Introduction

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.

—Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding Massachusetts's ban on same-sex marriage unconstitutional)

Promises that matter have consequences. Even children know this. Consider the case of little Brad, who hid behind his brother's bedroom door after helping himself to an unauthorized share of his brother's Halloween candy.

“Did you eat Zach's candy?” I asked.
“No,” said Brad through chocolate lips.
“Are you sure?” I asked.
“Well, I ate some,” he said.
“Promise me you won't eat any more,” I said, stashing the plastic pumpkin head of sweets on a high closet shelf.
“I promise,” said Brad.

Brad's promise bought him a reprieve from a time-out. But he knew that if he broke his promise, if he climbed on a chair, retrieved the pumpkin head, and helped himself to another serving of his brother's candy, there would be a price to pay: the reprieve would be revoked and the dreaded time-out imposed. Brad's promise mattered.
Promises come in many forms, and we all expect that the serious ones will have consequences if they are broken. I promise to sing in your opera, to paint your house, to repair your Cessna or your vacuum cleaner; I promise to sell you hamburger that isn't spoiled or a bathtub that doesn't leak—all these promises have consequences that make it safe for a promisee to rely on them.

So what of marriage promises? Do they matter? Family law's answer to this question is surprising and troubling: marriage promises matter very much in judicial rhetoric, but otherwise hardly at all. Contemporary courts, especially those addressing same-sex marriage, may wax eloquent on the significance of the marriage commitment, but when marriage promises are broken, they are largely ignored, relegated to the status of a pitch by a used-car salesperson—assurances on which only the foolish rely.

For me, this is Casey's story. Casey (not her real name) could have been male or female, black or white, gay or straight. As it happened, she was a petite, white, heterosexual woman, probably in her early fifties, with short brown hair and a quiet way about her. I met Casey at the small law firm where I worked as a paralegal many years ago. One day when I reported for work, Casey was there, sitting behind a tiny desk that had been squeezed into a hallway leading to the firm's trio of offices. No one was aware of any plan to hire a receptionist. Looking back, I imagine one of the attorneys spontaneously created the position just for Casey.

As I later learned, Casey had been a full-time homemaker, married to a professor at a major university in a nearby state. The couple's children were grown and gone when one day the professor came home with some startling news: he had fallen in love with another woman and wanted out of the marriage. The couple divorced and Casey ran away, ending up in our city, where she rented a room and took a minimum-wage job as our receptionist. Casey reported that she got next to nothing from the marriage—scant property, no alimony, and of course no child support.

One day Casey didn't show up for work. We phoned her home but got no response and figured she had walked out on us. Who could blame her? Hers wasn't much of a job—low wages, lots of tedium, little respect. As it was, Casey had made a darker choice: She had traveled back to her hometown, to her old house, to her old garage, where she sat in a car and took her life.
Of course, I don’t know the whole story of Casey’s marriage. Maybe she was a scoundrel, a reprobate disguised as a vulnerable, middle-aged mother. Maybe. But I wondered then and I wonder now why she should be reduced to a near-poverty existence after so many years as a home-maker and wife of a well-positioned husband. It didn’t seem right then and it doesn’t seem right now.

What makes Casey’s fate seem so wrong? Surely, it is sad to see decent folks fall on hard times. But I believe the discomfort occasioned by Casey’s story goes deeper—to an unsettling awareness that the law turned her into a sucker for relying on the marriage promise. As we will see in the following chapters, primary caregivers like Casey typically experience lost opportunities and declining human capital as a result of their marital role, while their spouses often experience human capital gains as a result of career or job investments. If these gains and losses are not shared at divorce, the result is that one partner enjoys most of the long-term benefits of family teamwork while the other bears most of the costs. This outcome devalues the contributions of caregivers in raising the next generation, encourages an individualistic rather than a communal vision of marriage, and makes reliance on the marriage promise a dangerous, foolhardy proposition.

Casey is no dinosaur; she cannot be dismissed as part of a dying breed of Betty Crockers and soccer moms. Casey is my colleague’s wife, my gay neighbor, my beautiful thirty-something niece—all the many varieties of marital partners who take on the lion’s share of family labor, a role that describes many contemporary homes. The point is not that the law should encourage primary caregiving—a posture that would trouble many of us for many reasons—but rather that the law should not denigrate and penalize this choice, surprising unwary caregivers with the news that they were foolish to invest in their families, foolish to think their marriage promises mattered.

So how exactly should the law respond to the financial peril of divorcing caregivers? Family law gives divorce courts three (and only three) financial tools: child support, property distribution, and alimony. While child support orders are commonly entered at the time of divorce, their focus is not the spouses’ responsibility to each other, but rather their responsibility to common children. The distribution of marital property is a more appropriate tool for imposing divorce consequences, but
its usefulness is limited by the fact that while most divorcing couples have the ability to produce future income, they have few existing assets. Alimony is thus often the only available tool for addressing the financial consequences of a divorce. To be sure, alimony is not always a practical tool. When spouses have barely enough income to keep one of them out of poverty, an alimony award is useless. But in very many middle-and upper-class marriages, alimony is an important tool for ensuring that the long-term costs of marital roles do not fall exclusively on family caregivers. Yet alimony as currently conceptualized is not up to this task.

Commentators have long bemoaned the sorry state of alimony law—the broad judicial discretion that makes alimony orders unpredictable and inconsistent, the lack of any coherent theory to justify alimony, and the general disdain for alimony, which ensures that few awards are made. The word “alimony” itself has a nasty connotation, inspiring visions of spoiled and greedy women sipping martinis poolside while their hapless ex-husbands struggle to make ends meet.

Indeed, such visions have long played a role in popular fiction. Take the 1933 movie Alimony Madness, in which a cruel ex-wife takes a man’s last twenty dollars to pay the vet bill for a Pekinese dog. This heartless alimony grab is the final straw that drives the man’s new wife temporarily mad; she kills the ex-wife, but (in a happy ending) is acquitted by an understanding jury. Alimony misadventures are told with similar relish in Alimony—Preying on Innocent Dupes, the 1949 movie that tells the “Daring inside story of the alimony racket”; Guilty Conscience, a 1985 television movie about an attorney (Anthony Hopkins) who fantasizes about killing his wife (Blythe Danner) to avoid paying her alimony; and the book Remember the Alimony, a 2007 murder mystery about a beauty queen who has an affair with her husband’s attorney.

These alimony tales are entertaining—notorious and delicious, with a touch of schadenfreude. But today’s stories in the blogosphere have a very different tone—one that is impassioned, angry, and indignant. Check out the website Alimony Nightmares, where you will see reports of alimony payors who are living in motor homes and working odd jobs to make ends meet, payors who are thrown in jail because they cannot pay their alimony, and who are committing suicide because they “have lost all hope.” Similar reports and sentiments appear at the
websites New Jersey Alimony Reform, where you will see tales of alimony abuse “more frightening than any Hollywood horror film,” and Alimony Slaves in America, where the blog name says it all. The Alimony Nightmares website doesn't mention Casey. Nor do reports of alimony horrors tend to mention that, despite popular perceptions to the contrary, alimony is uncommon, usually short-term, and often limited to the rehabilitation of a needy spouse.

Alimony is complex—more complex than Alimony Nightmares or popular fiction or Casey’s story can fully convey. Alimony is a mirror of American culture, a reflection of changing views of women, of marriage, and of personal commitment. Its history is a richly layered account of the tension between individual and collective responsibility for dependency, of aspirational reform surprised by the intractability of gender-driven roles and the cruel judgment of well-intentioned dreamers. Alimony is a tale of notoriety and hype, of risk and high stakes, of the danger of myth and the powerful symbolism of money. It is at once a grand narrative of the evolution of law, and a personal story of an intimate relationship—a story of betrayal, desperation, and bravado, of investment, regret, and freedom to start over, a story of self-sacrifice aging into lost opportunity and financial responsibility hardening into involuntary servitude. And it is a tale without a grand finale, a still-evolving story of what is sometimes cast as the lone holdout in family law’s dramatic progression from coverture to partnership marriage.

Alimony is at a crossroads. Even as today’s alimony reform groups publicize reports of abuse designed to inspire anti-alimony fervor and statutory limits on alimony awards, the American Law Institute identifies a contemporary rationale for alimony and advances a reform template designed to promote predictable awards. In the end, alimony’s fate will depend on whether it is understood, yet the general disdain for alimony has made it a much-neglected topic of study.

This book aims to further our understanding of alimony by examining the history and current state of alimony law, theory, and practice, and then to advance a reconceptualization of alimony as a marriage buyout. Buyouts draw on a loose analogy to partnership—a compelling metaphor for contemporary marriage, with its principles of mutual contribution, reciprocal responsibility, shared fate, and default rules that assume equality of status. Buyouts do not depend on who files for
divorce or who commits marital fault; nor do they aim to penalize a spouse who wants out or compel specific performance of the marriage promise. What buyouts do, however, is significant: they replace alimony with a financial award consistent with norms of contemporary marriage; they provide a presumptive quantification formula that injects predictability and certainty into the law; and they go far in ensuring that primary caregivers are not thrown under the bus when their marriages end. The book’s final chapter looks beyond alimony, describing a co-parenting partnership between committed couples who add children to their family, and a conceptual basis for a new form of income sharing between divorced parents of minor children.