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THE INFLUENCE OF *MARVIN v. MARVIN* ON HOUSEWORK DURING MARRIAGE

*Margaret F. Brinig**

When Michelle Marvin was forced to leave the home she shared with what today we would call her partner, Lee Marvin,¹ she had a number of problems. The first ones, of course, were legal: she had no marriage with Lee and no written contract that could distinguish their relationship from "mere cohabitation."² Nor had she contributed directly to his career or other assets.³ What she alleged was his express promise to "take care of her"⁴ (for some time period that was not altogether clear) and, less obviously, a promise implied by all she had done with and for him during the seven years they had spent together⁵ and, still less obviously, career sacrifices she allegedly made in order to further his career⁶ or to accommodate his express desire that

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1 The relationship ended "at his insistence." *Marvin v. Marvin*, 176 Cal. Rptr. 555, 557 (Ct. App. 1981).

2 *Id.* at 557-59 (discussing the various findings of the trial court and finding no basis for its award of \$104,000 in rehabilitative support).

3 *Id.* at 557.

4 *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) ("Plaintiff avers that in October of 1964 she and defendant 'entered into an oral agreement' that while 'the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined.'").

5 The court held, "In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties." *Id.* The court also stated, "The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture or some other tacit understanding between the parties." *Id.* at 122 (citation omitted).

6 "[P]laintiff agreed to 'give up her lucrative career as an entertainer (and singer' in order to 'devote her full time to defendant . . . as a companion, homemaker, housekeeper and cook;' in return defendant agreed to 'provide for all of plaintiff's financial support and needs for the rest of her life.'" *Id.*

she not work far away from him.⁷ As it turned out, she had fact problems as well and was ultimately unable to show either any sort of promise (agreement) or any benefit lost or conferred.⁸

If the Marvins had been married for seven years instead of scorning the "piece of paper" that was the marriage certificate,⁹ the story might well have turned out differently. Even if Lee had not promised to "take care of" Michelle, he would in his vows have committed himself, regardless of his private wishes, to a duty of support for her.¹⁰ Since the couple lived in California, Michelle would automatically have been entitled to a share of the property earned by his labors during the marriage—"community property"¹¹—whether or not she could prove that he had gained from her contributions or that her career had suffered because of her sacrifices.¹²

While the California courts would have let Michelle recover if she had been able to show any sort of contractual or equitable claim to relief¹³—and this took them further than most courts would go, even today¹⁴—we ought to be curious about whether this result, a result

7 *See id.*

8 *See Marvin*, 176 Cal. Rptr. at 558.

9 CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 501-15 (2d ed. 2000) (reprinting the opinion of Judge Marshall of the trial court on remand in *Marvin v. Marvin*, Civ. 59130 (Super. Ct. L.A. County 1979)).

10 *See* CAL. FAM. CODE §§ 4334-4335 (West 1994) (providing for support of former spouses for contingent and fixed periods of time, respectively).

11 *Id.* § 2550.

12 CAL. FAM. CODE § 2550 provides:

Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally.

Id.

13 *See Marvin v. Marvin*, 557 P.2d 106, 118 (Cal. 1976) ("Plaintiff's complaint . . . could be amended to state a cause of action founded upon theories of implied contract or equitable relief. As we have noted, both causes of action in plaintiff's complaint allege an express contract; neither assert any basis for relief independent from the contract.").

14 As of February 2001, six states unequivocally recognized breach of implied contracts for non-business contributions by cohabitants. In addition to California, these states are Connecticut, *see Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987); Indiana, *see Glasgo v. Glasgo*, 410 N.E.2d 1325, 1331 (Ind. Ct. App. 1980); Michigan, *see Featherston v. Steinhoff*, 575 N.W.2d 6, 9 (Mich. Ct. App. 1997) (including a presumption that services performed are gratuitous, however); Oregon, *see Pinto v.*

that did not occur in the *Marvin* case but has in countless others from all over the United States¹⁵ (and some foreign countries¹⁶), would have been a just one. Further, while most of the papers in this Symposium are discussing the extent to which cohabitants, heterosexual or same-sex, do and ought to recover twenty-five years later, I am reflecting here on a closely related question: the impact of *Marvin*, and *Marvin*-type thinking, on married couples.¹⁷

The inquiry that follows will address several correlative questions. What, besides a piece of paper, do married couples have that cohabiting couples do not? Why, from a factual as opposed to a moral point of view, might this justify different treatment of their finances when the couples break up? Why are the profound *Marvin* implications so closely related to a feminist agenda not only for the family, but also for the labor force? How can the value of "women's work" in the home be compensated to remedy the "gender gap" in earnings, and should it be? Is it fair, good, or wise to deal with these problems when couples divorce but not in a more direct and pervasive way when couples continue to live together? Finally, to the extent that *Marvin* sounds in contract, is there something about marriage that makes

Smalz, 955 P.2d 770, 773 (Or. Ct. App. 1998); and Pennsylvania, see *Knauer v. Knauer*, 470 A.2d 553, 564 (Pa. Super. Ct. 1983). Other states will do so when the parties are engaged in a business relationship in addition to their personal one. See, e.g., *Champion v. Frazier*, 977 S.W.2d 61, 63 (Mo. Ct. App. 1998); *Martin v. Coleman*, 19 S.W.3d 757, 761 (Tenn. 2000); *In re Estate of Thornton*, 499 P.2d 864, 866 (Wash. 1972).

15 For two surveys, see generally Sanford N. Katz, *Emerging Models for Alternatives to Marriage*, 33 FAM. L.Q. 663 (1999), and Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245 (1998–1999).

16 See, e.g., Rebecca Bailey-Harris, *Financial Rights in Relationships Outside Marriage: A Decade of Reform in Australia*, 9 INT'L J.L. & FAM. 233, 238–39 (1995); Craig A. Sloane, Note, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189, 191 (1997).

17 I suspect, with no empirical data to support my notion, that the analysis here will apply exactly to couples electing "civil union" under Vermont's new legislation. VT. STAT. ANN. tit. 15, §§ 1201–1207 (Supp. 2000). I also suspect that the distinction between married and cohabiting couples that I will draw for heterosexual couples will hold true for same-sex partners who, at least in Vermont, do not take advantage of such laws. See *id.* I am less sanguine about the results for couples elsewhere who have gone through "commitment ceremonies" and who consider themselves married, but who cannot marry because state law forbids it. Were these heterosexual couples, some states would permit at least the "innocent" party to recover under "putative spouse" laws: they tried, they made the commitment, they conferred every benefit and undertook every sacrifice they would have if married, but, through no fault of their own, that "mere piece of paper" remained illusive. See, e.g., *Marvin*, 557 P.2d at 118; *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979).

thinking in terms of entitlements, as contract doctrine encourages us to do, inappropriate or even destructive?

When Michelle Marvin's case was first appealed through the California courts, she had a formidable ally in University of California-Davis professor Carol Bruch, who wrote the amicus brief for the California Supreme Court¹⁸ that later turned into a pathbreaking article in the *Family Law Quarterly*.¹⁹ In her turn, Bruch had been heavily influenced by the early work of sociologist Lenore Weitzman, whose *Legal Regulation of Marriage*²⁰ stressed the importance of housework, largely done by women, for the earning capacity of the spouse who was the primary breadwinner.²¹ Bruch extended Weitzman's thinking beyond marriage and moved it from social sciences into law at precisely the time when most legislatures were rethinking property division at divorce. For the last twenty-five years, academics of all sorts have pondered the relationship between home and market work.²²

18 Bruch's influence on *Marvin* shines through the following section of the opinion:

As Justice Curtis points out 'Unless it can be argued that a woman's services as cook, housekeeper, and homemaker are valueless, it would seem logical that if, when she contributes money to the purchase of property, her interest will be protected, then when she contributes her services in the home, her interest in property accumulated should be protected.'

Marvin, 557 P.2d at 119 (citing *Vallera v. Vallera*, 134 P.2d 761, 764 (Cal. 1943) (Curtis, J., dissenting); Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 102 (1976)). The case also states:

But although we reject the reasoning of *Cary* and *Atherley*, we share the perception of the *Cary* and *Atherley* courts that the application of former precedent in the factual setting of those cases would work an unfair distribution of the property accumulated by the couple. Justice Friedman in *Beckman v. Mayhew* . . . also questioned the continued viability of our decisions in *Vallera* and *Keene*; commentators have argued the need to reconsider those precedents. We should not, therefore, reject the authority of *Cary* and *Atherley* without also examining the deficiencies in the former law which led to those decisions.

Id. at 120-21 (citing Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 102 (1976)).

19 Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 102 (1976).

20 Lenore V. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974).

21 *Id.* at 1281.

22 See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 97-109 (2000); Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141, 1142-46 (1977); Suzanne M. Bianchi & Daphne Spain, *Women, Work, and Family in America*, 51 POPULATION BULL. 2, 31-35 (1996); Shelley Covernan & Joseph F.

While the discussion will no doubt continue and will be fueled by exchanges such as that of this Symposium, the American Law Institute's (ALI) project on Family Dissolution,²³ adopted in the spring of 2000,²⁴ suggests several answers to these questions, as no doubt Professor Ellman, the project's Chief Reporter, will tell us. The first suggestion of the ALI is that, in domestic partnerships that closely resemble marriages,²⁵ the results ought to be the same as for marriage.²⁶ The second is that both should be measured, failing a more accurate ac-

Sheley, *Change in Men's Housework and Child-Care Time, 1965-75*, 48 J. MARRIAGE & FAM. 413, 420 (1986); Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1478-97 (1993); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 599-603 (1998). See generally Gary S. Becker, *A Theory of the Allocation of Time*, 75 ECON. J. 493 (1965) (providing an economic analysis of the relationship between work and leisure time); Margaret F. Brinig, *Equality and Sharing: Views of Household Across the Iron Curtain*, 7 EUR. J.L. & ECON. 55 (1998) (exploring the results of German legislation seeking to remedy the inequality of housework contributed by husband and wife); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89 (1993) (suggesting how the relationship between home and market work contributes to the gender gap in compensation); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978) (analyzing alimony awards with respect to the distinction of home versus market work for the wife); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (arguing that the market/family dichotomy must be overcome in order for meaningful reform efforts aimed at improving the lives of women); Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998) (concluding that no-fault divorce has increased the number of hours worked in the market without a corresponding reduction of home work); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (discussing the sociology, economics, and legal treatment of housework in comparison to market work); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (discussing the tax code's distinction between home and market work and how it reflects sexual distinctions).

23 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES (Tentative Draft 2000)].

24 See *Actions Taken at 2000 Annual Meeting*, at http://www.ali-aba.org/ali/ali2000_actionssummary.htm (last modified Oct. 19, 2000).

Subject to the discussion at the meeting and to final editorial revisions, the Institute completed its review of the project by giving final approval both to Tentative Draft No. 4 and to earlier drafts that had been tentatively approved. The entire work will be integrated into a coherent final text, which is expected to be published in 2001.

Id.

25 ALI *Principles* § 6.03(1) defines domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple." ALI PRINCIPLES (Tentative Draft 2000), *supra* note 23, § 6.03(1).

counting,²⁷ by the extent of the career loss of the spouse (or partner) making sacrifices for the relationship.²⁸ The third, a result approximated in community property states at least, is that the contributions of each, in cash or kind, should be presumed equal if the spouses (partners) stay together for some period of time.²⁹

I. HOW DO THE RELEVANT INCENTIVES IN MARRIAGE DIFFER FROM THOSE IN COHABITATION?

At least some notable sociologists of the family agree that marriage seems to benefit participants (and particularly men) in ways that cohabitation does not.³⁰ Marriage makes men and women live longer.³¹ For men, the lifestyle and motivational changes that come with marriage and having children also translate into more stable employment, higher earnings, and more responsibility on the job.³² For

26 Thus, ALI *Principles* § 6.04(1) defines domestic-partnership property, subject to distribution "if it would be marital property under Chapter 4, had the domestic partners been married to one another during the *domestic-partnership period*." *Id.* § 6.04(1). Section 6.06(1)(a) provides that unless stated otherwise "a domestic partner is entitled to compensatory payments on the same basis as a spouse under Chapter 5." *Id.* § 6.06(1)(a).

27 Some of the pragmatic problems for awarding emotional losses and gains are discussed in PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.02 cmt. at 262-63 (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES (Proposed Final Draft 1997)]. Problems of allocating gain are discussed *id.* at 263-64. The contribution rationale for dividing marital property is discussed and rejected by the Reporter in the comments on § 5.05, *see id.* § 5.05 cmt. at 303-04.

28 *See id.* § 5.02. The career loss, or opportunity cost, is that alternative that most likely would have been taken by the sacrificing spouse had the couple found the money somewhere else. *See id.*

29 ALI *Principles* § 4.15(1) provides: "Except as provided in Paragraph (2) of this section, marital property and marital debts are divided at dissolution so that the spouses receive net shares equal in value, although not necessarily identical in kind." *Id.* § 4.15(1). For the rationale that supports this section, *see id.* § 4.15 cmt. (b) at 196-97.

30 *See, e.g.,* Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235, 243 (1999) ("Several decades of research have shown, for example, that men are the greater beneficiaries of marriage than women.").

31 *See* WAITE & GALLAGHER, *supra* note 22, at 51.

32 STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES 66-68 (1999); *see also* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EMPLOYMENT 60 (1988) (reporting that "married men earn more than married women at every age").

Women's income and hours of employment decrease following marriage. FUCHS, *supra*, at 58-59; *see also* FRANCINE D. BLAU ET AL., THE ECONOMICS OF WOMEN, MEN, AND WORK 95 & tbl.4.4 (1998).

whatever reason, or combination of them—responsibility,³³ nagging by wives,³⁴ societal pressure to conform to the “ideal worker” image,³⁵ or the time freed up by the homemaker’s contributions³⁶—men get a financial premium from marriage.³⁷

The interesting thing, from the perspective of this Article, is that women do not profit in a similar way from marriage.³⁸ Cohabiting relationships tend to be more egalitarian,³⁹ and women are more likely to sacrifice careers for the couples’ children or their husbands’ employment during marriage.⁴⁰ An economist would characterize

33 This seems to be the underlying basis of Nock’s book, since he bases the changes upon a growth in the man’s fundamental masculinity, stating, “Men can judge themselves as good or bad husbands because the standards of normative marriage are also well-known. Good husbands are mature, faithful, generous fathers and providers. Good husbands are expected to achieve, to help others, and to remain true to their promises. Good husbands are good men.” Nock, *supra* note 32, at 8.

34 See WAITE & GALLAGHER, *supra* note 22, at 55–56. Linda J. Waite, *Does Marriage Matter?*, 32 *DEMOGRAPHY* 483, 488 (1995), argues that wives “nag” their husbands into better behavior.

35 For descriptions of an “ideal worker” who has the support of a homemaker spouse, see JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1–6 (2000), and Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 *N.Y.U. L. REV.* 1559, 1619 (1991).

36 See FUCHS, *supra* note 32, at 60. See generally ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* (1989) (arguing that women’s struggles in the workplace are due to men’s unwillingness to share in child-rearing and housework).

37 See FUCHS, *supra* note 32, at 58–60; see also Nock, *supra* note 32, at 66, app. at 143 (using the National Longitudinal Survey of Youth: 1979–1993, showing that the same married men earn \$4260.85 more than before they were married, holding age constant).

38 See Nock, *supra* note 30, at 243 (“In their physical and mental health, social life, and overall satisfaction, marriage gives men more than it gives women. More interestingly, men appear to benefit from marriage regardless of the quality of the union. When women benefit from marriage, it is because they are part of a satisfying relationship.”).

39 As Steven Nock puts it, “Cohabiting couples are more likely than married partners to believe that men and women should share equally in household chores, even while they tend to perform such tasks like married couples do. . . . [C]ohabiting couples are less committed to performance.” STEVEN L. NOCK, *MARRIAGE IN MEN’S LIVES* 16 (1998).

40 This makes sense because only over the very long run will some of these “investments” bear fruit. Marriage and divorce laws also protect spouses who make them. The economic model of marriage is explained in relatively simple terms in Robert A. Moffitt, *Female Wages, Male Wages, and the Economic Model of Marriage: The Basic Evidence*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 302, 303–06 (Linda J. Waite ed., 2000). Much of the work on the economics of households began with Gary Becker. See Gary S. Becker, *A Theory of Marriage: Part I*, 81 *J. POL. ECON.* 813 (1973); Gary S. Becker, *A Theory of Marriage: Part II*, 82 *J. POL. ECON.* S11 (1974); see also GARY S. BECKER, *A TREATISE ON THE FAMILY* 30–53 (enlarged ed.

this qualitative difference between the married and unmarried as a problem in joint production.

The economist Armen Alchian tells the story of the individual fishermen who join together to take advantage of specialization and the economies of scale.⁴¹ Eventually, even as they add units of labor and capital until the marginal product of each is equal to marginal cost, they encounter another problem, which he calls the problem of team production.⁴² It is the same problem in miniature as the one faced by socialist economies,⁴³ as well as by corporations⁴⁴ and marriages.⁴⁵

Marriage, like fishing, involves commitment and sharing.⁴⁶ Experiences are shared, enjoyment is shared, work is shared, and income is shared. What, then, is the problem? The problem is that, when more than one person works on a complicated project so that exact input is hard to measure and one receives an equal share of the outcome, there is a tendency to shirk.⁴⁷ The more people involved or the more complicated the task, the easier it is to shirk successfully. Eventually the risks of being caught are so small that only the saint-like will

1991) (presenting an economic analysis of such family matters as division of labor, procreative decisions, and divorce). For a recent argument, see WAITE & GALLAGHER, *supra* note 22, at 108–09.

The mechanism for making these investments through marriage and enforcing them at divorce is discussed in June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 959 (1991).

41 See ARMEN ALCHIAN & WILLIAM R. ALLEN, EXCHANGE & PRODUCTION: COMPETITION, COORDINATION, & CONTROL 163–70 (3d ed. 1983); see also Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779–81 (1972) (describing the concept of “team production”).

42 See Alchian & Demsetz, *supra* note 41, at 779–82.

43 For a classic argument, see generally FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 119–47 (1949).

44 See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 300–04 (1999).

45 See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Paper Dolls, Partnership Buyouts and Dissociation under No-Fault*, 60 U. CHI. L. REV. 67, 93 (1993); see also Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807, 825 (1996) (explaining “the relevance of marriage to the communitarian perspective on the suitability of bargain” by looking at unenforceable marriage contracts); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1270–80 (1998) (discussing principles for distributing “the surplus from the marital bargain”).

46 For an analysis of what wives and husbands perceive as “fair,” see Herbert L. Smith et al., *Identifying Underlying Dimensions in Spouses’ Evaluations of Fairness in the Division of Household Labor*, 27 SOC. SCI. RES. 305, 323–25 (1998).

47 ALCHIAN & ALLEN, *supra* note 41, at 170.

resist the temptation and continue working to the maximum (according to his ability) to receive an equal share (according to his need). The economic term for this general problem is the principal-agent question.⁴⁸

A different, and perhaps more familiar, view of the same problem is the Prisoner's Dilemma game.⁴⁹ In group enterprises, societies, and families, happiness and wealth are maximized when everyone contributes one hundred percent to the venture.⁵⁰ Still, the actor knows that the best individual outcome is achieved by being the only shirker when everyone else exerts maximum effort.⁵¹

There are several strategies for reducing shirking. One is to employ a residual claimant who monitors those who use effort and decides how much to reward each person.⁵² In the family, usually both spouses live in the marital home; therefore, they are residual claimants for or ultimate beneficiaries of housework,⁵³ but they may have entirely different values for what is acceptable housekeeping. This results in the familiar "gender war" of "I'd be glad to do the wash, but I don't mind not doing underwear for two weeks."⁵⁴

48 See, e.g., Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, AM. ECON. REV., May 1973, at 134, 138; see also Joseph E. Stiglitz, *Principal and Agent (ii)*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 966-71 (John Eatwell et al. eds., 1987) (identifying the "central problem of economic incentives" as the principal-agent problem).

49 This is described in JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 283-86, 518 (1988). The idea is that two prisoners accused of a common crime are separated and questioned separately. See *id.* at 283. Each is told that if he confesses, he will get a reduced punishment. See *id.* at 283-84. If neither confesses, both will go free because there will not be enough evidence. See *id.* at 284. The theory is that they will both confess if they cannot communicate, because for each that is the lowest risk strategy. See *id.* For applications to family law, see, for example, Antony W. Dnes, *Applications 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, 538-39 (1999); Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 646; Scott & Scott, *supra* note 45, at 1294-95. For applications to children, see Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 203 (1999).

50 England & Folbre, *supra* note 49, at 203.

51 See *id.*

52 Alchian & Demsetz, *supra* note 41, at 781-82.

53 See, e.g., BECKER, *supra* note 40, at 30-32 (discussing shirking and specialization).

54 See Silbaugh, *supra* note 22, at 13-14. See generally WILLIAMS, *supra* note 35, at 145-76 (describing how gender wars "take on elements of class and race conflict").

This may be one explanation for why marriages are more stable when, holding other things constant,⁵⁵ either men or women do traditional “men’s work.” “Men’s work” contributes to the value of externally verifiable (and objectively priced) things such as homes and cars.⁵⁶ “Women’s work” contributes to the far more speculative (though important) value of increased comfort and well-being.⁵⁷ These more hedonic contributions are important for reasons we have noted already—married men do better than their otherwise equivalent single counterparts on every scale in such diverse areas as employment, job responsibility and salary, health, longevity, mental health, and participation in social groups.⁵⁸

The perception and reality here are the same: Women do disproportionately more housework even when both spouses are employed.⁵⁹ Income is shared if the spouses remain togeth-

55 We hold constant other possible contributors to divorce or stability: each spouse’s income and education, children, race, divorce in their parent’s background, cohabitation, length of marriage, age at marriage.

56 Steven L. Nock & Margaret F. Brinig, *Weak Men and Disorderly Women: Divorce and the Division of Labor* (manuscript at 20, on file with author), in *MARRIAGE AND DIVORCE: A LAW AND ECONOMICS APPROACH* (forthcoming 2001).

57 The widely publicized, unusually high dollar divorce of Lorna and Gary Wendt, the former CEO of General Electric Capital, provides a good example of this dichotomy. See *Wendt v. Wendt*, 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998). For some of the popular literature, see Stanley Bing, *Keep Your Mitts Off My Options, Dear!*, *FORTUNE*, Feb. 2, 1998, at 51; Lisa Reilly Cullen, *A Headliner Divorce Teaches You How to Get a Fairer Share from Your Spouse*, *MONEY*, Feb. 1998, at 20. While the rationale used by the court is hardly clear, from the order it is apparent that Mrs. Wendt successfully claimed that she should be entitled to some of the vast wealth and income of her husband, because she provided significant “backup” for Mr. Wendt. See *Wendt*, 1998 WL 161165, at *3. In other words, because she was a model housewife (as the trial court said, she was “an excellent representative of motherhood, very organized, a very good cook” who “even did windows,” *id.* at *7), she relieved him of many of the strains he would otherwise have had in managing his busy schedule. Because he did not have to worry about his personal life, he could work long hours and come home drained. See *id.* She also attempted to argue that she gave up her career as a piano instructor or public school teacher as what we have termed a marital sacrifice. *Id.* She said she had stopped working because of Gary Wendt’s business requirements, but the court found that it was her voluntary choice so “she could go on luxury trips with him.” *Id.* In other words, she had made no real sacrifice. Nonetheless, the court awarded her very substantial assets (more than \$8,000,000) and support primarily because she “did give the defendant’s career priority in her life,” because both parties were part of the “GE team,” and because she was a “team player.” *Id.* at *8.

58 NOCK, *supra* note 32, at 3–5, 13–15.

59 See *infra* Table 1; see also Bianchi & Spain, *supra* note 22, at 31–32; Coverman & Sheley, *supra* note 22, at 420. Women are apparently both more committed and more dependent than are men. See Steven L. Nock, *Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 66 tbl. 1 (1995).

er.⁶⁰ If they divorce, the spouse with the higher income keeps it or pays the other only a token or time-limited amount in spousal support.⁶¹ Some writers believe that lifetime income-sharing is an integral part of marriage.⁶² The part of me believing in covenant agrees,⁶³ but I would not limit the sharing to finances. The spouses also are residual claimants for "parental consumption"⁶⁴ and so should be dividing parenting responsibility more or less evenly as well.⁶⁵ But here again, what succeeds in the commercial firm may not be a good analogy, since the spouses probably get entirely different levels of satisfaction from their minor children.⁶⁶

In addition to establishing residual claims, another strategy to defeat shirking is to "pay by the piece," rewarding as each small job is done.⁶⁷ A division of duties works for routine or small tasks because the degree of effort is obvious and can be quickly assessed.⁶⁸ Of course, assessment may come too late, as it did for two of my friends, both lawyers, who had their phone disconnected twice because the "spouse in charge," the husband, forgot to pay the bill. Strategic behavior may be involved here as well.⁶⁹ The outcome for this particular couple is that the wife now pays the utility bills.

60 See *infra* Table 1.

61 See *id.*

62 See, e.g., MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 146-47 (1993); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1121 (1989). Chapter 5 goes some way towards making compensatory payments more permanent. See ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 27, § 5.07.

63 See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 31 (2000).

64 Children provide smiles, entertainment, and achievements for their parents. See, e.g., Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393, 408-14.

65 They do not seem to do so during most marriages, see Cathleen D. Zick & Jane L. McCullough, *Trends in Married Couples' Time Use: Evidence from 1977-78 and 1987-88*, 24 SEX ROLES 459, 472-73 (1991); therefore, equal time sharing would not be the custody regime I would advocate upon divorce. For my position, which favors adoption of the ALI Principles' "approximation" regime, see Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 157 (2000).

66 See Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 288-89 (1993) (discussing differing utility).

67 Steven N. S. Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1, 6 (1983).

68 See *id.* at 6-7.

69 That is, the husband may be trying to get out of doing the job by doing such a bad job that the wife takes over in disgust. Cf. Karen Czapanskiy, *Volunteers and Drafts: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1456 (1991) (child care).

Piecework is related to a third shirking-reduction strategy, which is to divide the entire project into such small parts that there really is no joint production except in the aggregate.⁷⁰ Although the monitoring effort is simplified, the gains from coordination that stem from the smoothness of the entire operation are correspondingly diminished.⁷¹ Participants need to stop whatever they are doing for reporting, the domestic equivalent of clock-punching or paperwork. In fact, an exchange relationship produces less satisfaction⁷² than one taking an "internal stance"⁷³ central to a meaningful interpersonal relationship. In marriage, a relationship based upon short-run exchanges signals instability.

A final strategy to reduce shirking (or equalize work) is to create a very large incentive to maximize the joint effort.⁷⁴ This device is used by coaches giving pep talks to their teams, political leaders during "Fireside Chats," or family members supporting reunions. In marriage, the duration of the relationship⁷⁵ and the ideal—if not the

See generally Williams, *supra* note 35, at 1599 & n.221 (discussing the inequitable distribution of household labor).

70 *See* Cheung, *supra* note 67, at 8.

71 *See id.* at 9–10.

72 Gary L. Hanson, *Moral Reasoning and the Marital Exchange Relationship*, 131 J. SOC. PSYCHOL. 71, 79–81 (1991) ("[B]eing exchange oriented may adversely affect marital happiness.").

73 MILTON C. REGAN, JR., *ALONE TOGETHER: LOVE AND THE MEANING OF MARRIAGE* 24 (1999). Regan earlier defined that internal stance in marriage as

a universe of shared meaning that serves as the taken-for-granted background for individual conduct. At this moment, a spouse stands "inside" the marriage as a participant who accepts its claims, not "outside" it as an observer who calls those claims into question. This stance makes possible the experience of lives lived in intimate concern, rather than mere parallel association.

Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2049 (1995).

74 *Cf.* Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 15–18 (1985) (arguing that the use of collateral—something valued by both parties—helps to ensure that promises will be kept without resorting to threats or violence).

75 *See* Nock, *supra* note 30, at 240–41; *see also* Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 402–04 (1998) (discussing how a long-term relationship with children acts as a bond between the parents; also discussing the concept of "hands-tying") [hereinafter Brinig & Buckley, *Joint Custody*]; Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and at Fault People*, 18 INT'L REV. L. & ECON. 325, 329–30 (1998) (noting that when divorce was more difficult, people had incentives to invest more in marriage).

fact—of love give strong incentives to make the marriage work.⁷⁶ No-fault divorce has unfortunately diminished many of the values of these incentives, particularly because the legal residual claimant for some investments (such as children or professional degrees) tends to be only one spouse.⁷⁷ Putting a spouse through a graduate education, or accommodating the demands of a rising corporate star or military officer,⁷⁸ or building a strong relationship with children will benefit the *marriage* only, or at best primarily, if it remains intact.⁷⁹ Consequently, the non-student spouse may well choose not to delay her own education or not to live at a reduced standard of living to finance her husband's education, if she thinks it likely that the marriage will break up before the couple gets to enjoy the benefits of the increased earning ability.⁸⁰ Another consequence is that the father may choose not to spend tremendous amounts of time with his children, if he feels that they will be "taken away" and his relationship with them sabotaged by a vindictive former wife.⁸¹ On the other hand, a joint custody statute that encourages relationships with children after divorce strengthens the incentives.⁸² Perhaps because the invested father values his children more and realizes that divorce is hard on them, there are fewer divorces where joint custody legislation is in place.⁸³ Some sort of guaranteed income sharing (whether or not the marriage continues)⁸⁴ should work the same way to keep marriages together and

76 For a discussion of marriage vows as hortatory, see Scott & Scott, *supra* note 45, at 1230.

77 See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 885–86 (1994); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 146–48 (4th ed. 1992) (noting the economic importance of one spouse's "non-pecuniary contributions").

78 See H. Leroy Gill & Donald R. Marvin, *Wherever He May Go: How Wives Affect Their Husband's Career Decisions*, 27 SOC. SCI. RES. 264, 277 (1998). Decisions about remaining in the service or leaving it are influenced by potential implications for the wife, especially her earnings capacity. However, traditional men make career decisions without much concern for their wives. *Id.*

79 See, e.g., Joan Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection of the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 387 (1980).

80 For a general empirical discussion of why this may explain women's increased labor force participation, see Parkman, *supra* note 22.

81 One very angry father who apparently feels this way is Robert E. Fay, *The Disenfranchised Father*, 36 ADVANCES IN PEDIATRICS 407, 413–14 (1989).

82 See Brinig & Buckley, *Joint Custody*, *supra* note 75, at 402.

83 See *id.*

84 See, e.g., ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 27, §§ 5.03, 5.05 (providing for compensation for the loss in living standard experienced at dissolution by the spouse with less wealth or earning capacity in a marriage of significant duration). Compare June Carbone, *Income Sharing: Redefining the Family in Terms of*

counterbalance the distinction between less easily unverifiable (women's work) and verifiable (men's work) investments in the marriage.⁸⁵

II. COSTS OF SHARING

Gary Becker's disciples and feminist scholars agree that one of the essential components of marriage is sharing.⁸⁶ This point is where the similarity of their viewpoints ends, however. For law and economics proponents, sharing evolves naturally from comparative advantage and specialization.⁸⁷ Since the wife (specialist in household production) cannot recoup her human capital investments if the marriage ends, the husband, who retains his market investments, must compensate her with alimony.⁸⁸ The more specialized the couple, the more efficient the marriage.⁸⁹ According to this view, alimony is a permanent feature of the marriage landscape.⁹⁰ For some feminists, on the other hand, income sharing is at best a temporary expedient, at worst an anchor to an inequitable system in which men exploit and dominate women.⁹¹ If men and women were truly equal, they would not so

Community, 31 Hous. L. Rev. 359, 414-15 (1994) ("Income sharing proposals insist on recognition of this reconstituted community, of the custodial family's continuing claim on the absent parent's income, and of the identity of interests between custodial parent and child."), with Singer, *supra* note 62, at 1121 (sharing of spousal income for the benefit of wife, who may or may not have children, after long-term marriage).

85 Cf. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 142-43 (1998) (arguing that monetary contracts should not be enforced because nonmonetary contracts are not enforced; "monetary and nonmonetary components of marriage need to be treated equally in order to properly value unpaid family labor").

86 BECKER, *supra* note 40, at 30-31 ("Virtually all societies have developed long-term protection for married women; one can even say that 'marriage' is defined by a long-term commitment between a man and a woman."); see also Douglas W. Allen, "What Does She See in Him?": *The Effect of Sharing on the Choice of Spouse*, 30 ECON. INQUIRY 57, 66 (1992).

87 See Allen, *supra* note 86, at 66.

88 See Landes, *supra* note 22, at 44-45. This concept first surfaced in the legal literature in Krauskopf, *supra* note 79, at 388.

89 BECKER, *supra* note 40, at 33. For a criticism, see Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461, 2469-73 (1994) (finding that a household is not efficient if diminishing returns to scale and psychic costs as well as financial gains are considered).

90 Brinig, *supra* note 89, at 2470 n.58.

91 See Marsha Garrison, *Marriage: The Status of Conduct*, 131 U. PA. L. REV. 1039, 1060 (1983) (book review); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 309 (1987); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80, 85 (1987).

much specialize, but rather, share household and market work.⁹² Both husband and wife would participate in the marketplace to the extent that this made them happy.⁹³ Both would participate in child rearing and in any other household tasks for which the market did not provide a satisfactory substitute.⁹⁴

The consequences of sharing take a tangible form in the concept of alimony and property distribution. Feminists agree that realizing the dream of sharing has remained elusive in the vast majority of marriages.⁹⁵ Women still perform most household jobs and consequently earn only about three quarters as much as their male counterparts.⁹⁶ Here the feminist group splits. Some maintain that alimony should serve as a transitional or stop-gap measure for homemakers displaced because of the change in legal and social regimes.⁹⁷ Because they grew up, married, and stayed home with children in the reasonable expectation that either the marriage would continue or they would be awarded alimony, basic fairness requires compensation for the changes wrought by divorce reform and gender equality.⁹⁸ A minority argues that the promise of alimony discourages potential wives and mothers from investing in their own human capital to the optimal extent, reinforcing dependence, male oppression, and a society in which women can never be players without handicaps.⁹⁹ The ALI's proposed solution is to give long term—even permanent—compensation, for career losses suffered because of investments in the marriage,

92 See Brinig, *supra* note 22, at 59.

93 Brinig, *supra* note 89, at 2472 (“[N]either spouse really benefits from ‘all work and no life,’ as my teenage daughter puts it. Society does not benefit either, as the line for the couple’s joint benefits shows.”).

94 For many couples, home cooking, home nursing when one spouse is ill, and, certainly, sexual pleasure fall into this category.

95 See, e.g., Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 695–96 (1990); Williams, *supra* note 35, at 1619.

96 This is a somewhat circular proposition since wives rationally choose household production because of their lower opportunity costs of remaining out of the job market. See Silbaugh, *supra* note 22, at 17–21; Wax, *supra* note 22, at 530.

97 See, e.g., Carbone, *supra* note 84, at 413–15; Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454 (1994); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 70–71 (1993).

98 See sources cited *supra* note 97.

99 See Kay, *An Appraisal of California’s No-Fault Divorce Law*, *supra* note 91, at 317–18; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 15, 22–25 (Katharine T. Bartlett & Roseanne Kennedy eds., 1991).

including for the couple's children.¹⁰⁰ This would seem to satisfy the first group of feminists, but not the second.

Thus, the characterization of sharing also matters because it so dominates the rationale for alimony and property distribution. The couple's investment in the reputation of their marital family, as well as its material goods, will continue to bear fruit even after divorce.¹⁰¹ (Thus, many years after their divorce, one of my former colleagues confesses to true pleasure in his former wife's successful legal career. He is also very proud of their joint achievement, their adult son.) These ongoing portions of the marriage covenant are what I refer to as franchise.¹⁰² Arguably, the part of the relationship that continues, but that may not be currently recognized by law, should be taken into account in determining alimony.¹⁰³ If we compensate according to the franchise nature of the post-divorce relationship, the key concept will be the investment in one's spouse or in the relationship.¹⁰⁴ If we do not recognize franchise interests, alimony will instead compensate for opportunities foregone or as an incentive mechanism to promote optimal marriage behavior.¹⁰⁵

The point that what a supporting spouse contributes to another's earning capacity should be considered an investment rather than a simple loss is explored most carefully in the Iowa case of *In re Marriage*

100 ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 27, § 5.05.

101 For a lengthy discussion of this "franchise" concept, see Brinig, *supra* note 64. See also BRINIG, *supra* note 63, at 181-207 (describing the "family franchise"—relationships that exist after the legal bonds of family have been broken).

102 The concept is defined for families in BRINIG, *supra* note 63, at 7. Briefly, it refers to the portion of a covenant family that remains when the legal relationship between participants ends at adoption, emancipation, or divorce.

103 See Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 106-13 (1997) (discussing why the prevailing "clean break" theory of divorce doesn't fit what happens in most dissolving families); Rosemary Shaw Sackett & Cheryl K. Munyon, *Alimony: A Retreat from Traditional Concepts of Spousal Support*, 35 DRAKE L. REV. 297, 302 (1986) ("With the bitterness that frequently follows a dissolution, the ideal situation would be to put the parties' economic differences to rest with the property division. Where possible, each party should be given his or her own separate assets.").

104 To some extent this is captured in Chapters 4 and 5 of the ALI *Principles*, though in them spouses are compensated at dissolution for career losses occasioned by these investments. In other words, loss (sacrifice) is the basis rather than gain (investment), though the ALI *Principles* are couched in terms of earning capacity rather than non-human capital assets. See BRINIG, *supra* note 63, at 171 & n.202 (referring to ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 27, § 4.07(1), cmt. A). The rationale for equating property distribution and compensatory payments is discussed. See *id.* at 100-01.

105 See Ira Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 50-51 (1989).

of *Francis*,¹⁰⁶ in which the supporting wife actually received a sum that represented not her loss in earning capacity (since she had worked throughout),¹⁰⁷ nor reimbursement for the amount she had contributed to supporting her husband and securing money for his tuition,¹⁰⁸ but rather a return on the share of the investment she had made.¹⁰⁹

Although sharing in some form is central to marriage, it is obvious that the feminist ideal of shared housework has not been realized even when most married women work outside the home.¹¹⁰ Time studies chronicle the daily behavior of husbands and wives, mothers and fathers, and unmarried cohabitants.¹¹¹ In each of these situations, labor is sharply divided, even when both adults work at full-time jobs. Most routine household tasks are done by women, who also per-

106 442 N.W.2d 59 (Iowa 1989). It was a medical-degree case with facts that made the supporting wife's case rather more sympathetic than in the more well-known *Mahoney* case that appears in most casebooks. See *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982). The court in *Francis* reasoned that an investment in a professional degree, like any other asset that earns money, comes from two sources: labor and capital. See *Francis*, 442 N.W.2d at 65. Labor contributions come entirely from the spouse in school. Contributions to capital, on the other hand, can come from either spouse. These contributions may be in cash or in kind—through earnings in the labor force or relieving the student spouse of the labor of caring for the house and the children. Although the returns on labor vary enormously, economists regard the returns on capital as quite predictable and easy to measure. (Financial institutions make such calculations all the time when they establish interest rates for lending money.) See *id.* The expert witness who testified in *Francis* said the conventional ratio of labor to capital in investments is seventy to thirty. See *id.* The spouse seeking a return on investment, instead of recompense for career loss, would multiply the value of the advanced degree (or other earnings enhancement) times thirty percent times the proportion of the capital investment he or she had made. See generally BRINIG, *supra* note 63, at 110–12 (providing a general discussion of the type of calculation that would be warranted).

107 She had an in-home daycare business. See *Francis*, 442 N.W.2d at 61. The court noted: "From the outset of their marriage, Thomas and Diana agreed that Diana would care for their children and earn income for the family by caring for other people's children in their home. This arrangement continued throughout the marriage except for a brief period shortly after Melissa was born." *Id.* at 64.

108 *Id.* at 64–65 ("During the summer before medical school began, Thomas worked as a gardener and earned approximately \$1200. Diana earned roughly \$5000 per year from her in-home day care business. Thomas' parents contributed \$11,500 and Diana's mother gave them \$12,000. Student loans accounted for \$45,500 over the six-year period.")

109 *Id.* at 65.

110 See Nock & Brinig, *supra* note 56 (manuscript at 5).

111 See, e.g., Bianchi & Spain, *supra* note 22, at 31–33; Coverman & Sheley, *supra* note 22, at 420; Nock & Brinig, *supra* note 56 (manuscript at 5, tbl.1).

form most of the child care and associated functions.¹¹² Couples divide financial management and grocery shopping more evenly.¹¹³ More men than women take care of cars and yard work, so the couples typically divide "inside" and "outside" tasks.¹¹⁴ As Joan Williams has written, the labor market expects an "ideal worker," who is almost invariably a married man with a homemaker-wife who takes care of most of the behind-the-scenes work.¹¹⁵ Because women, even post-*Marvin*, still perform these household tasks, eating into their leisure time, they cannot do as much in the paid job force as the men to whom they are compared.¹¹⁶ Thus they earn less, progress more slowly, and have lower opportunity costs from engaging in household production that mean their employment sacrifices are more rational than their mate's.¹¹⁷ In order to change this pattern, either the ideal worker concept (characteristic of the labor force) or the (non)sharing of housework (characteristic of the household) must change. There is some evidence that both are changing gradually.¹¹⁸ Still, the drawbacks of "women's work," the fact that no one wants to do it, and the reality that, undercompensated as it is at present,¹¹⁹ it does not add to

112 FUCHS, *supra* note 32, at 73-74; *see also* Bianchi & Spain, *supra* note 22, at 32 (reporting that the hours women spend on housework have decreased over ten years, and "[i]n families in which the wife works outside the home . . . husbands perform a greater share of domestic tasks and child care"); sources cited in Brinig, *supra* note 89, at 2477 & n.90.

113 Nock & Brinig, *supra* note 56 (manuscript at 26, tbl.2).

114 *Id.* People's time is divided roughly into labor, leisure, and housework. Studies show that women have less leisure time than do men. *See, e.g.*, BECKER, *supra* note 40, at 76, 2S.1 (reporting that in 1975 to 1976, the average leisure hours for all married women was 26.7, for men 27.1 and that, when employed full-time, women had 21 hours of leisure per week, men 23).

115 WILLIAMS, *supra* note 35, at 71-72; Williams, *supra* note 35, at 1596-97.

116 Nock & Brinig, *supra* note 56 (manuscript at 27, tbl.3).

117 PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT AND GENDER 80-82 (1986); FUCHS, *supra* note 32, at 64.

118 *But see* WILLIAMS, *supra* note 35, at 64-113. *See generally* FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME (1991); ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK (1997) (discussing the increased participation of women in the workforce).

119 For descriptions of men's and women's work in the paid labor force, *see* William T. Bielby & James N. Baron, *Sex Segregation Within Occupations*, AM. ECON. REV., May 1986, at 43; Katherine Silbaugh, *Grounded Applications: Feminism and Law at the Millennium*, 50 ME. L. REV. 201, 202 (1998); and Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861, 868 (1995).

For examples of the differences in compensation, *see* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL EMPLOYMENT, HOURS, AND EARNINGS, 1981-93 (1993), which reports annual average weekly earnings for 1988 of \$461 for carpentry

marital stability,¹²⁰ all give some support for the Bruch-Marvin view that homemakers' contributions need to be valued.

III. PRIVACY LIMITATIONS ON SHARING

Despite the importance of sharing, spouses do not share everything, despite any intent to "share and share alike."¹²¹ They retain some private spaces as individuals.¹²² Some of these involve their innermost thoughts, obviously not the subject of legal proceedings. Some involve questions of the appropriate involvement of courts "behind the marital veil."¹²³ Some involve such intimate matters as the wife's choice of whether or not to bear a child to term.

and floor work, *id.* at 24, \$531 for plumbing, heating, and air conditioning, *id.* at 21, and \$299 for auto repair, services, and parking, *id.* at 438. The same Bureau of Labor Statistics data shows weekly earnings of \$215 for residential care, *id.* at 463, \$146 for miscellaneous personal services, \$214 for laundry, cleaning, and garment services, *id.* at 424, and \$172 for retail bakeries, *id.* at 381. In 1985, men employed as repairers and mechanics earned an average of \$400 weekly, compared to the \$130 women earned in private household service. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 436, tbl.696 (1998).

120 Nock & Brinig, *supra* note 56 (manuscript at 28-29, tbl.4).

121 See, e.g., ALA. CODE § 6-10-98 (1975) (marital homestead); OHIO REV. CODE ANN. § 143.43 (Anderson 1999) (survivor benefits); 31 P.R. LAWS ANN. § 3621 (1993) (providing that earnings or profits of a conjugal partnership are divided upon dissolution).

122 See, e.g., KAHLIL GIBRAN, *On Marriage*, in THE PROPHET 15 (1923).

But let there be spaces in your togetherness,
And let the winds of the heavens dance between you.
Love one another, but make not a bond of love:
Let it rather be a moving sea between the shores of your souls.

Id. at 15.

123 See Scott & Scott, *supra* note 45, at 1302-04. Privacy of course has its downside, particularly for women.

Many feminists, as Dean Bartlett recently observed, have questioned the premises of family privacy, insisting that just because relationships are private does not make them beyond public concern. They have challenged the inevitability of naturalness of family privacy, arguing that where the line is drawn between private and public is itself a highly discretionary, political act. And they have exposed the hypocrisy of a construct that purports to be neutral but that suppresses recognition of the kinds of harms from which women disproportionately suffer, while leaving room for prohibition of the kinds of harms men experience.

Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 475 (1999). See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (exploring the privatization of family law and arguing that this trend brings new dangers for families).

The first genre of privacy cases involves time-honored questions. For many centuries, spouses could not sue each other in tort because to do so would violate the "marital unity."¹²⁴ In other words, when they married, the two became one person, and a person could not sue himself.¹²⁵ Although this marital unity has disappeared largely from the realm of property law,¹²⁶ it still retains some validity in tort, not so much because of the "unity" concept, but for reasons of privacy.

Courts are afraid that their interference even in more egregious cases involving intentional torts might encourage suits for such day-to-day problems as the "uninvited kiss"¹²⁷ and, thus, return spouses to an accounting or contract-like type of behavior characteristic of the market, rather than the firm.¹²⁸ The "inviolable veil" of family autonomy¹²⁹ hails from high, and perhaps infinitely high, "transaction costs" to use the words of economists.¹³⁰ It is nearly impossible to recall the context of everyday family affairs, particularly when minor slights and adjustments go on for years.¹³¹ Nonetheless, modern courts have abrogated the doctrine for simple unintentional torts, such as auto-

124 There is an extensive discussion of this line of reasoning in the Supreme Court case of *United States v. Trammel*, 445 U.S. 40, 43-45 (1980) (discussing immunity from adverse testimony by a spouse). This reasoning appears in *Sundin v. Klein*, 269 S.E.2d 787, 790-91 (Va. 1980), where a murdered wife's estate tried to recover property held by the spouses as "tenants by the entirety."

125 See, e.g., *Keister's Adm'r v. Keister's Ex'r*, 96 S.E. 315, 322 (Va. 1918) (Burke, J., concurring) (The duties of marriage "forbid the idea that this 'one flesh' may so divide itself that either spouse may sue the other."); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

126 Although the tenancy by the entirety still exists in a few states (for example, Virginia permits this holding if the intent to create it explicitly appears in the deed, VA. CODE ANN. § 55-20 (Michie 1995)), and the marital community flourishes in others, customs like dower and courtesy (giving wives and husbands, respectively, shares in the property acquired by the other during the marriage) are abolished. For one of the last holdouts, see VA. CODE ANN. § 64.1-19.2 (Michie 1995).

127 *Wait v. Pierce*, 209 N.W. 475, 482 (Wis. 1926) (Eschweiler, J., dissenting) (noting that allowing suits between spouses would encourage litigation over things so trivial as the unwanted kiss).

128 For a modern example of a court struggling with this problem and ultimately declining to allow a wife to recover in tort for intentional infliction of emotional distress, see *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991). The opinion states: "Even though one may question the utility of such comments, spouses are also free to express negative opinions of one another. 'You look awful' or even 'I don't love you' can be very wounding, but these statements cannot justify liability." *Id.* at 1325.

129 The phrase comes from *Menefee v. Commonwealth*, 55 S.E.2d 9, 15 (Va. 1949) (discussing the marital communications privilege).

130 See, e.g., DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 53-60 (1992).

131 See the discussion in *Hakkila*:

mobile accidents¹³² and household injuries,¹³³ where the parties are covered by automobile or homeowner's insurance.¹³⁴ They have been more resistant to abolishing the immunity for intentional torts,¹³⁵ although some courts have allowed suits where the action complained of was "outrageous" and destroyed any hope of marital unity.¹³⁶

The second privacy concern involves individual rights on a constitutional level. Despite his obvious interests in and connections with his unborn child, a husband cannot interfere with his wife's right to choose whether or not to carry a pregnancy to term.¹³⁷ In the more recent early-term abortion cases, practical interests, like the employment progress women have made since *Roe v. Wade*¹³⁸ and the concerns about abuse, outweighed the interests of the husband.¹³⁹ In another context, a court rejected a husband's attempt to enforce a contract made prior to marriage that limited the couple's sexual intercourse to once a week (while the wife insisted on more).¹⁴⁰ This last case reveals concerns both about family autonomy and individual privacy.¹⁴¹ Courts are loath to pierce the marital veil by entering the marital bedroom (and an inquiry into the frequency of intercourse, or requests for intercourse, would have had to accompany the husband's suit).¹⁴² They are also reluctant to second-guess individual decisions

The connection between the outrageousness of the conduct of one spouse and the severe emotional distress of the other will likely be obscure. Although the victim spouse may well be suffering severe emotional distress, was it caused by the outrageousness of the conduct or by the implied (and privileged) message of antipathy?

Hakkila, 812 P.2d at 1325.

132 See, e.g., *Lewis v. Lewis*, 351 N.E.2d 526, 532-33 (Mass. 1976).

133 *Merenoff v. Merenoff*, 388 A.2d 951, 962 (N.J. 1978).

134 See, e.g., *Surratt v. Thompson*, 183 S.E.2d 200, 202 (Va. 1971).

135 For a survey, see generally Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745 (1999) (outlining the tort actions that are currently available in the marital context).

136 See, e.g., *Eagan v. Calhoun*, 698 A.2d 1097, 1099 (Md. 1997). See generally Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1659-63 (1966), for an old version of the doctrine and Singer, *supra* note 123, at 1463-64, for a modern feminist approach.

137 *Planned Parenthood v. Casey*, 505 U.S. 833, 893-94 (1992).

138 410 U.S. 113 (1973).

139 *Casey*, 505 U.S. at 889-94.

140 *Favrot v. Burns*, 332 So. 2d 873, 875 (La. Ct. App. 1976).

141 See *Bartlett*, *supra* note 123, at 488-94 (discussing feminist concerns about sex and reproductive issues).

142 Cf. *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (finding that a law prohibiting the "use" of contraceptives "reaches into the intimacies of the marriage relationship"; proof of its violation involves "an invasion of privacy that is implicit in a free society");

about marital sexuality, a matter over which each individual spouse has complete control.¹⁴³

Although the strongest claims of marital privacy supported the concept that a man could not rape his wife, violent sexual assault violates covenant promises like the injunction that 'the husband is to "love his wife as his own body."¹⁴⁴ Once married women were accorded rights as people and citizens,¹⁴⁵ the ancient common-law immunity from marital rape charges¹⁴⁶ necessarily disappeared as well. The assent to marriage was no longer seen as blanket consent to intercourse at the husband's demand.¹⁴⁷ Once the abortion cases fixed matters involving sexuality firmly within individual control, the husband's immunity from rape became a dead letter,¹⁴⁸ though there is still a difference between marital rape and stranger rape in many state statutes.¹⁴⁹ (Of course the proof problems, troublesome in most sexual assault cases, become still more intractable in marital rape cases.¹⁵⁰)

id. at 548–49 (Harlan, J., dissenting) (discussing contraceptive use by married couples).

143 See *In re Pamela P. v. Frank S.*, 443 N.Y.S.2d 343, 346 (Fam. Ct. 1981) ("Constitutional doctrine as to procreative freedom has developed mainly in the context of women's rights. There can be no question, however, that the Fourteenth Amendment to the Constitution guarantees to a man equally with a woman freedom of choice to use contraception and avoid procreation.") (citing *Eisenstadt v. Baird*, 405 U.S. 438, 448–49, 453 (1972)).

144 *Ephesians* 5:28.

145 See PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* 154–55 (1980). See generally RICHARD H. CHUSED, *PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW* (1994) (noting the connection between Married Women's Property Acts and the availability of judicial divorce); Reva B. Siegal, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 *YALE L.J.* 1073 (1994) (exploring the rise and retreat of the movement for joint property advocacy).

146 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 436 (2d ed. reprint 1923) (1898).

147 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (1736).

148 See, e.g., *State v. Smith*, 426 A.2d 38, 42–43 (N.J. 1981). Further, no-fault divorce gave the wife the right to voluntarily withdraw from the marital relationship, terminating any such marital contract. See *Weishaupt v. Commonwealth*, 315 S.E.2d 847, 855 (Va. 1984).

149 See, e.g., VA. CODE ANN. § 18.2-57.2 (Michie 1996) (criminalizing marital sexual assault); *id.* § 18.2-67.2:1 (requiring marital sexual assault to be reported within sixty days of the offense). See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CAL. L. REV.* 1373 (2000) (describing the evolution of marital rape laws from the 19th century to today).

150 See, e.g., *Kizer v. Commonwealth*, 321 S.E.2d 291, 294 (Va. 1984).

The last several paragraphs have described the privacy concerns surrounding married couples in legal terms. The same phenomena may be analyzed in an institutional economic framework as well. The first set of problems—involving over-regulating the marriage—are rather like the concerns leading to the concept of “bounded rationality” as a limitation on the complete contingent claims contract.¹⁵¹ In other words, spelling out all the terms of a contract and enforcing each minute detail would itself be destructive of many long-term relational contracts,¹⁵² whether commercial or marital.¹⁵³ In marriage, this point explains why there are not more antenuptial (or premarital) agreements—the necessary negotiation and specificity take some of the bloom off the most romantic relationship.¹⁵⁴ In the commercial parallel, if managers or employees of a business firm had to be continually afraid of lawsuits for the most trivial of matters, much worthwhile business simply would not get done.¹⁵⁵ Similarly, over-regulating a marriage, or what Milton Regan calls “the external stance,”¹⁵⁶ hurts marriages by encouraging a constant reexamination of whether continued confidence in or loyalty to the other spouse is worthwhile. Even if all things in a marriage could be foreseen, specific enforcement of marital promises may be harmful.¹⁵⁷ Finally, some of the qualities that make up a good marriage are simply incom-

151 See Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 258 (1979); see also Scott & Scott, *supra* note 45, at 1228–29 (arguing that marriage can and should be analyzed as a long-term relational contract).

152 See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092–93 (1981).

153 See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 42–44 (1990).

154 See *id.* at 50; Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 209 (1982). One other reason is that couples during engagement are convinced that their particular marriage will not end in divorce, although they are aware that half of all marriages will. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (observing that “the median response of the marriage license applicants was 0% when assessing the likelihood that they personally would divorce”).

155 See generally Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221 (1995) (comparing the “love-it-or-leave-it” rule of marriage dissolution to partnership law).

156 Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2049 (1995).

157 Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, “I Gave Him the Best Years of My Life,”* 16 J. LEGAL STUD. 267, 300–02 (1987).

measurable,¹⁵⁸ so that courts may have difficulty dealing with them because they are at the same time such wonderfully familiar and incalculably worthwhile attributes.

Recent empirical work by Margaret Brinig and Steven Nock¹⁵⁹ shows why one consequence of diminished specialization leads to marital instability. Couples studied in the National Survey of Families and Households¹⁶⁰ were asked, along with many other questions, how many hours they (and their spouses) spent working each week in the paid labor force or on specific household tasks.¹⁶¹ Meal preparation, shopping, washing dishes, and doing laundry were among the traditional “women’s tasks,” while household repair and auto maintenance were among those usually thought of as “men’s work.”¹⁶² The results for each couple were compared and found to be highly consistent.¹⁶³ Five years later, the same couples were surveyed again.¹⁶⁴ Brinig and Nock found that couples in which *either* husband or wife spent more than the median time doing “women’s work” in 1987–1988 were significantly more likely to have divorced or separated by the second survey, taken five years later.¹⁶⁵ These results remain robust even when the usual indicators of marital stability are held constant and even when labor force employment hours and income are included.¹⁶⁶

On the other hand, when *either* husband or wife spent more time than the median doing “men’s work” in the earlier period, the couple was significantly less likely to experience divorce or separation by the second survey.¹⁶⁷ Finally, couples who refused to answer the house-

158 See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 814–16 (1994).

159 See generally Nock & Brinig, *supra* note 56 (demonstrating “how husbands’ involvement in women’s tasks and wives’ involvement in men’s tasks affects the chances of marital disruption . . . explor[ing] the extent to which attitudes, as opposed to fair division of labor, matter for marital stability”).

160 See *id.* (manuscript at 6).

161 See James Sweet et al., *The Design and Content of the National Survey of Families and Households*, in CENTER FOR DEMOGRAPHY AND ECOLOGY, UNIVERSITY OF WISCONSIN-MADISON, NATIONAL SURVEY OF FAMILIES AND HOUSEHOLDS WORKING PAPER NO.1 (1988), available at <http://www.ssc.wisc.edu/cde/nsfhw/p/nsfh1.pdf> (last modified Dec. 15, 1995).

162 Nock & Brinig, *supra* note 56 (manuscript at 26, tbl.2).

163 See *id.* (manuscript at 27, tbl.4).

164 See *id.* (manuscript at 7).

165 See *id.* (manuscript at 28–29, tbl.4).

166 See *id.*

167 See *id.*

hold labor questions (or who answered "zero hours" for more than three of the questions) also had more stable marriages.¹⁶⁸

These findings indicate that the early feminist predictions of successful egalitarian marriages are over optimistic. The most likely psychological explanations for these results are that "women's jobs" are distasteful or have lower status or are less goal-directed than the "men's."¹⁶⁹ The economic explanation for all the differences between men's and women's work would seem to be that "men's work" contributes directly to marital assets (which have value outside the relationship), while "women's work" does not.¹⁷⁰ This explanation suggests that couples should rely on third parties (or advanced technology) for "women's work" and promote or subsidize (to the extent they are not favored anyway) "men's work," especially if the couple works on cars or household repairs together. It also suggests that couples who are not keeping track of who is doing what around the house are happier.¹⁷¹ This, of course, relates to the theme of unconditional love that differentiates marriages from other close interpersonal relationships.

An alternative explanation, that increased labor force participation by women itself destabilizes marriage, is not borne out by empirical research.¹⁷² Although women may work more in the labor force

168 See *id.*; see also Nock, *supra* note 30, at 239–41 (stating that certain behavior in marriage only makes sense if its turn-taking nature is considered and that marriages exist not only in the present, but more vividly in their "histories and futures"); Smith et al., *supra* note 46, at 321 (reporting that wives do not view their disproportionate share of housework to be unfair when they believe it "helps create a happy and harmonic life").

169 See *supra* note 119.

170 See Margaret F. Brinig & Steven L. Nock, "I Only Want Trust": Norms, Trust and Autonomy (unpublished manuscript, at 15, on file with author).

171 See *id.* (manuscript at 15–17). For a more general application of the Heisenberg principle of quantum mechanics to economics, see Eric Blankmeyer, *The Heisenberg Principle in Economics*, available at <http://netec.mcc.ac.uk/WoPEc/data/Papers/wpawuwpgt9904004.html> (Apr. 20, 1999).

172 See generally Liana C. Sayer & Suzanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Reexamination*, 21 J. FAM. ISSUES 906 (2000) (concluding that women's greater economic independence does not destabilize marriage). Sayer and Bianchi are trying to disprove the common supposition that women's increased employment (and economic power) destabilizes marriage. They found, using the National Survey of Families and Households (NSFH), that "indicators of marital commitment and satisfaction are better predictors of marital dissolution than are measures of economic independence." *Id.* at 938. Interestingly, Sayer and Bianchi's piece, *supra*, found that if the husband felt the marriage was troubled or unhappy, it was not a statistically significant predictor of divorce within the next five years. See *id.* at 932–33. If the wife felt the marriage was troubled or

after the marriage becomes unstable (at least in part to guard against the chance of having to work at a less satisfactory job after divorce),¹⁷³ labor force participation or their earning power was not significantly associated with divorce, while *women's* emotional satisfaction with the relationship was.¹⁷⁴

CONCLUSIONS

So, was the influence of *Marvin* on marriage good or bad? The undisputed good, from a feminist point of view at least, is that *Marvin* recognizes the value that women confer on men and family. At the same time *Marvin* was being argued and written, a number of legislatures were enacting property distribution statutes.¹⁷⁵ Many of these "first generation" statutes explicitly recognized spouses' contributions to the family as well as their financial contributions.¹⁷⁶ As will be shown shortly, the question is whether the way that revelation has played out (only at dissolution, instead of more pervasively) poses a problem for marriage.¹⁷⁷ If compensation is made pervasively and does not require periodic cost-accounting, it should not destabilize

unhappy, there was a statistically significant relationship, holding other things constant, at least to $p < .01$ and in one model to $p < .001$. *Id.* at 929-31 & tbl.3.

173 See Stacy J. Rogers & Paul R. Amato, *Have Changes in Gender Relations Affected Marital Quality?*, 79 SOC. FORCES 731, 732 (2000); see also Parkman, *supra* note 22, at 44 (arguing that married women may work outside of the home in order to protect themselves against the economic consequences of no-fault divorce).

174 See Sayer & Bianchi, *supra* note 172, at 918-19, 932-33.

175 See, e.g., Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 Wis. L. Rev. 789, 809-11; O'Connell, *supra* note 22, at 1494-98; Marcia O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D. L. Rev. 225, 225-26 (1985).

176 By the winter of 1983, thirty-two states considered nonmonetary contributions (such as being a homemaker, serving as a parent, contributing to career potential of the other spouse, or contributing to the well-being of the family) in determining property distribution and/or maintenance. Doris Jonas Freed & Henry H. Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 381 & tbl.V (1984).

177 One suggested solution to this problem is to restrict divorce so that the inequalities never surface. Thus some writers have suggested changes in divorce grounds to allow "no fault" divorces only when there is mutual consent. See, e.g., ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 137-40 (1992); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 Ky. L.J. 51, 61 & n.43 (1999); Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91, 106 (1993). Scott and Scott, *supra* note 45, argue that divorce, as the termination of relational contract, requires a reasonable opportunity for "winding down" the marriage partnership so that each spouse can disentangle or realize investment. See Scott & Scott, *supra* note 45, at 1263-84. The Scotts' provision basically gives notice that a divorce will occur after, say, two years. *Id.* at 1262. But this does not help the spouse who has been emotionally abused nor the spouse who is emotion-

marriage. That is the benefit of the fifty-fifty sharing assumptions¹⁷⁸ that have been in place in intact community property regimes for some years.¹⁷⁹ The important insight is that home work needs to be dignified and the property/support thus gained treated as *earned*, not as a gift or handout.¹⁸⁰ In dissolution cases, household work needs to be treated as contributing not only to financial assets, but also to future earnings generally.¹⁸¹ The investment made in the other's future earning capacity is not necessarily tied to the contributing spouse's earning potential. That is, to some extent, though the career sacrifice of the homemaker may be quite different, the employed spouse will gain the same whether the homemaker has given up a legal or a secretarial or a nurse's aide career.¹⁸² This point is missed by the ALI *Principles*, which allow permanent compensation to reduce loss and equalize income, but not rise to the level of the gain to the other spouse.¹⁸³

But to keep from destabilizing marriage and reducing marital behavior to a series of exchanges,¹⁸⁴ the contributions of what Nock discusses in terms of marital-specific capital¹⁸⁵ must be realized during ongoing marriages as well. This concern might argue for something

ally reaping no satisfaction from the relationship who also has made career investments.

178 For a discussion noting that many feminists favored equal division of property during divorce reform efforts of the 1970s and 1980s, see Bartlett, *supra* note 123, at 479-80. See also Fineman, *supra* note 175, at 836 (noting that the Wisconsin Marriage and Divorce Act has a rebuttable presumption of equal division instead of needs-based settlement); Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 *BUFF. L. REV.* 375, 450 (1988-89) (noting that many feminists find the "rebuttable presumption of equal distribution" more attractive than "equitable distribution").

179 See Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 *UCLA L. REV.* 1, 1 (1977); Michael J. Vaughn, *The Policy of Community Property and Inter-spousal Transactions*, 19 *BAYLOR L. REV.* 20, 20-21 (1967).

180 See, e.g., Marcus, *supra* note 178, at 438-39 & n.255 (stating that otherwise the system is fundamentally unfair).

181 See Brinig, *supra* note 64, at 423.

182 See June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 *VAND. L. REV.* 1463, 1487 & n.100 (1990).

183 ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 27, § 5.05.

184 This is what I see as the primary problem of a number of contract-based solutions. See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 *WM. & MARY L. REV.* 145 (1993) (arguing that a contractual, market-based model of marriage is not entirely appropriate); Wax, *supra* note 22 (describing how strictly market based notions fail to capture the full reality of "marital bargaining").

185 See Nock, *supra* note 30, at 238-39.

like the taxation solution proposed by Nancy Staudt.¹⁸⁶ Such a “carrot” or reward approach,¹⁸⁷ as opposed to arguing for equal division of assets upon divorce, might also include the moribund “comparable worth” compensation¹⁸⁸ for traditionally female occupations that require as much training or education as traditionally male “comparables.” It might suggest direct compensation from the employer who, as in the case of the university president, requires significant service by the key employee’s spouse.¹⁸⁹ For recipients of government benefits, it suggests treating all caretakers as being as dependent upon external wage supports as are their charges.¹⁹⁰ Another positive step may be marriage education, which focuses on communication skills learned prior to marriage and reinforced throughout it.¹⁹¹ Of course, though this tactic seems to help reduce divorce, it may not promote

186 Staudt, *supra* note 22, at 1647 (proposing taxing women’s contributions to GNP like any other work so that these contributions will be valued and also “earn” such benefits as Social Security). For a more recent approach on getting rid of marriage tax, see Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495, 518–23 (1999) (suggesting that removal of the more burdensome tax on the second, more elastic, earner will reduce women’s immiseration; finding the source of the role inequality not in housework but in childcare). See generally EDWARD J. McCAFFERY, *TAXING WOMEN* (1997), for a discussion of these principles.

187 See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2450–51 (1995) (advocating giving parents privileges to compensate them as fiduciaries unless they are shown to be unfit).

188 See Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358, 394–96 (1995).

189 See, e.g., *UGa President’s Wife to Receive Stipend*, FLA. TIMES-UNION, Oct. 19, 2000, at B5 (reporting that the president’s wife will receive a \$30,000 annual compensation). See generally Julianne Basinger, *A Paycheck for Presidents’ Spouses?*, CHRON. OF HIGHER EDUC., Sept. 22, 2000, at A37 (citing survey data and discussing the case of Mary Ann Shaw, who has a formal title with the provost’s office and earns \$65,000 at Syracuse University).

190 See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 161–64, 231–32 (1995) (advocating that “inevitable dependants” should be placed along with their caregivers in the legal category of the family); see also Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2200 (1995).

191 See generally Scott M. Stanley et al., *Strengthening Marriages and Preventing Divorce: New Directions in Prevention Research*, 44 FAM. REL. 392 (1995) (reporting on the Prevention and Relationship Enhancement Program (PREP) eighteen-year follow-up study). The program focuses on couples’ communication skills and handling of conflict. See *id.* at 394; see also William Doherty Home Page, at <http://www.nco.northfield.mn.us/doherty/index.html> (last visited Mar. 22, 2001) (featuring many publications of William Doherty, Director of the Marriage and Family Therapy Program at the University of Minnesota and proponent of couple education).

equality of power during marriage. And, as Katharine Bartlett observed, that continues to be the central problem for family law.¹⁹²

192 Bartlett, *supra* note 123, at 475. Feminists have questioned "the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others." *Id.*

TABLE 1. HOURS SPENT ON HOUSEWORK

	1960s	1970s	1978	1988
Women			26.7	21.3
Nonmarried			17.2	13.4
Married—			29.1	23.6
Not Employed	48.0–43.0	23.0–34.0	37.1	33
Employed	20.0–26.5	11.5–20.0	24.3	20.8
Men			6.1	7.4
Nonmarried			8.2	7
Married—			5.8	7.5
Not Employed	5.0–8.0	3.0–9.0	5.0	6.4
Employed	5.5–8.0	3.0–9.5	6.4	7.8

Table derived from Francine D. Blau, *Trends in the Well-Being of American Women, 1970-1995*, Nat'l Bureau of Economic Research, Working Paper No. 6206, tbl.12 (1997); data are drawn from the Michigan Panel Study of Income Dynamics, 1979 and 1989.

TABLE 2. AVERAGE HOURS SPENT ON HOUSEHOLD TASKS
BY HUSBANDS AND WIVES

Household Task	Husbands	Wives	N	Sig.T.
1. Preparing Meals	2.05	9.75	4377	0.001*
2. Washing Dishes	1.76	6.07	4377	0.001*
3. Cleaning House	1.59	8.13	4379	0.001*
4. Outdoor Tasks	4.96	1.81	4380	0.001*
5. Shopping	1.39	2.81	4380	0.001*
6. Washing, Ironing	0.57	4.29	4379	0.001*
7. Paying Bills	1.36	1.60	4378	0.001*
8. Auto Maintenance	1.84	0.18	4379	0.001*
9. Driving Others	1.15	1.39	4372	0.001*
Male Tasks (4+8)	6.80	1.99	4375	0.001*
Female Tasks (1+2+3+5+6+7+9)	9.87	33.98	4381	0.001*

* Paired samples T-Test (2-tailed) is significant at $p < 0.001$

Table from Nock & Brinig, *supra* note 56 (manuscript at 26, tbl.2).

TABLE 3. SUMMARY STATISTICS FOR ALL VARIABLES

(N=2892)

Sample Characteristic	Average/ Percentage	Standard Deviation
Years in Current Marriage	18.99	15.74
Percent who Separated/Divorced	10.58%	
Husband's Age at Marriage	24.47	5.41
Wife's Age at Marriage	22.6	4.87
Percent of Couples who Cohabited Before Marrying	18.34%	
Number of Children Born to Couple	2.12	1.79
Husband's Wage/Salary Wave I (thousands)	20.76	26.81
Wife's Wage/Salary Wave I	8.59	27.69
Husband White	78.97%	
Husband Black	10.45%	
Husband Hispanic	7.24%	
Husband Asian	1.13%	
Husband American Indian	0.36%	
Spouses Different Races	13.61%	
Husband's Years of Schooling	12.84	3.43
Wife's Years of Schooling	12.74	2.91
Husband's Parents Divorced	9.26%	
Wife's Parents Divorced	9.15%	
Husband's Hours at Paid Work Last Week	34.30	21.82
Wife's Hours at Paid Work Last Week	18.52	19.80
Husband's Hours on "Men's" Tasks Last Week	6.80	8.75
Husband's Hours on "Women's" Tasks Last Week	9.87	13.71
Wife's Hours on "Men's" Tasks Last Week	1.99	4.17
Wife's Hours on "Women's" Tasks Last Week	33.98	23.73
Husband's Fairness: Household	3.21	0.56
Wife's Fairness: Household	2.71	0.64
Husband's Fairness: Paid Work	3.01	0.48
Wife's Fairness: Paid Work	2.99	0.50

TABLE 4. COX REGRESSIONS PREDICTING MARITAL DISRUPTION

I. Control Variables

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
Cohabited	1.7717	5.8808**	1.6776	5.3528**	1.6677	5.2998**	1.6651	5.2863**
Number of Children	-.6076	.5447**	-.6187	.5387**	-.6291	.5331**	-.6475	.5234**
Husband's Wages	-.0019	.9981	-.0047	.9953	-.0046	.9954	-.0050	.9951
Wife's Wages	-.0101	.9899	-.0130	.9870	-.0108	.9893	-.0103	.9898
Husband Black	.4167	1.5169*	.3728	1.4519*	.3759	1.4562*	.4213	1.5239*
Husband Hispanic	.3080	1.3607	.2441	1.2765	.2716	1.3120	.3054	1.3572
Husband Asian	.3517	1.4215	.2471	1.2804	.2455	1.2783	.2506	1.2848
Husband American Indian	.5910	1.8058	.4515	1.5707	.3698	1.4475	.3333	1.3962
Different Races	.0184	1.0186	.0492	1.0505	.0402	1.0410	.0396	1.0404
Husband's Education	.0017	1.0017	-.0141	.9860	-.0164	.9837	-.0219	.9783
Wife's Education	.0017	1.0017	-.0083	.9918	-.0154	.9847	-.0142	.9859
Husband's Age at Marriage	.0002	1.0002	.0041	1.0041	.0039	1.0039	.0055	1.0055
Wife's Age at Marriage	-.0757	.9271**	-.0689	.9334**	-.0700	.9324**	-.0745	.9282**
Husband's Parents Divorced	.6762	1.9665**	.6231	1.8648**	.5941	1.8115**	.5326	1.7033**
Wife's Parents Divorced	.6771	1.9681**	.6203	1.8594**	.6096	1.8396**	.6080	1.8368**

* $P < .05$, ** $p < .01$ for coefficient or -2LL change over prior model

II. Division of Labor

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
Husband's Hours Paid Work			.0154	1.0155**	.0154	1.0155**	.0090	1.0091
Wife's Hours Paid Work			.0019	1.0020	.0015	1.0015	.0360	1.0367*
Husband's Hours Male Tasks			-.0244	.9759**	-.0253	.9750**	-.0926	.9115
Husband's Hours Female Tasks			.0133	1.0134**	.0150	1.0151**	.1142	1.1210*
Wife's Hours Male Tasks			-.0417	.9592*	-.0386	.9621*	-.2882	.7496*
Wife's Hours Female Tasks			.0065	1.0065*	.0066	1.0066*	.0497	1.0509**

* $P < .05$, ** $p < .01$ for coefficient or -2LL change over prior model

III. Sense of Fairness

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
Husband Household					-.1558	.8557	.1775	1.1942
Wife Household					-.2478	.7805**	-.4391	.6446*
Husband Paid Work					-.3753	.6871**	-.6066	.5452*
Wife Paid Work					-.0176	.9825	.7369	2.0895**

* $P < .05$, ** $p < .01$ for coefficient or -2LL change over prior model

IV. Fairness Hours Interaction

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
Husband Fairness: Paid X Hours Male Tasks							.0201	1.0203
Husband Fairness: Paid X Hours Female Tasks							-.0218	.9784
Husband Fairness: Household X Hours Paid							-.0054	.9946
Wife Fairness: Paid X Hours Male Tasks							.0884	1.0925*
Wife Fairness: Paid X Hours Female Tasks							-.0141	.9860**
Wife Fairness: Household X Hours Paid							.0092	1.0093*
Husband Fair: Household X Hours Male Tasks							.0029	1.0029
Husband Fair: Household X Hours Female Tasks							-.0117	.9883*
Wife Fair: Household X Hours Male Tasks							-.0079	.9922
Wife Fair: Household X Hours Female Tasks							-.0002	.9997
Husband Fair: Paid X Hours Paid Work							.0083	1.0084
Wife Fair: Paid X Hours Paid Work							-.0199	.9803**
N	2858							
-2LL	778.310							
Change (-2LL)	443.766**		44.070**		20.076**		24.066**	

* P < .05, ** p < .01 for coefficient or -2LL change over prior model

