**Marital Contracts on the Fault Lines: A Liberal Inquiry (tentative)**

**Introduction: The Problem and the Challenge**

Over the last 50 years, there has been a dramatic revolution in marriage law in the West, often described as a process of family law liberalization.[[1]](#footnote-1) Two of the main trends characterizing this upheaval are the reduced centrality and importance of fault criteria related to the parties’ sexual conduct, together with a rise in the importance and centrality of marital agreements. Fault considerations have almost entirely lost their value in relation to the very possibility of obtaining a divorce,[[2]](#footnote-2) and carry significantly less weight even when determining the economic consequences of a divorce.[[3]](#footnote-3) Agreements between couples, which were formerly perceived as contrary to public policy, are now routinely enforced by all Western legal systems. Individuals are now entitled to stipulate the economic consequences of their separation, and sometimes even to prescribe arrangements concerning the ongoing marriage.[[4]](#footnote-4)

Although a precise and thorough examination of these two processes shows that they have not unfolded to the same extent in all legal systems and in all contexts,[[5]](#footnote-5) it is undisputed that as a broad trend, they represent part of an overall movement that has transformed the nature of family law. This process of liberalization can be viewed as a story with a three-tiered framework focusing on the concepts of privatization, individualization, and equality.[[6]](#footnote-6) In terms of privatization, both the decline in the importance of fault, and most certainly the rise in the use and weight of contracts, reflect a shift from the perception of marriage as a public institution regulated by state law following certain common moral values ​​and public interests, to one where marriage is considered a private relationship regulated by the individuals involved for the benefit of their discrete happiness.[[7]](#footnote-7) In terms of individualization, these two trends indicate a transition from an approach that views the family as an independent unit, to one wherein the relationship is seen as consisting of two separate and autonomous individuals who have the right to separate from one another at will, as well as to determine the circumstances of their lives through negotiation.[[8]](#footnote-8) In terms of equality, the two processes reflect a shift from a legal system based on traditional gender expectations and female subordination to men, to one that rejects discriminatory historical norms, and is committed to gender equality, viewing both spouses as equal partners.[[9]](#footnote-9)

Thus, the two salient trends described above – the fall of fault and the rise of contract – appear to complement one another within the liberalization of family law. However, there is a sense in which these two trends are not complementary and integrative, but rather contradictory and even conflicting. We refer, of course, to the situation in which the parties to a relationship seek to contractually establish their own, more conservative, norms, assigning economic consequences to fault-related considerations within their relationship. In such cases, there appears to be a conflict between the two obligations of liberal family law. On the one hand, there is an agreement that regulates the property relations between a couple in accordance with their wishes and values, a phenomenon that is gaining recognition and increased support. And on the other hand, such an agreement, to the extent that it penalizes certain sexual conduct, is an attempt to reinsert family law into the couple’s bedroom, and to engage in moral judgment of their marital behavior, a phenomenon that has met with fierce opposition. Should the parties be permitted to enter into such an agreement, enforceable by the legal system? Which trend deserves to prevail over the other?

One way to try to solve the dilemma is to determine the relative weight of the two processes, and to decide in favor of the more important one. Thus, we can debate whether it is more important to promote the autonomy of the parties to shape the contract as they wish, in the spirit of freedom of contract, or whether it is more important to emphasize modern perceptions about the place of fault in marital law. After deciding which process is more important, or which value (for example: autonomy or privacy) should be given preference, we can determine the nature of fault agreements: whether an unequivocal decision in favor of one position, or constructing a compromise that will reflect the relative weight of both positions, while also forcing concessions on both sides.

In this article, we will present another possible framework for thinking about the subject. We will draw on mediation vocabulary, while metaphorically considering the proponents of marital contracts and those supporting the elimination of fault as two opposing parties seeking to resolve a conflict between them. Applying this model, it is possible to identify cases in which conflict between opposing parties may be resolved in a way that fully expresses the interests of both, while completely, or at least almost completely, protecting the values ​​and principles embedded in each of the conflicting processes.[[10]](#footnote-10) Thus, the conflict is resolved not by declaring victory or making painful concessions, but by exposing the motives of each one of the opposing parties, and demonstrating that on closer examination, the fundamental positions do not clash at all. While this method does not completely entirely resolve every conflict, it may protect the main interests of each party, while facilitating a decision that treats the issue as more than a zero-sum game, and makes it possible to distinguish between the interests at the core of each party’s position, identify other interests on which compromise can be reached more easily, and determine other contexts in which a compromise does not entail any cost from the parties’ real perspective.[[11]](#footnote-11)

The metaphor of mediation will also dictate the course of the discussion. Clarifying the scope of the conflict between the parties requires a deep and intimate understanding of each one of them. For this purpose, we begin with a systematic clarification of the two positions. Chapter A presents the position of the “fall of fault” through an examination of possible considerations in favor of considerations of fault (in a world where the divorce itself does not depend on it), and an analytical discussion of the liberal arguments rejecting those considerations. Chapter B presents a parallel picture regarding the position supporting the “rise of contract.” After an in-depth exploration of both positions, Chapter C is devoted to their points of convergence and to examining the extent of actual conflict between them, as well as the ability to generate alliances, agreements, concessions, or compromises. Finally, in Chapter D, we discuss the practical implications arising from the discussion, focusing on two common test cases in which the dilemma of fault agreements arises.

Before beginning, it is important to precisely define the scope of the article. First, for the sake of clarity, we will focus here only on sexual fault, that is*,* behavior that can be considered “adultery” or “infidelity” by one of the spouses.[[12]](#footnote-12) Questions concerning other types of fault, such as violence or economic misbehavior, both relate to different prevailing legal norms and to a different set of considerations, and will therefore be omitted from the present discussion.[[13]](#footnote-13) Second, questions related to a contractual stipulation that would have made the divorce itself harsher and fault-dependent were discussed in the 1990s in the context of attempts to create a system of covenant-marriage.[[14]](#footnote-14) We will not readdress this question here. Our discussion will assume the transition to a regime of divorce by unilateral initiative, and an inability to make it alter that by agreement. We focus on the implications of sexual fault on the couple’s economic rights, whether by creating a correlation between sexual conduct and the manner in which family property law is applied, or by way of setting independent financial penalties. Third, for the sake of refining the discussion, we will not address cases where the property outcome of the agreement could drive one of the parties into destitution, a consequence so serious that it could obscure other considerations and hamper our conceptual discussion. We will thus focus our examination on situations in which under the terms of the agreement, the party at fault will be penalized in terms of property, but still retain sufficient resources to avoid destitution.[[15]](#footnote-15)

How then should fault agreements be treated? Reviewing the law that exists in countries that have ceased to employ fault in relation to the economic consequences of divorce, as well as academic literature, reveals an assumption that opposition to fault considerations also implies opposing agreements that set such considerations.[[16]](#footnote-16) These positions assume that the same arguments, and the same intensity of resistance, should apply to both cases, i.e., regardless of the source of the consideration. Our opinion is different. The transition from a default arrangement regulated by general law, to the boundaries of the permitted and the forbidden in private agreements between parties, is not a trivial one, and is not self-evident. The present article is devoted to a systematic exploration of this question.

The aims of this paper are also derived from this point. First, as stated, the article focuses on the normative question of the appropriate legal attitude to agreements seeking to prescribe property consequences to the parties’ sexual conduct during a marriage. To this end, we will engage in an updated analysis of the opposition to fault and the rise of contract, while addressing the challenges and criticisms raised about them over the years. However, the purpose of the discussion extends beyond a decision on this discrete question. The study of the conflict between these two facets of family law liberalization — the “fall of fault” and the “rise of contract” — makes it possible to offer, in retrospect, a multidimensional understanding of the entire liberalization process, as well as of the various forces and considerations operating within it. In this respect, fault agreements are not only an independent issue, they are also a litmus test for identifying the exact position that different voices may take within the general trend of family law liberalization. Analyzing these attitudes and the relationship between them may serve as a key to dealing with additional dilemmas that arise in the face of such a multiplicity of voices.

**Chapter A** —  **Sexual Liberalization** —  **The Fall of Considerations of Fault in Determining the Financial Consequences of Divorce**

To fully understand the liberal position advocating the fall of fault in the property context, we must begin by analyzing the position supporting such consideration. We will not present a historical description of the rise and fall of the consideration of fault, but will seek to conduct the discussion according to an analytical key of distinguishing different considerations that may lead to economic consideration of fault, even without an impact on divorce. Next, we will distinguish between different lines of argument opposing such considerations from the liberal point of view.

**I. Why Can Fault be Relevant to Property Outcomes, in a World of No-Fault Divorce? Classification**

The premise of the present discussion is a legal environment that permits the dissolution of a marriage by unilateral initiative, without fault. That is, a world that recognizes the ability of each spouse to dissolve the marriage even without specifying any misbehavior by the other party. Prima facie, removing the issue of fault from divorce reflects a withdrawal from policing the parties’ conduct over the course of the relationship, and bolsters the freedom of individuals to end a relationship. What scope is there then, in such a setting, to ascribe economic relevance to infidelity by one of the parties? Two main lines of thought are relevant here, which we will refer to briefly as the alternative of the “Responsibility for the Separation” and the alternative of “Independent Wrongdoing.”

The first alternative focuses on the issue of the unfaithful party’s responsibility for ending the marriage. Here, although the law does not prevent the divorce itself, it does not follow that it must be neutral on the issue of responsibility for the dissolution of the marital relationship, or ignore the foundation of the long-term commitment inherent in marriage. In this respect, one possible position would argue that even if the marriage cannot be enforced (that is, protected as property, or contractually with a remedy of specific enforcement), compensation may be sought for dissolution of the relationship, perceived by this position as a breach of the contractual obligation reflected by the marriage covenant (that is to protect it by liability).[[17]](#footnote-17) In this way, to the extent that someone can be identified as responsible for ending the relationship (along with cases where the marriage mutually comes to an end), there is scope for imposing the costs of the dissolution of the relationship on the party at fault. According to this approach, adultery or infidelity can be identified as a paradigmatic example of misconduct that reflects responsibility for the dissolution of the relationship, whether the initiator of the dissolution is the unfaithful party, or the betrayed party acting justifiably.[[18]](#footnote-18) A more limited approach focuses on infidelity not only as a paradigmatic case, but also as a unique event that reflects risk even to a functioning marital relationship. Under this approach, while an initiative to dissolve a marital relationship reflects the termination of the relationship or the “death of the marriage,” infidelity is a prime example of circumstances in which a functioning relationship may also be damaged, that is, it reflects a case of “a murder of the marriage” by one of the parties. One aspect of this considers the main point of wrongdoing as a violation of the norms governing how a relationship should be terminated. According to this view, a party who is considering undoing his or her marriage in favor of a relationship with another person should give their spouse an opportunity to rekindle the relationship before taking unilateral and irreversible action. This position posits that providing an opportunity to rekindle a relationship is also a mechanism for distinguishing between a unilateral exit in a functioning or salvageable relationship, and the dissolution of a failed relationship that has long since run its course. One way or the other, the fundamental wrongness of infidelity is the responsibility for the dissolution of the marital relationship, and thus the property outcome reflects the responsibility for the damage inherent in the dissolution of the relationship.[[19]](#footnote-19)

The second alternative does not focus on the effect infidelity has on ending the marriage, but views it as problematic behavior per se. This alternative posits that although each spouse has an unlimited right to end the marriage for any reason, sexual fidelity is part of the marital obligations over the course of the relationship, and breach of this obligation is a tort which justifies compensation.[[20]](#footnote-20) This approach is in contrast to the traditional view that violating the sexual exclusivity requirement is an independent moral and religious sin, thus focusing on the harm to the spouse’s status and possibly honor. According to a more modern version, the wrong focuses on deception and breach of trust; meaning it reflects a burden on the spouse seeking to deviate from the requirement of exclusivity, to obtain the spouse’s consent, or to terminate the marriage before moving to a new relationship.[[21]](#footnote-21) Several nuances can also be identified within this alternative. According to one, the wrong is limited to the violation of the marital norm or the deception accompanying it, and, in any case, the damage inherent in the violation is mainly the psychological damage accompanying the breach of trust.[[22]](#footnote-22) According to another nuance, the infidelity and the deception attached to it are mainly harmful in the period of time between its occurrence and its discovery. Thus, damage is incurred mainly if the infidelity is discovered only after a significant passage of time. According to this view, the betrayed person relied on the marriage based on a misrepresentation by the spouse, and perhaps even made sacrifices for the sake of the marital relationship in reliance on that misrepresentation, and is entitled to compensation for his or her sacrifice or reliance during this period. A similar position focuses on the way in which infidelity reflects an undermining of the marital partnership, so that the betrayer is not entitled to enjoy the fruits of the marital bond created during the period of infidelity. This last position gives rise to a defensive claim allowing the betrayed party to avoid sharing with the unfaithful partner the property that the betrayed party accumulated during the time of the deception.

It is important to note that different perceptions about the wrong inherent in infidelity may lead to different perceptions about the definition of infidelity. For example, there may be a difference between repetitive or once-only behavior and between what is predominantly an emotional relationship (such as falling in love with another and having a romantic relationship) versus behavior that is predominantly casual physical interaction, or an act of infidelity or separation that occurred after the couple argue, or the bond started to fray, as opposed to infidelity that led to the conflict. We will return to this point later.

**II. Justifications for Liberalization in the Field of Sexual Fault: An Anatomy**

Having reviewed the arguments and justifications that may underlie property consequences of sexual fault, we turn to analyze the liberal objections to these justifications, and the considerations underlying the reluctance to set proprietary outcomes for infidelity.

**Neutrality** —  **It is Personal, and Is Unsuitable for the Coercive Power of the State**

From a liberal point of view, the very legal preoccupation with what is going on in the parties’ bedroom, in their personal space and domestic behavior, and the definition of what goes on there as a violation or a tort, exceeds the boundaries of the state’s legitimate intervention. These are intimate matters that are not the state’s concern. In essence, the liberal view holds that the area of intimate domestic behavior should not be subject to the majority’s authority over the individual, or to the power of state coercion, but should be confined to the individual’s personal scope of decision-making or to the fields of ​​morality and religion. A proper implementation of the concept of responsibility for ending the relationship, or of the concept of an independent tort, requires a perception of what is permitted and what is forbidden in a relationship, such as the norms of communication between the couple, and the requirement for support, friendship, emotional and physical intimacy, as well as the relationships among all these. None of these are matters for the state, or for the power of public coercion, but are matters for the individual, or at least the local community.[[23]](#footnote-23) This liberal position can be supported by the fact that there is a broad range of social opinions regarding expectations from the institution of marriage, both in terms of the expectation of the marriage lasting until “death do us part,” and in terms of the degree of tolerance towards infidelity.[[24]](#footnote-24)

**Focus on the Ideological Controversy Regarding each Injustice**

Moreover, both the question of responsibility for ending the relationship, and the perception of infidelity as an independent wrong, rest on controversial moral perceptions. According to a possible liberal position, whereby the personal happiness of the individual is an essential element of marriage, it is appropriate to oppose the imposition of a cost on the dissolution of marital relations. Such dissolution is a quasi-desirable “efficient infringement. There is no point in preserving an unwanted marital relationship, and in any event, there is nothing morally reprehensible in dissolving a marriage upon a unilateral initiative, so responsibility for the dissolution is not an issue.[[25]](#footnote-25) Moreover, under the liberal view, the individual is not required, certainly not legally, to sacrifice his or her happiness for the sake of another, so that each spouse has the right to dissolve the relationship at will.[[26]](#footnote-26) An even deeper analysis would posit that it is not possible to speak of one party as being responsible for ending the relationship as a wrongdoer, as both parties should be viewed as responsible for the crisis. The deep perception behind this position, which focuses on the marital relationship as a reflection of intimacy between the spouses, sees the dissolution of the relationship as arising from an estrangement between the couple, and not from the vantage point of the conduct by either one of them from a given fixed point or axis based on external norms expected of the parties.[[27]](#footnote-27) Regardless, it is not obvious to talk about one side being more responsible for the estrangement than the other, just as there is no point in discussing which shoelace is responsible for the breakdown of the connection between the laces.

A position that denies the fundamental ability to identify a side responsible for the dissolution, would of necessity object to attaching a proprietary price to such responsibility. A position recognizing the possibility of identifying the party dissolving the relationship, but denying the wrong inherent in such, can still distinguish between different degrees of reluctance to attach an economic price to infidelity, depending on the extent of the desired protection of the individual’s right to leave. According to a more moderate position, the law must facilitate an effective right to exit a marriage, and therefore the economic cost attached to that must be limited in a way that grants each spouse a realistic possibility of leaving the relationship. Yet another position focuses not on the possibility of a realistic exit, but on removing burdens. According to this view, the question is not whether the spouse can meet the cost associated with divorce, but the extent to which this cost is burdensome For example, it would be appropriate to focus not on the total resources left to the spouse who breaks up the relationship, but on the size of the part that the party is losing). Another position would see any restriction attached to the dissolution of the relationship as an impediment to the realization of “effective separations.” Taking this to an extreme, this approach is unwilling to ascribe any wrongdoing to ending a relationship unilaterally, and thus is reluctant to impose any price for ending the relationship, not even giving scope for assigning a symbolic expression of responsibility for breaking up the relationship. From the distinction between these different positions derives the scope of the limitation on determining the scope of the economic cost of a spouse’s infidelity is derived from the distinction between these positions, according to the position that focuses on the responsibility for the dissolution of the relationship.[[28]](#footnote-28)

Even the position that views infidelity as an independent tort, which is not dependent on the responsibility for ending the relationship, in fact rests on a controversial moral position. First, the perception of infidelity as a breach of trust is based on an obvious mutual expectation of sexual exclusivity during marriage. However, it is doubtful whether such an expectation actually reflects the perceptions of all couples today, as is expressed in numerous discussions in popular literature or cultural forums about the disadvantages of monogamy,[[29]](#footnote-29) at least insofar it is the type of expectation that the parties perceive as a legal obligation.[[30]](#footnote-30) According to another possible position, which stems from the increase in the value today’s world assigns to sexual satisfaction,[[31]](#footnote-31) breach of sexual fidelity is not wrong in itself. According to one position, an individual’s sexual behavior represents the core of his or her zone of privacy, about which the individual should be required to account to anyone, and certainly not to the state, about. Regardless of the particular justification, these positions hold that the state should not be able to define sexual conduct as a legal wrong, as long as it is voluntary and consensual. An additional nuance suggests that a violation of sexual fidelity does not merit being perceived as socially wrong. In fact, in the proper and socially superior design of the institution of marriage, it would be appropriate to allow each spouse to “take a breath of fresh air” through intimate relationships outside the marriage, in order to allow them to maintain the stability of the truly important relationship established for economic cooperation and raising children together.[[32]](#footnote-32) According to this view, it is preferable to shape social norms to allow spouses to have casual extra-martial relationships, and to avoid the result where a deterioration in sexual attraction between spouses will inevitably lead to family breakdowns, which involves both economic harm and personal harm to the children. Therefore, while it is desirable to encourage spouses to act openly with each other, there is no justification for harnessing the power of the law in order to punish a spouse who has violated a duty of fidelity, about which there is doubt as to the value of its preservation.[[33]](#footnote-33) In fact, it may even be better for the law to encourage citizens to become indifferent to their partners’ sexual conduct, precisely in order to stabilize and protect the family bond.[[34]](#footnote-34)

Even for those who do not fully embrace these positions reflecting a perception of infidelity as a wrong or an infringement related to an overall perception about a good married life — both in terms of the benefits of an easy breakup of the relationship, and of providing space for intimate relationships outside the marriage — these positions facilitate a return to a neutral-pluralistic point of view. From this perspective, it is not appropriate for the state to decide between different perceptions of the good life, but to refrain from determining proprietary outcomes prevents public controversy. The state does not necessarily establish the behavior as proper, but merely refrains from expressing any position on the matter, recognizing the state’s inadequacies in resolving such disputes. This position also corresponds to the desire to encourage alternative perceptions of the “good life,” reflecting the preferences of different segments of the population in a way that enables them to express their perspectives and accepted values, beyond the reach of state power attempting to enforce uniformity.

**Equality Considerations**

The reluctance to employ the law to address infidelity is joined by a reluctance to focus on sexual behavior from a gender equality perspective. According to this perspective, dealing with sexual behavior reflects patriarchal control, and not an effort to protect morality or prevent breach of trust. Any focus on sexual behavior could therefore tend to reinforce traditional gender roles. Under the traditional patriarchal model, a man is expected to earn a living and a woman to be “modest.” Giving legal expression to this expectation, even if the criteria were formulated symmetrically to apply to both men and women, would therefore represent a reversion to women’s historical roles, which could consequently reimpose male control over female sexuality, given the extensive history of female oppression at the hands of men in these spheres.[[35]](#footnote-35) A legal doctrine recognizing economic harm based on sexual behavior, in additional to creating general social harm, could have systematic, gender-based affects, and harm women’s resources and female choice more than men’s. Any such legal doctrine would thereby inevitably operate unequally, ultimately policing female sexuality and restricting the resources available to women in the family setting.

This consideration is thus added to the need to redesign the institution of marriage in a way that does not focus on the sexual behavior of the parties. The shift from a focus on policing sexuality (stemming from religion or life circumstances that did not include contraception or genetic testing), to a focus on financial commitment, emotional support, and cooperation in rearing children, is one of the great achievements of the struggle for gender equality. Refraining from determining that sexual conduct carries legal implications therefore represents a refusal to roll back history to a previous era in which marriage and divorce laws functioned as mechanisms of patriarchal control and is therefore justifiable in the context of the law’s guiding role, which focuses on shaping the boundaries of the social institutions in which the state has an interest and motivating people to take part in them.[[36]](#footnote-36)

**Prudence and Welfare Considerations**

The ideological factors are joined by an understanding of the limits of the law in terms of the benefit that the parties will derive from its involvement in their relationship, from a practical-pragmatic perspective focused on the well-being of the individuals. According to this perspective, even if there is something wrong with infidelity, it is better to motivate spouses to deal with it not within the framework of law, but to non-judicial channels, such as therapy for coping with emotional issues. According to this position, conducting legal proceedings after infidelity is like “scratching the wound” that will exacerbate the psychological damage inherent in the betrayal, instead of making it better. It is preferable for the parties to focus on the future and on recovering from the crisis, rather than trying to seek justice and recognition in the courtroom in a manner that would impede that very recovery.[[37]](#footnote-37)

A related position emphasizes the law’s inability to achieve the goal desired for the couple ex ante, i.e*.*, the futility of trying to influence the parties’ sexual conduct through the law. According to this position, imposing legal sanctions for infidelity is ostensibly a mechanism that deters infidelity and encourages the parties to remain faithful to each other. But sexual exclusivity achieved solely by virtue of fear of legal sanction has little value in advancing the goal that the parties seek to achieve. If one spouse believes that the other is being faithful only to protect their share of the family property, this would deprive the fidelity of any value.[[38]](#footnote-38) Regardless, it is hardly appropriate to use the law as a mechanism for encouraging sexual exclusivity.

**Identification Factors**

These objections are exacerbated when we turn our attention to the limitations arising from the need for institutional operation of the law and its enforcement. First, an outside observer will find it difficult to correctly detect who is the person responsible for ending the marital relationship, or who is perceived as the wrongdoer, and to isolate the act of infidelity from the general background of the relationship. According to this position, the act of infidelity is the “tip of the iceberg” of the crisis in the relationship, and the party who violated the sexual exclusivity clause should not be seen as responsible for breaking the bond, especially because it is nearly impossible to distinguish between the cause of the dissolution of the marriage bond and its actual dissolution.[[39]](#footnote-39) Similarly, understanding infidelity as an independent tort is related to a comprehensive assessment of the totality of the relationship and the understandings between the parties. In certain circumstances, it may be possible to justify the behavior of the unfaithful party, or at least exempt the offending party from blame for their behavior, given the state of relations between the parties. For example, in periods of separation and estrangement, or given some disgraceful behavior on the part of one of the parties, the betrayed party can be viewed as being guilty of “contributory fault” that led to the occurrence. A similar difficulty relates to clearly defining what the misbehavior actually is. The same event may be interpreted differently by either party or by an observer. For example, it is possible to hold differing positions about cases such as a virtual affair, a platonic relationship, or alternatively a physical relationship devoid of emotional attributes.[[40]](#footnote-40) If so, an outside observer will find it difficult to determine under what conditions the infidelity is to be considered a wrong on the part of the unfaithful spouse, or to determine the extent of the wrong inherent in it, particularly the extent of its contribution to ending the relationship. This aspect, which involves a normative consideration together with an epistemological consideration distinguishing between justified belief and opinion, underscores the need for state neutrality, and amplifies the expected damage to the parties and their privacy from a judicial examination of their lives.

**Finally, Institutional Considerations Apply**

There are also systemic-institutional considerations that focus on the entities and organs that actually operate the law. Because the legal system must be a general one to meet the needs of all society and varieties of issues it is still preferable to avoid a course of action that can in some cases be beneficial, but in many other cases be harmful, even if the considerations mentioned above apply with different intensity in different cases. For this purpose, the function of the legal arrangement in practice, involving the need to maintain a legal system that hears evidence and establishes facts must also be taken into account. In view of the complexity of the issue of infidelity, including its precise identification and context, the legal system is likely to prove an unreliable forum, placed in the undesirable position of a “Peeping Tom” required to address the intimate aspects of individuals’ relationships. Not only does this seriously invade the privacy of both parties, but it also leads to a a fear of creating adverse litigation incentives, such as accusations of frequent infidelity.

**Conclusion** —  **There is no Harm in the Alternative of Independent Tort**

The abovementioned considerations have focused on the contention that there is no scope for setting proprietary outcomes to infidelity because such conduct should not be considered inherently wrong or a legal violation, or that the conduct cannot be properly identified. However, even if we overcome these obstacles, it still remains to be seen what are the damages for which one can demand property penalties for sexual conduct. As shown in the previous subchapter, the alternative approach of assigning responsibility for the dissolution places the question of damages within the context of the consequences of the separation and the need to divide the damages between the spouses. In contrast, the alternative view of infidelity as an independent tort raises difficulties in precisely defining the damages. Damages that may result from reliance or sacrifice on the part of the betrayed spouse, or a claim regarding the betrayer’s ineligibility to enjoy the fruits of the marital relationship, are inherently limited to the period between the infidelity and its discovery, and in any event, do not apply when the infidelity was discovered close to its actual occurrence in time. The main damage remains, therefore, the psychological harm that accompanies discovery of the breach of trust, and the resulting crisis.

This aspect raises a difficulty, given the general limitation of the law in dealing appropriately with emotional damages and their quantification, a problem exacerbated given the identification difficulties discussed above, and the variability and uniqueness of each couple’s relationship. Although arguments can sometimes be entertained for consideration of non-pecuniary damages in certain circumstances,[[41]](#footnote-41) this possibility is limited in scope and presents an additional institutional difficulty, especially if we reject the legitimacy of the alternative which sees the property implications as compensation for the very dissolution of the relationship. There is the danger that, in practice, the courts will tend to deal with the difficulties of assessing the non-pecuniary damages by adhering to tradition, and setting compensation that actually imposes liability for ending the relationship. In essence, an independent tort may actually serve as camouflage for claims for liability for ending the relationship, both on the part of the plaintiffs, and on the part of the courts that may respond to these claims and set unjustified compensation. This can impose a heavy cost on the dissolution of relationships, and frustrate the purposes discussed earlier for the law’s recent tendency to allow unilateral no-fault exit from unwanted marriages by either party.

**III. Different Types of Sexual Liberals**

In the first chapter we described the historical trend of liberalization in the legal attitude to sexual fault. However, the analysis we conduct in the current chapter of the various arguments related to the retreat from considerations of fault, shows that a number of different and distinct types of liberal positions can in fact be identified within the modern opposition to imposing fault. These types can be characterized by division into five main prototypes:

The **first** type is the **neutral-pluralist** liberal. This position focuses on the state’s shortcomings in setting norms in a field into which it should not venture, or in resolving disputes about the perception of the good life. Its sub-version focuses on the advantages that may arise from a number of conceptions of the good life existing side-by-side within society, or from the need to enable different cultural groups realize their values and traditions. According to this position, the law should not interfere in the private field of consensual sexual conduct, especially in light of the lack of a social consensus on the values ​​on which the marital relationship and sexual behavior should be based, and of socio-cultural diversity in this area.

The next two types of sexual liberals represent different shades of an ideological liberal position. The **second** type focuses on the values of **liberty and autonomy**, a position associated with the perfectionist-liberalism preached by Yosef Raz.[[42]](#footnote-42) According to this position, which elevates the values of individualism, authenticity, and self-fulfillment, it is wrong to shackle a person to an unwanted relationship, and there is even value in refraining from limiting the individual’s sexual freedom. According to this position, the state may promote the perception of the good, and take part in the market for ideas, but within the framework of the conceptions of the good that should be promoted, special consideration should be given to the individual’s freedom to shape one’s life as one wishes, including the freedom to remove oneself from frameworks and obligations that may undermine one’s happiness and identity.

The **third** type of sexual liberal focuses on the importance of **equality** and, in particular, **gender justice**. Consequently, this liberal stance insists that the institution of marriage and the norms governing it be sensitive to discrimination and the power discrepancies between the genders, as well as reflect the need to ensure equal status for men and women. This view, which is to some extent close to the core of liberal thought, is to some extent unrelated to it, will therefore focus on the need to refrain from placing supervision of sexuality at the center of legal regulation of family relationships, given that the field has historically been characterized by male domination over women. This position also expresses the possible dangers arising from giving legal express to fault of employing sexual double standards, and of unequal property in a way that will lead to systematic harm to women.

The latter two types of sexual liberals present arguments in support of sexual liberalization, with no ideological commitment to the values ​​underlying liberal philosophy. Consistent with these approaches, the **fourth** type of sexual liberal supports the retreat from considerations of fault is based on **pragmatic** causes focusing on the **well-being** of the individual. This position highlights the gap between the pursuit of justice with the help of the law, and the inherent benefit to the individual in turning to therapy and looking towards the future, rather than seeking retribution for past wrongs. Similarly, the **fifth** type of sexual liberal weighs abolishing fault considerations and focuses on **systemic-institutional** factors, emphasizing the institutional inability of the judiciary to properly deal with disputes about fault, and the inherent ensuing damage inherent to the individuals themselves (similar to the previous type of sexual liberalism), and to the legal system and its status. These last two positions are not committed to a liberal conception of values ​​(regarding the weight of liberty or equality), nor to a liberal political conception of the limits of the authority of the state. However, both are based on weighty considerations against the legal regulation of family life that factor sexual infidelity into the framework of property relations.

In conclusion, therefore, an examination of the various arguments against consideration of fault reveals that behind the various arguments lie different types of justifications which may express different positions in terms of value and practice. Undoubtedly, this division is not mutually exclusive, in that one person may hold positions associated with more than one type of liberalism proposed here. Thus, for example, it is possible to both support the idea that the state should not interfere with the private realm of the individual, as well as the position that the courts are not institutionally competent to operate in this field in an efficient and reliable manner. However, making the distinction between the different types leads to a more comprehensive and deeper understanding of the controversy that can prove useful in analyzing how to actually address the issue of resolving infidelity-based conflicts. First, the second trend characterizing the liberalization of family law, contractual liberalization should be examined.

**Chapter B: Contractual Liberalization** —  **The Rise of Agreements in Family Law**

**I. The Justifications for Liberalization in Enforcement of Marital Contracts**

Traditionally, public and legal opposition to the contractual regulation of family life was based on two main claims that seem contradictory. According to one, family agreements should not be enforced because the norms are not a truly private matter. According to the other, the law should not interfere with agreements between spouses since they are actually extremely private. That is, according to the first position, private regulation or agreement is not suitable to family life, since the family, as a social-public institution, should be regulated by public norms. The family should reflect a moral conception of the proper way to live, public interests concerning social stability and cohesion, the protection of the stability and independence of the family unit, and a worldview regarding gender roles and gender relations. Thus, for instance, issues such as the division of labor within the family, the roles of the spouses, or the mutual obligations, are considered public matters by nature.[[43]](#footnote-43) In contrast, according to the second position, the opposition to bestowing legal validity on agreements between family members is anchored precisely in the fact that family life is not a public matter, but a private one, in two different respects. First, some family issues are private and should not be subject to judicial scrutiny, as they are based on love and affection, and not on legal relations. Second, some family matters are perceived as protected under the autonomy of the family unit, entitled to independence from the involvement of the law or the state, so the court must stop before crossing the threshold of the residential home.[[44]](#footnote-44)

In the setting of the liberalization of family law in the last decades of the twentieth century, opposition to private agreements regulating family relations declined in light of a series of social and ideological changes, which led to an increase in the power of family agreements in general, and between spouses in particular.[[45]](#footnote-45) Indeed, today, some scholars seek to convert all family law into a contractual arrangement, or view the contract as an effective conceptualization of marital law itself.[[46]](#footnote-46) There are a number of reasons for the move to a more permissive approach to family agreements rests. First, this trend was based on the state’s retreat from the pretense of fully regulating family life, based on the rationale that it is the right of individuals to shape their family life as they see fit, and the public should not set moral norms that govern the life of the individual in that sphere so long as it does not harm others. Family life is an arena to realize one’s private idea of the good that should not be subject to the power of state coercion, and in any event, the parties should be left to determine the exact content of their relationship, inter alia, through entering contracts. This trend has also recognized the importance of diversity and pluralism, acknowledging that there are different legitimate styles of family life, and they should not be homogenized by force, nor should it be assumed that one style is correct for everyone.[[47]](#footnote-47) Second, since autonomy is a central social value, family life itself must be organized in a way that focuses on advancing the interests of the individuals that comprise it, and on developing the autonomy of each member of the family.[[48]](#footnote-48) Allowing the parties to shape their relationship by negotiation recognizes their separate existence from one other, as well as the individual’s right to establish his or her own life framework, in relation to both his or her spouse and to society. Third, focusing on the couple as individuals places the family first and foremost and is designed to promote the well-being of the individuals comprising it, granting them priority in designing the arrangements they desire and adjusting the family framework to suit their specific circumstances and meet their needs.[[49]](#footnote-49) Finally, this position rests on a commitment to gender equality, which includes both a reluctance to base family norms on fixed gender roles, and respect for women’s ability to act as agents who can determine the nature of their family life in agreements.[[50]](#footnote-50)

However, precisely from the point of view of gender relations, the move to contractual liberalization has also raised some concerns. First, it has been argued that leaving the determination of family norms to negotiations between the parties would expose weak parties, and especially women, to disparities in bargaining power and divergent starting points, thus perpetuating dependency, and permitting exploitation of power and information gaps or abuse of trust.[[51]](#footnote-51) This may result in a suspicion of contractual arrangements, based on the assumption that such arrangements ultimately transfer rights to those wielding greater power in the relationship, thereby transferring rights otherwise granted to women into the hands of men.[[52]](#footnote-52) A counter-position, seeking to renounce the automatic designation of women as those in need of legal protection, emphasizes women’s potential to increase their power from agreements that serve their interests, while expressing the hope for ensuing changes in women’s status.[[53]](#footnote-53) Between these two extremes are more moderate positions that try to apply a unique approach to family agreements with the help of legal assistance and oversight at the stages of concluding the agreement and the enforcement stage, or by appropriate application of general contractual doctrines that are sensitive to power imbalances and the unique dangers associated with such relations. There are also approaches that seek to adapt the idea of ​​autonomy to the relational context of family life, for example, by emphasizing the duty of good faith between the parties, and the special relationship that prevails between them.[[54]](#footnote-54)

While there is generally a broad consensus in support of contractual regulation of the economic issues arising from the dissolution of a marriage, a unique controversy has arisen regarding agreements seeking to regulate the course of the ongoing marriage. The disfavor shown such agreements has rested, first, on hostility to the law’s pretension in regulating domestic relations, and the urge to leave areas outside the jurisdiction of the law, so that these could be regulated by other systems, such as culture, religion, or morality. Even if the parties are individuals, and not a cohesive unit, there is reason to isolate the personal-intimate space from the realm of law. This approach emphasizes that even if the source of the contractual arrangement is ostensibly the parties themselves, giving legal effect to the arrangement, and appealing to the state for enforcement, inherently involves a public determination of norms that effectively expropriates control of the contract from the parties to it.[[55]](#footnote-55) Similarly, a concern has been raised that a framework of a contractual-legal relationship would infringe on the nature of the marital relationship, while imposing on it a world of individualistic-atomistic concepts that is alien to the relational-intimate nature of the marital relationship.[[56]](#footnote-56) According to another position, the ongoing course of marital life is not a sufficiently important matter for the law to justify the use of public resources to resolve disputes. The option to leave an unwanted relationship is viewed as sufficient grounds to dissolve a marriage, and it is not appropriate for the law to seek to manage the married life of couples who fail to do so on their own.[[57]](#footnote-57) Yet another approach asserts that even if managing marital life is important, legal tools are not suitable for effectively managing disputes in this area, so that legal involvement may not only be prone to error, but could even harm the judicial system and its ability to perform its other functions.

In contrast, others have emphasized the ability and need to allow for legal recognition, even with respect to agreements that govern the management of marital life. First, it is argued, it is important to apply principles of justice also within the family framework. According to this position, the perception of the domestic space as a sphere that is beyond the scope of the judicial system, or that is too marginal to warrant attention by the principles of justice, actually serves a traditional regime of female oppression by their husbands. It has also been argued that the flourishing of the intimate space depends on a just allocation of rights.[[58]](#footnote-58) Moreover, it is precisely from a feminist point of view that it is important to emphasize the nature of the family relationships as being based on reciprocal exchanges, in a way that allows all parties to rely on mutual obligations and gain recognition of the value of domestic inputs traditionally considered “transparent.”[[59]](#footnote-59) Similarly, it is precisely in the domestic sphere that it is appropriate to pay special attention to norms of honesty, trust, and fairness. Consequently, removing the law from the domestic sphere undermines the relational nature of the relationship, rather than strengthening it.[[60]](#footnote-60) Similarly, allowing for a contractual commitment about how to behave in the family space enables the parties to establish credible representations and indicate their true intentions and mutual expectations to each other.[[61]](#footnote-61) Finally, it is argued, it is not true that the law is not suited to the management of family relationships, since the law — that is, the determination of fundamental norms — also operates outside the courts, allowing for agreements and negotiations that may have therapeutic value, or provide a basis for cooperation or mediation.[[62]](#footnote-62)

**II. Several Types of Family-Contractual Liberals**

We have reviewed a number of reasons behind the liberalization process in family law’s attitude to family contracts, as well as various disagreements and nuances within the arguments. Analysis of these arguments reveals that, again, there are five main types of arguments. These types are distinguished from each other not only by the different positions they adopt about family-contractual liberalism, but also in terms of their theoretical and normative infrastructures.

The **first** type, the **neutralist-pluralist** liberal, focuses on the state’s duty to let individuals choose their family way of life for themselves and by themselves, in a manner that reflects their perception of the good life, holding that setting norms in this field is beyond the scope of the state’s power to dictate to its citizens. This stance further emphasizes the importance of allowing minority groups to express their needs, or allow for a variety of ways to organize their lives from which individuals can choose.

The **second** type, **a** **liberty and autonomy liberal,** focuses on the importance of contracts as a mechanism for shaping the perception of spouses as separate individuals who autonomously determine their life frameworks for themselves, and are not required to subjugate their desires and well-being to family or social frameworks. Granting individuals the power to design such a fundamental social institution acknowledges the importance of their autonomy.

The **third** type, a **gender equality and justice liberal,** focuses on the impact of family agreements on the status of women. Emphasizing the woman as an equal party, and viewing the contract as a tool for female empowerment, along with concerns about the implications of the contractual tool and the discrepancies in bargaining power, as well as avoidance of this tool, reflect a focus on the status of women and gender equality. Closely linked to this stance is an approach emphasizing the feminist point of view regarding the state’s duty to ensure justice also inside the household, arguing that the importance of family life renders it an arena worthy of legal protection, and viewing contracts as instruments that free individuals from gender expectations, or at the least enable them to gain recognition for the performance of their tasks.

A **fourth** type of contractual liberal focuses on the ability of the contractual tool to contribute to advancing the goals and well-being of individuals, who are thought to know better than the social planner the mechanisms that will promote their **well-being**. These considerations are also accompanied by doubts and reservations about the suitability of the law as a tool for regulating day-to-day family conduct, applying a **pragmatic** approach to regarding practical ways in which the law might achieve its objectives.

The **fifth** type, an **institutional and systemic** liberal, opposes using contracts to govern behavior within the home, insisting that the law should be used to advance public interests rather than private whims, and doubting the law’s institutional capacity to operate within the family unit in a manner that can reliably determine facts, effectively enforce norms, and efficiently compensate for the type of damages normally arising from family conduct.

The strength of all these considerations and their consequences may indeed be controversial, but both parties to marital contracts appear to agree that institutional and systemic questions indeed influence their decision in relation to family contracts.

Indeed, it is apparent that there are many similarities between the five types of liberalizing trends identified in the rise of ​​family contracts, and the five types of liberalism characterizing the fall of fault. Nonetheless, a close and careful examination of the changes in the rise of family contracts and the fall of fault reveals that they actually rely on very differing lines of argument. While these lines of argument ultimately result in the rise of contract or the fall of fault, there is a profound difference between them in terms of value and ideological commitment. It may initially appear that the lack of homogeneity between the two types of arguments makes the challenge of agreement between them regarding fault agreements more complex. However, the very fact that the different arguments supporting both approaches are genuinely distinguishable may open the door to a new approach to resolving the conflict over marital fault agreements.

**Chapter C: Conflict Over Fault Agreements** —  **A Meeting of**

**Contractual and Sexual Liberalism**

**Methodological Introduction: How Do We Resolve the Tension?**

Having closely analyzed sexual and contractual liberalism, we now turn to examining the question of the status of fault agreements, that is, agreements that seek to deviate from the default arrangement, and assign property outcomes to sexual fault in a couple’s behavior. This issue at first may appear to provoke a confrontation between those who oppose fault and those who are in favor of contracts. If this is indeed the case, either the camp determined to have the greatest relative importance will prevail, or there will be an attempt to find compromises and balances between the camps. An alternative route is that proposed in the introduction of examining the possibility of a mediation-like compromise, or striving to find contexts in which the parties’ positions do not conflict at all, or, at least, to settle them without an excessive cost to either party. Following the discussion in the previous chapter, we determined that it is appropriate to think of such a quasi-mediation process as mediation between heterogeneous groups or communities, and not as conflict resolution between individuals or between homogeneous camps.

However, a careful study of the types of reasoning behind each position leads to a new assessment which calls for a change in the optimal way to discuss the question. In fact, as we have seen, each camp is characterized by different arguments corresponding to five archetypes of liberal thinking: five types of sexual liberalism, and five types of contractual liberalism, among which there are surprising resemblances. To a large extent, the conceptual similarity each one of the types displays to its corresponding type from the other camp, between sexual and contractual liberalism, is greater than the conceptual closeness among the types belonging to each these camps. Therefore, the value debate here is not about whether the status of family agreements carries particular import, or whether reservations concerning fault are ascendant. The heart of the debate relates to the basis of the identity of the type of liberalism supporting each of the two processes. Exploring this question reveals a complex collection of possible agreements and conflicts among the five types. As a result, this study suggests that the correct way to discuss the normative status of fault agreements is to organize the discussion not on the basis of the outcome to which each position is putatively committed (support for sexual liberalization or contractual liberalization), but according to the reasons underlying these positions. This process, seeking to build consensus, and not confrontation between two camps in a society characterized by diversity, [[63]](#footnote-63) may result in a new conclusion regarding imposing damages for sexual misconduct

To this end, the discussion below will adopt a two-step methodology. In the first phase, in the present chapter, the discussion will seek to group the liberal type couples from both camps, around “discussion tables” suitable to their basic value commitment. One Table for the type who is ideologically committed to neutrality; another for those ideologically committed to autonomy; and so on. At each one of these “Tables” we will examine the optimal resolution of the dilemma of fault agreements, whether by way of balancing and deciding between conflicting considerations, or by way of a “mediation compromise” that will facilitate finding common ground between the representatives of the two positions based on their common language. In the second stage, in the next chapter, we will group together the conclusions of each one of the sub-discussions conducted around each “Table,” and examine the ability to formulate, on the basis of this collection of conclusions, an overall conclusion, or the possible outlines for such a conclusion.

**I. First Table: The Neutralists and the Pluralists**

Around the First Table, we will seat the sexual liberal who opposed giving expression to fault for reasons of neutrality and the state’s need to refrain from taking a position with respect to the good life in general, and perceptions of sexuality in particular (the “Neutralist Sexual Liberal”), together with the contractual liberal who saw family agreements as consistent with the state’s neutrality (the “Neutralist Contractual Liberal”). The meeting around this Table clearly and distinctly demonstrates that these are not necessarily two opposing parties. This is because, as is readily apparent, the arguments underlying the Neutralist Sexual Liberal’s opposition are completely defused when the source of the norm supporting a consideration of fault is found in the agreement between the parties rather than imposed by the state.

First, the sociologically-natured concern pertaining to the state’s inability to assess its citizens’ preferences in relation to sexual exclusivity (both as an indicator of the responsibility for the dissolution of the relationship, and as an independent tort), becomes immaterial when the source of consideration of fault is a desire expressed by the parties themselves. This is the case whether the assumption is that the state does not know the preferences of its citizens, or that the state has a reasonable general stance, but that the contractual tool allows minority groups to deviate from it. In fact, from this point of view, the Neutralist Sexual Liberal is expected to embrace the contractual tool (and not just to come to terms with it), since the contract provides a tool for effectively identifying the details involved rather than resorting to a default option imposed by the state.

Second, the normative concern that the state cannot, or should not, determine the agreement about the good life and the elements of a spousal relationship, especially in matters of fault, does not apply when the source of the norms and values ​​is not the state, but the parties themselves, who have expressed their preferences.[[64]](#footnote-64) Moreover, while the contractual source has effectively eliminated any opposition from the sexual liberal, the contractual liberal may not merely permit such an agreement, but enthusiastically support, and even encourage it. The contractual liberal’s support is based on considerations of pluralism and diversity, aimed at enabling citizens to choose between a number of alternatives and lifestyles on an important and central issue such as the nature of the marital relationship. Also important for the contractual liberal are multicultural factors, which focus on allowing different cultural groups to act according to their own understandings (even if there is no intrinsic value in the variety of institutions per se, so that their support for allowing a variety of institutions is a response to a reality of a multiplicity or survival of a conservative position, which in itself is not necessarily welcome). Thus, as long as a position that attaches importance to sexual fidelity is considered a valuable or reasonable one, or is at least present in an agreement, and certainly when it reflects a preference of a cultural minority group,[[65]](#footnote-65) giving expression to it results from a commitment to basic liberal perceptions of state neutrality. In fact, since, as seen in Chapter A, part of the modern commitment to shun fault lies in a comprehensive ideology about the good life (as shown at the following Table),[[66]](#footnote-66) the right of the individual — whether as an individual or as part of a group — to deviate from the majority group ideology in the setting of an agreement or agreements entered into in person, is an exemplary expression of liberal values, in that it reflects the liberal commitment to the upholding the right of the minority to insist on adhering to its own opinions and beliefs even when deviating from the majority’s position.

A similar conclusion also emerges from another perspective, related to how the contract affects the fundamental nature of the liberal point of view concerning fault content. While, from an initial liberal point of view, the question of sexual conduct is often seen as one of morality enforcement,[[67]](#footnote-67) beyond the bounds of state interest, anchoring a consideration of infidelity in an agreement between the parties transforms it from a question of private morality into a question of fairness or reliance. This change is consistent with the general modern trend that has shifted the focus from the fundamental commitment to the marital relationship, to that of the breach of the spouse’s trust when addressing the wrong inherent in infidelity.[[68]](#footnote-68) In this sense, the law’s position regarding infidelity is also neutral as to content. Infidelity becomes wrong in the eyes of the law solely because the parties have so stipulated, whereas a breach of trust in an intimate relationship is an action which is not in the same protected area of ​​self-regarding action which is shielded from the state’s legitimate interference. The conclusion therefore, is that in the eyes of a Neutralist-Liberal, the contract reverses the normative picture, neutralizing any counter-considerations, and adopting new considerations favoring taking such conduct into account.

Thus, the discussion reveals that while at first glance there is a clash between a commitment against fault and a commitment to agreements, from the point of view of a Neutralist Liberal, there is no conflict when fault agreements are in place. In such instances, the sexual liberal “crosses the lines” and becomes allied with the contractual liberal. Not only does the sexual liberal have no reason to oppose such agreements, but may actually seek to encourage them. This reversal is consistent with the social change concerning attitudes to fault. Whereas, classically, the elimination of fault in family law focused on the minority’s desire for liberty, versus the values ​​of the majority, in the current social climate, fault agreements present a contrary point of view of a minority seeking to renounce the now prevailing public norm. It is not surprising, then, that those committed to individual liberty in the face of prevailing public norms will change their position. In the context discussed above, this is a perfect mediation compromise, which does not require either party to sacrifice its values ​​or that which it holds dear. Thus, as long as such agreements properly reflect the genuine desires of the parties to them, the neutralist-pluralistic “Table” is united in its tolerant attitude towards fault agreements, and may even seek to support and encourage the existence of such an alternative.[[69]](#footnote-69)

**II. Table Two** —  **“Perfectionist” Proponents of Liberty and Autonomy**

The first chapter examined the opposition arguments of those we term sexual liberals who support liberty and autonomy from the liberal-perfectionist standpoint. According to this position, traditional arguments in favor of considering fault are in direct tension with key core values. For example, insofar as setting a price on fault creates a burden on the dissolution of the relationship, or even reflects identification of the person responsible for said dissolution, such a determination directly conflicts with the centrality of the individual’s autonomy in shaping the marital relationship, and the proper support of each partner’s right to exit a relationship in which they are no longer interested. This position focuses on the individual’s right to self-fulfillment, and the duty to encourage a marital system in which each spouse is required to ensure that the other is satisfied with the relationship.[[70]](#footnote-70) Even the notion that attaching a price to fault reflects an independent tort conflicts with the concern that such a tort does not reflect independent damage (and is in any event suspected to represent a retreat to awarding compensation due to having caused the relationship to end). It is also in conflict with support for the ideas of the centrality of sexual freedom and the right of every individual to self-fulfillment and to realize his preferences without limitation. It is also antithetical to the goal of shifting the focus of the institution of marriage away from supervising the parties’ sexual behavior and toward ensuring marital emotional and financial support and stable joint parenting, for the benefit of the couple and their children.

Does this position change where the source of the consideration of fault is the will of the parties as expressed in an agreement? It seems that the answer should be no. Such an agreement, in contractual terms, may be considered a contract contrary to public policy, because it conflicts with public values ​​about the proper way to live. This is because, even in the contractual model, the result of the arrangement is a restriction on the possibility of ending the relationship, or on the exercise of sexual freedom. In any event, if there is a perfectionist opposition to the institution of marriage that imposes a burden on the person wishing to leave it, or to married life that severely restricts the sexual freedom of the couple, the validity of the objection lies in the scope of the burden or limitation, and not its source. A high price may actually act as a practical limitation, and, in fact, from a liberal point of view, even setting any price inherently judges otherwise legitimate behavior as wrong. Thus, while the fact that the parties are interested in such an arrangement can be considered an opposing consideration which the sexual liberal should take into account, it does not undermine the basis of the fundamental opposition as set out above. In fact, where the price of fault originates in a private arrangement by the parties that sets it as an independent tort, it may actually exacerbate the suspicion that this arrangement is intended to disguise an attempt to restrict exiting from the relationship, and not just the conduct during it, as discussed below.[[71]](#footnote-71) Thus, unlike the neutral liberal, whose opposition was dropped in the face of a contractual regulation of the question of fault, the sexual perfectionist liberal remains steadfast in the face of the frontal collision between the values ​​to which he or she is committed, and the arrangement the parties sought to establish. One could therefore expect a collision between the sexual liberal and the contractual liberal.

At the “Table,” the sexual liberal’s opposition to fault was blunted in the face of a contractual agreement after an in-depth examination of his or her underlying precepts. However, at the current “Table” under discussion, it is, surprisingly, the perfectionist contractual liberal whose motivation to support a contractual arrangement diminishes, if not evaporates, in the context of fault agreements, due to the importance the contractual liberal attributes to the value of autonomy. This is because in liberal eyes focused on autonomy, fault agreements can be seen as expressing improper self-imposed restraints. In order to present this position clearly, we will distinguish between agreements that operate to restrict the freedom to leave, and agreements that restrict sexual behavior during the relationship.

It will be recalled, first, that a contractual liberal opposes a consensual calcification of the divorce regime itself in the form of any stipulation that would deprive the parties of the right to unilaterally exit a relationship.[[72]](#footnote-72) An agreement that denies a spouse the right to exit is perceived, under this position, as excessive self-enslavement, similar in structure to a contract to sell oneself into bondage mentioned in the Millian example. There is an additional concern that the individuals may change by unduly imposing restraint on themselves with regard to such a central and important issue in such a way that will apply into the distant future, when tastes, perceptions, and positions can likely change.[[73]](#footnote-73) If so, precisely from a perfectionist liberal-contractual point of view, which supports agreements out of a commitment to personal autonomy, there is room to object to such a restrictive agreement. From this point of view, a high economic price attached to the termination of a marriage is tantamount to an effective limitation on terminating the relationship.[[74]](#footnote-74) Moreover, beyond a general-autonomy-focused position, the perfectionist contractual liberal in the family context advocates the essence of supporting family agreements for protecting each spouse as an independent individual. The focus of the individuation process of family law is not on setting a boundary between the home and society, but on eliminating the walls of the home, and emphasizing the nature of the marital bond as a bond between two independent individuals. Thus, a perfectionist contractual liberal will not accept agreements restricting the right to exit a relationship.

Similarly, the perfectionist contractual liberal may also oppose the alternative position, which sees the focus of the condition not on ending the relationship, but as the management of the parties’ behavior during marriage, thereby rendering the financial consequence a kind of independent tort. This is because imposing a legal price on an individual’s sexual conduct during the relationship, even regardless of how it ends, may be considered an infringement of one’s autonomy. This position is strengthened precisely because of the over-importance of sexual freedom. Thus, for example, in the context of reversing consent to sexual contact, it is clear that the freedom of every person to act according to his or her current preference, and not according to a previous obligation, must be protected.[[75]](#footnote-75) Similar contexts that highlight the particular importance of sexual freedom from the point of view of an individual’s autonomy, are situations in which a spouse seeks to examine his or her sexual orientation during a relationship, or the way in a nun’s vow of chastity should be viewed. According to the perfectionist liberal-contractual position, it is proper to protect a sphere of privacy granted to each person, in which sexual behavior — just like freedom of thought — must be free of a need to report or account to any other, or bear any price, as such requirements will deprive a person of his or her autonomy. Again, the position is related not only to the liberal’s general stance, but also to the liberal’s position regarding the family unit, which emphasizes the separateness of each one of the individuals sharing the marital bond, and considers them entitled to an independent domain where they have the right of protection even from each other. In particular, exposing the private sphere to judicial authorities or imposing legal sanctions for invading that independent sphere would be considered deprivations of the spouse’s autonomy.

Admittedly, it is important to note that not every liberal position committed to the value of autonomy in the contractual context, or the separateness of individuals in the marital bond, must also adopt the concrete worldview that recognizes the special importance of self-fulfillment in the sexual realm. Along with the position that locates the focus of autonomy in the concept of liberty, an alternative position places the focus of autonomy precisely in the individual’s ability to take on a commitment, which stems from the individual’s self-determination. This sense of autonomy, as self-legislation, may reject the worldview of the sexual liberal, perceiving it as one focused on pleasure and submission to impulses, in contrast to a truly autonomous position concerned with a life of commitment to principle and values, characterized by restraint and commitment.[[76]](#footnote-76) From this point of view, the contract is an instrument that allows individuals to realize their values ​​and principles by creating an independent normative space that requires them to keep their word. According to this position, the origin of the self-limitation by agreement cures the harm to the private space, and the fact that this limitation is intended to serve the self-interest of each of one the partners in the marriage leaves the position within the liberal space.[[77]](#footnote-77) Thus, although each individual has the right to terminate the marriage at will, the parties may also prescribe that certain behaviors, which may also result in ending good and beneficial marital relationships, will be considered improper, and a mechanism will be built to help the parties avoid them, as long as this mechanism does not in fact deny the very right to leave.[[78]](#footnote-78) Therefore, a legal system that enforces such an obligation is actually, in this sense, respecting the autonomy of its subjects.

In conclusion then, the case of fault agreements reveals a duality within the perception about the value of liberty and autonomy. On the one hand, a liberal conception emphasizing self-fulfillment, authenticity, and constant choice, leads to the conclusion that the contractual liberal will join his or her sexual liberal friend in opposition to fault agreements, since support for such agreements does not reconcile with the principles that led to support for family agreements in the first place. On the other hand, another liberal position which views the contract as an instrument for creating commitment, self-restraint, and moderation, actually highlights the dispute between the sexual liberal and the contractual liberal, in a way that calls for a resolution between their opposing positions.

Together with this fundamental controversy about the sexual freedom of individuals, emphasizing the overriding importance of questions of sexual behavior during a marriage and highlighting the liberal opposition to fault agreements, an additional position of the sexual liberal stems from express support for restricting the importance of sexual behavior and questions of sexual morality in general within family law as a means for shaping public perception of the institution of marriage. This seeks to remove the focus of the institution of marriage from such issues, both for reasons related to gender equality (to which we will return in the next sub-chapter) and in order to strengthen the stability of the marital relationship for the benefit of the couple and their children (thus, ironically, the stability factor has transformed from a consideration in favor of considering fault to one against it). At first glance, there might therefore have been a conflict between the (opposing) sexually liberal position, and the (ostensibly supportive) contractually liberal position. However, on closer examination, it is possible that, in this, the scope of the disagreement is narrower. From the point of view of influencing the general social institution, there is scope to distinguishing an arrangement originating in legislative default from private arrangements between spouses, especially if their scope is limited.[[79]](#footnote-79) Regardless, the sexual liberal will be able to demonstrate tolerance and agree to a limited scope of fault agreements, as long as these do not threaten the prevailing public perception of family life. On the other hand, the contractual liberal may be more tolerant of interfering with fault agreements for reasons related to shaping public perception of the institution of marriage, or of state involvement in influencing citizens’ behavior. This is because, as mentioned, the idea that the contractual tool is intended to promote a liberal conception of the good life and give the parties decent alternatives is deeply rooted within the conception of the perfectionist contractual liberal, who sees the role of contract law in producing suitable social institutions, and not in protecting every whim of the individual.[[80]](#footnote-80) Thus, while with regard to the fundamental principle we can identify a turbulent dynamic of forming an alliance (with the permissive liberal) or highlighting the dispute (with the conservative liberal), with regard to the consideration focusing on the design of the institution of marriage, there appears to be a compromise dynamic coalescing around the center, in the setting of which both the contractual liberal and the sexual liberal can live peacefully, with the law’s attempt to shape the individuals’ consents, and direct them against fault agreements. Both will even live in harmony with the desire of a limited group to deviate from this direction, as long as this deviation does not undermine the central social construct.

In conclusion, then, the contractual liberal may also share the sexual liberal’s worldview, to the extent that it focuses on liberty and the absence of restraint. It appears that in such a case, there is no tension between the value commitment on questions of the right to exit a marriage or the importance of the sexual sphere, and the value commitment to the importance of contracts in the family arena. It is true that on the other hand, we have observed that this position is not *de rigueur*, that is to say, that a contractual liberal’s positions could still be remain intact even if rejecting the particular positions of the sexual liberal, in whole or in part. Regardless, while there remains a gap between the two positions regarding the design of the institution of marriage, there is also common ground that enables them to compromise around active state support for one type of marriage institution,[[81]](#footnote-81) alongside limited tolerance of deviating from that institution to some extent or another. Moreover, as part of the liberal commitment by both types of liberals, neither are blind to the cost of imposing arrangements on parties against their express wishes. In this regard, it is reasonable to adopt a mediating mechanism, even if the parties will not be fully satisfied as a result.

**Table III** —  **The Feminists: Gender Equality and Justice**

The previous chapter dealt with the point of view of a person committed to perfectionist liberalism, defined around the centrality of the value of an individual’s liberty and autonomy. This chapter addresses another type of ideological consideration stemming from a commitment to gender equality and justice within the family. Again, we will try to examine how the position opposing the effect of fault may change when the source of consideration of fault is an agreement between the parties, and how the position in favor of a contractual stipulation is affected when the content of the contract is determining proprietary consequences to the parties’ conduct in the sexual realm.

As will be recalled, two main arguments underpinned the feminist opposition to the consideration of fault. A first consideration, as a matter of principle recognized the problematic nature of placing sexuality at the heart of the family relationship, in light of criticism that emphasized the patriarchal nature of legal oversight of sexuality, as a matter focused on control and subordination (rather than chastity, fidelity, or morality). According to this approach, the opposition does not lie in the exact content of the legal norm, but in the preoccupation with the sexual sphere, which is characterized as a realm of male domination over women.[[82]](#footnote-82) A second and instrumental consideration expresses the concern that the legal focus on the parties’ functioning on the sexual plain could translate into the enforcement of traditional roles within the family, and primarily the position that while the man is expected to support and lead, the woman is expected to carry out domestic functions and be sexually faithful. To this one must add the fear, rooted in social data, of applying sexual double standards, forbidding women from doing that which men are permitted to do. From this point of view, the establishment of a legal institution whose actions would tend to result in female oppression, or which could lead to proprietary harm to women, is undesirable and should be opposed. These two arguments, together, have driven the feminist opposition to assigning proprietary consequences to sexual fault during marriage.

How does this point of view change when the source of the consideration of fault is an agreement between the parties? It seems that even in such a case, both branches of the argument can stand. The argument from principle, rooted in a radical eschewal of organizing the law around sexual behavior, does not change following such agreement, especially as we see the difficulty created by the organization of the family relationship around sexual behavior as a matter that raises class issues that extend beyond the spouses’ zone of privacy. In fact, it is feasible that a consensual determination of the behavior contains details that carry proprietary implications and will actually exacerbate the problem of policing and control eschewed by this position.[[83]](#footnote-83) A similar result also derives from the instrumental-consequential argument. If the consideration of fault depends on the parties’ consent, there is a growing fear that most of the demand to enter into such agreements will come from men seeking to control their wives’ conduct. In any event, there is concern that the wording of such agreements, or the manner in which they will operate, will impose an asymmetrical obligation on men and women, reflecting sexual double standards: men will demand “fiduciary clauses” more than women; men, more than women, will attempt to pry and uncover their spouses’ sexual conduct; and, perhaps, even the courts will apply such norms differently in relation to men and women.[[84]](#footnote-84) The end result will be that the law in practice will enforce different norms for men and women, even if the agreement is worded symmetrically. Consequently, such agreements will lead both to the enforcement of traditional roles, and to harming women’s property interests. Moreover, attaching the norm to an agreement exposes its content to the general discrepancies in bargaining power between men and women, and, in this respect, the position of the gender liberal may be suspicious of consensual regulation in general, and of the consensual regulation of an area where there are gender gaps in particular, as having the potential to promote the interests of men more than the general good.[[85]](#footnote-85)

Thus, at first glance, it appears that the conflict between fault’s opponents and the supporters of agreements remains the same at the gender equality Table, and perhaps has even been exacerbated. There is inherent tension between a commitment to removing sexual fault from the legal regulation of family life, and feminist support for contracts, which emphasizes the importance of contracts in achieving independence and autonomy in general (including for women),[[86]](#footnote-86) or which emphasizes the importance of contractual norms entering the home while obscuring the private-public distinction, and eschewing the traditional norm which has left the dwelling as a space immune to considerations of justice and fairness.[[87]](#footnote-87) It seems, therefore, that within feminist thinking itself, a rift has been created between the two conflicting commitments: against fault, and in favor of contracts, wherein the camp that insists on opposing fault considerations finds an ally in the camp that is suspicious of contractual arrangements in the relations between the sexes.

However, upon deeper examination, it appears that here also, just as in the previous chapter, a more complex dynamic can be described. First, it seems that some of the general feminist support for family contracts is completely eroded when the content of the contract is related to sexual fault. This position, which views family agreements not only as a tool for promoting autonomy, but primarily as a tool for achieving justice and fairness in the domestic sphere, may withdraw its support for agreements when their content, or at least their expected outcome, does not promote justice and equality. According to this position, support for family agreements for feminist reasons does not apply to such agreements at all, both because of their policing nature, and because of their expected consequences. In any event, there is no conflict between the “anti-fault” camp, and the “pro-contract” camp, as the pro-contract camp does not support a contractual arrangement at all when it comes to fault agreements. On the contrary; there is an alliance, not conflict, between feminist opponents of fault and feminist proponents of contract, both of whom rely on justice and equality. This alliance is equivalent to the alliance discussed above between the perfectionist contractual liberal and the perfectionist sexual liberal. However, in this case, the common ground is not a commitment to the value of liberty, but a commitment to the value of equality. Opposition to such contracts requires no ideological concession on the part of the feminist contractual liberal of this type.

Along with this point of view, which expresses a reversal in which the pro-contractual position becomes an active opponent, a number of contours of compromise positions can be drawn that reflect both a rejection of fault, and respect for contractual principles within the family. For example, while the radical position described above vehemently opposes any expression of sexual fault within the law, a less radical position regarding the sexual realm may show an excess of willingness to be flexible in its perception where the source of the restriction is the parties’ agreement. Indeed, a systemic default that gives effect to the parties’ sexual conduct is an expression of a patriarchal regime, but when it comes to contractual consent, the norms are prescribed “bottom-up” in accordance with the individuals’ wishes. Giving effect to such a stipulation may reflect a commitment to the application of general norms (such as the duty to keep promises and be faithful) even within an intimate relationship, in a manner that shifts the focus from its patriarchal nature,[[88]](#footnote-88) and, on the contrary, can be seen as a lever for changing traditional social perceptions, and remedying them with the aid of the contractual tool.[[89]](#footnote-89) Therefore, anchoring the norm in a contract between the parties transforms it from a repressive social norm to a question of fairness on the domestic level, provided that the norms themselves do not reflect gender injustice, and when it is assured that the agreement was entered into by the voluntary choice of both parties.

Moreover, even a position that opposes consideration of fault for class reasons, may recognize the importance of recognizing women’s autonomy to promote their own well-being and desires within the framework of an agreement. In this respect, there is tension between class considerations and the commitment to women’s freedom, including the freedom to promote independent interests that are important to a particular woman, at the expense of class interests of the general female public.[[90]](#footnote-90) This position can also therefore compromise whenever the violation of the class interest is mitigated and the individual’s benefit is guaranteed. Finally, instrumental opposition to fault considerations, rooted in apprehension pertaining to the arrangements’ consequences, may reach a level playing field with a realistic pro-contractual position which recognizes the limitations of the contractual mechanism, while supporting alternatives involving oversight of the conclusion and the content of the agreements. Such compromise has a functional nature; it is possible to agree to the existence of agreements with some, but not other, content, or to agreements entered into under some conditions (which guarantee free choice and lack of exploitation) but not others. In Chapter IV we will return to discuss the details of such arrangements.

**IV. Table Four** —  **Prudentialism, Welfare, and the Limits of Condition (Paternalism)**

We recall, that among the considerations underlying the sexual liberal’s opposition to proprietary consequences for fault, there were also a host of prudential considerations focusing on the welfare of the individual in question, and concentrating on the claim that an arrangement giving expression to fault will not promote individual welfare. This is attributable to a number of factors. First, concentrating on infidelity after it has already occurred is by its nature scratching a wound that is best avoided at the level of the individual’s emotional well-being. This painful consequence is exacerbated when the probe is carried out in the setting of legal proceedings, with all their challenging and invasive characteristics. In addition, it is argued that proprietary compensation will not give the victim the relief desired, nor will it benefit the betrayed party after the injury. In addition, from an ex ante point of view, an agreement that prevents one spouse from betraying the other’s trust only by creating fear of the financial sanction, will not secure partner loyalty of any value, and thereby not achieve the goal that the couple seeks to advance. Finally, legal proceedings that focus on intimate aspects of the couple’s lives will ultimately violate their privacy, thereby resulting in a loss arising from the price inherent in assigning proprietary consequences to sexual conduct. In light of these considerations, and in accordance with the position that allows the state to promote policy in order to contribute to the well-being of individuals, the preference of a no-fault marriage regime enables the state to set the norm in a way that corresponds to the preferred alternative from the point of view of the individuals.

How does this position change when the desire to prescribe proprietary consequences to aspects of fault stems from a determination by the parties themselves? Is the state entitled to promote the well-being of the individual even against the individual’s express wishes? Dealing with this question requires that we distinguish between contexts in which an agreement changes the very harm to the individual’s well-being or its extent, and those contexts in which there is no change to the intensity of harm to the individual’s well-being. However, in the latter context, the fact that this harm results from the individual’s independent decision alters the legitimacy of interfering with his or her choices.

An example of a context in which an agreement changes the intensity of the harm to the well-being of the individual is the effect of taking fault into account on the well-being of the parties in terms of privacy, where it arises from an agreement between the parties. Indeed, the judicial determination of matters that are the parties’ private affair harm both the accused spouse and, sometimes, the betrayed spouse, whose intimate details will be revealed publicly.[[91]](#footnote-91) However, it is arguable that the effect is reduced when the source of the infringement is an agreement, at least pursuant to one possible understanding of the concept of privacy. This is because the idea of privacy is based on control;[[92]](#footnote-92) consent changes the nature of the infringement and blunts it. The harm to the accusing spouse will remain under that spouse’s control, as the spouse can make the accusation and either consent to the harm or refrain from doing so. Even the harm to the accused spouse is blunted; even though prior consent is not equal to present consent, it does leave the victim with more control over the invasion of his or her privacy, since it arose as a result of that spouse’s independent choice.[[93]](#footnote-93)

Another context in which an agreement may change the very consequences of considering fault is related to the difference between the behavioral effect of one’s own commitment, as opposed to compliance with an external norm.[[94]](#footnote-94) It has been argued above that fidelity based solely on compliance with the law is not likely to achieve the desired result for the parties, which is a life based on an authentic sense of faithfulness. However, it is possible that when the parties are themselves the source of the legal obligation, this can contribute to achieving the desired result. First, such a commitment may affect not only the behavior of the individuals, but also their attitudes by leading them to adopt attitudes and behavioral patterns that are consistent with their voluntary commitment.[[95]](#footnote-95) Second, while refraining from infidelity for fear of legal sanction does not reflect authentic fidelity, doing so out of an inherent private commitment is in itself an expression of commitment and fidelity, and is, in any event, not useless, in the sense that sexual exclusivity by force of law does not serve the desired purpose at all.[[96]](#footnote-96)

Other contexts do not necessarily reduce the intensity of the harm, but do, however, highlight the challenge raised by interference that restricts the individual in the name of his or her own well-being. At first glance, it seems that a liberal position is committed to refraining from a paternalistic assertion that purports to know better than the citizen how to advance the citizen’s own interests, especially when the citizen insists on making his or her own choices. This is both because the citizen’s opposing position is a reason to doubt the state’s judgment of what is good for that citizen, and because forcing a position which is contrary to the citizen’s explicit preference involves a price in terms of welfare and harm to the individual’s autonomy. In this respect, the pragmatist sexual liberal, who advocates opposition to considerations of fault on the strength of the individual’s well-being, is therefore required to change his or her initial position with respect to consideration of fault stemming from a choice by the parties themselves.

However, even in the liberal sphere, one can sometimes find varying degrees of justifications for paternalistic intervention in bad choices made by individuals purportedly for the benefit of those individuals themselves, such as example, where there are special reasons to believe that the individual’s power to identify the course of action that best advances his or her own interests is limited. This position is also shared by the reasonable contractual liberal, who is aware of the limitations on the individual’s ability to choose, especially in contexts in which the individual suffers from cognitive limitations or other decision-making defects.[[97]](#footnote-97) One challenge to the individual’s choice, or to the underlying voluntariness and consciousness, involves the ability to decide in advance about the outcome of a future action from two main aspects. First, the parties to the prenuptial agreement determining the proprietary consequences of their future conduct may be overly optimistic about each other’s desire to engage in that conduct, or about the probability that the other spouse will desire it in the future. Second, the undertaking purports to limit the action of a different future self, under conditions in which the parties may find it difficult to anticipate their future preferences.[[98]](#footnote-98) This is especially so in light of the widespread claim that preferences in the spheres of ​​sexual behavior, ​​sexual desire, or ​​monogamous tendencies, tend to be dynamic over time.[[99]](#footnote-99) In a similar vein, it is possible that the parties will err in their assessment of the price that will accompany probing the wound of violated trust (perhaps from a tendency to repress thoughts of it, or in the absence of first-hand experience of such an experience), or even err on the question of their future preferences in respect of the choice of whether to end the relationship due to infidelity, or to preserve it, or between amicable separation and exacting revenge on their spouse for the misconduct. In light of these challenges, it is possible that a restriction on agreements for paternalistic reasons may also be acceptable to the contractual liberal.

Another justification for paternalistic intervention in this context stems from the fact that a limitation on fault agreements is not a reflection of doubt about the individual’s aims, but rather helps the individual to adjust the means to suit the ends. Pursuant to this line of argument, the present case concentrates on aligning the individual’s own goals (a marriage based on sexual exclusivity) and the means chosen for achieving this, as opposed to interfering in the goals of individuals or in the values ​​they believe in, which highlights the conflict between the sexual liberal and the contractual liberal. If the desired value — fidelity — can indeed not be achieved by fear of legal sanction, then there is scope to intervening in the individual’s choice, not because we reject that individual’s value position seeking sexual fidelity, but rather because we support it. The intervention then protects the individual from the consequences of an erroneous choice that fails to discern the absence of a rational connection between the chosen means and the goal. It is thus an intervention in the individual’s factual, not value judgment, an intervention that is less problematic from a normative-liberal point of view.[[100]](#footnote-100)

In conclusion, as long as it is a “Table” around which both the pragmatic sexual liberal and the pragmatic contractual liberal sit, both focused on promoting the individual’s welfare, it appears that in the context of fault agreements there is no disagreement between them, as both can be harnessed to work together, focusing on the goal of securing the individual’s welfare while balancing between giving expression to the individual’s voluntary and conscious choices, and their ability to advance their goals for their own benefit, and taking into account the limitations that may lead the individual to harm his or her own well-being by making the wrong choices. The result is a willingness to view such agreements as suspect, and to subject them to procedural oversight or to limit such agreements to concrete circumstances,[[101]](#footnote-101) while also recognizing the right of an insistent individual to implement his or her voluntary and conscious choice about promoting his or her own well-being. To this one must add two cautionary remarks about the connection between this decision and a possible position inherent in a more ideologically liberal commitment, based on a non-instrumental conception of the value of autonomy. First, such a position would highlight the importance of providing a space for personal choice for the individual, even at the cost of the individual making the wrong choice. Second, such a position might be concerned that behind the seemingly procedural oversight of an individual’s well-being and the means that individual chooses for achieving his or her goals, lies a perfectionist motivation to interfere with the goals the individual has chosen in order to dictate upon that individual a centralized value world that the individual rejects. These concerns will be given closer treatment in Chapter D’s conclusions.[[102]](#footnote-102)

**V. Fifth Table: Institutional** —  **Systemic**

Around the Fifth Table will gather all the positions that focus not on the fault agreements per se, but on the limitations and challenges arising from the need to execute them in the real world with the aid of judicial mechanisms that hear evidence, establish facts, and enforce the agreements. We will divide these considerations into two camps. The first camp, which we will deal with in section (a), focuses on the ability to implement the agreement and achieve the benefits inherent in it. The second camp, which we will deal with in section (b), focuses on the indirect implications of resorting to such agreements, and the damages that may be caused to the legal system. In both cases, the systemic-institutional position heard from the contractual liberal was reserved from the outset. In this respect, this “Table” reflects a slightly different dynamic, in which institutional opponents of fault meet those whose support for family contracts is subject to institutional considerations. It remains only to be seen what their position will be in relation to the particular case at hand of fault agreements.

**a. Operational Considerations: The State’s “Problem of Knowledge, Generalization, Identification and Quantification”**

The discussion up to this point has focused on the effect an agreement has on the advisability of considering fault in the context of the property relationship between spouses. In doing so, we have seen that one of the objections to considering fault in law lies in the difficulty of generalizing a uniform norm with respect to a diverse population, or correctly identifying the preferences of the individuals before us, as well as correctly identifying the misconduct that should be considered and attaching the appropriate price to this behavior in terms of setting the amount of damages. How does this position change when the parties agree about the source of the consideration of fault?

It seems that regarding the question of generalization, or the problem of identifying the preferences of the individuals, an agreement solves the problem. A default rule prescribing that fault not be considered, along with an ability to prescribe it privately, enables parties wishing to do so to signal their preferences to the justice system, while the general population can be segmented in accordance with its approach to the importance of fault in a relationship. The court will therefore recognize the couple standing before it, and understand what its positions are, applying different norms to different couples. Thus, even if such an arrangement is for the most part considered undesirable, it will still serve the minority that do want it, in a manner appropriate to the individuals’ expectations both as to the idea of marriage, and with respect to the price they wish to bear so that their fault will be investigated (in terms of privacy, for example).[[103]](#footnote-103) The sexual liberal who based a general objection on these considerations should therefore completely renounce this objection when the parties inform us of their uniqueness and their preferences by way of contractual agreement.

The question of identification, i.e., the legal system’s ability to operate and enforce an arrangement that depends on fault, is somewhat more complicated, given the difficulty in correctly identifying what exactly the wrong behavior was and who was responsible for it within a complete and complex marital relationship. According to this position, even if consideration of fault is justified on its merits, the courts are incapable of identifying who the party at fault really is, and in particular, the question of “infidelity” should not be seen as synonymous with responsibility for separation. This difficulty is not eliminated even if the source of the demand to consider fault is the will of the parties, since even if the parties want the court to identify the culpable party in the context of the relationship, this cannot be accomplished in practice due to the court’s fact finding limitations.

While it is true that, on second glance, it is possible to envisage two lines of argument that reduce the identification problem, where the origin of the arrangement is the will of the parties, but these apply only in the cases where the agreement itself deals with the problem of identification by accurately defining the conduct which the parties view as wrongful. Such a definition can rely on any of two possible considerations. First, the couple can use the agreement to set their red lines, that is, behavior that is ostensibly inappropriate regardless of whether or not it was caused by a broad and complex context within the relationship. Thus, although “infidelity” is often the result of a complex set of circumstances in a relationship between parties, where it is difficult to clearly identify the person responsible for it (the “tip of the iceberg” argument), the parties may still stipulate that such conduct is unacceptable to them, in a similar way to the manner in which the law, rightly, refuses to address the circumstances that precede domestic violence. In doing so, the parties reveal that, in their view, such conduct represents serious independent wrongdoing, or the crossing of a line that makes the betrayer responsible for the collapse of the relationship. According to a second and related line of argument, even if the parties do not deny the complexity surrounding infidelity, they may seek to set precise milestones that will allow the law to intervene in the conduct of the relationship, precisely to deal with identification difficulties. This is discussed in the general legal writings of the neo-formalist school of thought in contract law, taking into account the difficulties in the operation of the norm by the courts, and the attempt to strive for even an imperfect judicial determination which is preferable in their eyes to completely ignoring the entire issue, which also implies error.[[104]](#footnote-104) Thus, in those cases where the parties themselves have clearly defined the misconduct, the institutional difficulty involved in the identification problem is removed. That having been said, in cases where the particularity problem was not resolved within the framework of the agreement, and the parties were satisfied with leaving the determination of the content of the wrongful conduct to the court, the problem of identification still remained.[[105]](#footnote-105)

Matters are even more complicated with respect to another systemic-institutional difficulty, which lies in the challenge of assessing and quantifying the damages — the extent of taking account of the misconduct in the property outcome. It will be recalled that, assuming that it is not appropriate to set a price for the very dissolution of the relationship (which in itself is perceived as legitimate), the proponents of fault suggested viewing the infidelity as an independent, compensable tort.[[106]](#footnote-106) The institutional sexual liberal argued that there is no room for such consideration, since infidelity as an independent tort does not carry actual damages, or that the damages accompanying it are entirely in the emotional realm, which the court has no power to accurately assess. How does this position change when the source of considering fault is an agreement between the parties?

At first glance, it appears that the parties themselves can not only highlight the importance of the issue to them and the fact that it should bear damages in their opinion, but also attach a price to it as they see fit, thus easing the burden of assessment that would normally be imposed on the court. Thus, in those agreements which expressly determine the extent of the proprietary consequences, and do not leave this task to the court, it appears that the problem of assessment and quantification has been resolved.[[107]](#footnote-107) However, it is here that concern may arise from the point of view of general contract law, which tends to object to penalty clauses and to agreed-upon punitive damages.[[108]](#footnote-108) The concern is that the compensation that the parties to the contract may prescribe will not, in fact, reflect the damages they expect, but will rather serve as a punitive mechanism for harming and deterring the violator. In the present context, beyond the usual reasons for eschewing agreed penalty clauses, there is also a concern that the parties are in fact disguising, under the guise of compensation attached to infidelity, their real desire, which impose a penalty on the party viewed as responsible for breaking up the relationship, which, as stated above, is an objectionable position. Thus, it appears that the problems of assessment and quantification are resolved only when the parties themselves have set the scope of the price attached to infidelity, and in circumstances where it is reasonable to assume that this is indeed the real damages arising from the concrete context of the stipulation,[[109]](#footnote-109) and of course, whenever the question of the voluntariness of the contract is solved by way of proper procedural oversight.

**b. Systemic Considerations: Efficiency, Integrity, and the Status of the Courts**

In the previous sections we discussed the liberal opposition to considering fault inherent in an infringement of the parties’ privacy, and the difficulties of identifying relevant facts in this context. But beyond the harm to the parties, the liberal position also highlights the possible institutional harm to the courts. According to this view, conducting proceedings around questions of sexual fidelity would burden the procedure in terms of time and resources. Worse, systematic unreliability in establishing the facts, or examining the minutia of intimate relationships between couples, would place the court in the position of a “voyeur,” and expose some of the intimate world of the judges themselves, thus leading to a distrust of the courts and a contempt for the judiciary. These problems are not solved by the parties’ consent, as they involve the harm to the courts, and in any event, the sexual liberal’s opposition to the consideration of fault should remain unchanged even if the origin of this consideration is in an agreement. However, it is possible that arrangements of the type described above, which would alleviate the difficulties of identification and intrusion inherent in them, may mitigate the difficulty in such agreements. Admittedly, there is a trade-off between invasiveness and reliability, meaning that operating less intrusively will increase the problem of reliability. In any event, the sexual liberal’s opposition also applies to fault agreements, without any real change from the initial opposition, and therefore a conflict between this position and the position of the contractual liberal is ostensibly still to be expected.

But upon reevaluation, it seems that again, part of the conflict fades, surprisingly on the part of the contractual liberal; meaning that at least part of the camp of contractual liberals who support consensual regulation of family relations actually adopt a systemic-institutional position compatible with opposition to fault agreements, rather than in support of them. As seen in Chapter B, a central position in contract law opposes *ab initio* dealing with trifles, and with issues which are not economic, emphasizing the nature of the contract as a public institution that does not focus on enforcing private promises, but on advancing public interests.[[110]](#footnote-110) Similarly, among the proponents of the consensual regulation of family matters were those who sought to restrict such agreements to regulate only the property regime, while being reluctant to attempt to regulate the conduct of the parties over the course of the marriage.[[111]](#footnote-111) Both these types of contractual liberal thus view the institutional opposition to dealing with fault agreements identically as does the sexual liberal. Regardless, the conflict between the sexual liberal and the contractual liberal about imposing institutional restrictions is limited in scope. Thus, it appears that the only opponent that still supports fault agreements in the face of the institutional critique is that type of family-contractual-liberal who seeks to insert the law into the domestic sphere, including the enforcement of fault agreements.[[112]](#footnote-112) This type of liberal is therefore required to address the institutional considerations mentioned, and at first glance, it seems that this will entail moderating and tempering their position given the institutional price inherent in judicial preoccupation with matters of fault as described above.

However, an examination of the fundamental considerations underlying this position reveals that instead of moderation, a frontal, acute controversy arises. As we have seen, the position that supports family contracts that govern family behavior rests on a feminist view that disapproves of these institutional considerations, based on assumptions foreign to this worldview. From this point of view, the concern for efficiency is in itself suspect, based on the assumption — vehemently denied — that family matters related to the intimate sphere are less important, and therefore unworthy of an allocation of public time and resources. Similarly, even the fear for the status of the courts falling into disrepute due to having to deal with the parties’ intimate relationship may be perceived as reflecting a masculine agenda that demarks the personal-residential space as one that it is disrespectful to discuss. Thus, although according to the family-contractual liberal, there may still be a certain institutional price for engaging in the field. Given the concern for the credibility of factual determinations, the essence of the institutional opposition is in direct conflict with the fundamental commitments of this type, and in this respect, the family-contractual liberal’s support for fault agreements may yet be unchanged.

In conclusion, here again it transpires that at least for some of the opposing parties, the two camps reach an equal footing upon a deeper exploration of their own principles, whether by alleviating the sexual liberal’s concerns, or by exposing the fact that the contractual liberal disapproves of such agreements. However, the conflict with a particular type of family-contractual liberal is highlighted and remains unchanged.

**VI. Summary**

To summarize this chapter, we will briefly recall the conclusions that emerge from each one of the discussion tables, and classify them into three main groups: support for fault agreements, opposition to such agreements, and an intermediate position that conditions its support for such agreements on various conditions, or limits them to certain circumstances. Starting with the neutral-pluralistic table, an examination of the considerations underlying these positions led to a general conclusion in support of fault agreements, in a manner reflecting an alliance between the two trends (against fault and in favor of contracts). In contrast, both the perfectionist Table and the feminist Table voiced clear opposition, indicating that the same considerations underlying opposition to fault are equally valid even when the source of the consideration of fault is an agreement between the parties. However, at these two tables, we also identified a possible divide in that within each of these camps there was also an opposing position. In the perfectionist camp, there was a position in support of a contractual arrangement holding that the appropriate expression of autonomy is precisely in the capacity to limit oneself, reflected in restraint and commitment, or that the emphasis on marriage design as based on autonomy is sufficiently reflected in the law’s default position. In the feminist camp, there was a position arguing that support for contractual regulation of domestic life also enhances the ability of spouses to give contractual expression to domestic obligations that have traditionally been perceived as based on altruism and affection, and that have not been protected and recognized by the law. Thus, these two tables raised a possible position in support of fault agreements. However, even in these two cases, the support was not sweeping. Support for fault agreements may depend on the specific content of the proposed arrangement, or at least will not apply to some of the possible agreements, so these two positions actually belong to a third group. The members of the fourth, welfare-focused table, also belong to this third group, supporting such agreements only under supervision that will ensure voluntariness and protect individuals from bad choices. Finally, members of the institutional Table also split into two camps that correspond to the two main considerations underpinning their positions. While the camp that focuses on knowledge and generalization supports agreements as long as the agreement successfully addresses these issues (i.e., belongs to the third group), the court-status-focused camp mainly opposes consideration of fault even if it originates in agreement, and therefore belongs to the second group. All that remains is, therefore, to outline the mechanism that will enable us to strive for a general conclusion that takes into account the full range of considerations that have arisen at each one of the tables, which will be the focus of the next chapter.

**Chapter D: Conclusions, Decision, Implications, and Future Direction**

We concluded the previous chapter with three positions, each derived from the fundamental commitments of each liberal type characterized in the discussion. This chapter strives to achieve an overall practical conclusion which can be reached while taking into account the totality of the positions that emerged from the various points of view. In essence, we would like to bring together the representatives of each one of the positions or “Tables,” in order to explore the practical possibilities in an attempt to formulate a practical regulation of the subject. Naturally, this stage may involve cooperation, that is, making arrangements that would be acceptable without reservation to each one of the positions. Along with these arrangements, this stage is also expected to include easy compromise arrangements, that is, arrangements in which each party is willing to agree to unnecessary arrangements in order to advance its members’ goals, and even painful compromises, i.e., arrangements in which a party will be willing to pay a price to achieve a solution agreeable to the other parties. Finally, as we shall see below, sometimes arrangements that will serve one party to the discussion will actually increase the price in the eyes of an opposing party. In the latter cases, there will be no alternative but to choose a side, making a practical decision indicating preference for one position over the other.

**I. Three Types of Mechanisms**

For the purpose of argument, and in order to find as broad a common denominator as possible, we start with the point of view of the camp describe as “Agreeing with Conditions,” or agreeing to fault agreements subject to reservations, requirements, or preconditions. We will examine whether these conditions are tolerated by the supporters’ camp and whether they reduce the opposition of the opponents’ camp. For the purposes of discussion, these conditions can be divided into three main branches of possible regulation. It is possible to first divide, as is customary,[[113]](#footnote-113) a branch that focuses on supervising the process of concluding the agreements, from a branch that focuses on limiting the content of the agreements. In addition, there is another conceivable method of regulation that has not thus far received comprehensive discussion. This method does not focus on the circumstances of the conclusion or the content of any agreement, but on the question of the prevalence of these agreements in a given society. Each one of these methods of regulation may be supported by different considerations, and sometimes also provoke tension between opposing considerations. Accordingly, we will list the various considerations that may support its adoption, and the practical arrangements that must be derived from these purposes with respect to each type of regulation.

**a. Procedural Mechanism**

As part of the regulatory toolbox related to the process of contracting, a number of possible tools, acceptable in contract law, can be listed. First, the conclusion of the agreements can be conditioned on mechanisms that ensure that the parties are well aware of the content of their agreement, and that they have made the decision in a considered and responsible manner. Thus, for example, a requirement could be set that both parties be provided with adequate information (typically ensuring that they are not suffering from an underestimation of future risks or circumstances), an appropriate period of time to make a decision about their willingness to enter into an agreement, and even separate legal representation that ensures that the agreement is reconcilable with the interests of each of the parties. Furthermore, judicial involvement in the agreement could also be added to the foregoing mechanisms, whether by conditioning the validity of the agreement on judicial approval that ensures that the parties are aware of the content of the agreement, and agreed to it freely, or by judicial review of any defects in an agreement that would be applied at the time when it needs to be enforced.

As stated in Chapter B, use of such procedural mechanisms stems from the general feminist concern about how marital agreements exploit power and information discrepancies between the spouses, and thereby harm women. Moreover, their use also stems directly from the fear, presented by the prudential position, that there is scope for a paternalistic intervention to prevent the couple from concluding fault agreements that do not benefit them. This is in light of the possible difficulty inherent in the parties’ over-optimism at the time of contracting with respect to their ability to anticipate the preferences of a future self, in the assessment of the price inherent in judicial involvement in their personal lives in the course of any conflict, or in the ability to achieve the desired goal of sexual fidelity by attaching a legal sanction.[[114]](#footnote-114) From this point of view therefore, appropriate use of procedural mechanisms alleviates the concern, and may allow the proponent of this position to join the camp supporting the enforcement of fault agreements.

A more complex position stems from the perspective of the perfectionist camp focused on autonomy. Although this position was initially opposed to fault agreements restricting the liberty of the parties to them, the use of procedural mechanisms may reduce the objection. The consequence of employing the procedural mechanisms will be that only insistent couples, whose desire to enter into such agreements will based not only on a voluntary and conscious decision, but also on a willingness to meet the prices attached to the onerous approval process, will be parties to such fault agreements. From the point of view of concern for autonomy, this would be to place additional weight on the opposing scale, according to which said agreement reflects the autonomous decision of the parties. Even if this does not enlist the support of the perfectionist, or blunt the perfectionist’s initial opposition, it is sufficient to clearly present the difficulty inherent in state coercion that imposes restrictions on individuals, and to highlight the power of coercion inherent in limiting such agreements, i.e., to influence the power of the opposing consideration. If this is so, adopting an onerous procedural mechanism may persuade the perfectionist to relent and agree to enforcing such agreements in order to reach a practical compromise.[[115]](#footnote-115)

A surprising position may arise out of the neutralist-pluralistic point of view. At first glance, members of this group have expressed support for respecting fault agreements, and therefore it can be all the more expected that they will join in support of agreements that have undergone procedural review, as this seems to reinforce the voluntariness of the agreement that was the basis of their support in the first place. However, this perspective may actually be wary of the such procedural oversight. As much as the neutralist support was focused mainly on a desire to remove family life from the realm of state involvement, and respect the value choices of individuals without top-down dictation of any particular perception of the good, members of this group may fear that under the guise of procedural criticism, there will actually be value-based state involvement seeking to enforce a systemic perception of the good over the will of the parties. Thus, for example, subjecting the agreement to judicial approval may lead a judge to refrain from approving an agreement that does not conform to his or her personal perspective, or to the point of view of the majority in society in general or in the hegemonic culture. Similarly, a court that objects to the content of an agreement will all too easily find defects in the contracting process. Thus, a point of view that focuses on the right of the independent individual to map out his or her own path in matters concerning private perceptions of the good will seek to insist that the procedural supervision does not seep into control of content, which would harm the freedom of the individuals. This position reminds us that procedural burdens also carry a price from a liberal point of view, and if so, a solution that seeks to encompass the majority of positions will limit the depth and power of the procedural oversight tools that will be applied to fault agreements.

**b. Content**

Another approach to supervising agreements is a limitation that focuses on the contents of the contract, whether at the stage of conclusion, or at the stage of operation. Thus, for example, it is possible to examine the fairness of the agreement’s terms and conditions, or to limit certain types of agreements that are in tension with considerations of public policy. In the context of fault agreements, such content restrictions are possible, which may result from the various objections we have described above. For the purpose of examining the content restrictions, one should recall the content-dependent reasons underlying the possible objections to fault agreements, with the camp that was willing to accept fault agreements subject to conditions, or the objections, which, if tempered, would enable opponents to compromise and reduce their opposition.

We start with considerations focusing on a concern for gender equality. Supervision of the content of the contract will be able to ensure that the agreements are based on equality in a way that prevents unilateral implementation of such agreements in favor of male policing of female sexuality, or that reflect sexual double standards, both in the terms and conditions of the agreement, and in its enforcement. Such supervision may almost entirely remove the instrumental concern that fault agreements would enforce traditional gender roles, or lead to adverse proprietary outcomes specifically to women. Even from the principled point of view, which focuses on placing sexuality at the center of the relationship as a patriarchal practice of control and subordination, adherence to equality may somewhat blunt the resistance, and make it easier for those who hold this position to compromise.

Another set of considerations focuses on autonomy, that is, on the restriction that such agreements impose on ending relationships or on sexual freedom. First, the intensity of the opposition may be sensitive to the details of the agreement. Thus, for example, there is a difference between an agreement that is burdensome to those seeking to exercise the option of leaving a relationship, and an agreement that only seeks to regulate the procedure for exiting, i.e., requiring the spouse seeking to dissolve the marriage to wait to establish a new relationship until after the first relationship has been properly dissolved.[[116]](#footnote-116) Similarly, the operation of the agreement can be circumscribed according to the degree of restriction on sexual freedom inherent in it in a way that distinguishes, for example, a restriction on casual infidelity from infidelity that reflects deeper self-fulfillment, such as the realization of a different sexual orientation. Second, different levels of impact on the freedom to leave or sexual freedom can be recognized, depending on the extent and nature of the fine imposed on the party violating the agreement.[[117]](#footnote-117) Thus, beyond the question of the size (relative or absolute) of the property consequence, one can distinguish between a consequence that is a denial of a benefit and one that is a denial of a right, or between harm to the share of property due to the spouse based on the parties’ presumed intention, versus harm to the share of property due to that spouse due to justice-based considerations.[[118]](#footnote-118) Relieving the burden (by way of a low price, or the denial of a benefit only) directly addresses the instrumental difficulty inherent in the fear of encumbering freedom, and somewhat weakens the strength of the fundamental opposition to the very inclusion of such a limitation in an arrangement between the parties.

However, it is important to note that while content restrictions of various kinds may harness positions that originally expressed opposition to the agreements to a position in support of agreements, the very supervision of the content may provoke new opposition from the camp that expressed initial support for these agreements, the neutralist camp, and, in particular, the libertarian element of this camp. From this point of view, while it is possible to come to terms with procedural oversight that leaves most of the decision in the hands of the parties themselves, oversight of the content of the contract reflects substantial state intervention based on public value perceptions, in a manner that would frustrate precisely what this position sought to achieve by reference to private agreements. In this respect, it is not a tolerable price, but a price that undermines the principal goals and commitments that underlie the concept. In fact, the fear of over-supervision of the content of agreements may lead the neutralist-libertarian to fear legal regulation of fault agreements precisely because of their commitment to preventing the state from depriving individuals of control over their personal-family space. It seems, therefore, that the question of content limitation may provoke a conflict which requires a decision that involves preferring one position over another, and not by reaching an agreed compromise.

Another, different type of content-dependent constraint, is related to the third set of considerations, which focused on institutional opposition. As will be recalled, the institutional opposition to fault agreements relied on two main considerations: the systemic difficulty in terms of efficiency and integrity; and the difficulty in terms of knowledge and generalization (which is also shared by a prudential concern of the infringement of the parties’ privacy). Again, intervention in the content of the agreement may cure, or at least weaken, the strength of the opposition. An objection inherent in the desire to refrain from engaging in trifles, or matters that are not at the heart of public interest, or one arising from a desire to refrain from discrediting the judicial institution as a result of engaging in intimate affairs, may be dismissed where the parties do not seek judicial involvement, but on the contrary, prefer lack of such involvement. This is the case when the content of the contract creates independent mechanisms for its enforcement (such as deeds, powers of attorney, or trusts), or when the parties seek to settle their disputes before an arbitrator, a subject to which we will return.[[119]](#footnote-119) In these cases, the lack of intervention by the court will lead to honoring the agreements and not avoiding them. Consequently, from this point of view, there is no impediment to agreeing to the existence of such agreements, as long as they do not demand judicial resources and involvement.

Similarly, the degree of judicial resources devoted to the agreements is also sensitive to the particular scope that characterizes them, that is, the degree of detail in which the parties defined the misconduct and its consequences. A high degree of detail, or an accurate definition of the prohibited conduct, may also reduce the extent of invasion and infringement of privacy, as well as the problems of knowledge and generalization discussed above.[[120]](#footnote-120) If so, limiting the content of permissible agreements in a way that would require them to save the court the need to identify the exact will of the parties, and characterize what they view as misconduct, or even limiting agreements to those that do not require judicial involvement or public resources to enforce them, should weaken opposition based on systemic and institutional considerations, or considerations related to the invasion of privacy, and allow holders of the described positions to join in supporting the legitimacy of such fault agreements.

It is interesting to note, that while the content control mechanisms discussed above have enraged the neutralist-libertarians, it seems that the proposed mechanisms, from a systemic-institutional point of view, would actually be acceptable, perhaps even desirable, for them. Transferring the implementation of the agreement to the individuals in a manner that does not require judicial involvement is consistent with the liberation’s desire to leave control of the agreements in the hands of the individual or the individual’s immediate community. A requirement of specificity, and a precise definition of the explicit terms of the agreement, is also consistent with the vision that leaves control of the details of the contract in the hands of the parties and limits the scope of judicial involvement in determining the terms and conditions of the agreement, while blocking channels of public values entering into the private relationship prescribed by the parties for themselves.[[121]](#footnote-121) In these respects, the mechanisms of content adjustments that relied on systemic-institutional sensitivity are not only acceptable to the neutralist, but may find in him or her an ardent ally and supporter.

While these adjustments diminish the problem from the point of view of the systemic-institutional liberal, and have the support of the neutralist liberal, they may exacerbate the problem from the feminist point of view, which may see over-detailing, or precise definition of misconduct, as a price in terms of policing and control. Although an agreement that sets out in detail the limits of what is permitted and what is forbidden solves the problems of knowledge and identification from a judicial point of view, it casts the parties into a relationship that gives each one of them specific control over the other’s behavior. Such a control structure is suspected of operating asymmetrically along gender lines (even if it is worded symmetrically), so that the law finds itself giving control tools to domineering men seeking to limit their spouses’ actions.[[122]](#footnote-122) Similarly, the transfer of agreement enforcement to non-judicial mechanisms that can solve the difficulties of efficiency or integrity, may exacerbate the feminist fear of exploiting power disparities, or abandoning the arena to parties who are not committed to equality. Finally, the very institutional reluctance to engage in the relationship-intimate realm is in direct tension with the basic feminist insight about the importance of respecting these areas, and the insistence on the need to avoid immunizing the domestic space to norms of justice and fairness.

**c. Scope and Scale**

Along with the possibility of supervising the manner in which the agreements are concluded, or the contents of such agreements, another compromise mechanism may be proposed that allows some of the opponents to accept the existence of fault agreements. This mechanism is not common in contract literature, but can be borrowed from other fields of law,[[123]](#footnote-123) and focuses on the issue of the prevalence of the phenomenon, that is, on the question of to what extent are such agreements prevalent in society, or could be prevalent in it. Essentially, contrary to the strictness of the manner of concluding the agreements (which was addressed within the setting of the procedural mechanisms), or the contents of the agreement (which was dealt with within the setting of the content mechanisms), the frequency of entering into such agreements can be monitored. This may be done from a motivation to achieve two possible goals. It is possible that such agreements can be considered legitimate only as long as their prevalence is limited, and in this respect, a kind of quota can be set for the permitted number of agreements, or alternatively, an attempt can be made to limit their number. Another alternative is to focus on how widespread such an agreement might become, or whether it could spread in society like wildfire, that is, to focus not on securing a given quantity, but on the question of how slippery the slope towards widespread distribution really is, or how “contagious” appealing to such agreements might be. According to this position, if there is indeed a fear of widespread distribution, there is scope to avoid the very possibility of concluding such agreements, even on a limited scale.

A willingness to limit the prevalence of fault agreements without completely eradicating them may correspond to a number of perspectives we have analyzed. We start with the ideological perspective that seeks to shape the institution of marriage as an institution based on liberty and equality, and to sever the traditional bond between marriage and policing sexuality.[[124]](#footnote-124) According to this view, as will be recalled, beyond the question of the impact on the disputing couple, the legal design of the institution of marriage has broad social implications that apply to all spouses who choose to marry. There is therefore scope to shift the focus of married life from a mechanism for policing sexuality, to a unit focused on economic cooperation, psycho-social support, and partnership in rearing children. The emphasis here, then, is on the broad impact the law has on public perceptions, while relying on the expressive value of the law, whether by its declarations or by the nature of the institutions it produces.[[125]](#footnote-125) Therefore, even if such a position seeks to organize the social institution of marriage around the contours described, it can, to some extent, be tolerant of a limited deviation from the model, as long as the default supported by the legislature points towards the appropriate model of marriage, and as long as the quantitative extent of deviation is not significant enough to influence public perception about the social character of the institution. In these respects, a liberal willingness to agree to a limited and narrow scope of fault agreements reflects a mediative compromise, that is, a compromise that does not carry any significant sacrifice from this liberal position’s point of view.

A unique position is related to the pluralistic point of view, that is, the same position which seeks to anchor the state’s neutrality in the commitment to ensure the existence and flourishing of different ways of life, whether in order to allow each individual real choice between alternatives, or to allow different cultural groups to live together under a single socio-legal framework. Such a position, with its two alternatives, will not only agree to the existence of fault agreements on a given scale, but may even welcome them and perhaps even support the existence of the option to choose such agreements, precisely because they reflect a different concept of marriage and family based on a different value premise than the liberal family institution described above. However, although a pluralistic position will seek to support the existence of a variety of possibilities, such support will be limited to cases where there is no fear that one position will completely encroach upon another, or — pursuant to the multicultural alternative — transcend the boundaries of the cultural minority group, and affect the perceptions prevalent amongst the majority.[[126]](#footnote-126) Thus, the pluralistic point of view will be sensitive not only to the question of the prevalence of fault agreements, but also to the fear that this phenomenon will spread uncontrollably and adversely affect diversity or social relations.[[127]](#footnote-127) But even from this point of view, regulating the scope of the phenomenon is not a sacrifice or compromise, but a realization of the values ​​and desires of the pluralistic point of view itself.

While these latter positions may support the phenomenon of limited-scale fault agreements, or at least live in peace with it, the opposition of other positions remains unchanged. But even from these points of view, which in themselves support the complete eradication of such agreements, it is possible to tolerate a small amount of deviation from what is perceived as the desired situation, certainly when this deviation rests on the stubborn position of a small group, and when the price of forcing the majority’s position on the minority group is high and also entails a high degree of friction.[[128]](#footnote-128) Such a perception may be shared by both those who oppose fault agreements on an ideological basis,[[129]](#footnote-129) and those who base their fundamental opposition on systemic considerations related to the functioning of the courts. Thus, although this is a real sacrifice, and not a mediative compromise, one can imagine limited-scope-based mechanisms as a step in the right direction towards formulating the overall liberal position on fault agreements.

How can scope-based restrictions be implemented in practice? Ostensibly, the main route is to grab the bull by it horns, and prescribe a quantitative quota that will limit the prevalence of such agreements. But aside from the difficulties arising from the challenge of the fair distribution of such a quota (assuming that the demand for such agreements exceeds the proposed quota), the solution of a quota is inadequate in certain central respects. First, it does not filter those resorting to such agreements based on the intensity of their preference, and therefore may not solve the conflict with particularly insistent groups. Second, such a mechanism does not suppress demand. In fact, it may lead to the opposite result, whereby such agreements will be considered a coveted solution that the few benefit from, and thus act against the expressive trend described above. Finally, it is unsuitable to multicultural motivations, which seek to link the distribution of the agreements to various socio-cultural circles. In the latter respect, the preferred mechanism is a mechanism that will allow use of such agreements only within the boundaries of the given minority group, whenever the boundaries of the group can be clearly identified.[[130]](#footnote-130)

In view of the difficulties inherent in the mechanism of a quota, two main alternatives can be offered. Under one, the law will try to limit, as far as possible, the prevalence of such agreements by placing obstacles before those who want them, which will lead to a reduction in the demand for such agreements, as well as express the public message that this alternative is an undesirable exception to the rule. In principle, it is feasible to think of burdening mechanisms, such as collecting a tax or fee from those seeking to enter into such agreements. However, in practice, it is important to note that the procedural and content mechanisms mentioned above also function as burdening mechanisms, as they impose a cost on employing such agreements, and in this respect, they can be sufficient, while noting their indirect role in reducing demand for fault agreements, and the manner in which they express public reservations about this alternative.

Along with the alternative that focuses on reducing the scope of employing fault agreements, one can also think of an alternative that focuses on a binary decision about the treatment of such agreements that will be based on the given social conditions regarding the fear of the phenomenon spreading. For example, it may be possible to tolerate a certain quantity of such agreements in a society where the agreements will be employed only by the few, but avoid making this option widely available whenever, under the given social conditions, there is a fear that such agreements will become a more widespread norm. In this respect, the mechanism must be adapted to a social structure that may change from place to place and from time to time, and the adjustment must be accompanied by a mechanism of vigilance that will ensure the continued adaptation of the mechanism to the conditions of life and prevailing tendencies.

**d. Summary**

In this chapter, we have seen that despite the different starting positions, various mechanisms can be envisaged that will be widely supported by most of the typical liberal positions we have reviewed, whether by circumventing the problems, or by alleviating them. Establishing procedural conditions and content provisions for entering into fault agreements will create a sticky default that reflects public sentiment, serve as a nudge that will guide citizens towards the desired way of life, and address difficulties and concerns about freedom of choice and the agreements’ consequences, as well as inherently leading to limiting the prevalence of such agreements. As we have seen, while it is possible to describe a grouping of different basic positions around some of these mechanisms, another part reflects a conflict that requires a determination, since solving the problems of one position raises new difficulties from a different perspective, a phenomenon that arises naturally at the value ends of the discussion, while the practical and pragmatic considerations are, by their nature, more amenable to settlement by way of compromise.

Both types of dynamics — the one that allows for convergence around agreed-upon solution mechanisms, and the one that exposes the fundamental ideological disagreements in a way that calls for a decision between them — will be briefly desribed in the next sub-chapter, by focusing on two implications of the discussion in practically significant contexts. The first example is the case of agreements that direct the discussion of the couple’s case to a religious tribunal, especially in a multicultural society. The second example is “reconciliation agreements,” i.e., agreements between spouses made after a crisis between them, where the crisis is an infringement of sexual exclusivity on the part of one of them, and the agreement seeks to create a future mechanism that will protect the betrayed spouse from such behavior being repeated by the offending spouse.

**II. Two Consequences**

**a. Appeal to a Religious Tribunal**

One of the prevalent phenomena in Western democracies in recent decades, particularly in societies where there are significant religious minorities, is the parties’ preference of settling their family matters before religious tribunals (and by implication, in accordance with religious law).[[131]](#footnote-131) This phenomenon has gained a range of normative responses, ranging from strong opposition that excludes such tribunals from ordinary arbitration arrangements,[[132]](#footnote-132) to an approach that is willing to enforce and even support such arrangements[[133]](#footnote-133) through an intermediate position seeking to limit and monitor this phenomenon, but willing to permit them on strict conditions of compatibility with public policy.[[134]](#footnote-134) Most of the discussion concerning this question has traditionally relied on general questions about the relationship between church and state, and in particular the question of disestablishment,[[135]](#footnote-135) general questions about commitment to gender equality, perceptions about the division of labor within the family,[[136]](#footnote-136) and concerns about the voluntariness of seeking such arrangements in devout religious societies.[[137]](#footnote-137) But an appeal to divide property in accordance with religious law or the decision of a religious tribunal typically exposes the parties to a property decision sensitive to fault considerations, a common framework in different religions. Thus, agreements referring to religious law are also a private case of fault agreements. It makes sense therefore, to also think of them from this point of view, isolating this aspect from the other aspects of the dilemma. Accordingly, we will discuss the case in light of the five main considerations we presented in the previous chapter, while also emphasizing the willingness to adopt compromise mechanisms discussed in the current chapter, from the point of view of each one of the positions.

We begin with the position we characterized above as the neutralist-pluralistic position. The desire of religious minority groups to be subject to a religious judicial process in their family affairs highlights the extent to which the question of the status of fault in family law is a cultural war issue that reflects a deep moral controversy.[[138]](#footnote-138) In this respect, the demand that the state refrain from resolving this moral dispute is strengthened. Similarly, the perception concerning the importance of open discourse and different lifestyles, attributed to the pluralistic position,[[139]](#footnote-139) is strengthened, as is the desire to protect significant multiculturalism, i.e., to allow minority groups a space where group members are allowed to preserve their culture and values. Thus, this position is likely to support religious jurisdictional agreements, and to be suspicious of the limiting mechanisms discussed above, as long as these reflect one side of the culture war.[[140]](#footnote-140)

A different point of view arises from the two main ideological directions. The first is the perfectionist position that focuses on choices, and the feminist position that focuses on equality. This point of view will first seek to ensure that direct restrictions on the contents of agreements will not “enter through the back door” by way of an arbitration agreement, which in effect imports the invalid norms by way of a procedural mechanism. The prism of fault agreements underscores the extent to which a discussion of property division actually rests profoundly on fundamental questions about the scope of sexual liberty and the right to leave a marriage. Moreover, from a feminist point of view, the difficulty inherent in concentrating on the parties’ sexual behavior is exacerbated in light of the tendency of religious norms to reflect sexual double standards, and in light of the prevailing practice of religious tribunals as manned only by men.[[141]](#footnote-141)

A more complex position stems from the perfectionist perception that focuses on the nature of marriage as a social institution, and on the expressive aspect of the legal norm. In this respect, the fact that the fault-dependent norms are not an explicit part of the agreement, but arise from it indirectly, alleviates the difficulty. This is also the case when the arrangement is prospectively limited to a minority group, in a manner that reflects the nature of the main social institution in the face of the exception that is suitable to those who are not fully part of the values ​​of the majority community. Finally, the fact that the way in which agreements are implemented or the fact that they stem from a private mechanism and do not pass through an official public-state institution, also makes it possible to stick to the message about the appropriate form of marriage, and to avoid harming the social perception of the family institution. However, from this point of view, one must beware of cases in which the influence of the religious model of the family will displace the civic institution. This is the case, for example, when the group that relies on religious justice is large enough to influence the prevailing perception of what is right and acceptable. Similarly, this concern is sensitive not only to the size of the group, but also to its distinctiveness and the rigidity of its boundaries. For example, if religious justice characterizes a distinct minority group (for example, members of a religious minority), the public model can be preserved in its purity, but in a society where processes of secularization on the one hand, and religious coercion on the other, are unstable, there is concern of widespread adoption of the religious model, and there is scope for more aggressive action by the liberal model to limit the ability to resort to other mechanisms. Moreover, from the gender equality point of view, a sensitivity arises to the fate of those who are considered a “minority within a minority,” that is, the status of women within the minority group.

A complex position also emerges from the fourth conception, which focuses on the well-being of the individual, and the proper limits of paternalistic intervention. On the one hand, the choice of religious judgment raises general doubts about the degree of voluntariness of the choice in the face of community or social pressure. Moreover, the fact that this is an overall choice that reflects an inclusive package of all religious norms, raises concerns that the choice does not rest on individual and concrete preferences about the importance of fault in property relations, and in this respect, raises doubts as to whether the individual knows better than the state which alternative is preferable for him or her. However, on the other hand, it can be argued that a comprehensive reliance on tradition actually reflects a deeper *animus contrahendi* in relation to the set of values ​​and principles embedded in the traditional perception of marriage. Moreover, while the usual paternalistic opposition to fault agreements has relied, inter alia, on a concern of over-optimism, or the regulation of a different future self, such arguments seem to demand more humility in faceof a model based on a tradition-anchored solution, that draws its wisdom from what can be described as “the wisdom of the ages,” or cumulative, multi-generational experience.[[142]](#footnote-142)

Finally, from the systemic-institutional perspective that focuses on efficiency and the protection of the status of the courts, there seems to be unreserved support for appealing to religious tribunals, at least as long as the approval procedures for these arbitration rulings do not require excessive involvement by the courts. Such agreements do not require the courts to waste their time on what may appear to be “trifles,” nor do they require that the courts intrude on the parties’ personal lives, “contaminating” themselves with the intimate details of the spouses’ lives. Thus, there is no injury to judicial time or institutional integrity, and in any event, there is no scope to opposing such agreements, and perhaps they should even be encouraged. This position clearly reveals the inherent tension between the systemic-institutional position and the feminist position as described above, as it plainly demonstrates how considerations of efficiency and institutional integrity may lead to the abandonment of important areas of life to the unregulated field of ​​unofficial judgment. More broadly, the model case of agreements that refer the couple to adjudication before a religious tribunal illustrate the context in which it exacerbates the divide between the various liberal positions described in the article. In contrast, the next model case, which we shall discuss presently, illustrates the possibility of a reverse dynamic.

**b. Reconciliation Agreements**

Along with prenuptial agreements and divorce agreements, a special case of marital agreements are reconciliation agreements, that is, agreements entered into in light of a crisis in the parties’ relationship following a decision to stay in the relationship. In the present context, we will focus on situations where the cause of the crisis was infidelity by a spouse. In such cases, the parties may seek to prescribe, as a condition to reconciliation, that a sanction be attached to future infidelity, to deter the unfaithful spouse from such conduct, and to give real effect to his (or her) undertaking not to do so again. This case is a special private case of fault agreements. It is important to clarify that our interest here is in agreements dealing with the consequences of future infidelity. We will not therefore directly discuss here a tangential question that deals with agreements in which a property transfer is actually effected as a condition of reconciliation and as compensation for past infidelity, where the question is whether to honor this transfer when the parties eventually separate.[[143]](#footnote-143) The prevailing position in case law did not view reconciliation agreements as a special category, and treated them like prenuptial fault agreements, perhaps even with a possible reservation on the very ability to conclude them postnuptially.[[144]](#footnote-144) Here we would like to demonstrate that in the special case of reconciliation agreements, a number of features intersect that, in their cumulative weight, may tip the scales towards a unique legal attitude to such agreements which will combine to support the possibility of entering into them. The present discussion is not aimed at exhausting the issue, but at a brief demonstration of how the considerations operate in its setting, and the relationship between them.

The most important difference seems to arise from the prudentialist-paternalistic point of view. This position focused on the parties’ inability to anticipate at the stage of entering into the marriage, how they would seek to act in the event of future infidelity, both with respect to their desire to maintain the marital relationship and with respect to the interest they would have in seeking legal recourse. When it comes to a reconciliation agreement, it must be assumed that the parties are not overly optimistic about the chances of infidelity occurring again in the relationship. Similarly, the parties may stipulate, based on their personal experience, both the consequences of infidelity on their very relationship, as well as their desire to deal with the hurt by agency of the law. This position is further strengthened when the content of the agreement is not aimed at an intangible future infidelity, but at a particular or similar relationship. It is important to note that this consideration arises in full force especially in cases where the reconciliation agreement follows real infidelity, and not situations in which a more abstract crisis of trust has taken root between the spouses, which does not accompany the acquisition of significant self-knowledge by the parties. In the event of actual infidelity, it can be assumed that the parties fully understand the alternatives facing them, and therefore it cannot be assumed that the law protects them from themselves by restricting fault agreements. Admittedly, it is important to address, with the aid of procedural oversight tools, the concern that such an agreement is entered into in the midst of a highly agitated emotional state, or out of momentary guilt, that can affect the parties’ rational judgment.[[145]](#footnote-145)

Similarly, familiarity with the circumstances of the concrete occurrence may help the parties more accurately define what they perceive to be misconduct, thus relieving the courts of the burden of interpretation, and invasive fact finding. In this respect, such agreements are less problematic from a systemic-institutional point of view. In addition, the scope of reconciliation agreements is, of course, more limited, as it depends on the occurrence of concrete circumstances. In any event, being tolerant of reconciliation agreements is not likely to excessively burden the courts, and it also has a mechanism for limiting the prevalence of such agreements in terms of scale, while limiting them to special circumstances that do not affect the general social design of the institution of marriage and martial relationships. In this respect, a willingness to compromise in this area may also stem from a perfectionist point of view that focuses on the design of the institution of marriage.

Thus, a number of perspectives focused mainly on practical and systemic aspects converge in favor of supporting the possibility of entering into reconciliation agreements. On the other hand, and in contrast to the previous model case, from an ideological point of view that focuses on liberty or equality, there is no particular reason to oppose reconciliation agreements. In fact, it is possible that the experience of severing the bond, and a desire to recommit, act as a counterweight also to the ideological opposition based on liberty and autonomy. Even in terms of considerations of equality, it is feasible that on the basis of a possible scenario, which needs to be investigated further,[[146]](#footnote-146) that reconciliation agreements are more prevalent following men’s betrayal of women and not vice versa, recognition of such agreements will instrumentally lead to property transfers from men to women. This position should be reserved for those cases in which such agreements do not include excessive behavioral limitations or extreme policing of spouses’ behavior, and are not characterized by asymmetry between spouses along gender lines.

**Conclusion**

1. Mary A. Glendon, *The Transformation of Family Law: State Law and Family in the United States and Western Europe* (1989); John White, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (1997); Harry Willekens, *Long Term Developments in Family Law in Western Europe*, in The Changing Family: International Perspectives on the Family and Family Law 47, 56 (John Eekelaar & Thandabantu Nhlapo eds., 1998). [↑](#footnote-ref-1)
2. Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Fam. L.Q. 497 (1996). [↑](#footnote-ref-2)
3. Ellman, Ira Mark “*The Place of Fault in a Modern Divorce Law*” 28 Arizona State Law Journal 773 (1996) . זוהי המדינות של ה- AMERICAN LAW INSTITUTE, PRINCIPLE OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 42-64 (2002).

   למגמה דומה באוסטרליה ראו KILLICK v KILLICK (1996) 21 Fam LR 331), ובקנדה T v J-YT, [2008] 2 SCR 781, 2008 SCC 50, [2008] 2 RCS 781, [2008] SCJ No 51, [2008] ACS no 51; Frick v Frick, [2016] OJ No 5625, 2016 ONCA 799, 132 OR (3d) 321, 2016 CarswellOnt 16670, 271 ACWS (3d) 737, 408 DLR (4th) 622, 91 RFL (7th) 129 [↑](#footnote-ref-3)
4. Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 213-216 (1982); *CONTRACTUALISATION OF FAMILY LAW – GLOBAL PERSPECTIVES* (Frederik Swennen ed., 2015); Maria Neave, *Private Ordering in Family Law: Will Women Benefit*, in Public and Private: Feminist Legal Debates 145, 146 (Margaret Thornton ed., 1995). להצטרפות של אנגליה למגמה ראו Radmacher v. Granatino, [2009] EWCA Civ. 649 (C.A.) (Eng.). בהקשר לחופש החוזי מחוץ לגבולות הנישואים ראו Lifshitz, *A Liberal Analysis of Western Cohabitant Law*, in Family Finance 305 (Bea Verschraegen ed., 2009).

   לפירוט נוסף ראו הדיון בפרק אII, סביב הערות 000-000. [↑](#footnote-ref-4)
5. כך למשל, בהקשר למגמה של ירידת האשמה המינית – הדין האנגלי עדיין פותח פתח להתחשבות כזו במקרים מסוימים. ראו סעיף 25(2) ל- Matrimonial and Family Proceedings Act 1984 , וכן מיטשל. עם זאת דומה שלאחרונה נסגרת יותר ויותר הדלת בפני שיקולים אלה ראו למשל Sharp v Sharp [2017] EWCA Civ 408 אף בארה"ב אין מדובר בחוק פדרלי וקיימים הבדלי גישות משמעותיים בין מדיניות שונות ראו למשל אל מול התיאור של אלמן הש 3, והצעת ה- ALI המדגישים את המגמה של הירידה את התיאורים של Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 Regent U. L. Rev. 243, (2004/2005); Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Continues to Matter to (Some) Wronged Spouses,* 66 Wash. & Lee L. Rev. 503 (2009) [↑](#footnote-ref-5)
6. ליפשיץ TIL [↑](#footnote-ref-6)
7. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

   Carl E. Schneider, Marriage, *Morals and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503. [↑](#footnote-ref-7)
8. GLENDON, לעיל הערה 000, בעמ' 102-103: Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 Geo. L.J. 1519, 1526 (1994); Elizabeth S. Scott, *Rehabilitation Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687,687; Brenda Cossman, *A Matter of Difference: Domestic Contract and Gender Equality*, 28 OSGOODE HALL L.J. 303 (1990). [↑](#footnote-ref-8)
9. Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1988); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 TUL. L. REV. 953, 961-982 (1991); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110-11 (1989). [↑](#footnote-ref-9)
10. הערת שוליים על תפוזים וקליפות וכו' [↑](#footnote-ref-10)
11. רם reasons jurisprudence משהו על הקשר בין זה לבין. [↑](#footnote-ref-11)
12. אל השאלה אילו התנהגויות יכולות להיחשב ככאלה, נשוב להלן, סביב הערות 000-000. [↑](#footnote-ref-12)
13. להבחנה בין אשמה כלכלית למינית ראו למשל [↑](#footnote-ref-13)
14. Hass; YEFET

    Brian Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 372, 377 (Robin Fretwell Wilson ed., 2006); Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998); Jamie Alan Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL’Y 231 (2006). [↑](#footnote-ref-14)
15. ממילא, לעיתים הדיון לא ישליך ישירות על התנאה אודות זכות בת הזוג למזונות (alimony) ככל שזו תלויה בצורך (need). עם זאת, לעיתים דיני המזונות מפצים בפועל על אינטרסים רכושיים אחרים ואינם תלויים בהיעדרו של מקור מחיה של הזכאי (הפניה לאלמן? לALI). במקרים אלו יחול הדיון שלנו, בשינויים המחויבים. [↑](#footnote-ref-15)
16. להכניס כאן משפט של תיאור פוזיטיבי דיאזדדו, וALI וביקס, *D'Andrade v Schrage, 2011 ONSC 1174 (CanLII)* גם בקנדה התנגדות למה שהם מכנים פסקי דין אישיים. מנגד, לבדוק את המאמר של Guidice, שטל תסכם [↑](#footnote-ref-16)
17. לדיון קלאסי ברוח זו ראו: Margaret F. Brinig & June Carbone, *Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1987-1988); Antony W. Dnes, *Application of Economic Analysis to Marital Law: Concerning a Proposal to Reform the Discretionary Approach to the Division of Marital Assets in England and Wales*, 19 INT'L REV. L. & ECON. 533, 535-538 (1999). [↑](#footnote-ref-17)
18. לצורך הדיון הנוכחי, לא נעסוק בשאלה האם ניתן לזהות אחריות לפירוק גם בגין התנהגויות אחרות, אף כי חלק מן הדיון יהיה רלוונטי גם לשאלה זו, בשינויים המחוייבים. [↑](#footnote-ref-18)
19. לגבי התוצאות הכלכליות העגומות הצמודות לגירושין, שעיקרן בוויתור על היתרון לגודל ובצורך לממן שני משקי בית מאותם משאבים, יחד עם הוצאות מיוחדות הקשורות לעיתים לטיפול בהשלכות המשבר על ילדי בני הזוג, ראו אולי Brinig & June Carbone, *supra* [↑](#footnote-ref-19)
20. See, e.g. Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243 (2004). [↑](#footnote-ref-20)
21. למעבר בין פגיעה עצמאית לבין פגיעה המתמקדת בהפרת אמון, ראו:

    Wreen, Michael J. “*What’s Really Wrong with Adultery*.” International Journal of Applied Philosophy 3.2 (1986): 45-49.

    Marquis, Don. "What’s Wrong with Adultery?." *What’s Wrong? Applied Ethicists and Their Critics* (2005). [↑](#footnote-ref-21)
22. Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994). [↑](#footnote-ref-22)
23. *Cf*. JEREMY WALDRON, *Legislation and Moral Neutrality*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 143 (1993). [↑](#footnote-ref-23)
24. בהינתן מחלוקת חברתית, הדרישה לניטראליות היא לפיכך לא רק ל exclusion of ideals from political justificationאלא גם לכך ש the state should not take sides between different conceptions of the good. ראו JOSEPH RAZ, *The Morality Of Freedom* 108-109 (1986) [↑](#footnote-ref-24)
25. Ellman Lorr. [↑](#footnote-ref-25)
26. See, *e.g*.: Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 616 (2006) [↑](#footnote-ref-26)
27. הפניות על 'התמוטטות הקשר', ספרות פסיכולוגית וסוציולוגית. [↑](#footnote-ref-27)
28. Placeholder. לסקירת הדין הפוזיטיבי בקשר להיקף התוצאות הרכושיות העשויות לנבוע מאשמה, ראו 000. [↑](#footnote-ref-28)
29. הפניות. אפשר לבחון גם כתיבה על ציפיות נאמנות אצל זוגות גברים. אסתר פרל מזכירה שיותר מקובל לדבר על זה במפורש בקרב גברים

    לסקירה סוציולוגית ראו Mark Regnerus, *Cheap Sex: The Transformation of Men, Marriage, and Monogamy* ch. 5 (Oxford University Press, 2017); והשוו ל: Deborah Anapol, *Polyamory in the 21st Century: Love and Intimacy with Multiple Partners* (2010). לנתונים, המדגימים נכונות הולכת וגוברת למערכות יחסים לא מונוגמיות, ראו:Fairbrother, Nichole, Trevor A. Hart, and Malcolm Fairbrother. “*Open relationship prevalence, characteristics, and correlates in a nationally representative sample of Canadian adults*.” The Journal of Sex Research 56, no. 6 (2019): 695-704; Levine, E. C., Herbenick, D., Martinez, O., Fu, T., & Dodge, B. (2018). *Open relationships, nonconsensual nonmonogamy, and monogamy among U.S. adults: Findings from the 2012 National Survey of Sexual Health and Behavior*. Archives of Sexual Behavior, 47*,* 1439–1450. לעלייה בעניין הציבורי במערכות יחסים לא מונוגמיות, ראו: Moors, A. C. (2017). *Has the American public’s interest in information related to relationships beyond “The Couple” increased over time?* Journal of Sex Research, 54(6), 677–684. לספקות אודות הערך המוסרי שבמונוגמיה ראו: Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. Rev. L. & Soc. Change 277 (2004); Natasha McKeever, “*Is the requirement of sexual exclusivity consistent with romantic love?*” Journal of Applied Philosophy 34.3 (2017): 353-369. לטענה רדיקלית יותר, ראו אף: Harry Chalmers, “*Is Monogamy Morally Permissible?”* Journal of Value Inquiry  Vol. 53, No. 2, (2018), pp. 225-241; Hallie Liberto, “*The problem with sexual promises*.” Ethics 127, no. 2 (2017): 383-414 [↑](#footnote-ref-29)
30. לראות את המאמר של אד שטיין, סביב ה"ש 1, סקר גאלופ על התנגדות אמריקאית גורפת לבגידות, וגם הספר של הגב' מסטנפורד. וגם: Jenny van Hooff,. “*An everyday affair: Deciphering the sociological significance of women’s attitudes towards infidelity*.” The Sociological Review 65, No. 4 (2017): 850-864. [↑](#footnote-ref-30)
31. … [↑](#footnote-ref-31)
32. ראו: 000. מגמה זו קשורה בגינוי של רגשות הקנאה אותם עשוי לחוש בן הזוג הנבגד, והצגתם כמפוקפקים מבחינה אתית. ראו המקורות בהערה 29 למעלה. [↑](#footnote-ref-32)
33. מזוהה עם אסתר פרל [אבל כנראה לא בצדק, אלא רק עם ההתקבלות הציבורית של הספר שלה], ואולי עם זרמים שמטיפים לפוליאמוריה. לראות גם את

    McKeever, Natasha. “*Why, and to what extent, is sexual infidelity wrong?*” Pacific Philosophical Quarterly 101.3 (2020): 515-537 [↑](#footnote-ref-33)
34. סוף פרק 1 אצל אסתר פרל –'סיפור מהצד' - לא בטוח שנכון להתגרש בעקבות בגידה. [↑](#footnote-ref-34)
35. לסקירת הסטנדרט הכפול שרווח בעולם המערבי בקשר ליחס המשפטי לניאוף, ראו

    DEBORAH L. RHODE, *ADULTERY: INFIDELITY AND THE LAW* (2016)., עמ' 245, 256, 25-30, 33, 41.

    Duncombe, Jean Ed, Kaeren Ed Harrison, Graham Ed Allan, and Dennis Ed Marsden. *THE STATE OF AFFAIRS: EXPLORATIONS IN INFIDELITY AND COMMITMENT*. Lawrence Erlbaum Associates Publishers, 2004, Chapters 6 – 7. [↑](#footnote-ref-35)
36. Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498-9 (1992). [↑](#footnote-ref-36)
37. הפנייה לפסיקה או מאמר [↑](#footnote-ref-37)
38. מבחינה זו, הטיעון מקביל לטיעון המפורסם של לוק על הסובלנות [↑](#footnote-ref-38)
39. 2008 Ellman & Lohr, , בעמ' 735; כן ראו: Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 613 (1997). [↑](#footnote-ref-39)
40. אסתר פרל, פרק 2 [↑](#footnote-ref-40)
41. Samuel A Rea Jr,. “*Efficiency implications of penalties and liquidated damages*.” The Journal of Legal Studies 13.1 (1984): 147-167. [↑](#footnote-ref-41)
42. RAZ 1986 רם להוסיף הפניות [↑](#footnote-ref-42)
43. <שחר משלים> [↑](#footnote-ref-43)
44. <שחר משלים> [↑](#footnote-ref-44)
45. ראו המקורות לעיל הערה 4 [↑](#footnote-ref-45)
46. Martha L. Fineman, *Contract Marriage and Background Rules*, *in* Analyzing Law: New Essays in Legal Theory 183 (Brian Bix ed., 1998); Elizabeth Emnes, Elizabeth S. Scott, *World without Marriage*, 41 Fam. L.Q. 537 (2007); *Regulatory Fictions: On Marriage and Countermarriage*, 99 Calif. L. Rev. (2011); *Cf.* Mary A. Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758 (2005). [↑](#footnote-ref-46)
47. מהלך הנייטראליות – שניידר וכו' [↑](#footnote-ref-47)
48. טריבלקוק מתחבר גם לרעיון הדגניסטי על חוזים כמוסד חברתי מקדם אוטונומיה (אז אולי אין כאן כלל מהלך של הפרטה, אלא פשוט שינוי בנורמה הציבורית). קשור גם לנעמי כהאן ולרעיון של אכיפת מוסר מודרנית (The complexities). כלומר הערכים הציבוריים היום הם לא במתח עם אוטונומיה אלא לקידום אוטונומיה אישית. [↑](#footnote-ref-48)
49. וויצמן (Lenore J Weitzman) [The Marriage Contract: Spouses, Lovers, and the Law] (בכיוון של תרומה לרווחת הפרטים). לראות איך לשבץ את הספרות (מרג'ורי שולץ ועוד). מרי אן קייס STAKE; Mnookin

    <אצל שניידר יש בסיפור שלו מהלך שקושר בין נייטראליות לבין שיקולים פרגמטיים כמו מה עובד וכו'> [↑](#footnote-ref-49)
50. ראו את ניתוח הפסיקה הקנדית בעניין זה במאמר על PELECH [↑](#footnote-ref-50)
51. Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 Buff. L. Rev. 1153 (1999);

    And more, Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229 (1994). [↑](#footnote-ref-51)
52. אורית גן והפניות? [↑](#footnote-ref-52)
53. פסיקה בעיקר. אולי שולץ. pelech . פוזיטיבית: שלב ראשון מתלהב. שלב שני נרגע ולוחץ על הבלמים ודורש יותר ליווי ופיקוח (מן הuniform code להצעת ALI). [↑](#footnote-ref-53)
54. במידה רבה זוהי הרוח המאפיינת את ה- ALI [↑](#footnote-ref-54)
55. מוריס כהן [↑](#footnote-ref-55)
56. ראו למשל: ברנדה קוסמן 'דילמת ההבדלים' Brenda Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality,* 28 Osgoode Hall L. J. 303 (1990); Marcia Neave, *Resolving the Dilemma of Difference: A Critique of the Role of Private Ordering in Family Law,* 44 U. Toronto L.J. 97 (1994). זו דאגה משותפת הן לעמדות פמיניסטיות-תרבותיות והן לעמדות קהילתניות שעמדו על החלוקה בית-שוק [↑](#footnote-ref-56)
57. Love it or leave it…; פרידמן [↑](#footnote-ref-57)
58. אוקין, דיוני private-public, וולדרון על justice v. affection [↑](#footnote-ref-58)
59. Silbough, ertman, Carmel Shalev [↑](#footnote-ref-59)
60. Jill hasday [↑](#footnote-ref-60)
61. Marriage as a signal… אמנם לא עוסק במהלך החיים אלא בתנאי הפירוק אבל הרעיון תקף [↑](#footnote-ref-61)
62. MA Case, enforcing bargains in ongoing marriage [↑](#footnote-ref-62)
63. שחר יוסיף כאן הערה יהודית-דמוקרטית [↑](#footnote-ref-63)
64. נקודה זו עלולה לעורר חשש, מנקודת מבטו של הליברל החפץ בחירות מעמדתה הערכית של המדינה. כפי שלימד הדיון הקלאסי של מוריס כהן, אכיפת חוזים אינה פעולה נייטרלית, אלא כזו המשקפת את הבחירה לאכוף את החוזה, להשלימו ולפרשו, בחירות הנשענות כולן על עמדה ציבורית. החשש, לפיכך, הוא שהסדרה הסכמית של סוגיות כאלו תיתן למדינה דריסת רגל בקביעת הנורמות במרחב הביתי. אלא שמנקודת מבט זו, ברי כי לפרט עדיפה החשיפה למעורבות המדינתית בדרך החוזית על פני כפיפות לברירת המחדל שאינה מכבדת את טעמיו כלל. את היקף המעורבות המדינתית ניתן לצמצם על ידי הרחבת דרישת המסוימות. לדיון נרחב בהיבטים אלו, ראו להלן את הדיון הסובב את הקושי המוסדי \*\*\*, שם נדון בקושי הטמון במעורבות המדינה בענייני אשמה מעבר לשאלת האינטרסים של הפרטים לחוזה. [↑](#footnote-ref-64)
65. הפניה לדיון (להלן) בהעדפות תרבותיות עבות \*\*\*. לצד היתרון של בחירה "עבה", עלול להתעורר גם קושי לגבי רצוניות הבחירה, בפרט במקומות בהם יש מגבלה על יכולת הexit של הפרט מן הקבוצה החברתית אליה הוא שייך. ראו: \*\*\*. <להבחין בין הבעיה העקרונית, עד כמה הבחירה משקפת רצוניות, לבין הבעיה המעשית – כמה דם יישפך אם ננסה לאכוף על קבוצת המיעוט עמדה שזרה לה> [↑](#footnote-ref-65)
66. לשים לב שטיעון הפלורליזם והמגוון יכול לחול כשיקול נגד לא רק כלפי מודלים פילוסופיים של תפיסות משפחה אלא גם כנגד טענות של תועלת דוגמת טיעוני לגבי טיעון הגירוד בפצע –אולי אפשר להתווכח לגבי השאלה אם יש לזה ערך תרפויטי (הוויכוח על משפחה-נזיקין ועל IIED). ואם זה אכן רב משמעי, אז אולי לצדדים מותר להחליט לבד אם הם רוצים לגרד בפצע או לא, לפחות כשהם הצהירו את זה מפורשות מראש. אז אולי זו לא אופציה טובה בעינינו כברירת מחדל אבל אנחנו מוכנים להעמיד אותה למתעקשים, כלומר היא לא מספיק פסולה כדי לאסור עליה. [↑](#footnote-ref-66)
67. הלא הארט. [↑](#footnote-ref-67)
68. What’s wrong with [↑](#footnote-ref-68)
69. שחר להפנות למאמר על עידוד הסכמים. [↑](#footnote-ref-69)
70. דגן, שם שם. [↑](#footnote-ref-70)
71. הבהרה על דרך ההפניה לדיון להלן על פיצוי מוסכם [↑](#footnote-ref-71)
72. ספרות סביב תיאודור הס מ88, ומשהו אצל ביקס. וגם אצל קארין. [↑](#footnote-ref-72)
73. אייזנברג – limits of cognition, עדנה אולמן-מרגלית על big decisions. [↑](#footnote-ref-73)
74. לגבי השאלה עד כמה צריכה התוצאה הרכושית להיות משמעותית, אם בכלל, השוו לדיון בפרק א' III.B.ii. נושא אחר העשוי לעלות כאן קשור בהבחנה בין הסכם הקושר בין בגידה לבין שלילת זכות, לבין הסכם שתוצאתו היא שלילת הטבה, כלומר שהטבה המוענקת בהסכם מותנית בהיעדר-בגידה. סוגיה רחבה זו, הקשורה בשאלת אפשרותן של הצעות כופות או של תנאים פסולים (unconstitutional conditions) מעוררת סיבוכים נוספים שלא כאן המקום לדון בהם. [↑](#footnote-ref-74)
75. Wertheimer, *Consent to Sexual Relations*, *ibid., ibid*. המאמר ב ethics על הבטחות בנושאי מין: Hallie Liberto, “*The problem with sexual promises*.” ETHICS 127, no. 2 (2017): 383-414. [↑](#footnote-ref-75)
76. להבחנה בין עונג, אותנטיות או איפוק בהקשרים של מוסר מיני, ראו 000 [↑](#footnote-ref-76)
77. סקוט, קומיטמנט [↑](#footnote-ref-77)
78. הבחנה בין מות הנישואין לרצח הנישואין. להעיר כאן לגבי הדיון על גובה תג המחיר [↑](#footnote-ref-78)
79. הפניה קדימה ל .scale מצד שני, מבחינה מסוימת העובדה שעשית הסכם מראה שאתה אובססיבי במיוחד למוסר המיני. צריך לא לעודד אותך. [↑](#footnote-ref-79)
80. שני ניואנסים: דגן ומוריס כהן. [↑](#footnote-ref-80)
81. תמיכה כזו יכולה לשאת, למשל, אופי של ברירת מחדל דביקה, או nudge. ראו להלן, 000 [↑](#footnote-ref-81)
82. מקינון <אולי להסתפק בהפניה למעלה>. מבחינה זו, אף בהסכם אשמה בין זוג גברים יש פגיעה בנשים. השוו לעמדתה המפורסמת של מקינון לעניין אונס/פורנוגרפיה, only words שם שם. <NTS: למצוא הפניה גם למישהו רדיקלי פחות 000> [↑](#footnote-ref-82)
83. מקביל בחלקו לדיון המוסדי-אידיאולוגי לעיל (ערך ציבורי בהסטת המוקד מענייני מין). ככל שיש יותר מסוימות שתפתור את בעיית הזיהוי ואת הבעיה המוסדית כך יש פוטנציאל ליותר משטור <לשים לב שהקורא עוד לא יודע על פתרון חוזי לבעיית הזיהוי, וזה עניין שבין המוסדות>. אמנם, צריך להודות שההשלכה המעמדית קשורה גם לscale, ראו להלן, סביב ה"ש 000. [↑](#footnote-ref-83)
84. כאן צריך למצוא מקור סוציולוגי או אחר, שיתמוך בהשערות הכורסה האמפיריות שלנו. 000 [↑](#footnote-ref-84)
85. מנקודת מבט זו, העמדה המתנגדת להסכמי אשמה עשויה להיות קרובה ברוחה לעמדה פמיניסטית המתנגדת להסכמים באופן כללי, ורואה בהם סכנה לקיפוח נשים. ראו --- (פנלופה בריאן, שרון תומפסון, וכד'). עמדה אחרונה זו שוכנת מחוץ לגבולו של המאמר הנוכחי, שכן היא לא חלק מן הדילמה הליברלית שעיקרה בתמיכה בחוזים לצד התנגדות לאשמה. [↑](#footnote-ref-85)
86. See *surpa*. [↑](#footnote-ref-86)
87. See *surpa*. [↑](#footnote-ref-87)
88. הסדאי לעיל (ספק אם גם לגבי הסיפא). [↑](#footnote-ref-88)
89. כרמל שלו וארטמן לעיל. [↑](#footnote-ref-89)
90. אינטרס זה הוא בעל אופי כפול: ראשית, ייתכן כי נשים יבקשו להשתמש בהסכמים כאלו על מנת להניא את בני זוגן מבגידה. שנית, ברוח Silbough, הסכמי אשמה יאפשרו לנשים "למסחר" את הציפיה מהן לא לבגוד, ולקבל עליה תמורה או התחייבות נגדית. [↑](#footnote-ref-90)
91. אם בקשר להתנהגות בן זוגו, אם בקשר לטענות 'אשם תורם' שיעלה בן הזוג המואשם [↑](#footnote-ref-91)
92. בירנהק, שם שם [↑](#footnote-ref-92)
93. אנלוגיית המתאגרף [↑](#footnote-ref-93)
94. פלדמן & טייכמן [↑](#footnote-ref-94)
95. “ [↑](#footnote-ref-95)
96. כלומר שבן זוג יכול להסכין עם העובדה שבן-זוגו חושק בבגידות אבל מתאפק מתוך נאמנות. הפניה סוציולוגית. אבל אולי הסכם ג'נטלמני מספיק, כלומר יש הבדל בין 'כי הבטחתי' לבין 'כי הבטחתי שאשלם כסף אם אפר'. אפשר לחשוב שההתחייבות הכספית כאן אינה המניע אלא מעין 'דמי רצינות', ששמים את הכסף היכן שהפה. [↑](#footnote-ref-96)
97. אייזנברג [↑](#footnote-ref-97)
98. עדנה אולמן מרגלית big decision, הפנינו קודם בפרק ב [↑](#footnote-ref-98)
99. הפניה לספרות פסיכולוגיה אבוליציונית דה לה שמאטע [↑](#footnote-ref-99)
100. ג' דבורקין [↑](#footnote-ref-100)
101. ר' להלן את הדיון בהסכמי פיוס, שבהם לצדדים יש פחות רציונליות מוגבלת, פחות בעיית פרטיות כי פחות בעיית זיהוי, וכו'. [↑](#footnote-ref-101)
102. [↑](#footnote-ref-102)
103. הפניה לדיון הפטרנליסטי למעלה. [↑](#footnote-ref-103)
104. רוברט סקוט, ניאו פורמליזם, safe harbors וכו'. בתוך כך, אפשר לראות את זה גם כאפשרות לקבוע סטנדרט **ראייתי** שיעזור לנו לקבוע עובדות נכונה או עובדה מספיקה (למשל: הסתפקות ב'ייחוד', הסתפקות בראיה מסוימת שתיחשב חד-משמעית וקונקלוסיבית), ואולי גם לקבוע אותן בלי לפגוע בפרטיות ובכבוד שלהם

     נפקא מינה בין שתי החלופות, העקרונית והפורמליסטית – השפעה על גובה הנזק. B, הפורמליסטי, בעצם מאפשר לצדדים לקבוע קריטריון לגבי האשם בפירוק ולהטיל עליו את כל העלויות, בעוד a לא הופך את הצד שפעל כך לאחראי לפירוק אלא רק לצד שעיוול. [↑](#footnote-ref-104)
105. אבל: משיקולים פמיניסטיים, יתר מסוימות היא יותר משטור ואולי גם יותר שליטה (בחלופת ההיסתרות). #בין השולחנות [↑](#footnote-ref-105)
106. כלומר, הטיעון המוסדי נגד הסכמי פיצוי על אשמה:

     אם יש בעיית הבחנה בין הסכם לפיצוי על עוולה עצמאית לבין הסכם לפיצוי על סיום הקשר,

     ויש סיבה להתנגד להסכם לפיצוי על סיום הקשר

     אז יש סיבה להתנגד להסכם לפיצוי על עוולה עצמאית. [↑](#footnote-ref-106)
107. הסכמי משוש נפש Rea, לעיל הש 000. יש טעם להבחין בין עצם הזיהוי של התחום הנפשי כחשוב, לבין שאלת שומתו הדורשת לא רק הצבעה על הנזק אלא גם כימות ושומה שלו, בעיה אותה Rea לא פותר. [↑](#footnote-ref-107)
108. הפניות <אחריות שחר>, הן על ההסתייגות והן על המחלוקת אודותיה, ואולי גם לגבי הדין במדינת היעד. [↑](#footnote-ref-108)
109. הפניה קדימה, #הסכמי פיוס. < בהסכמי פיוס בעקבות בגידה חד-פעמית ('אחזור אליך בתנאי שזו הפעם האחרונה').> [↑](#footnote-ref-109)
110. פרידמן-מוריס כהן וכו'. [↑](#footnote-ref-110)
111. ביקס, עומד במתח אם הליברל החוזי-משפחתי של ongoing marriage [↑](#footnote-ref-111)
112. כזכור, כפי שראינו בפרק גIII, אף מתוך המחנה התומך בהסכמים המסדירים את מהלך הנישואין משיקולים פמיניסטיים, מחנה משמעותי מסתייג מניה וביה מאכיפת הסכמי אשמה, מתוך החשש לפגיעה של הסכמים כאלו בשוויון בין המינים. אם כך, קבוצת בני-הפלוגתא המתוארת כאן היא תת-קבוצה של קבוצת תומכי הסדרת מהלך הנישואין. [↑](#footnote-ref-112)
113. ארתור לף, שם שם [↑](#footnote-ref-113)
114. ראו לעיל, סביב הערות 000-000 [↑](#footnote-ref-114)
115. מסקנה דומה עשויה לנבוע, בשינויים המחויבים (ואולי בעוצמה אחרת), גם מעמדתם של המתנגדים משיקולים פמיניסטיים, ואף אלו המתנגדים מערכתיים, אם כי התנגדותם עשויה להיות גם מוחרפת, לאור העומס העודף על בתי המשפט או לאור הצורך להגדיל את נפח הדיון בנושאים אלו במסגרת המערכת השיפוטית. [↑](#footnote-ref-115)
116. להתאים את הניסוח כאן לאיך שכתבנו בסופו של דבר את פרק א' על ההבחנה בין עוולה א' ועוולה ב' שבתוכו [↑](#footnote-ref-116)
117. לראות איפה להכניס את הדיון שנמצא כרגע סביב הערה 1. [↑](#footnote-ref-117)
118. See, 000 [↑](#footnote-ref-118)
119. ראו בתי דין דתיים [↑](#footnote-ref-119)
120. הש 61-64. לשים לב ולהחליט מה להשאיר שם ומה להעביר לכאן [↑](#footnote-ref-120)
121. על פירוש והשלמה כמנגנון חלחול כזה ראו זמיר, פירמידה. [↑](#footnote-ref-121)
122. הפניה לספרות על אלימות בקשר למניעת קשרים חברתיים ואחרים עם גברים [↑](#footnote-ref-122)
123. משהו על האפשרות הכללית של מנגנון כזה: [הגבלים עסקיים <היקף כח השוק משפיע על האפקט, בפרט בהקשר של הסכמי בלעדיות (מותר עם חלק מן המשווקים, עד לרף שזה נהיה יותר מדי)>, מדיניות הגירה, תגובה לסרבנות מצפון, הסתה, תכנון ובניה, מדיניות אכיפה, ענישה ב'מכת מדינה', מכסה לכמות הגשה של תביעות קטנות [פלדור]; (גם אם יש סיבות למנוע הסכמים כאלו, אם התופעה לא רווחת אין הצדקה למאמצי אכיפה, ואז לפחות בחלופה של מנגנונים חוץ-שיפוטיים מצדיק אי-התערבות) אולי הערת שוליים?] [↑](#footnote-ref-123)
124. פרפקציוניסטים וגם פמיניסטיים [↑](#footnote-ref-124)
125. Obligatory footnote on Expressive function of law [↑](#footnote-ref-125)
126. כך למשל, מתעורר חשש לפיו האפשרות לכרות הסכמי אשמה תקרין על זוגות אחרים באופן שיהפוך נישואין ללא הסכם כזה להצהרה על חוסר נאמנות מינית. בתנאים חברתיים-תרבותיים מסוימים, די בכך כדי להוביל מעגלים רחבים להיזקק להסכמים מעין אלו, אף אם לא היה להם ביקוש מלכתחילה. <לדיון דומה ראו 0000> [↑](#footnote-ref-126)
127. חשש זה עשוי לנבוע מאופייה השמרני של החברה או מסוג היחסים בין פלחי האוכלוסייה. להרחבה ראו הדיון במקרה הבוחן של דינים דתיים, להלן סביב הערה 000. [↑](#footnote-ref-127)
128. מקביל לנכונות להסכין עם פוליגמיה או עם חינוך סגור בקבוצות מיעוט קטנות והדוקות [↑](#footnote-ref-128)
129. טענה זו נכונה הן מבחינת הדאגה לחירות והן מבחינת הדאגה לשוויון. עם זאת, ביקורת פמיניסטית על משטר הנישואין עשויה להיות רגישה במיוחד לעובדה שפרקטיקה נוהגת בקבוצת מיעוט דווקא, עובדה המחדדת את היותן של נשות קבוצה זו בבחינת "מיעוט בתוך מיעוט". ראו: 000. עם זאת, גם עמדה זו נדרשת לקחת בחשבון את המחיר הטמון בחיכוך גבוה או בקשיי האכיפה של המדינה. [↑](#footnote-ref-129)
130. אנלוגיה לסובלנות כלפי פוליגמיה/ הפרדה בבריכות שחיה... דוגמאות אוניברסליות [↑](#footnote-ref-130)
131. ראו: 000. בדיון הנוכחי לא נעסוק בתופעה קרובה, שהיא פניה לסמכות דתית על מנת ליישב את הסכסוך באופן אלטרנטיבי בדרך של גישור או פנייה אל סמכותו הרוחנית של מנהיג קהילתי. ענייננו כאן הוא בפניה אל מנגנון פנים-דתי העוסק במובהק בהחלת נורמות דתיות על חלוקת הרכוש בין הצדדים. בדומה, לא נדון כאן באכיפה אזרחית של הסכמים דתיים כהסכמי כתובה או מוהר. ראו:

     Brian H. Bix, *Marriage Agreements and Religion*, 2016 U. ILL. L. REV. 1665 (2016).

     James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 Seton HALL L. REV. 717, 733 (2015).

     Odatalla v. Odatalla, 810 A.2d 93, 97 (N.J. Super. Ct. Ch. Div. 2002) (enforcing mahr under neutral principles of law as a contract between consenting adults); Akileh v. Elchahal, 666 So. 2d 246, 248–49 (Fla. Dist. Ct. App. 1996) (same); In re Altayar & Muhyaddin, 139 Wash. App. 1066 (Wash. Ct. App. 2007) (rejecting mahr as inequitable avoidance of state property distribution rules); see also Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501(2004), at 521–22 (observing that enforcement of mahr contracts “turn[s] on the law of contract”).

     Emily Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS.INT’L L.J. 361 (2007).

     See Lindsey E. Blenkhorn, *Note, Islamic Marriage Contracts in America Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 191 (2002), (criticizing mahr agreements as depriving women of property without adequate representation or understanding); Lugo, *supra* Footnote 27, at 79 (arguing that the enforcement of mahr agreements endorses an “institutional discrimination against women”). [↑](#footnote-ref-131)
132. [↑](#footnote-ref-132)
133. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004). [↑](#footnote-ref-133)
134. [↑](#footnote-ref-134)
135. [↑](#footnote-ref-135)
136. [↑](#footnote-ref-136)
137. [↑](#footnote-ref-137)
138. ברויד, פרק א'. [↑](#footnote-ref-138)
139. השוו ברויד, 261. [↑](#footnote-ref-139)
140. אמנם, תפיסה נייטראליסטית הנשענת על מחויבות ליברטריאנית עשויה להסתייג מהסכמים שאינם משקפים הכרעה עצמאית-פרטית, אלא מחויבות קבוצתית או הכפפה עצמית לשיפוטם של גופים כוחניים אחרים. נשוב לזה כשנדבר על הפרודנטיאל. [↑](#footnote-ref-140)
141. Obligatory footnote על דייניות בשריעה. [↑](#footnote-ref-141)
142. אדמונד ברק, שם שם. [↑](#footnote-ref-142)
143. להפנות לפסיקה האמריקאית שעוסקת בזה <המאמר של Ravdin בהערה הבאה>. Dawbarn v. Dawbarn, 625 S.E.2d 186 (N.C. Ct. App. 2006)

     Brian H. Bix, *Agreements in American Family Law*, 4 INT'l J. Jurisprudence FAM. 115, 122 (2013).

     Bix: What good-faith reasons might there be for seeking a change in the financial terms of a marriage in the middle of the marriage? One relatively sympathetic narrative involves one spouse’s thinking of divorce owing to the other spouse’s bad behavior (for example, adultery or addiction), and the badly behaving spouse offering property either at the time of agreement or in case of divorce to persuade the innocent spouse to stay in the marriage. Courts have been more inclined to enforce reconciliation agreements of this sort,32 though the case law remains sporadic, inconsistent, and unsettled.33

     32: E.g., Dawbarn v. Dawbarn, 625 S.E.2d 186 (N.C. Ct. App. 2006) (after husband had affair, wife demanded transfer of jointly held property to her in exchange for keeping the marriage going; after the marriage ended nine years later, court held the transfer to be valid). נראה ששם לא היה מדובר בתוצאה רכושית עתידית אלא בהעברה רכושית בזמן הפיוס, שניתן לה תוקף כשבני הזוג התגרשו 33: E.g., Spurlin v. Spurlin, 716 S.E.2d 209, 211 (Ga. 2011) (same standard for reconciliation agreement as premarital agreement); Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009) (reconciliation agreements, at least ones touching on marital behavior, are unenforceable) [↑](#footnote-ref-143)
144. ראו ALI, וכן Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009) המסתמך בהכרעתו על עניין Diosdado הנזכר לעיל הערה 000. לגבי חשדנות אודות הסכמים בתוך הנישואין, ביחס להסכמי קדם נישואין, השוו Uniform Marital Property Act s. 10(f) , וראו בהרחבה:Linda J Ravdin, “*Postmarital Agreements: Validity and Enforceablility.*” Family Law Quarterly 52, no. 2 (2018): 245-276.. [↑](#footnote-ref-144)
145. הפניה למקורות במאמר שלי במשפטים על אשמה ובושה והשפעתם על תחושת ערך וויתורים כספיים. [↑](#footnote-ref-145)
146. תמונת ראשונית בכיוון זה, לפיו נשים נוטות יותר להתפייס, יש במקורות שאספתי בסוף. אבל לא קונקלוסיבי ולא קובע מי מוכן להתפייס תמורת כסף. [↑](#footnote-ref-146)