracklow* is unsatisfactory for a number of reasons. It is confusing and makes it hard for spouses to know the extent of their obligations, and to predict when, or even if, a court will accept arrangements that they have themselves made and lived by. It is also troubling because it obscures distinctions between married and unmarried couples. Perhaps the Supreme Court wished to avoid articulating just how much the incremental increases in recognition of unmarried couples have eroded the special status of marriage; perhaps the Court is still absorbing the effects of such changes to treatment of unmarried couples, both opposite-sex and same-sex. The tension between the availability of no-fault divorce and the retrenchment of the welfare state further complicated the Court's task.

The judgment's effect, however, is to increase a support obligation that applies alike to married and unmarried couples while some marriage privileges are still withheld from unmarried couples, especially same-sex couples, who lack even the choice to marry. Concerning same-sex couples, the Supreme

¹⁸⁴ See supra note 137 and preceding text.

Court in *Bracklow* continues its pattern of more easily recognizing *inter partes* obligations resulting from domestic relationships than extending government benefits. Yet because some passages, out of context, can be cited as upholding the so-called sanctity of marriage, *Bracklow* potentially reduces the chance for recognition of same-sex marriage. In contrast, a relational contract analysis, by focusing on households instead of the distinction between married and unmarried couples, would make achieving such recognition easier. At a time when the Supreme Court may wish to avoid further charges of judicial activism, it is significant that relational contract provides a characterization of the disparity in regimes applicable to same-sex couples not as an infringement of equality rights under the *Canadian Charter of Rights and Freedoms*,¹⁸⁵ but rather as a private law problem of inconsistent treatment of contracts.

Complex questions of how to frame the story of a marriage and determine spousal support can be dealt with more simply within relational contract.¹⁸⁶ It is simpler from the trial judge's perspective to view the factors and objectives in subsections 15.2(4) and 15.2(6) of the *Divorce Act* as tools with which to reconstruct a failed relational contract than as a competition between two models of marriage. The literature on relational contract is sensitive to the tension in family law between independence and community, and so is adequate to replace, for analytical purposes, the broad social obligation model and the unduly restrained compensatory model articulated by the Court. Relational contract, with its sensitivity to the non-promissory elements of deep exchange relations and of potential failures of contracting, provides a methodology for scrutinizing a particular marriage and its agreements and obligations. The model, as essentially a middle ground, is defter and thus more useful than a competition between two ~~more~~ extreme positions. It is not that judges, legislators, or policy-makers should not from time to time borrow from models set out in *Bracklow* or elsewhere; relational contract should not be a juridical straitjacket. Borrowing should, however, be deliberate.

Moreover, as this article indicates, defining legal models, particularly competing models, poses complex challenges of conceptualization and the determination of appropriate boundaries, both within the category defined and between that category and similar ones. The application of *Bracklow*'s models

¹⁸⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(1).

¹⁸⁶ It is possible that the Court's new "functional, child-centred" approach to support of children by step-parents, based on "the reality of relationships," indicates connections with relational contract, particularly in the incremental formation of deep relationships. See A. Harvison Young, "This Child Does Have 2 (Or More) Fathers ...: Step-parents and Support Obligations" (2000) 45 McGill L.J. 107 at 127.

to unmarried couples suggests that models instantiating norms—here the appropriateness of enduring obligations after an intimate relation—may not be tidily confined to their original field. This hypothesis requires testing in other settings, but raises implications about unintended consequences of scholars and judges using legal models in other areas. Despite these challenges, however, courts adjudicating divorce disputes continue to seek to define marriage models; therefore, the best starting point in light of the contemporary regime is relational contract.¹⁸⁷

There has been little Canadian literature on relational contract and family law, so it is understandable why the Supreme Court approached *Bracklow* using models taken freely from Rogerson's work, but this approach is not the most useful. Recognizing three approaches avoids a frank discussion of the kinds and extent of reliance and expectation that will be compensable within intimate relations, thus downloading a complex social question onto trial judges and obviating public debate on a national level. The judgment is also a reminder that contractual compensation is always a complex policy issue, and suggests that while the balance between private ordering and default regimes is contingent and dynamic, even where there appear to be numerous choices, there is a hardening core of public order obligations concerning marriage. For trial judges to improve their work, and for parties to be better equipped to tailor their own particular norms and expectations and to reduce transaction costs by negotiation and settlement, the default rules and presumptions, and the ability to derogate from them, need to be articulated more clearly.

On another level, *Bracklow* is illustrative of the dialogue between family law scholars, trial judges, and the Supreme Court. Legal scholarship has recently been more conscious of such dialogue in other areas, notably constitutional law, although the parties in that conversation are generally perceived to be the Court and the legislatures. In family law, where organizing concepts such as marriage are both legal and social constructs, the way in which ideas alter as they move between the three types of actors deserves further study. In *Bracklow*, for example, the Court relied on social concerns judicially articulated in *Moge*, but drawn extensively in that judgment from family law scholarship. *Bracklow* shows the Court advancing as sources of obligation, or at least as persuasive tools in interpreting legislation, marriage models derived from Rogerson's attempts not to prescribe, but merely to

¹⁸⁷ It is possible that commentators who would reject the wide discretion accorded trial judges in favour of more rules may underappreciate the narrative component of adjudication, that parties may expect the judge to do more than grind undisputed facts through a set of rules. If a judge is to write a narrative, a structural device such as a model may be useful. See *e.g.* "Rules and Rulelessness," *supra* note 140.

classify decisions by trial judges. The Supreme Court's judgment may prove to be most enduring not as a representation within family law of the institution of marriage at a particular time, for the legal meaning of the institution will continue to undergo legislative and judicial change, but as a reminder of the potential normative influence that may be exercised by legal models.