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Marriage Contracts and the Family Economy

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I. INTRODUCTION

One simplified view of contract law is that the state enforces private bargains without looking into the substance of those bargains. From this contractual perspective marriage might look like a contract to exchange services and goods: love, money, the ability to have and raise children,

housework, sex, emotional support, physical care in times of sickness, entertainment and so forth. But when the parties to a marriage put these terms in writing, courts only enforce the provisions governing money. This contract/family law rule of selective enforcement disproportionately benefits those who bring more money to a marriage, who are more likely to be men than women.

Where a rule of law can be shown to have this kind of disparate impact, we expect to find an important difference between the categories upon which the legal distinction has been drawn. An examination of the family economy, however, will lead us in the opposite direction: the distinction on which courts rely—monetary versus nonmonetary—is not as polar as courts suggest. These components play a similar role within the institution of marriage. This is both because the nonmonetary components of marriage contribute material wealth to a family, and because the monetary components of marriage are themselves highly intimate. My claim is that justice requires that the monetary and nonmonetary aspects of marriage receive similar legal treatment, both as a matter of gender equity and to preserve a central positive social meaning of marriage: that diverse efforts by spouses enjoy equal status.[1] This is an Article, then, about the selective enforcement of contract terms, and the unwarranted distinction between financial and nonfinancial aspects of marriage.

The scholarly literature about premarital agreements, like the judicial decisions it interprets, misses the question I am raising here. Most of these articles focus on the monetary issues,[2] and relegate nonmonetary issues to a

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[1] This Article privileges equality, understood as equity between men and women regardless of diverse work choices, over other values, including liberty. Moral values reflected in family law doctrine have shifted toward equity and away from older moral values, such as marital fault defined as infidelity. These legal changes reflect a contemporary social meaning of marriage that includes equity. *See* Naomi Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 229, 238-40, 246-48 (1997).

[2] There is scholarship on the topic advocating a broad range of policies. Some favor premarital agreements so strongly that they would make them *mandatory* for all entrants to marriage. *See, e.g.*, Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 399 (1992); Kaylah Campos Zelig, Comment, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1230 (1993). Some, though they would not mandate premaritals, believe that their use should be vigorously expanded. These scholars are sometimes proponents of free contract in general. *See, e.g.*, Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879 (1988).

Proponents of vigorous expansion in the use of premarital agreements have also come from the ranks of feminism, particularly in the early 1980s, among some who hoped that contracts could be used to craft individualized marriages whose rules were less troubling for sex equality purposes. *See* LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW (1981) (favoring contract on nonproperty aspects of relationship); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207 (1982) (arguing that old form of marriage is rigid and obsolete, so contractual options should be allowed; therefore, should contract over nonproperty aspects of marriage); Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974); Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161, 1208 (1974) (recommending marriage contracts governing ongoing

footnote in which they are pronounced beyond the scope of the discussion.[3] Of the few scholars who have engaged nonmonetary issues, those who oppose enforcement of nonmonetary terms have not considered the problem *selective* enforcement presents for the family economy.[4] Those who favor enforcement of nonmonetary terms haven't adequately confronted the conspicuous judicial reluctance to enforce such terms.[5]

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family relations with the idea that they would be used to make the traditional marriage roles more egalitarian by requiring sharing of household responsibilities).

Some scholars have taken the middle position that premarital agreements are fine when they govern property and alimony only, but should be subject to special rules of review because of the particular public interest in marriage. *See, e.g.*, Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. (forthcoming Oct. 1998); Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979) (contractual elements required for enforceability); Barbara Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REFORM 397 (1977); Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77 (1990) (arguing that dissolution planning is a fine idea, fairness interventions and freedom of contract analyses are problematic though; instead, parties should modify agreements themselves as changed circumstances arise); Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059 (1988) [hereinafter Younger, *Perspectives*] (this article is a well-respected guide to the law governing prenuptial agreements); *see also* Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. LAW. 1 (1992) [hereinafter Younger, *Update*].

In recent years some feminists have been concerned that in practice premarital agreements are more often used to prevent women from benefiting from background family law rules, which was not the expectation of the early feminist proponents of contracts. *See, e.g.*, Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994); Ronald S. Ladden & Robert J. Franco, *The Uniform Premarital Agreement Act: An Ill-Reasoned Retreat from the Unconscionability Analysis*, 4 AM. J. FAM. L. 267 (1990).

[3] *See* Brod, *supra* note 2, at 231 n.3 ("This article does not consider premarital agreements which regulate the nonfinancial aspects of the couple's marriage relationship."); Perry, *supra* note 2, at 77 n.2; Stake, *supra* note 2, at 399 n.7 ("Though premarital agreements could deal with other incidents of marriage and divorce, the proposal in this Article is limited to contracts relating to division of property and future income after the dissolution of the marriage. It is difficult to work out the many other incidents of a working marriage in advance because marriage is fluid and unpredictable.").

[4] Several scholars have defended the nonenforcement of nonmonetary issues. See Banks McDowell, *Contracts in the Family*, 45 B.U. L. REV. 43, 49 (1965) (nonmonetary issues are too trivial to take up court time); J. Thomas Oldham, *Premarital Contracts are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757, 783-84 (1984) (enforcement of nonmonetary terms would reintroduce acrimony into divorce that premarital agreements are supposed to eliminate, because parties would be litigating details of marriage); Dean C. Dunlavey, Comment, *Enforceability of Antenuptial Agreements Concerning Education of Children*, 43 CAL. L. REV. 132, 140 (1955) (nonenforcement better serves child's best interest); Comment, *Enforceability of Prenuptial Promises Concerning the Religious Training of Children*, 10 CASE W. RES. L. REV. 171, 171-77 (1959) (constitutional, practical, and child welfare problems with enforcing premarital agreements); Howard O. Hunter, *An Essay in Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039 (1978).

[5] The typical pattern is to acknowledge that they are not now enforceable, but then to say that they ought to be and might be given various changes in related family law or contract doctrine. Often those in favor of enforcement pay little attention to contending with the reasons against enforcement. *See* Haas, *supra* note 2, at 900-04; Elizabeth Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 35 n.93 (1990); Shultz, *supra* note 2, at 300; Zelig, *supra* note 2, at 1237.

This Article, by contrast, offers a new ground for analyzing and criticizing premarital agreements surprisingly absent from the literature. I pose selective enforcement itself as a subject of inquiry, not the overall desirability of premarital contracts. I make this case based on an examination of the economic significance of the nonmonetary aspects of a marriage to the balance struck within the family economy. But the fact of selective enforcement won't tell us whether we need more or less enforcement. I conclude that some of the public policy reasons for not enforcing nonmonetary terms are sound, including the protection both of child welfare and of the social meaning of marriage. More surprising, the case for nonenforcement also extends to monetary terms. Based on reasonable caution about enforcing nonmonetary terms of a premarital agreement, I conclude that we should seriously rethink the trend toward enforcement of monetary terms at death or divorce.[6]

Part II of this Article introduces the doctrine governing premarital agreements. The examination includes a focus on the different kinds of analyses used to decide cases governing monetary versus nonmonetary issues, and the disparate treatment the two kinds of agreements receive. Part III explores the extensive contemporary literature in family law and in economics on the economy of the family. This literature shows the economic significance to the family of nonmonetary activities, and the gendered impact of legal rules on the welfare of different family members in light of their different economic contributions to the family unit.[7] Part III then describes the material exchanges that take place in most marriages, setting out the nature of the monetary-nonmonetary labor exchange. It argues that we should treat these major components of marriage equally, where possible. This section completes the critique of the current law selectively enforcing premarital agreements. Part IV provides a solution; it argues that we cannot have meaningfully enforceable contracts over nonmonetary aspects of marriage, in part because this would have a negative impact on child welfare. It concludes that equity dictates that we should at least have a presumption

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[6] From my simplified view of contract law—the state enforcing private bargains with no interest in the substance—we might expect the conclusion to be complete enforcement. But contract law is more complicated than that. In practice, courts have always engaged in some substantive review of terms at the time of enforcement. There is particularly thick substantive review of contracts within the family, which has resulted in the nonenforcement of agreements governing components of marriage other than money. Much of that substantive review protects appropriate interests, including the interests of children and the social interests in a reasonably stable understanding of marriage. I argue later that those concerns also extend to monetary agreements. Recognizing that, I argue that the proper way to eliminate the disparate impact on women of the selective enforcement of terms is to prevent the enforcement of all premarital agreements, including those that govern money.

[7] In this Article, I will call the unenforceable terms nonmonetary issues. I use the word "nonmonetary" advisedly. It indicates that the contract term is focused on something other than money. Some of these agreements allow that money will be the reward for performance of a nonmonetary endeavor. Nonmonetary is not to be confused with noneconomic, a distinction that is core to the argument I make here.

against the enforcement of monetary contracts. Part V concludes this Article by offering some implications of the argument.

The argument here builds on prior work examining the nonmonetary activities of family life.[8] Much activity within the family, including cooking, cleaning, childcare, management of household finances, education planning, nursing the ill, shopping, and even counseling, is economically productive and valuable, meaning it contributes to a family's material well-being as much as a wage does. This Article is one piece in a long-term project that asks for legal reform that would put that home labor on an equal footing with wage labor. While peculiarities of the context of home labor may mean that identical rules for home and wage labor are not sensible, we should not thereby be relieved from seeking substantive equality in the status of waged and unwaged labor. Because women, whether they work in the wage labor market or not, do substantially more home labor than men, the lower legal status afforded to home labor disproportionately disadvantages women.[9] This Article continues that larger project in the context of the selective enforcement of premarital agreements.

The study of premarital agreements permits discussion of the meaning of marriage as expressed through the ability of individuals to create their own definition of an institution. Individuals create their own meaning, but without social boundaries to the stock of available meanings the individual meanings would be merely private and unrecognizable; the opposite of an institution.[10] I argue that some equality in the balance struck between the monetary and nonmonetary aspects of marriage—what I call the family economy—is central to the preservation of a core constructive social meaning of marriage.[11]

II. THE DOCTRINE GOVERNING PREMARITAL AGREEMENTS

Premarital agreements—contracts signed in anticipation of marriage—are enforceable when the terms of the agreement fix property rights at the

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[8] *See* Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) [hereinafter Silbaugh, *Commodification*]; Katharine Silbaugh, *The Polygamous Heart*, 1 GREEN BAG 2d 97 (1997) [hereinafter Silbaugh, *The Polygamous Heart*]; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) [hereinafter Silbaugh, *Turning Labor into Love*].

[9] *See infra* notes 122-34 and accompanying text.

[10] Social meaning helps third parties to understand the institution, but it also helps the parties themselves to informally enforce the norms of the institution. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 186-97 (1996).

[11] Though marriage is a social institution and is not defined individually by each married couple, I acknowledge that its social meanings are plural and plastic, with some meanings recognized as more constructive than others. This Article explicitly privileges a broadly recognized equality of status for diverse work roles within marriage. There is a clear trend toward this understanding in family law and scholarship. *See* Cahn, *supra* note 1, at 229, 238-40, 241-48.

end of marriage. They are increasingly enforceable when they fix alimony rights. But they are generally unenforceable insofar as they attempt to govern any other issues. A nonmonetary agreement, then, might address issues relating to the care, custody, or religious upbringing of children or to the care of an ill spouse by the healthy spouse, perhaps by providing a wage for what is otherwise uncompensated work. It might allocate work responsibilities within marriage, restrict the ability to seek a divorce on no-fault grounds, or it might dictate the frequency of sexual relations. These agreements purport to govern the behavior of individuals within an ongoing marriage.

I begin with a review of the doctrine governing premarital agreements. Premarital agreements have never been treated like ordinary contracts, and we need familiarity with the general peculiarities of these agreements before we can understand the particular peculiarities that distinguish monetary from nonmonetary agreements.

A. Conventional Doctrine: Skeptical Enforcement

In the second half of the nineteenth century, all states passed Married Women's Property Acts, which permitted those few women who entered marriage with property of their own to maintain ownership of it.[12] This began the separation of a married woman's legal identity from her husband's. But it was the Earnings Statutes of the same period that introduced the real change in women's legal status for our purposes.[13] Prior to their enactment, husbands had owned their wives' labor, both inside and outside the home. The Earnings Statutes permitted a wife to work for a wage outside of the home and receive that wage herself, rather than through her husband. This gave wives a right to make contracts that they had not previously enjoyed under coverture. Although courts did not interpret this shift as a right to make contracts between spouses over household labor,[14] it gave women a contracting identity that eventually extended broadly. This contracting right included contracts with her husband, so long as those contracts did not attempt to change the essential legal incidents of marriage. That qualification for the "essential incidents of marriage" survives today, and forms the basis of what will be our examination of the discriminatory enforcement of premarital agreements.[15]

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[12] *See generally* NORMA BAUSCH, IN THE EYES OF THE LAW (1987).

[13] For extensive examinations of the way courts have interpreted the Earnings Statutes so as to maintain coverture with respect to domestic labor, see Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2181-96 (1994); Amy D. Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988).

[14] *See* Siegel, *supra* note 13, *passim*.

[15] In using the term discriminatory enforcement, I'm not implying subjective intent to discriminate, or "bad motives" on the part of judges. I'm interested instead in the objective meaning of this disparate

In this section we will examine conventionally enforceable premarital agreements that deal with monetary terms to understand what makes premarital contract review unique even before we consider limitations on appropriate terms. I explain two distinctions that have mattered to courts. First, courts distinguish enforcement at the death of a spouse from enforcement at the time a couple divorces. Second, courts insist on particularly high standards in reviewing the fairness of the procedural safeguards for entering the agreement, as well as the fairness of the substance of the agreement. I discuss those rules in this section. In the next section, I will elaborate on the way courts distinguish monetary from nonmonetary terms.

1. The Death versus Divorce Distinction.—The simplest and most common premarital agreement dictates the disposition of property in the event of a spouse's death, overriding the state's elective share law. These are almost uniformly enforced if properly executed.[16] Typically these agreements are signed by parties to a second marriage where one party has adult children from a prior marriage and wants to prevent the new spouse from exercising her statutory right to override a will that leaves her with nothing but provides for the adult children instead. It is the most conventional premarital agreement, and the least controversial. It anticipates a marriage that ends in the death of one spouse, not divorce, and so some, though not all,[17] of the trust in the marriage is preserved.

Next, consider contracts signed in anticipation of divorce, rather than anticipation of death. Their enforceability will require a bit more discussion, as courts closely scrutinize the circumstances surrounding their execution, and sometimes the substantive fairness of the agreements themselves. In brief, they are usually enforceable with respect to property, often enforceable with respect to alimony, and rarely enforceable with respect to anything else. This greatly oversimplifies the situation, but will suffice until we examine the treatment of different terms in the next section.

Until 1970, courts would not entertain a premarital agreement upon divorce, as distinct from death. There was a well-articulated rule that courts would not enforce agreements that encouraged or promoted divorce, and that was understood to mean any agreement invoked *upon* divorce.[18] A court might say that contemplating divorce at all in an agreement necessitates condoning it and, therefore, should not be rewarded. Beginning in

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impact. *See generally* Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63 (1994).

[16] *See* Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R. 4th 22 § 2[a] (1987).

[17] A spouse is not *required* to override a will by exercising her elective share, and under circumstances of perfect trust, a promise not to do so, absent legal formalities, would suffice.

[18] *See* Roy, *supra* note 16, § 2[a].

1970, courts began to enforce some of these agreements upon divorce,[19] but many maintained the principle that they would not enforce agreements that *encouraged* divorce. This required the creation of a distinction among agreements contemplating divorce; courts would decide whether any given agreement tended to encourage divorce or instead tended to promote marital stability.[20] Either story could be told about many agreements.[21] But with increasing frequency in a pragmatic reaction to a rising divorce rate,[22] courts took the position that a premarital agreement gave marriage stability because it forced a couple to review financial issues before marriage, taking any uncertainty out of the marriage's finances and reducing the disparity in expectations that the two parties to a marriage might have at the outset.[23] In time, many courts just stopped discussing whether an agreement encouraged divorce. The prohibition against encouraging divorce is not *completely* dead: some courts today still refuse to enforce agreements that seem to give one party a particularly strong incentive to seek a divorce—such as a clause making provisions favorable to one spouse expire after five years such that that spouse will be wise to seek an early divorce if he experiences any ambivalence.[24] But most courts don't worry about whether ordinary agreements encourage divorce, enforcing even these "sunset" clauses. It is important for our purposes to emphasize that this evolution occurred where

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[19] The landmark case allowing enforcement upon divorce is Posner v. Posner, 233 So. 2d 381, 385 (Fla. 1970); *see also* Brooks v. Brooks, 733 P.2d 1044, 1051 (Alaska 1987) (idea that premarital agreements encourage divorce is outdated).

[20] *See, e.g.*, Ranney v. Ranney, 548 P.2d 734, 737-38 (Kan. 1976) (premarital agreements not of themselves against public policy, though some contracts will be voided if they encourage separation of the spouses, which the agreement in this case did); Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (property and alimony agreements not per se against public policy, but certain contracts may "so unreasonably encourage divorce as to be unenforceable on grounds of public policy").

[21] *See* Capps v. Capps, 219 S.E.2d 901, 903 (Va. 1975) (premarital agreements are void only when they tend to encourage separation or divorce; public policy is "vague and not susceptible to fixed rules").

[22] *See* Newman v. Newman, 653 P.2d 728, 731-32 (Colo. 1982) (public policy had "altered dramatically" with respect to divorce with adoption of no-fault and rising divorce rate); Burtoff v. Burtoff, 418 A.2d 1085, 1088 (D.C. 1980) (public policy changes as society changes, and society has changed such that divorce is now a fact of life); Buettner v. Buettner, 505 P.2d 600, 603-04 (Nev. 1973) (premarital agreements are no longer void for being in derogation of marriage because divorce has increased to the point of being commonplace).

[23] *See, e.g.*, Scherer v. Scherer, 292 S.E.2d 662, 665 (Ga. 1982) (premarital agreements can promote marital stability); Volid v. Volid, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972) ("contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability"); Tomlinson v. Tomlinson, 352 N.E.2d 785, 788 (Ind. Ct. App. 1976) (contracts defining spouses' expectations and responsibilities promote marital stability).

[24] *See* RESTATEMENT (SECOND) OF CONTRACTS § 190(2) cmt. c, illus. 5 (1981); *In re* Marriage of Dawley, 551 P.2d 323, 329 (Cal. 1976) (prenuptial agreement violates public policy if it "encourages or promotes divorce"); *In re* Marriage of Noghery, 169 Cal. App. 3d 326, 329-30 (Cal. Ct. App. 1985); McHugh v. McHugh, 436 A.2d 8, 12 (Conn. 1980) (agreements unenforceable if they provide an incentive for divorce); Neilson v. Neilson, 780 P.2d 1264, 1269 (Utah Ct. App. 1989).

the terms of an agreement covered the disposition of property, and sometimes alimony, but not more novel issues that might arise within a marriage.

2. Strong Procedural and Substantive Review.—The courts' recent acceptance of monetary premarital agreements has not put these agreements on an equal footing with other contracts. Although the substance of many contracts is in practice reviewed for public policy concerns, courts today employ unique fairness criteria for scrutinizing premarital agreements before they are willing to enforce them, using standards that far exceed ordinary contract law. These reviews are both substantive and procedural. State law varies widely with respect to this special scrutiny. If there is any trend, it is toward treating premarital agreements more and more like commercial contracts, but no state treats them identically yet.[25]

a. Procedural fairness.—The special procedural requirements for enforceable agreements used in most states include one or more of the following: a requirement of full disclosure of assets,[26] a requirement of separate counsel,[27] a requirement of disclosure of the rights being waived—the underlying legal regime[28]—and a requirement of sufficient time to review the agreement before the wedding itself.[29] Where one of these procedural elements is missing, a court will either ignore the agreement entirely, or enforce it only insofar as, despite weak procedures, the terms of the agreement dispose of the relevant money in a manner that is not unfavorable to the party who was shortchanged procedurally. Courts review agreements for procedural problems because spouses are not arm's-length commercial negotiators, but instead have a relation of trust that presumes they take account of one another's interests and deal fairly with one another. Moreover, the emotional effects of delaying a scheduled marriage and of forcing a spouse who did not propose the premarital agreement to focus on financial arrangements at a time in a relationship where optimism is at a peak, lead courts to compensate with stringent procedural requirements for what might reasonably be cognitive errors made by prospective spouses. This kind of procedural review does not preclude the notion that spouses may define the

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[25] Even states at the extreme freedom of contract end of the spectrum still do not treat potential spouses as arms-length bargainers. Instead, they recognize something like a fiduciary duty, and require at a minimum that the parties disclose the value of their assets to one another before signing. The Pennsylvania Supreme Court has delivered the opinion providing the maximum freedom to contract of any state but requiring this disclosure. *See* Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990).

[26] *See, e.g.*, Norris v. Norris, 419 A.2d 982, 985 (D.C. 1980); *Simeone*, 581 A.2d at 166-67; Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986).

[27] *See, e.g.*, Friedlander v. Friedlander, 494 P.2d 208, 214 (Wash. 1972); *In re* Marriage of Foran, 834 P.2d 1081, 1088-89 (Wash. Ct. App. 1992); *see also* Gant v. Gant, 329 S.E.2d 106, 116 (W. Va. 1985) (agreement without separate counsel will be scrutinized more closely).

[28] *See, e.g.*, Orgler v. Orgler, 568 A.2d 67, 70 (N.J. Super. Ct. App. Div. 1989); *Button*, 388 N.W.2d at 551.

[29] *See In re* Marriage of Matson, 730 P.2d 668, 672-73 (Wash. 1986).

consequences of marriage, but instead it seeks to be certain that this was their intention.

b. Substantive fairness.—Many states also review the substance of an agreement to decide whether the terms are fair before they will enforce it. Those jurisdictions that employ this fairness review use a much more stringent standard than that seen in the contract doctrine of unconscionability. In some jurisdictions, the terms of the contract must be substantively fair at the time of enforcement, not just at the time of execution, meaning that changed circumstances can void a document that was fair at the outset.[30] In effect, this gives courts tremendous opportunity to set aside agreements, as marriages see many changed circumstances such as employment changes, the birth of children, or declining health.[31] States that examine substance even when the procedure for entering the agreement clearly indicates voluntariness do not simply seek to protect parties from cognitive errors. Instead these states assert an ongoing role in defining the legal consequences of marriage, no matter what the parties may prefer. Some states only look into the substantive fairness of the terms if there is a question as to the fairness of the procedure surrounding the execution of the agreement.[32] This may be a strong form of ensuring voluntariness. But as a part of the general peculiarities of premarital agreement law, courts often feel free to simply ignore the existence of agreements, or dismiss them on fairly thin grounds, when their enforcement seems unfair in the context of a given divorce.[33] This skeptical attitude is an important starting point from which courts deny enforcement to entire classes of contracts, including all nonmonetary contracts, which we will examine more closely below.

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[30] This differs from U.C.C. § 2-302, in which unconscionability is decided as of the time of execution. Many courts reserve this right to review the substance of an agreement for its fairness at the end of a marriage in light of the changes that have occurred since the beginning of the marriage. *See, e.g.*, Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982); Lewis v. Lewis, 748 P.2d 1362, 1366-67 (Haw. 1988) (fairness of alimony provision judged at the time of divorce, while property provision judged at time of inception of marriage); Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981); McKee-Johnson v. Johnson, 444 N.W.2d 259, 267 (Minn. 1989); Gross v. Gross, 464 N.E.2d 500, 509 (Ohio 1984); *Button*, 388 N.W.2d at 551-52.

[31] Recent reaffirmations of judicial review for fairness at the time of divorce include *In re* Dechant, 867 P.2d 193, 195 (Colo. Ct. App. 1993) and Kolflat v. Kolflat, 636 So. 2d 87, 90 (Fla. Dist. Ct. App. 1994).

[32] *See, e.g.*, Newman v. Newman, 653 P.2d 728, 733 (Colo. 1982); Norris v. Norris, 419 A.2d 982, 985 (D.C. 1980); Cladis v. Cladis, 512 So. 2d 271, 274 (Fla. Dist. Ct. App. 1987).

[33] A court frankly acknowledged this in Capps v. Capps, 219 S.E.2d 901, 903 (Va. 1975) (premarital agreements are void when they tend to encourage separation or divorce; public policy is "vague and not susceptible to fixed rules"). The most common way for this to happen is by calling the agreement substantively unfair, but the less straightforward route of attacking the procedure in which the problem is substantive is not uncommon. *See, e.g., Orgler*, 568 A.2d at 70 (finding agreement unenforceable on "procedural" grounds: she did not fully understand equitable distribution law, despite the fact that she had independent counsel and several days to review the agreement; agreement also substantively unfair, but attack under New Jersey law must be on procedure.).

In recent years a minority of states have moved from these thick reviews of substance and procedure toward the kind of review accorded ordinary contracts, although no one has eliminated the duty to disclose assets in contracts that drive a hard bargain.[34] Family law scholars call this a trend, as states that do move at all move in that direction, not in the opposite direction. This movement has been greatly assisted by the Uniform Premarital Agreement Act.

The Uniform Premarital Agreement Act ("UPAA") was promulgated in 1983.[35] It had been adopted in nineteen states by 1995.[36] The Act expansively favors freedom to make enforceable contracts, and uses the term "unconscionability," borrowed from the Uniform Commercial Code, as the only limit on the substantive balance within a given bargain. Still, the drafters of the UPAA claimed that it did not change state law, but only clarified it. Thus, courts feel free to disregard contracts under the rubric of "public policy," an idea that is expressly preserved in the UPAA.[37]

B. Appropriate Terms: The Monetary/Nonmonetary Divide

Because premarital agreements have never been presumptively enforceable, one must view the evolution of enforceability as a set of exceptions carved into a disfavored practice. The preceding discussion has drawn out some of the procedural and substantive fairness requirements that restrict enforcement. Here, we look at another characteristic of the general skepticism of these agreements: the subjects over which parties may contract is quite limited. Whole areas of potential negotiation are denied recognition by courts. It is this distinction among terms that raises the gender equity question explored in this Article, and so we must finish our examination of the doctrine by looking at the distinctions among acceptable and unacceptable contract terms.

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[34] *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 166-67 (Pa. 1990); Laird v. Laird, 597 P.2d 463, 467 (Wyo. 1979).

[35] UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 373 (1983).

[36] *See* Linda D. Elrod, *A Review of the Year in Family Law*, 28 FAM. L.Q. 541, 549 & n.60 (1995). The 19 states are: Arizona, Arkansas, California, Hawaii, Kansas, Illinois, Iowa, Maine, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia. *See id.* Some of these, however, have modified key provisions of the UPAA. For example, California, Iowa, and South Dakota do not permit contracting over support—alimony—issues. *See* Younger, *Update, supra* note 2, at 13 n.59.

[37] UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8) provides that parties can contract over any aspect of marriage that is not against public policy. *See* Younger, *Perspectives, supra* note 2 (presenting a well-respected guide to the law governing premarital agreements, including the idea that the UPAA doesn't change state law, and including case cites to this point); *see also* Oldham, *supra* note 4, at 769 (arguing that it "seems doubtful" that the UPAA licenses agreements over nonmonetary issues "because such a radical step would not be taken in so oblique a manner"); Younger, *Update, supra* note 2, at 15-16.

1. Property.—Property distribution is the most permissible term in a premarital agreement. Almost every court will enforce an agreement governing only property, as long as the procedural and substantive requirements are met. In a number of states, it is the only term over which couples may contract.[38] These agreements dictate who will receive property—acquired wealth—upon death or divorce. Often they pertain to property that a spouse has acquired before the marriage begins, whose value is not enhanced by the labor of either spouse during the marriage itself. Sometimes they also pertain to property acquired or enhanced during marriage, such as a family business or professional partnership. But these agreements govern the disposition of existing assets, not the division of future income.

2. Alimony.[39]—The enforceability of alimony agreements was once prohibited, but is increasingly acceptable. An alimony agreement typically limits alimony—the sharing of income, as distinct from property, which is acquired wealth—after divorce. The UPAA expressly permits enforcement of agreements governing either property *or* alimony,[40] but some states draw a distinction between the two, permitting agreements as to property but frowning upon agreements pertaining to alimony.[41] The reasoning of those states is that alimony agreements violate public policy because they alter one of the essential legal incidents of marriage—the duty of support. Awards of alimony are based in the support duty that spouses owe to one another. States that will not enforce an alimony agreement consider the support duty to be essential to marriage. While a marriage is still intact, one spouse may not enforce this support duty against the other directly,[42] meaning that a wage-earning spouse may keep most of his wages to himself during a marriage.[43] Thus alimony is the only common practical effect of this essential legal incident of marriage.

Permitting an alimony agreement is different theoretically than permitting a property agreement because alimony is rooted in this essential incident of marriage, and property is not. Therefore, permitting contracts over

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[38] *See* Roy, *supra* note 16, §§ 11-12.

[39] The contemporary terms for this are "support" and "maintenance." I will use the more familiar term alimony here, although it is archaic, in part to distinguish it from the broader term support, which can sometimes include household labor and child support.

[40] *See* UNIF. PREMARITAL AGREEMENT ACT § 3.

[41] *See* Roy, *supra* note 16, §§ 11-13.

[42] *See, e.g.*, McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953). The necessaries doctrine, which makes one spouse liable for debts of the other used to buy necessaries such as food or housing can be enforced by third parties only. *See generally*, Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221 (1983-84). This does mean, however, that an unsupported person has an available self-help remedy of charging necessaries to a spouse's credit, if that person can persuade a vendor to do so.

[43] How much of his wages he may keep to himself depends on how much must be spent on the provision of housing and food that necessarily will be shared.

alimony challenges the state's role in setting the terms of marriage directly by allowing the parties to alter terms that have been identified as distinctly important to the legal meaning of marriage. Few states still hold the line against alimony agreements, and they are now more often treated just as a court would treat property agreements.[44] The vast majority of premarital agreements cover only property and alimony, so, for practical purposes, permitting alimony agreements has made for fewer controversial cases. Because we will be comparing the evolution of the enforceability of alimony agreements with the unenforceability of nonmonetary agreements, we will explore the rationale modern courts offer for enforcing alimony agreements in greater detail below. This comparison is illuminating because, in permitting alimony agreements, courts have had to struggle with the same questions about the legal core of marriage that are invoked in cases dealing with nonmonetary terms. We will see that courts have produced very different answers to those questions about the meaning of marriage when evaluating alimony agreements than they have when evaluating nonmonetary agreements. But first we will look at the treatment of nonmonetary agreements.

3. Nonmonetary Terms.—While property and alimony agreements are enforced, courts are extremely reluctant to enforce provisions dealing with anything else, whether those provisions dictate conduct within the marriage, including the division of labor, cohabitation, or sexual relations;[45] restrict the right to seek a divorce;[46] govern child custody;[47] or specify children's religious training in the event of a divorce.[48] Through the years of regularizing the enforcement of premarital agreements, I am arguing that a pattern has emerged: monetary terms are treated differently than nonmonetary terms. The courts do not themselves sort the terms along these lines—monetary versus nonmonetary. But courts' reasoning, which can differ from state to state, always has that effect. I'll discuss that reasoning below to give a better sense of why so few terms are negotiable.

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[44] *See* PREMARITAL AND MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS 6 (Edward L. Winer & Lewis Becker eds., 1993); Roy, *supra* note 16, § 2[a].

[45] *See, e.g.*, Favrot v. Barnes, 332 So. 2d 873, 875 (La. Ct. App.), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976).

[46] *See, e.g.*, Coggins v. Coggins, 601 So. 2d 109, 109 (Ala. Civ. App. 1992).

[47] *See, e.g., In re* Littlefield, 940 P.2d 1362, 1372 (Wash. 1997) (en banc) (prenuptial agreement setting out custodial arrangement for any future marital children unenforceable).

[48] *See, e.g.*, Edwardson v. Edwardson, 798 S.W.2d 941, 946 (Ky. 1990) (agreements may apply only to disposition of property and spousal maintenance). For cases on other terms, see *infra* notes 93-101.

Even the UPAA, despite its strongly procontract language, in effect acquiesces to this monetary/nonmonetary distinction.[49] The UPAA explicitly permits contracts over property, alimony, and choice of law. It says it permits contracts over anything else *that does not violate public policy.*[50] However, the UPAA both fails to provide for enforcement of the terms that fall into this catch-all provision and repeats the public policy exception. Moreover, the drafters emphasized that they were not changing state law.[51] Thus, this provision has been interpreted as preserving the public policy exceptions that already existed under state law.[52] As the term public policy is always used, whether alone or in conjunction with other reasoning, when denying the enforcement of a nonmonetary agreement, the UPAA doesn't appear to affect the general state law rules with respect to nonmonetary terms, despite its seemingly permissive language.[53]

C. Court Reasoning about Nonmonetary Terms

Courts do not overtly make the nonmonetary/monetary distinction, so a bit more detail on the doctrinal reasoning is in order here to understand how courts nonetheless reach that result. The two most common responses courts give in refusing to enforce nonmonetary agreements are that they violate public policy or lack consideration. Lack of consideration is an argument internal to contract doctrine, and we will take it up first, moving in the next section to the public policy arguments that are external to regular contract doctrine.[54]

1. Absence of Consideration.—Sometimes contracts over nonmonetary issues are said to lack consideration. This happens when the term under

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[49] *See* Oldham, *supra* note 4, at 769 (arguing that the UPAA didn't mean to make a radical change with respect to contracts over nonmonetary terms); Younger, *Perspectives, supra* note 2, at 1086-87 (presenting a well-respected guide to the premarital agreement law; UPAA doesn't change state law on contracts in violation of public policy).

[50] The language of the UPAA permits agreements over "any other matter" including "personal rights and obligations, not in violation of public policy . . . ." UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8).

[51] *See* Atwood, *supra* note 2, at 141-42.

[52] For one of the most prominent doctrinal interpretations of the UPAA, see Younger, *Perspectives, supra* note 2, at 1086; Younger, *Update, supra* note 2, at 38; see also Atwood, *supra* note 2, at 141; Oldham, *supra* note 4, at 769 (arguing that the UPAA didn't mean to make a radical change with respect to contracts over nonmonetary terms).

[53] The UPAA is not redundant, though, in that it clarifies the presumptive enforceability of premarital agreements, which was not, until 1970, ordinary. Moreover, it does not provide for the thick substantive review of the terms of an agreement for fairness at divorce that some courts still give, and it comes out in favor of alimony agreements, still an occasionally contested position. UNIF. PREMARITAL AGREEMENT ACT § 3(a).

[54] Admittedly the distinction between "internal" to contract doctrine and "external" to it is not a strong one; historically, public policy concerns have in practice been internal to contract doctrine. But they do not proceed as formally as the consideration doctrine.

negotiation relates to one of the duties owed between spouses within marriage. The prime example is an agreement giving wages or consideration in a will for housework, but it can also apply to sexual relations[55] or cohabitation.[56] Home labor, sex, and cohabitation are considered basic legal duties of marriage. A promise to perform them, then, is a promise to do something that the spouse is already obliged to do—it is a pre-existing legal duty, and there is no consideration for a return promise of money. Note, though, that the duty of support that underlies the alimony remedy was also historically one of these pre-existing duties, and so at its roots it should not be distinct from household labor with respect to the consideration argument. Nonetheless, as we will see below, the support/alimony premarital is no longer as frequently subjected to this lack of consideration argument. Rather, that argument is now usually reserved for nonmonetary, premarital terms.

For example, in *Borelli v. Brusseau*,[57] a California court invoked the pre-existing duty rule saying that "contracts whereby the wife is to receive compensation for providing [nursing-type] services are void as against public policy and *there is no consideration for the husband's promise.*"[58] And in *State v. Bachmann*, a Minnesota court refused to recognize consideration exchanged in a contract between spouses whereby the husband would have paid a wage to the wife for the care of their children. The court argued that "[t]he Bachmanns have not shown that their proposed wage agreement results in either gain or loss to either person; unlike the typical employment relationship, the economic exchange between the Bachmanns would be purely illusory."[59]

This "contractarian" rationale, as Professor Reva Siegel has called it, for nonenforcement rests upon a legal argument internal to contract law, the doctrine of consideration, for denying enforcement.[60] Siegel has argued that courts at the turn of the century used this argument to prevent the ap-

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[55] *See, e.g.*, Favrot v. Barnes, 332 So. 2d 873, 875 (La. Ct. App.), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976) (refusing to enforce an agreement to limit sexual relations to once weekly because "[m]arriage obliges the spouses to fulfill the reasonable and normal sex desires of each other"); *see also* Stapleton v. Stapleton, 209 So. 2d 202, 208 (Ala. 1968).

[56] *See, e.g.*, Jenny v. Jenny, 174 P. 652, 654 (Cal. 1918); Barnes v. Barnes, 42 P. 904, 905 (Cal. 1895) (promise to marry can be consideration between spouses, but "[t]he averment that she promised to live with him during their joint lives is of no consequence. It was included in the marriage contract itself, and its separate averment has no significance.").

[57] 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

[58] *Id.* at 19-20 (emphasis added).

[59] 521 N.W.2d 886, 888 (Minn. Ct. App. 1994).

[60] *See* Siegel, *supra* note 13, at 2196-2210. Siegel's research on marital contracts powerfully illustrates her thesis that the legal system transforms in a manner that ultimately maintains, rather than eliminates, stratified status relations in the face of political pressures on that stratification. My analysis here compliments hers. I use similar doctrinal materials, supplemented by family law materials and cases governing nonmonetaries other than home labor, to illustrate present-day inequities made visible by my understanding of the family economy, and to argue for a particular reform.

plication of the Earnings Statutes, giving women ownership of their labor, to household labor. In using the highly doctrinal consideration argument, she argues that courts sought to reinstate coverture by transforming it to fit the new circumstances of women's statutory labor and property rights.

The contractarian consideration argument still appears today,[61] despite the general late twentieth-century decline of the pre-existing duty rule in contract law that had served as its basis.[62] But as Siegel has observed, paradoxically courts mix that contractarian logic with some of what she calls the "anticontractarian" arguments—arguments that reject the contract discourse as appropriate to the facts—within the same case.

2. Debasing Marriage: The First Public Policy Concern.—When compared to the doctrinal consideration argument, public policy is an equally effective but less formal objection to enforcement. Public policy is something of a catch-all argument, used to describe a variety of rationales for declining to give effect to a premarital agreement. It is used to deny enforcement of many terms, from terms affecting child welfare to the freedom of religion or access to the courts, all of which concern areas of strong public interest. I begin with two large subsets of public policy arguments used to deny enforcement of agreements. First, courts frequently articulate a policy of preserving the integrity of marriage, or preventing its debasement, and invoke that policy to deny enforcement of nonmonetary agreements. Second, the courts invoke the related public policy against *altering the essential incidents* of a marriage. These two public policy arguments, against debasing marriage and against altering its essential incidents, establish two faces of the states' role in defining some minimum uniform understanding of the meaning of marriage. The former seeks to uphold something symbolic about marriage, the latter something concrete about its legal consequences.

Anticontractarian arguments reject the idea that contract is the proper paradigm for marriage at all, because contract discourse debases marriage. On this view, the nonmonetary aspects of marriage, like household labor, are expressions of love, not acts performed for personal gain.[63] Public pol-

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[61] *See, e.g., Borelli*, 16 Cal. Rptr. 2d at 19 (housework contract lacks consideration); *In re* Wood, No. 63,584, 1989 Kan. App. LEXIS 875, at *5-6 (Kan. Ct. App. Dec. 22, 1989) (caring for ill spouse is not consideration for a promise to execute favorable will because it is already owed; however resumption of marital relations after separation is sufficient consideration); State v. Bachmann, 521 N.W.2d 886, 888 (Minn Ct. App. 1994) (housework contract illusory); Hughes v. Lord, 602 P.2d 1030, 1031 (N.M. 1979) (care of ill spouse contract lacks consideration and is against public policy).

[62] *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.21, at 290-91 (2d ed. 1990) ("Courts have become increasingly hostile to the pre-existing duty rule." Courts labor to bring cases within exceptions to the rule. Some courts have abandoned the rule altogether, and the rule has been the subject of legislative reforms narrowing or abandoning it.).

[63] I have argued at length elsewhere that these two ideas—expressions of love and acts performed for material benefit—are not either/or with respect to any form of labor, least of all household labor. *See*

icy is the preferred judicial language when rejecting the contract paradigm. This is one particular form of a public policy rationale: protection of the marriage institution from the commercialized negative connotations of contract.

The anticontractarian reasoning that invokes "public policy" rejects the concept that intimate materials can be thought of in exchange terms. The court doesn't simply say it isn't prudent to enforce this agreement. It says that it makes no sense to view the negotiated terms as things that can be made materially negotiable. Consider an example of the strong form of anticontractarian language:

> To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations . . . .[64]

In the most common example—in which a wife who agrees to provide home care to an ill husband in exchange for a share of his estate—courts balk at the agreement, arguing that she *should* provide that service out of love and duty, and, therefore, his agreement to pay for it should have no effect. This argument is bolstered by the contractarian argument that she has a pre-existing duty to perform. But today the contractarian pre-existing duty rule, while offered as a rationale, is not emphasized as strongly as the notion that home labor ought to be done from love. So in the case of a contract exchanging nursing care for a share in an estate, a California court recently said:

> While we do not believe that marriages would be fostered by a rule that encourages sickbed bargaining, the question is not whether such negotiations may be [ill-advised]. The issue is whether such negotiations are antithetical to the institution of marriage as the Legislature has defined it. We believe that they are. . . . [E]ven if few things are left that cannot command a price, marital [service] remains one of them.[65]

By distinguishing between what is ill-advised and what is antithetical to the institution of marriage, the court frames the question in a particular way: it is saying that it makes no sense to talk about housework as a negotiable item at all. This is more than simply saying that on balance, we ought not negotiate over it. It is saying that it is incoherent to talk about negotiating over it, as that would imply that a person might perform these activities for

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Silbaugh, *Commodification*, *supra* note 8, at 81; Silbaugh, *The Polygamous Heart*, *supra* note 8, at 99; Silbaugh, *Turning Labor into Love*, *supra* note 8, at 26-27.

[64] Brooks v. Brooks, 119 P.2d 970, 972 (Cal. Dist. Ct. App. 1941).

[65] *Borelli*, 16 Cal. Rptr. 2d at 20 (emphasis added); *see also Hughes*, 602 P.2d at 1031 ("It is the policy of this state to foster and protect the marriage institution. It is not the policy of the state to encourage spouses to marry for money.").

personal gain, an idea inconsistent with the understanding that what is given in marriage is not given for gain, but altruistically, without expectation of return, as an expression of affection for one's spouse.

Siegel observes that the contractarian (absence of consideration) and anticontractarian arguments appear in the same cases, despite an apparent tension between them: one acknowledges the logic of contract, the other denies that that logic can apply to the case. But there is a similarity between the two arguments: in both arguments, nonfinancial contribution appears to add no material value. It adds no value in the contractarian argument because it is not enough to constitute new consideration for a promise. It adds no value in the anticontractarian argument because it is invisible as a *potentially* negotiable item at all.

3. Altering Essential Legal Incidents: The Second Public Policy Concern.—The policy prohibiting the alteration of essential incidents of marriage is frequently invoked in nonmonetary cases, but historically it has also worked to deny enforcement in alimony cases. At times it continues to do so today, though its use is on the decline as courts increasingly enforce alimony agreements. Because this policy has been invoked on both sides of the monetary/nonmonetary divide and has been largely discarded with respect to monetary agreements today, it bears closer examination in an effort to understand the disparate treatment nonmonetary agreements receive compared with monetary agreements.

The Restatement of Contracts Section 190 says that contracts that seek to alter the "essential incidents" of marriage will not be enforced.[66] Comment a to the Restatement provides the following explanation: "there is a public interest in the relationship, and particularly in such matters as support and child custody, that makes it inappropriate to subject it to modification by the parties."[67] The term "essential incidents" comes from the Restatement; courts prefer language closer to "duties imposed by law."[68] Countless cases employ this rule in setting aside premarital agreements. It serves as the ultimate assertion of the state's prerogative to have a hand in defining marriage. An early but still often-cited expression of the principle dates back to 1888 when the Supreme Court said in *Maynard v. Hill*,[69] "Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation

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[66] For an example of how a court might articulate this point, see Padova v. Padova, 183 A.2d 227, 230 (Vt. 1962) (finding premarital agreements should be carefully scrutinized and courts are to "override their provisions only to enforce duties imposed by law sought to be avoided by contract, or, in particular, to protect the interests of children involved").

[67] RESTATEMENT (SECOND) OF CONTRACTS § 190 cmt. a (1981).

[68] *See, e.g., Padova*, 183 A.2d at 230 (courts may override the provisions of premarital agreements in order to "enforce duties imposed by law sought to be avoided by contract").

[69] 125 U.S. 190 (1888).

once formed, the law steps in and holds the parties to various obligations and liabilities."[70]

There is no particular source to which to turn when dividing the "essential" from the "nonessential" terms of marriage, but there are practices that indicate the status of various "incidents." In a 1995 opinion that was later withdrawn upon rehearing, the Louisiana Supreme Court said that "only marginal aspects of these essentially personal relationships may be open to private ordering through contract proper or other expression of volition."[71] This kind of language seems an invitation to decide what is marginal about marriage by reference to what may be the subject of an enforceable contract. For example, because it has always been acceptable to contract about the disposition of property, at least upon death, the property rules of marriage would not properly be viewed as essential legal incidents of marriage. This may seem odd to many, because the fact of marriage has an enormous impact on property. Moreover, it has an impact that reflects and enforces a particular understanding of marital sharing,[72] and so it would seem to be one of the more influential legal effects of marriage. Nonetheless, it is clear that the prohibition against modifying essential legal terms never applied to property.[73]

An example of a conventional essential legal incident might include the obligation to cohabit. A premarital agreement that provides for the parties to live separately is said to "negative the effect of marriage" and is therefore unenforceable.[74] Here we will examine public policy with respect to essential incidents in order to examine the distinction between alimony, which has evolved from an essential incident into a contractable interest, and household labor or other nonmonetary interests, which have not.

a. Support/alimony as an essential incident.—The "incident" that has caused both the greatest debate and has seen the greatest change has been the support obligation, which is the source of alimony awards. At common law, husbands were obliged to support their wives and children financially, and in the modern era, both spouses have this support duty. At common law, wives owed a duty of service to their husbands in exchange

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[70] *Id.* at 210-11.

[71] McAlpine v. McAlpine, No. 94-C-1594, 1995 WL 71495, at *1 (La. Feb. 9, 1995), *rev'd*, 679 So. 2d 85 (La. 1996) (reversing earlier opinion that denied enforcement of all alimony agreements, deciding instead that spouses may contract over either alimony or property).

[72] Which particular view of marital sharing varies by jurisdiction. Community Property jurisdictions embrace a mandatory sharing model. Common law states are divided, depending on whether their equitable distribution statutes are interpreted as including a 50-50 presumption or not.

[73] *See, e.g.*, McLean v. McLean, 74 S.E.2d 320, 323 (N.C. 1953) (Barnhill, J., concurring) ("The law as it now exists in this State does not sanction any modification or limitation upon the obligations it imposes by a prenuptial agreement except in respect to the property of the contracting parties.").

[74] Schibi v. Schibi, 69 A.2d 831, 834 (Conn. 1949); *McLean*, 74 S.E.2d at 323 (Barnhill, J., concurring).

for this support obligation—service referring at least to household labor.[75] While today the service obligation is occasionally merged linguistically with "support,"[76] it appears to have persisted as a separate concept as well.[77] Both service and support have at one time fallen squarely within the prohibition on contracts over essential legal incidents of marriage.[78] In the past, courts spoke of support as one of the "duties and obligations" imposed by law, which cannot be "abrogated or suspended by the parties."[79] "The [] basis for the rule is the principle that the interspousal support obligation is imposed by law and cannot be contracted away."[80] In those states that still will not enforce a premarital agreement that seeks to alter the support obligation by limiting alimony awards, the strength of the pre-existing duty of support is still an important rationale.[81]

Over time, however, contracts that limit the financial support obligation have become more enforceable, and most states that have considered the question since 1970 will enforce them.[82] But curiously, the modern opinions justifying enforcement don't discuss whether financial support is an essential incident. Instead, these courts address whether contracts over alimony tend to promote divorce or not. Courts simply stopped talking about financial support as an essential legal incident and started talking about whether alimony agreements are compatible with the public policy of discouraging divorce, making a shift in reasoning. Courts enforcing alimony agreements speak of the change in terms of a public policy change occasioned by no-fault divorce, which made anticipation of divorce less

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[75] Before the Earnings Statutes of the late 19th century, the service obligation also included wage labor. Even after the Earnings Statutes, it included wage labor in a family business, and in some states still does in the absence of a clear expression of intent to the contrary.

[76] *See, e.g.*, CAL. FAM. CODE § 1620 (West 1996).

[77] We can tell that it has persisted only through the several roundabout enforcement mechanisms: the ability to recover loss of consortium damages for tortious impairment of the services owed and the unwillingness of courts to consider services to be "new" consideration for an agreement between spouses. *See supra* text accompanying notes 54-62.

[78] *See* FARNSWORTH, *supra* note 62, § 5.4, at 365-66 (on services); *see also* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 19 (Cal. Ct. App. 1993).

[79] Kershner v. Kershner, 278 N.Y.S. 501, 504 (N.Y. App. Div. 1935).

[80] *In re* Marriage of Gudenkauf, 204 N.W.2d 586, 587 (Iowa 1973).

[81] *See, e.g., id.* at 587 (interspousal support obligations are imposed by law and cannot be contracted away); Norris v. Norris, 174 N.W.2d 368, 370 (Iowa 1970) (maintenance limiting agreements void as class because they contradict husband's legal duty to support his wife); Holliday v. Holliday, 358 So. 2d 618, 620 (La. 1978) (can't waive support obligation during pre-divorce separation); Motley v. Motley, 120 S.E.2d 422, 424 (N.C. 1961) (property contracts okay, but there may be public policy concerns with respect to maintenance agreements because of husband's obligation to "provide support" for himself and his family); Connolly v. Connolly, 270 N.W.2d 44, 48 (S.D. 1978) (okay to alter property distribution, but not support because of spouse's legal obligation to support).

[82] *See* FARNSWORTH, *supra* note 62, § 5.4, at 366; Roy, *supra* note 16, § 2[a].

shameful,[83] and women's increasing economic equality, which makes state protection of women through marriage rules less necessary.[84]

Financial support must then be removed from the list of essential legal incidents of marriage by family law scholars, but courts haven't articulated the change that way; they have only talked about a change in public policy with respect to *divorce itself*. This is an example of the confusion that reigns between the generalized public policy argument, such as a policy of discouraging divorce, and the particular rule dividing the essential from the nonessential terms of marriage. While the latter is still a public policy argument, it is a rule-based one reflecting the precise legal consequences of marriage. Modern public policy, concerning both permissive divorce and women's improved paid labor force opportunities, dominates when enforcement is permitted, while the rule-based argument—that parties may not alter the essential incidents of marriage—dominates when enforcement is denied. The overwhelming majority of states that have considered the question since 1970 enforce an agreement limiting the support obligation in the event of divorce.[85] This suggests that financial support is no longer viewed as one of the essential legal incidents of marriage, but is instead, like property, an ancillary, merely financial issue.

b. Service obligation as an essential incident.—No such change has taken place with respect to the service obligation. The service obligation appears in almost all of the modern cases to be a non-negotiable component of marriage. Spouses may now contract over labor *in a family business* that exceeds the normal expectation of services within the home, so long as they are particularly explicit about their desire to make such a contract legally binding.[86] But they still may not contract over labor performed within the home.

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[83] *See* Williams v. Williams, 801 P.2d 495, 497 (Ariz. Ct. App. 1990) (because of no-fault, support agreements no longer void as against public policy); Parniawski v. Parniawski, 359 A.2d 719, 721 (Conn. Super. Ct. 1976) (maintenance agreements not void as against public policy because of shift in public policy occasioned by no-fault divorce); Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970) (no-fault divorce the occasion for rethinking public policy with respect to an agreement that apparently included maintenance restriction); Scherer v. Scherer, 292 S.E.2d 662, 665 (Ga. 1982) (no fault divorce required judicial re-evaluation of premarital agreements); Marschall v. Marschall, 477 A.2d 833, 837 (N.J. 1984) (no-fault divorce and rising divorce rate occasion for change in public policy with respect to enforceability of maintenance agreements); Gross v. Gross, 464 N.E.2d 500, 505 (Ohio 1984) (no-fault divorce and rising divorce rate require evolution of public policy with respect to enforceability of maintenance agreements).

[84] *See Parniawski*, 359 A.2d at 721 (noting women's equality in change of public policy with respect to premarital agreements covering maintenance); *Scherer*, 292 S.E.2d at 665-66 (noting increasing employment of women as occasion for change in enforceability of support agreements); Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (women's equality changes public policy with respect to enforceability of premarital agreements).

[85] *See* Roy, *supra* note 16, § 2[a].

[86] *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 302-03 (2d ed. 1988). *See also* Leatherman v. Leatherman, 256 S.E.2d 793, 802 (N.C. 1979) (wife's

Some courts that refer to services as being in the nature of an unalterable obligation of the marriage do not stop there. They go on to make a point about the moral nature of services that is not made about support. So in a case in which a husband fails to follow through on his promise to compensate his wife for her services by making a will in her favor, the court rules against the wife, but says:

> we are sympathetic to her apparent dilemma, and certainly would not condone defendant's apparent knavish ingratitude, but . . . . there is a personal duty of each spouse to [ ] the other, a duty arising from the marital relationship, ... So long as the coverture endures, this duty of [services] may not be abrogated or modified by the agreement of the parties to a marriage.[87]

This direct reference to the ban on modifying marital duties is not nearly as common in housework cases as it is in alimony cases. More often, housework cases rely on the formalistic consideration argument, of which the essential legal incidents argument is an unmentioned parent,[88] and on the anticontractarian argument against debasing marriage. The practice of overlooking the essential legal incidents argument in housework cases bears further examination.

4. Choosing Among Public Policy Arguments: Essential Legal Incidents Versus Debasing Marriage.—When a court invokes the rule in an alimony case that a contract shouldn't be enforced if it alters the essential legal incidents of marriage, that court is employing a *form* of the contractarian reasoning Siegel discusses, but a more complex and less legally formalistic version of it. It is not as contractarian as a doctrinal argument about absence of consideration, which assumes stability in the substantive pre-existing duties.[89] But it is a relative of the contractarian argument in the following sense: it implicitly recognizes certain components of marriage as being in the nature of an *exchange*, albeit one that cannot be privately negotiated. Voluntarily undertaken obligation motivates actions, rather than

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full-time work in family business for 14 years presumed gratuitous in absence of specific contract for wages, and therefore no compensation to be paid for that work).

[87] Kuder v. Schroeder, 430 S.E.2d 271, 272-73 (N.C. Ct. App. 1993).

[88] The consideration argument is actually dependent upon the essential legal incidents argument. In order for there to be a pre-existing duty that forms the basis for the case that there is a failure of consideration, the underlying duties of the marriage must be stable. In order to know whether they are stable, we need to know whether they may be modified by the parties to the marriage using a contract. Without a determination as to whether a term is an essential legal incident of marriage we cannot know whether it is therefore inadequate consideration for a promise. The former is a substantive law decision, the latter a rule of contract law.

[89] A decision that a particular promise lacks consideration because the proposed consideration is already owed through marriage itself assumes that the substantive legal duties of marriage are established, not declared anew each time a court decides what is an essential incident under contemporary conditions.

the drive to express affections, whether the obligation is undertaken through the execution of a contract, or generally undertaken through consent to marry into state-imposed duties. The undertaking is made with awareness that the other spouse becomes obliged at the same time. This distinguishes both essential incidents arguments and lack of consideration arguments from a purely anticontractarian rationale that rejects the discourse of exchange-for-gain altogether. Rather than calling this a contractarian argument, as we would call lack of consideration, I will call it an "exchange argument" because it relies on the exchange ethic of contract, but without explicit reference to a doctrinal issue within contract law. Embedded into the public policy prohibition against altering essential legal incidents is the notion that these components of marriage are "incidents" at all, *potentially* negotiable. Perhaps they should not be negotiable because there is a public interest in the relation in addition to the private interest,[90] but that is not to say that "interest" is the wrong way of conceiving of the legal incident.

Here we see a difference in the way alimony and nonmonetary items are understood. Alimony cases *denying* enforcement rest exclusively on the notion that it is not advisable to alter the duty to support. Nonmonetary cases may mention that reasoning, but alongside arguments denying that something like household labor can even be understood as a negotiable item. Recall the language of *Borelli v. Brusseau:*

> the question is not whether such negotiations may be [ill-advised]. The issue is whether such negotiations are antithetical to the institution of marriage as the Legislature has defined it.[91]

It is a difference of averages, as exchange arguments sometimes appear in housework cases, though anti-exchange, love-and-emotion arguments are more forcefully made. But *one never sees a love-and-emotions, anti-exchange argument made with respect to alimony agreements.*

This might lead one to speculate about the following hypothesis: as financial support looks more and more like an *interest*, a potentially negotiable component of marriage, and service looks less and less so, and more like an artifact of marital love, it becomes possible to move financial support into the contractable nonessential column while moving service into the more vague grouping of "against public policy/debases marriage" column. The result—support being an increasingly enforceable term and service remaining unenforceable—appears to rest on different premises. Support is either an essential or an inessential term, but it is a term. Service is harder to characterize as a recognizable interest, term, or component at all. It alone is priceless.

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[90] *See* RESTATEMENT (SECOND) OF CONTRACTS § 190 cmt. a (1981).

[91] 16 Cal. Rptr. 2d 16, 20 (Cal. Ct. App. 1993).

Courts are not careful in their use of the term public policy when denying enforcement of agreements. A court that uses the *term* public policy without explication can be conclusory about the value of the item being negotiated. This relieves a court of the need to conceptualize the item as an exchange component at all. Thus courts that want to make the point that the marriage institution should be spared contract rhetoric and reasoning altogether use the term public policy.[92]

It is hard to say with confidence whether courts' language choices between one form of public policy—not debasing marriage—and another—maintaining state control over essential terms—represent anything more than a haphazard pattern. But I speculate on the matter here because it may illustrate the need for the argument in this Article, which asks for more explicit recognition of the equality of interests between financial and nonfinancial aspects of marriage. My argument *depends* on the ability to see household labor as an "interest," whether contractable or not.

There is another set of public policy arguments invoked against enforcing nonmonetary agreements that does not implicate the "essence" of the marriage relationship itself. Those are discussed in the following section.

5. Public Policy: Interests Beyond the Marriage.—Not all cases in which a court refuses to enforce a premarital agreement on simple public policy grounds fit into the category of protecting marriage from debasement or from the alteration of essential legal incidents. There are a number of frequently invoked public policies, other than supporting the noncontractual nature of the marriage institution or maintaining legal duties, that may influence a court to deny enforcement. When these are invoked, courts are usually not explicitly describing the nature of the marriage institution itself, but some other concern.

a. Free exercise of religion.—A court may fear that enforcing an agreement will interfere with the free exercise of religion, and so may refuse to force an unwilling parent to raise a child in the religion agreed upon at the outset of the marriage,[93] or to force a spouse to go before a religious tribunal to seek a divorce even if such an appearance was the subject of a

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[92] *See, e.g.*, Hughes v. Lord, 602 P.2d 1030, 1031 (N.M. 1979) (denying recovery on a housework contract because "[i]t is the policy of this state to foster and protect the marriage institution. It is not the policy of this state to encourage the spouses to marry for money.").

[93] *See, e.g.*, Kilgrow v. Kilgrow, 107 So. 2d 885, 889 (Ala. 1958); *In re* Marriage of Weiss, 49 Cal. Rptr. 2d 339, 347 (Cal. Ct. App. 1996); *In re* Marriage of Wolfert, 598 P.2d 524, 526 (Colo. Ct. App. 1979); Zummo v. Zummo, 574 A.2d 1130, 1144 (Pa. Super. Ct. 1990) (religious freedom cannot be bargained away).

premarital contract.[94] While courts occasionally enforce these relatively common religious agreements, they are far more likely to declare them unenforceable.

b. Protecting child welfare.—A court may decide that enforcing an agreement is not consistent with the public policy of protecting the welfare of children, as in the case of agreements to limit child support,[95] fix child custody in advance,[96] refrain from having children, or prevent the child of a prior marriage from living with the couple.[97] While, as I'll discuss below, the failure to enforce agreements governing child custody has a serious impact on adult interests, the public policy against their enforcement is based on a court's understanding of the *child's* interests, distinguishing the nonenforcement rationale from the one used in household labor cases. The relevant public policy is not simply supporting the marriage institution. Despite the child's obvious stake in the outcomes of these potential agreements, parents, too, have their own stake in them. Even if the child's interests should prevail over the parents', a point that I accept,[98] there is reason to recognize the importance of the parental interest. I will argue later that the parental interest in custody is so strong that if it cannot be the proper subject of a contract on child welfare grounds, a parent is left without the ability to protect her most profound interest in the family. If another parent

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[94] *But see* Avitzur v. Avitzur, 446 N.E.2d. 136, 138 (N.Y. 1983) (an unusual case that upheld a clause in a ketubah, a traditional Jewish marriage document recording mutual financial obligations, that required parties to go before a jewish tribunal in the event of a civil divorce).

[95] *See, e.g.*, Monmouth County Div. of Soc. Servs. v. G.D.M., 705 A.2d 408, 413 (N.J. Super. Ct. Ch. Div. 1997) ("Parenthood, once embarked upon is not a dischargeable duty that private parties may dismiss of their own accord.").

[96] *See, e.g.*, *In re* Marriage of Garrity, 226 Cal. Rptr. 485, 489 (Cal. Ct. App. 1986); *In re* Littlefield, 940 P.2d 1362, 1372 (Wash. 1997) (en banc) (prenuptial agreement providing for custodial arrangement of any future marital children unenforceable).

[97] *See, e.g.*, Mengal v. Mengal, 103 N.Y.S.2d 992, 994 (N.Y. Fam. Ct. 1951); *see also* A. v. B., 252 A.2d 556, 557 (Del. Super. Ct. 1968) (couple had, but did not litigate, premarital agreement to have husband's children live with couple); Ball v. Ball, 36 So. 2d 172, 179 (Fla. 1948) (agreement contemplating the rearing of children though one party concealed operation to prevent pregnancy); Edwardson v. Edwardson, 798 S.W.2d 941, 946 (Ky. 1990); Huck v. Huck, 734 P.2d 417, 419 (Utah 1986) (agreements limiting child support not binding on court); Padova v. Padova, 183 A.2d 227, 229 (Vt. 1962) (premarital agreements should be carefully scrutinized and courts are to "override their provisions only to enforce duties imposed by law sought to be avoided by contract, or, *in particular, to protect the interests of children involved.*" (emphasis added)); RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981) (a promise that affects the custody of a child is unenforceable on grounds of public policy unless the disposition is also in the best interest of the child).

[98] I accept this point with acknowledgment that not everyone agrees, and some arguments against this view are powerful. The arguments against take two forms: first, adults are people too, and their interests are valid. Second, and a more forceful point, it is impossible to separate adult and child interests in the parent-child relationship. Courts are ill-suited to understand what is in a particular child's interests. Courts' inability to know enough to understand a particular child's interests does not fully make the case for subordinating a child's interest to a parent's. But it is often the case that it is hard to disentwine children's interests from those of their parents.

can protect *his* financial interest in the marriage, the law works an imbalance in the family economy against the parent with the greater stake in child custody.[99]

c. Providing access to the courts.—A court might also find a violation of public policy in an agreement never to divorce. One court in such a case was concerned about restricting a person's access to courts.[100] Another court decided, without clear explanation, that such an agreement lacked consideration.[101] I am not aware of any agreement of this sort that has been enforced. Again, I argue that though the courts' reasoning is external to the preservation of marriage, prohibiting this agreement can have a serious impact on adult interests, particularly in the case of a spouse who makes financial sacrifices in reliance on the continuation of the marriage.[102]

d. Adjudication concerns: conserving judicial resources and lacking workable standards.—Finally, a court might refuse enforcement in furtherance of a public policy against wasting judicial resources on what a court views as trivial matters. The objection based on judicial resources is thought to have enduring force by commentators.[103] This observation rests on the assumption that the nonmonetary issues one might bargain over within marriage are minor or trivial when compared with the kinds of issues that warrant judicial resources. I strenuously dispute the idea that not much is at stake in nonmonetary agreements in Part III, in which I discuss the proportion of women's labor that occurs within the home and the significant contribution that household labor and family care makes to a family's well-being. My contention that as much material well-being is at stake here as in the case of monetary premarital agreements will be critical to my critique of the enforceability of monetary premarital agreements.

A related but slightly different point is that courts lack workable standards for deciding these cases. This point does not rest as explicitly on the notion that these cases deal with trivial matters, but instead that they deal with matters that are hard to litigate. Comment a to the Restatement offers

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[99] *See* discussion *infra* section IV.C.1.

[100] *See* Coggins v. Coggins, 601 So. 2d 109, 110 (Ala. Civ. App. 1992); *see also* Moss v. Moss, 589 N.Y.S.2d 683, 685 (N.Y. App. Div. 1992) (agreement to stay married as long as they live unenforceable because "at best this clause represents nothing more than an unenforceable 'agreement to agree.'").

[101] *See* Hosmer v. Hosmer, 611 S.W.2d 32, 38 (Mo. 1980).

[102] Here it is interesting to consider the new Louisiana covenant marriage, which permits a couple to choose a marriage with more restrictive divorce laws than conventional marriage. *See* LA. REV. STAT. ANN. tit. 9, §§ 272-74 (West 1997). While this law is a part of a critical movement against no-fault divorce, it is a statutory change rather than one of a married couple's invention through contract. More significantly, the Louisiana covenant marriage simply requires a longer waiting period before seeking a no-fault divorce. The bill's proponents were not able to rally enough support for an absolute restriction, even by a couple's choice, on no-fault divorce.

[103] *See* McDowell, *supra* note 4, at 49 (nonmonetary issues too trivial to take up court time); Oldham, *supra* note 4, at 783.

this reason for not enforcing nonmonetary agreements: "the courts lack workable standards and are not an appropriate forum for the types of contract disputes that would arise if such promises were enforceable."[104] Many commentators have made a similar point. This might in part include the notion that adjudicating this sort of claim is inappropriate because it would change the nature of the claim, just as it would change an agreement to lunch with a friend if breach of that agreement were enforceable.[105] But any argument about negative effects on the social meaning of marriage should extend to financial contracts as well, as I will argue more fully below. The Restatement comment might also mean that courts have simply not developed standards for handling the claims.

These qualifications aside, there is some weight to the claim that nonmonetary issues are challenging to litigate, both as a practical matter and as a cultural one. This is part of why I will argue that we should slow or stop enforcement of *monetary* premarital agreements, in order to keep them on a par with nonmonetary ones. This solution avoids the difficulties with adjudicating nonmonetary agreements. Nonetheless, I think that the common claim that courts lack workable standards often implicitly includes the claim that the issues are not very important. When the stakes are high enough, courts find ways to create standards for many extremely difficult to administer problems, even when it exacts great costs or changes the nature of the social meaning of those problems.[106]

The foregoing doctrine is the target of the critical analysis in the rest of this Article. My criticism will proceed from an understanding of the nature of productive activities within the home, and the gendered implications of that description of the family economy. The next Part sets out the evolving discourse within law on the family economy. It asks what the doctrinal implications of the economic understanding of the family ought to be, taking into consideration other important theoretical questions about family life.

III. EXCHANGE AND THE ECONOMICS OF THE FAMILY

A. What is the Family Economy?

My critique of the doctrine leading to the monetary/nonmonetary enforcement divide depends upon a particular description of the family economy set forth more explicitly in this section. That description is of a family supported by both money and a constant flow of unpaid labor in the form of housekeeping, child, elder and other dependent care, household manage-

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[104] RESTATEMENT (SECOND) OF CONTRACTS § 190 cmt. a (1981).

[105] *See generally* Lessig, *supra* note 10; Posner, *supra* note 10, at 186-97.

[106] For example, child custody, structural injunctions such as prison overcrowding cases or school desegregation cases, efforts to value for tax purposes in-kind or illegal transfers, abuse and neglect determinations, assessing the maturity of a teenager to have an abortion, or the mental competency of a criminal defendant to represent himself.

ment, counseling and other emotional support, and entertainment. The family's well-being is secured by both these monetary and nonmonetary components. The family economy is the daily informal exchange of these various components for the betterment of individuals within the family and the family as a whole. The working assumption is that neither the monetary component of the family economy nor the nonmonetary component is more important to meeting a family's material needs.[107] Our social understanding of the institution of marriage—that no single one of these contributions is valued more than the rest—supports this starting point.

This description of the family economy is critical to understanding my critique of the uneven enforcement of premarital agreements, and for that reason the description bears elaboration, which is the task of this section of this Article. Here, I simply introduce its significance to my critique: if the monetary and nonmonetary components of a marriage make up an exchange that in most cases defines a significant part of the marriage, then treating them differently in contract law, which is the legal expression of the practice of exchange, would seem to require some serious substantive justification. In the end, the only viable explanations for their different treatment are adjudication difficulties and an inaccurate perception that only nonmonetary issues implicate child welfare. When administrative concerns are determining core substantive legal values, the tail is wagging the dog, and it is time to ask whether core substantive values can be restored through a mechanism that does not present the same administrative problems. The core substantive value I refer to is the equality in the exchange components of marriage[108]—equality realized through equal creation of legal entitlements.[109] The mechanism for reducing administrative problems is forbidding or seriously scrutinizing monetary premarital agreements.

Explorations of the family economy as I've described it are becoming more and more explicit in legal scholarship, and as that occurs, the image becomes more refined. Within family law, the discussion of the under-

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[107] A sample of the scholars who have made the argument for greater recognition of the value of home labor includes MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 67-68 (1995); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 578; Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992) [hereinafter Becker, *Maternal Feelings*]; Mary Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989) [hereinafter Becker, *Obscuring the Struggle*]; Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theory About Motherhood*, *in* REPRESENTATIONS OF MOTHERHOOD 56 (Donna Bassin et al. eds., 1994); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817 (1994); Dorothy Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993); Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

[108] One might posit this as a social meaning argument: the equality of these components is embedded in the social meaning of marriage, which is disrupted by this kind of uneven legal regulation. *See* Lessig, *supra* note 10.

[109] This is not a traditional version of formal equality, and might less controversially be referred to as equity between the monetary and nonmonetary components of marriage while having the same effect.

valuation of women's household labor has been going on for a long time in the context of property and income distribution at divorce, and to a lesser extent in discussion of child custody.[110] It has produced some constructive legal changes, particularly with respect to property, although many more are still needed.[111] Scholarly attention to the family economy is still uncommon within family law outside of the area of property and income distribution—its absence from the literature on premarital agreements a simple example.

In other areas of law, discussion of the nonmonetary components of the family economy are uncommon as well. It has been explored in the employment law literature by reference to women's greater burdens in the home and the impact of those burdens on their paid labor force participation, rather than by an exploration of the legal treatment of that home labor. But exploration of the legal treatment and effect of the family economy outside of those areas is a much more recent trend,[112] and there is a substantial amount of work left to be done in this area.

I want to distinguish between two ways of thinking about the nonmonetary contributions made in the home; I'll call them "loss thinking" and "gain thinking." The description of the family economy that I embrace—gain thinking—is more concerned with the *contribution* to family welfare that family care and home labor bring, rather than the detriment or losses suffered by those who perform that labor. The focus is on the productivity of household activities, not the correlating burden on those who perform them. Loss thinking, by contrast, emphasizes the losses that are suffered by women who focus on household labor as a result of the degradation in their paid labor force marketability.[113] The important observation that unpaid labor in the home can interfere with women's job opportunities in the paid la-

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[110] *See, e.g.*, Becker, *Maternal Feelings*, *supra* note 107.

[111] Sometimes, though, these discussions haven't fully captured the nature of the family economy, and this has led to difficulties in making the case for economic adjustments at divorce. For example, in the much debated problem of the division of a professional degree at divorce in which one spouse contributed to the other's acquisition of the degree, that contribution frequently has been conceptualized as financial support for the tuition itself, or for living expenses while the degree is earned. This rationale leads to rules that simply reimburse supporting spouses for the price of the degree. This rests on a narrow understanding of the non-student's contribution to the family economy. The vision of the new family economy being promoted here counts as the student spouses gain the ability to be a parent while studying and gaining a degree.

[112] *See, e.g.*, Becker, *Obscuring the Struggle*, *supra* note 107 (examining social security system and home labor); Ann Laquer Estin, *Love and Obligations: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995); Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274; Silbaugh, *Turning Labor into Love*, *supra* note 8; Staudt, *supra* note 107.

[113] This degradation of paid labor force marketability is multi-faceted, as it includes the need for shorter hours or occasional workplace absences during childrearing years, as well as the inability to invest in higher education or job training that will have a long-term effect on marketability even after childrearing demands slow.

bor force is an observation about losses to the caregiver.[114] Loss thinking has become quite widespread and has led to some incremental positive reforms, such as short-term alimony payments and the equitable division of property.[115] But loss-based equitable claims have been based on needs and reliance interests, which don't fully create entitlements in our legal system to the extent that productive labor creates entitlements. By contrast, the observation that unpaid laborers within the home should be entitled to an equal share of family property at the time of divorce can be an observation about the productive contribution made by unpaid labor to the family economy.[116] Productivity underpins entitlement.[117]

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[114] Those real losses have served in recent years as the basis for some equitable claims in the family law area, such as rehabilitative alimony, as well as the occasional claim in the employment law field, such as family leave which guarantees that a job will be held open for a person who takes a 12 week unpaid leave of absence to stay home with a new baby. I think an affirmative case can be made that society gains when parents are able to be with their youngest children and so compensation in the form of a job return guarantee is a response to that gain. Yet, that gain-thinking claim is not the claim on which family leave rests. Family leave is instead a measure taken to prevent a labor market loss that would occur as a result of labor in the home.

These are the kinds of losses that interest Ira Ellman in his work on alimony, both academic, *see* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 73 (1989), and practical, *see* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.02 & cmt. b (Proposed Final Draft Part I 1997), which makes the case for compensatory payments for the losses arising from divorce. Gains are not of interest to Ellman with respect to alimony because the ones discussed here, according to Ellman, are consumed within marriage or should be handled by property division. Because becoming a parent is not a gain entirely consumed within marriage, I believe gain thinking is still highly significant. *See* June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 1008 (1991) (noting that children are a benefit to both parents, and thus their care is a benefit to the secondary parent that deserves restitution at divorce); *see also* discussion *infra* section III.C.3.

[115] Both feminists and economists have given attention to the impact of specializing in household labor, either full-time or part-time, on marketable human capital development. The claim is that when women devote themselves full-time to their children, or even full-time to a paid job but in addition take most of the responsibility for their children, they usually are not able to develop as much marketable human capital as men who devote themselves full-time to developing career skills. The human capital development that results from work within the home often does not translate well to other situations, as it often involves intimate peculiarities of a given household. New Home Economists haven't objected terribly to this reality, but instead object to easy divorce rules that make it possible for women to specialize in home labor and then find themselves without adequate support from a husband who decides to seek a divorce. *See* GARY BECKER, A TREATISE ON THE FAMILY 226-30 (1981); Lloyd Cohen, *Marriage, Divorce, and Quasi-Rents; or "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 273, 278, 295, 303 (1987). This analysis fits largely into what I have called the "loss" vision of the family economy, with women having "lost" the opportunity to develop important human capital, and with divorce exacerbating that loss because women are prevented from reaping the benefits that can only be conferred as long as the marriage continues.

[116] This argument has been very successful in reform of marital property law. Unfortunately, most divorcing couples have no property. It has not yet been persuasive with respect to post-divorce income. It is also worth noting that a property claim for home laborers *can* be based on a claim that home labor is productive, but it can also be based on a claim that home labor causes debilitating losses, with marriage obligations serving as sufficient entitlement to have an ex-spouse be made responsible for those losses. I have argued elsewhere that courts often turn statutory language intended to recognize the productivity

Why does the distinction matter? Obviously the two are intertwined, but the distinction is important. Loss thinking requires correction only for the loss, not up to the amount of the potential gain. In economic terms, this means that "profit" from productivity above need-based levels is uncompensated in loss-thinking programs. For example, alimony based on a homemaker-spouse's needs compensates up to the point where the needs are met; the wage-earner spouse, however, is entitled to keep his remaining income even if it exceeds the amount necessary to meet his needs. He keeps the profit, then, because he is legally acknowledged as its earner. Compensation for losses in family law have proceeded as discretionary equitable pleas, not as a distributional entitlement.[118] Moreover, women with wages often don't appear to courts to be in need of compensation for losses to the extent that women who are full-time homemakers without wages are in need.[119] Given the work profile of most women today, which includes both paid labor force participation and a larger share of home labor than most men bear, loss thinking doesn't help many women. Gain thinking, however, aggregates a person's home labor with her wage labor, asking what the overall contribution of both is to a marriage.

Loss-thinking corrections tend to be oriented around correcting the *way* women allocate their time, pushing women closer to a wage-working model, while gain-thinking measures tend to ask for economic restructuring consistent with a person's choice to focus primarily on home labor. Thus rehabilitative alimony, for example, compensates divorced homemakers for their temporary unpreparedness to enter the wage labor market, but the wage labor market is the ultimate remedy for their relative economic weakness. Loss-thinking reformers want to prevent losses by changing behavior, with wage labor as the preferred behavior. In loss-thinking terms, the gold standard is wage labor marketability. Framing the issue as loss of that marketability reinforces the devaluation of household labor; framing the benefits of household labor as a gain refocuses the question on how to obtain property rights in that gain. Viewing the prime consequence of dedication

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of household labor into an opportunity to compensate for needs that arise as a result of household labor. *See* Silbaugh, *Turning Labor into Love, supra* note 8, at 55-67.

[117] *See, e.g.*, David Ellerman, *On the Labor Theory of Property*, 16 Phil. F. 293 (1985) (discussing importance of labor desert theory in property law).

[118] Formally, gain thinking plays a role in family law, as expressed, for example, in contribution-as-homemaker provisions that exist in most common law jurisdictions. Despite the language of these statutes, they are used by reference to meeting needs or enforcing sharing roles rather than valuing contribution. *See* Silbaugh, *Turning Labor into Love, supra* note 8, at 55-67 (discussing application of this provision is practice). Alimony statutes are explicitly need/equity based, making no pretense at claims of entitlement.

[119] This has been the primary alimony difficulty in advanced degree cases, in which one spouse puts another through graduate school and a divorce ensues immediately upon graduation. *See, e.g., In re* Marriage of Graham, 574 P.2d 75, 78 (Colo. 1978); Sweeney v. Sweeney, 534 A.2d 1290, 1291 (Me. 1987); O'Brien v. O'Brien, 489 N.E.2d 712, 718 (N.Y. 1985); Downs v. Downs, 574 A.2d 156, 158 (Vt. 1990).

to household labor as reduced wage labor marketability makes as much sense as viewing the prime consequence of wage labor as reduced ability to bond with family members. While it may be true that wage labor can produce that effect, that is not how we view its primary consequence; we focus instead on its benefits.

I want to argue that the burden experienced as a result of household activities is a product of the many legal rules surrounding that labor; the productivity occurs irrespective of legal rules, though legal rules may create occasional disincentives for choosing home labor. Using corrective legal rules to compensate for *losses* that are themselves the result of legal rules seems unnecessarily indirect; I advocate instead correcting the legal burdens that we have placed on home labor, such that losses would not occur in the first place.[120] Gain thinking is particularly better suited to thinking about the marriage exchange, because we are asking what affirmative components make up the understanding between most spouses.[121] Viewing nonmonetary contributions as a gain to the family will allow them to be examined on the same terms that wages are examined, which is for the gains they produce, not the losses.

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[120] It is important to note that loss thinking has sometimes resulted despite the efforts of reformers to employ gain thinking. The classic example of this can be seen in the equitable distribution statutes that have been adopted over the past 30 years in almost all states. Family law divorce reform has explicitly incorporated the insight that household labor is economically valuable by making "contributions to the accumulation of wealth made as a homemaker" one relevant factor in deciding the proper distribution of family wealth upon divorce. The vision of the family economy that focuses on productivity rather than loss has facilitated constructive discussion of appropriate divorce reform, *see, e.g.*, Carbone & Brinig, *supra* note 114, at 1008 (noting that children are a benefit to both parents, and thus their care is a benefit to the secondary parent that deserves restitution at divorce), but frequently discussions that make reference to productivity ultimately return to loss/victimization or don't properly distinguish the two. Courts, as distinct from scholars or legislatures, have had a particularly difficult time incorporating insights on the productivity of home labor, even when it has been incorporated into statutes, as in the case of equitable distribution statutes that require courts to consider the "contribution of a homemaker" to the acquisition of assets to be distributed at divorce. Despite the explicitly productivity-oriented language, courts prefer to analyze homemaking as the cause of losses that create needs that ought to be met at divorce, not as the cause of the acquisition of property. *See* Silbaugh, *Turning Labor into Love, supra* note 8, at 55-67. This is most clearly evidenced by judicial refusal to apply the "contribution as homemaker" provision in cases in which both spouses work in the wage-labor market but one also does most of the work at home. *See, e.g., In re* Marriage of Stice, 779 P.2d 1020, 1027-28 (Or. 1989). If productivity were the measure, the home labor would be just as relevant as it is in the case of a full-time homemaker. If, however, need or loss is the measure, a wage-laboring homemaker (called by one court a "breadwinner-homemaker-spouse") is thought not to be an appropriate candidate for relief under the contribution as homemaker provision, because she is able to provide for herself through wages and thus her losses are minimized.

[121] Some may think that this will lead to a low measure of the value of home labor, as its appropriate "gain-based" valuation will be that of a paid housecleaner. I reject this argument below. *See infra* note 143 and accompanying text. The paid housekeeper is underpaid, and the devaluation of women's work legally and culturally affect her wage. Moreover, the market price of spousal home labor would be much higher were it estimated based on the market wages of professional substitutes such as nurses, teachers, counselors, and managers.

B. Some Working Assumptions About Household Labor

A profile of nonmonetary family labor has been developing in recent years in legal scholarship. It will serve as our working understanding of that labor, and so it is summarized below.

Women contribute more nonmonetary welfare to families than men do. The first assumption is that the family economy that I describe is not sex neutral. Men bring more wages to a marriage and women bring substantially more unpaid labor. When we analyze the disparate treatment of wage and home labor, we are looking at the disparate treatment of men's and women's labor, at least as a matter of averages.[122] Women on average spend twice as much time as men engaged in productive activities within the home without pay.[123]

This gender disparity persists whether or not women work in the wage labor market in addition to their work at home. This gendered description of the family economy is not a description of primarily families with one wage-earner and one full-time unpaid caregiver in the home. There is a substantial body of empirical work that demonstrates that married women's paid labor force participation neither significantly raises the amount of home labor performed by their husbands nor substantially decreases the amount of home labor performed by women. Instead, it decreases the amount of time women are able to allocate to leisure.[124] This information poses a serious problem to those who would argue that the poor legal treatment of home labor should be left in place, but that home labor should be redistributed so that men and women bear an equal share of that work. This is often called the liberal feminist position,[125] though it is held by a range of scholars. To them, disparities in wealth caused by the unequal distribution of home labor are to be solved through women's increasing participation in the wage labor market, which will give women the economic or social

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[122] I have argued elsewhere, and will only mention here, that the unequal division of labor within the home cannot be said to be inherently problematic or unproblematic without accounting for many differences among women first, including different experiences, opportunities and preferences, as well as race and class differences. For an extensive discussion of the varying taste for home labor based on race and class, see Staudt, *supra* note 107, at 1579-83. What I find problematic is the disparate legal treatment of labor inside versus outside the home.

[123] *See* SARAH FENSTERMAKER BERK, THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS 8-9 (1985); VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 77-78 (1988); ARLIE HOCHSCHILD, THE SECOND SHIFT 3-10 (1989); BETH A. SHELTON, WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE 65-66, 73, 79 (1992); David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?*, 42 FAM. REL. 323, 323-31 (1993).

[124] *See* FUCHS, *supra* note 123; HOCHSCHILD, *supra* note 123; SHELTON, *supra* note 123, at 65-66, 73, 79; Demo & Acock, *supra* note 123, at 323-31. For an extensive examination of this data, see Silbaugh, *Turning Labor into Love*, *supra* note 8, at 8-14.

[125] For a recent example, see RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES AND BARGAINING POWER 4 (1995) ("In order for women to achieve economic equality with men, *men will have to do half the work of raising children.*").

power to force a more equitable sharing of home labor.[126] But this has not occurred; the distribution of home labor has remained stable through fluctuations in women's wage labor force participation. For those concerned with women's economic power, this places a greater emphasis on the need to improve the entitlements and legal status of unpaid labor.

The economic value of unpaid labor is staggering. Economists estimate the dollar value of unpaid household labor in the United States is the equivalent of 24%-60% of the Gross Domestic Product, depending on how the calculations are made.[127] The United Nations concludes that *women's* unpaid work worldwide produces the equivalent of $11 trillion, while the formally reported value of the world economy, not including unpaid labor, is $23 trillion.[128]

Unpaid labor contributes in diverse family forms. An equally important insight from the new family economy literature is that substantial productive contribution is not tied to any particular family form, and there is no reason to believe that married couples are more productive at home than single mothers, gay or lesbian families, or multi-generational living arrangements.[129] In addition, there is some evidence that the amount of time women spend on household labor does not vary much with race, class, or ethnicity.[130] The doctrine under review here necessarily concerns a married family format,[131] and in practice at least a middle-class level of wealth, but

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[126] It is important to note that many women find their home labor, whether combined with wage labor or not, satisfying, and so redistribution may not be their first choice. Redistribution becomes important only because of disparate legal treatment of waged and unwaged labor. To see things otherwise is to replicate the problem of treating wage labor as the gold standard.

[127] *See* EUSTON QUAH, ECONOMICS AND HOME PRODUCTION: THEORY AND MEASUREMENT 75-112 (1993); Ann Chadeau, *What is Households' Non-Market Production Worth?*, 18 OECD ECON. STUD. 85, 97 (1992) (her estimates range from 32% to 60% depending on whether substitution costs or opportunity costs are used as a measure); *see also* Silbaugh, *Turning Labor into Love*, *supra* note 8, at 17-18.

[128] When men's and women's unpaid labor is combined, the value rises to $16 trillion. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 97 (1995).

[129] *See* FINEMAN, *supra* note 107, at 228-33 (arguing that for legal purposes about which there is public concern, family should be redefined as child-mother, or dependent-caregiver, and the changing relations among adults should be handled through private law disciplines such as contract and tort); Demo & Acock, *supra* note 123, *passim*; Minow, *supra* note 107, at 829-30 (single mothers on welfare often need to do more work at home to provide for basic needs of children, as they are unable to purchase time-saving appliances or market substitutes such as prepared foods); Staudt, *supra* note 107, at 1617-18 (focusing on importance of family diversity in crafting solutions to undervaluation of home labor).

[130] *See* Heidi Hartmann, *The Family as the Locus of Gender, Class and Political Struggle: The Example of Housework*, 6 SIGNS 366, 385 (1981).

[131] Contracts between same or opposite sex unmarried cohabitants tend to be enforced or not based on ordinary contract principles; these will still exclude contracts that pertain to children, and so productive caretaking *may* not be a part of the legally negotiable family economy, although too little is known about the way a childcare contract between unmarried parents, gay or straight, would be handled to say for certain. For a discussion of same-sex contracts, see Mary Becker, *Problems With the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996).

the doctrinal failure to incorporate the insights of the new family economy can be seen in other areas of law across all kinds of family forms.[132]

Legal doctrine minimizes the value of domestic labor. For our purposes, the most significant issue brought to the surface by the new family economy literature is that legal doctrine dramatically undervalues domestic labor by denying those who perform it property rights in their labor and social benefits generally connected to labor.[133] Women do not gain property rights in their labor either through appropriate rights of action against beneficiaries of that labor, including present or former spouses or co-parents of children, or through the ability to gain the contractual security discussed in Part II. They do not gain social benefits such as welfare, social security, unemployment, disability or health benefits typically associated with paid labor. Legal rules tend to ignore the productive nature of household labor altogether, excusing the labor from entitlement based on its intimate context, on the assumption that the emotional context of home labor cannot be sustained if that labor is understood to lead to the kinds of entitlements associated with wage labor.[134]

C. The Exchange: The Valuable Components of Marriage

I've described this family economy as the daily informal exchange of money and nonmonetary components of marriage for the betterment of individuals within the family and the family as a whole. I've also said that women contribute more nonmonetary wealth than men, and men more money than women, on average. But more must be said about the contours of this particular description of the family economy. What is being exchanged? What is its relevance to premarital agreements? Second, implicit

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[132] For example, welfare laws and social security laws neglect the home labor of single mothers. *See* Silbaugh, *Turning Labor into Love*, *supra* note 8, at 38-41, 67-72. To the extent that the doctrinal argument here, however, is part of a larger project aimed at bringing the productive nature of home labor into the law, it should influence family forms other than heterosexual married couples.

Consider Carbone and Brinig's point that fathers have gained or benefited from women's unpaid labor by enjoying the status of parent. *See* Carbone & Brinig, *supra* note 114, at 1008. Fineman's argument for unhitching parent-child relations from adult affinities is powerful in part because of the inadequacy of insisting on restitution of the father's benefit when the father is only tenuously connected to that benefit or has no support to give. *See* FINEMAN, *supra* note 107, at 228-33. Fineman's radical rearrangement makes less sense if it ignores the opportunity to recoup that benefit in cases where it does exist, as in the case of some divorcing middle class couples. Reform of the law of premarital agreements, then, does nothing for the huge numbers of women whose home labor isn't a part of a family economy that directly benefits a wage-earner. But for that case—in which one is more likely to see a premarital agreement—there is an inequity worked between the spouses by the failure to appreciate the value of unpaid activities to the family economy.

[133] *See generally* Becker, *Obscuring the Struggle*, *supra* note 107 (examining social security system and home labor); Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Silbaugh, *Turning Labor into Love*, *supra* note 8; Staudt, *supra* note 107.

[134] For a historical account of the origins of this disentitlement, see Siegel, *supra* note 133.

in my understanding of the family economy is a normative view that the monetary and nonmonetary components should be treated equally, if not identically, and more must be said about that position to defend it against the charge that different treatment flows from relevant differences between the kinds of labor. I will make the argument that wage and nonwage labor play a similar role in family life in what I think is an unexpected manner: I will argue that to a family, wage labor is highly intimate, rather than arguing that household labor is not particularly intimate. I hope to draw the reader away from the view that nonmonetaries are too intimate for an informal accounting of marriage by asking that we consider the ways in which *money* is intimate within families.[135]

There are important nonmonetary obligations that we can meaningfully call economic contributions, and in addition, there is money itself. This section undertakes something that is bound to be subject to disputes large and small. I plan to provide a starting sketch of the labor exchanges that usually take place within a marriage. In many marriages some things can be added or subtracted from this list, but that sort of diversity does not take away from the observation that when these mainstream items are exchanged, they are not all susceptible to legal contracts, and that has a distorting effect. I am also not attempting an actual accounting, because I'm not sure a complete accounting is possible. This is particularly true with respect to nonmonetary benefits that one or both members of the marriage experience that may or may not be produced by labor within the marriage itself—happiness with the town in which the family lives, for example. My purpose here, though, is to set out the *labor* components that I believe are bringing equal value to the marriage, in order to contrast them with the narrower class of items of value recognized in the premarital agreement cases. I have divided these into four categories: nonintimate household labor, intimate household labor, children, and money.

1. Nonintimate Household Labor.—When one uses the term "housework," the things in this category are the first to come to mind, although the extent of the labor that goes into this category may escape the observation of some. Most will agree that cleaning falls into the category of housework, and contributes to family welfare in the form of better living conditions. Added to that are cooking, grocery shopping, laundering, the management of finances, gardening, washing dishes, arranging for services like trash removal, heating, automobile or plumbing maintenance, planning family events like vacations or holidays at home, sewing and other repairs, caring for pets, returning phone calls, or driving to pick up either children or goods. These kinds of services contribute concretely to a family's welfare, providing comfort and material benefits that could be quite expensive to ar-

[135] *See* discussion *infra* section III.D. *See generally* VIVIANA A. ZELIZAR, THE SOCIAL MEANING OF MONEY 36-70 (1994).

range and purchase on the market. This is especially so if one considers the time it would take to shop for a replication of these services on the market that would approximate the tailoring to individualized tastes and preferences that a family member can provide.

In addition, nonintimate labor can contribute to the market value of a family asset, usually a home, as distinct from contributions to the material welfare of family members that are consumed as they are produced. A spouse may provide labor, either physical or planning and organizational, to the upgrading or adding onto a house. Any activities that involve organizing neighbors for the betterment of the property value also count as family labor, such as organizing around crime reduction or around group expenses like improvements to shared driveways or sidewalks. This labor enhancement to capital goods, like home improvement, is unpaid labor contributing to family wealth.[136]

2. Intimate Household Labor.—The more intimate household services can be divided into two categories for the purposes of considering marital exchange: intimate services between spouses and intimate services provided by one spouse to the dependents of either one or both spouses, such as child care and elder care. Many intimate services, unlike many nonintimate services, would be extremely difficult to replicate with any semblance of similarity on the market. Nonetheless, these services still represent labor that contributes greatly to family welfare.

The first-party intimate services include counseling, nursing an ill spouse, and consortium. There is a question of why we should be concerned with these services; after all, our claim for an interest in the nonintimate household services is that labor is not equally distributed between the parties to the marriage. That being the case, we have to be concerned about the effects of providing fewer labor entitlements to household labor than wage labor because one party to a marriage, much more likely to be the woman, will be left with a legally produced economic weakness. By contrast, we might not make the assumption that intimate labor is regularly distributed unequally, and we would find the assumption difficult to prove in any event. Unequal distribution of intimate services might be hypothesized from works in sociology and psychology on the disparate emotional support given by women versus men on average.[137] These theories are contested,[138] and moreover it may be difficult to translate these general

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[136] *See* Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2415 (1994) ("[W]hen we see the unspoken property within arrangements that masquerade as 'sharing,' we can also see their injustice . . . .").

[137] *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[138] *See, e.g.*, William J. Friedman et al., *Sex Differences in Moral Judgments? A Test of Gilligan's Theory*, 11 PSYCHOL. WOMEN Q. 37, 44-46 (1987) (finding no difference between men's and women's

gendered studies into hypotheses about relations within marriages. However, some evidence suggests that a man's emotional well-being improves when he is married and a woman's declines when she is married.[139] My argument here is clearly speculative; although it does not seem counterintuitive to me that women provide more counseling-type services within marriage than do men on average, I do not feel that the rest of this description of exchange within marriages rises or falls on the veracity of this claim.

Leaving the hard-to-prove question of the exchange of intimate services between spouses, we move to the more straightforward issue of intimate services to other family members, most prominently child and elder care. Statistically these services are provided by women to a much greater extent than by men. I classify this as intimate service for two reasons. First, the question of market substitute is murkier; while these services are regularly purchased on the market, some would argue that parental care of children, for example, is a thing unto itself and is not the same as nurture by a paid domestic worker. While I have taken issue with this claim at least in its extreme form,[140] I will treat the claim as a reason to think about the intimate labor of child and elder care differently from nonintimate services, because many think the claim has substantial merit. If the claim is true, it ought to raise rather than lower the value of this intimate care to the marriage itself.

The second reason to classify childcare as intimate service is that childcare illustrates quite prominently an important issue with the description of household labor as akin to market labor: there is substantial benefit to the person who performs the labor, not just to its recipient or to those who have a legal obligation to make sure the care is provided. Both parents do have a legal and moral obligation to make sure that their children's needs are met. In that important sense, one parent's work as a primary caregiver of a child directly benefits the other parent, not just the child. But beyond discharging a duty, whether legal or moral, to care for one's child, a primary caregiver derives her own pleasure from childcare. In economic terms, this makes childcare some combination of labor on one hand and leisure/consumption on the other. While this seems right to me, it shouldn't undermine our ability to compare the contribution to marriage made by primary caregiving with the contribution made by wage labor. The comparison is still valid because of two underappreciated points about wage labor that I will make in more detail below. Briefly, those points are first that

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moral reasoning); Linda K. Kerber et al., *On* In A Different Voice*: An Interdisciplinary Forum*, 11 SIGNS 304 (1986).

[139] *See* Nadine F. Marks, *Flying Solo at Midlife: Gender, Marital Status, and Psychologic Well-Being*, 58 J. MARRIAGE & FAM. 917, 930 (1996); *see also* PUBLIC HEALTH SERV. CTRS. FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 88-1755, DATA FROM THE NATIONAL HEALTH SURVEY SERIES 13, NO. 94, OFFICE VISITS TO PSYCHIATRISTS (1985) (women in the age group 25-44 pay more visits to psychiatrists office than do men in the same age group).

[140] *See* Silbaugh, *Commodification*, *supra* note 8, at 81-82, 103, 112-15.

much paid labor has a component of benefit to a worker that exceeds the wage paid for that labor, however we choose to name it.[141] Second, the act of returning wages to a family by the wage-earner also gives substantial emotional benefit to that wage-earner, who enjoys the ability to provide for his or her family financially. That personal benefit from providing financially is similar to the benefit to a primary caretaker from providing nurture directly.

What constitutes childcare? For a parent, it includes not only supervision, but both short- and long-term planning for a child's development. At the very least, a parent is a teacher/tutor, a nurse, a counselor, a driver, an entertainer, and a planner. I raise all of these functions because it is frequently argued that the economic value of a primary caregiver is equivalent to the wage paid to a worker at a daycare center. While I would argue that the worker at a daycare center's wages are set far too low and on an uneven playing field,[142] it is also the case that the primary caregiver provides more nurture to a child than many daycare workers, given the long-range planning that a primary caregiving parent performs in nurturing a child.

Elder care is rarely a legal obligation of children.[143] But it may be considered a moral obligation, and it is certainly labor. As to the benefits conferred between spouses, it will make a difference in any given marriage whether a caregiving spouse is caring for her own or her spouse's relatives. However, on average, women are more likely to care not only for their own aging parents, but for their spouses' aging parents, than men are likely to provide direct care for their wives' aging parents.[144] Thus the legal treatment of elder care, like childcare, has implications for economic equality between men and women.

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[141] *See* ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 38-45 (1997). For an extensive discussion of those benefits, see B. K. Atrostic, *The Demand for Leisure and Nonpecuniary Job Characteristics*, 72 AM. ECON. REV. 428 (1982); *see also* Silbaugh, *The Polygamous Heart*, *supra* note 8.

[142] I have argued this in both Silbaugh, *Commodification*, *supra* note 8, and Silbaugh, *Turning Labor into Love*, *supra* note 8. Briefly, a tax subsidy to the unpaid worker deflates the competitive wage a paid domestic worker can charge. Moreover, specialized services like tutoring, nursing and driving are far more expensive than the wage of a domestic worker, which may suggest validity to the often-cited claim that race, gender, and immigration status play a role in the deflation of wages for paid domestic workers. Finally, domestic workers are explicitly exempted from coverage under collective bargaining statutes such as the National Labor Relations Act, so their wages have never been affected either by union organization or by the threat of union organization.

[143] No one is obliged to provide direct service to their parents, but a few states impose some financial responsibility on children whose parents are institutionalized. *See* Margaret F. Brinig, *The Family Franchise, Elderly Parents and their Adult Siblings*, 1996 UTAH L. REV. 393, 419 n.132.

[144] *See* FAITH ROBERTSON ELIOT, GENDER, FAMILY AND SOCIETY 128, 129, 133-34 (1996); Sherry L. Dupuis & Joan E. Norris, *A Multidimensional and Contextual Framework for Understanding Diverse Family Members' Roles in Long-Term Care Facilities*, 11 J. AGING STUD. 297, 297-325 (1997).

3. Children.—The reader may wonder why we've discussed childcare under one heading and have a separate heading marked children. This section will be most controversial to a theory of exchange within marriage, and so I will ask the reader up front to suspend judgment on commodifying implications until all of the qualifications are heard. The claim is simply this: the existence of children, their introduction into the world, is a benefit to their parents, and the ability to parent is something that is exchanged between spouses within marriage. At the most basic level, the claim that providing this benefit to one another is more work for a woman than for a man is supported by the facts of pregnancy and childbirth, at least in the majority of cases in which children are reproduced and not adopted.

Beyond the act of producing a baby, however, is the process of nurturing a child that results in particularly rewarding parenthood. While this may seem to be an overlap with childcare, let me try to distinguish it. Both parents are obliged, morally and legally, to provide for their children. Childcare discharges that duty, as discussed above, and therefore benefits parents.[145] But in addition, being able to *be* a parent to a successful child, however that success is measured,[146] is itself a benefit, and the success of that child is in some part the product of primary caregiving. So childcare discharges the duty to provide for a child; good childcare discharges that duty well. Good childcare *also* can provide parents with the *irrevocable* experience of being a parent, and this experience is a benefit.[147]

Margaret Brinig and June Carbone have emphasized the need to look at this benefit conferred in the form of the opportunity to be a parent when considering the family economy.[148] They argue that once you have been given parenthood by your spouse, you don't lose the benefit of being a par-

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[145] For an argument to this effect, see Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2230 (1994) (primary caregiving spouses enable a noncustodial parent's ability to parent).

[146] Here, I mean successful socially, psychologically, academically, athletically, artistically, or in whatever other sense any given set of parents seeks success for a child.

[147] After divorce, let's assume, as is usually the case, that the mother has primary physical custody. The father then loses one of the benefits of the status of *being* a parent: the child's company. To Gary Becker, this explains why fathers pay less child support: they don't receive a benefit from parenting without custody. *See* BECKER, *supra* note 115, at 374-76. A father does still benefit, however, from the mother's nurturance of the child, which furthers both his legal obligations and his continued ability to be a parent. That care will benefit him into the child's adulthood, after which custody will not be a relevant way to conceive of the status of being a parent. Very few older parents would argue, though, that the benefits conferred through the status of parenting end when children leave home. The noncustodial parent ordinarily has more contact with his child than the parent of a child who is away at college, but the latter parent still derives a benefit from parenthood. Once given the benefit of being a parent, the benefit cannot really be taken away, although it can certainly be diminished through the beneficiaries neglectful actions or through the primary caregiver's vindictive actions. I take those cases to be outside the norm, though by no means unheard of. The point is that the status of being a parent is beneficial because of a child's company, but in substantial part it is beneficial even without a child's company.

[148] *See* Carbone & Brinig, *supra* note 114, at 1008 n.238.

ent; once done it lasts a lifetime and cannot be expunged as a benefit. This is so, they argue, even if you are a long-hours-at-work father.[149]

Others have suggested this value *to parents* of parenting, although they have not put it in terms of a family economy, as economic discourse may not be in the forefront of their minds. Some have argued, particularly Mary Becker and Martha Fineman, that the parental interest is so strong that it should override a court's view of the child's interests, which will be hopelessly ill-informed by comparison to the primary parent's understanding in any event. Their argument reflects a sense of the strength of the caregiver's stake.[150] Katharine Bartlett has argued that parenting gives parents a chance to realize their "ennobled selves"—a deeper way of expressing the parental benefit perhaps than the one economists might use, but an expression of that benefit nonetheless.[151] Others have made similar claims, emphasizing the magnitude of the value of the parental status.[152] Bartlett has also pointed out the instrumental benefits to *parents* that arise from the negative rights expressed in the Supreme Court parental rights cases, *Wisconsin v. Yoder, Meyer,* and *Pierce.*[153]

The potential permanence of this benefit is important to the claim that nonmonetary contributions to marriage should be treated equally to monetary contributions. This is because some will argue that the items of exchange described herein are exchanged for the ongoing marriage only and are consumed during the marriage; when the marriage ends, nonmonetary benefits end. But the ability to be a parent is not extinguished by divorce, nor is a former spouse's contribution to that parenting. The claim for post-divorce financial sharing is not unlike the claim that parental labor still continues post-divorce.

Admittedly this proposition treads in delicate territory.[154] If it suggests that the child is a consumer good, it is offensive to the child's own integrity

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[149] Certainly, some parents may not experience parenting as a benefit, but instead as a burden, as is the stereotype of the deadbeat dad. That this parent does not wish to pay child support, however, does not mean that he does not enjoy the fact of being a parent and having a child. Similarly, some may argue that having children is a burden to women who are usually their primary caregivers, and not a benefit. Again, that they are a burden does not mean that they are not also experienced as a benefit.

[150] *See* Becker, *Maternal Feelings, supra* note 107, at 191; *see also* FINEMAN, *supra* note 107; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737-39 (1988); Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 666-67 (1992).

[151] Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988).

[152] For a similar view, see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 962 (1996); David A.J. Richards, *The Individual, The Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980) ("[C]hild-rearing is one of the ways in which many people fulfill and express their deepest values about how life is to be lived.").

[153] *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879-90 (1984).

[154] Economist Nancy Folbre comments,

as an individual. But to argue that parenting is a benefit is not to argue that the law should privilege that benefit over the child's interests; indeed, the law with respect to child custody appropriately privileges the child's interests over the parents interests in the child, at least in theory.[155] The position that a child's interests are to be privileged over parental interests is not a reason for denying the existence of parental interests in children, especially because denying those interests will, as Brinig and Carbone have argued, distort our image of exchange within marriage. If we shy away from the benefits conferred upon one spouse by another in the form of conferring parenthood, both biologically and in its fulfilled form following good primary caregiving, we miss a fundamental benefit of the marital exchange for that majority of marriages that yield children. Thus the stakes are too high to ignore it.

Here again, it is important to remember that we are distinguishing loss thinking from gain thinking. We are not simply asking what losses have been suffered by primary caregivers as a result of caring for children; we are instead asking what *gains* are conferred by one spouse upon another in the form of the ability to parent.[156] In part because of commodification concerns, I will argue that children should not be permissible subjects of premarital agreements.[157] But acknowledging that they confer a benefit on parents permits us to consider the side effects of the position that their individual interests should prevail over adult interests. If we cannot permit parents to contract over this fundamental benefit exchanged within marriage, how is the marital bargain distorted when other issues are in fact subjectable to contract? This question will be the subject of Part IV.

> Children tumble out of every category economists try to put them in. They have been described as consumer durables providing a flow of utility to their parents, investment goods providing income, and public goods with both positive and negative externalities. Children are also people, with certain rights to life, liberty, and the pursuit of happiness.

Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86 (1994).

[155] This is the principle expressed by the "Best Interest of the Child" standard, used in almost every jurisdiction to decide disputed child custody between fit parents. Like most commentators on the subject, I have my doubts about the ability of courts to make sense of this standard in a way that benefits either children or their parents, but that is not the subject of this Article. For statements of the practical difficulties of the Best Interest of the Child standard in providing for good child welfare decisions, see, for example, Bartlett, *Re-Expressing Parenthood*, *supra* note 151, at 303; Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 119-21; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 250-51 (1975).

[156] This is an important response to Ellman, who thinks gains need not be considered, particularly given the evidentiary problems with a genuine accounting, because they are generally consumed within marriage. *See* Ira Mark Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259.

[157] In any event, it would be a substantial, and at this point, unimaginable departure from current law to use a contract to prevent a judge from acting on her view of a child's best interest in a custody dispute.

4. Money.—The final common element of a marital labor exchange is cash. Most marriages have an inflow from wages that provides for necessities like housing, food and clothing, and luxury goods and services. Wages are earned by the labor of one, or in most marriages today both, spouses in the paid labor market. Despite the fact that most marriages have wages from both spouses, men contribute more wages than do women, as men work more paid labor hours on average and earn higher wages.[158]

D. Equivalence of Home and Wage Labor: Grounds for Equal Treatment

This explanation of an exchange may seem like a comical thought exercise in viewing a relationship that people know to be something other than a mercantile exchange. I will argue more fully in section E that not all exchanges are of a commercial nature. Here I simply want to acknowledge that what I have set out above is not the only proper way of looking at marriage. But it does have its own purpose. While many marriages do not include many of the above described interactions, and those that do may do so on varied terms, the description illuminates two issues we must understand in order to make a reasoned decision about the enforcement of premarital agreements: the social-meaning issue and the gender equity issue.

The social-meaning issue is this: the quality of the things people bring to marriage differ; some things are easy to count, some are not; some are fungible, some are not; some are susceptible to traditional ideas about property rights, and some are not. But all are the product of spousal efforts, and all are valuable to both spouses and to some extent *to the culture*. A legal conception of marriage ought to support central positive social understandings of marriage, including an understanding that declines to prioritize the value of these disparate contributions.[159] Whether or not it is the only available understanding of marriage, this is a central positive social meaning of marriage to the culture at large, that which makes it an institution, not simply a private contract.[160]

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[158] *See* sources cited *supra* note 123. For a recent confirmation of the persistence of the wage gap, see Tamar Lewin, *Women Losing Ground to Men in Widening Income Difference*, N.Y. TIMES, Sept. 15, 1997, at A1.

[159] Notwithstanding the multiple possible social meanings of marriage, it is appropriate to identify those that are valuable in thinking about the preservation versus the transformation of the social understanding of marriage. While many aspects of family law have changed tremendously in the face of changes in the culture at large, courts continue to struggle to update and transform, but to maintain, the principle that disparate efforts are equally valuable to marriage. That effort to preserve by updating a principle that no one kind of labor is to be privileged over another is evidence of the strength of that common understanding of a social meaning of marriage.

[160] *See generally* Cahn, *supra* note 1, at 238-40, 246-48 (arguing that gender equity has become a key moral value underlying family law); June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994) (discussing the larger stake in marriage as an institution important in the integrated task of rearing children); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 194 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (marriage as

The equity issue is this: *on average*, and by no means universally, the line that divides the countable from the uncountable is in practice a line that divides men's contributions from women's contributions. It is in order to illuminate these two issues that I set out the exchange above, knowing that it is only a sketch, and only one of a number of possible sketches, of the marital relationship.

I have said that I would defend my claim that monetary and nonmonetary components of marriage are entitled to equivalent, if not always identical, treatment. I will undertake that task in this section by defusing the suggestion that the differences between paid and unpaid labor are so relevant as to be appropriately decisive of their different treatment. I will try to make the case that barring some strong counterargument, equal legal treatment should be either a starting point or a presumption in considering the monetary versus the nonmonetary labor components of marriage.

Meaning of Money in Marriage. What does it mean for me to put money into this exchange along side seemingly different components of marriage, such as parenting or intimate services? Here are some possibilities. Some people might think that money is naturally one of the benefits exchanged within marriage, but might be skeptical of the claim that the other benefits are equally important. I have argued several times elsewhere against this view, and will not repeat those arguments here.[161] Conversely, a person might think that the other items are the true exchange that make up a marriage, and money is just a tool to support the workings of the real marriage—not itself an element of the marriage exchange. This is in effect, and sometimes explicitly, the view taken by courts that will enforce monetary premarital agreements only.[162] But many readers will take the more centrist position that money, if it is part of the marriage exchange, is so in a very different way than the other items. It is precisely this last view, because it is so commonly held, that I wish to examine and dispute.

The objection goes as follows: while we can agree that nonmonetary contributions are valuable labor and have that in common with wage labor, they are also something more than wage labor, and that feature makes them different. It takes away from unpaid labor to call it equivalent to wages in its role in the family. That claim is based usually on the intimate context in which family labor occurs, which makes that labor an expression of highly

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an institution has a meaning to the parties and to society at large that the cost of the division of labor will not fall disproportionately on one party but will be spread socially even beyond the marriage).

[161] *See* Silbaugh, *Commodification, supra* note 8; Silbaugh, *Turning Labor into Love, supra* note 8.

[162] See language in an opinion by the Louisiana Supreme Court that was later reversed, McAlpine v. McAlpine, No. 94-C-1594, 1995 WL 71495, at *1 (La. Feb. 9, 1995) ("Only marginal aspects of these essentially personal relationships may be open to private ordering through contract proper or other expression of volition," meaning that even support agreements are excluded, but property agreements are allowed.). Upon rehearing, the Louisiana Supreme Court decided to join the majority of states by allowing alimony agreements as well. *See* McAlpine v. McAlpine, 679 So. 2d 85, 92 (La. 1996).

personal affection, even though it is also materially beneficial.[163] I would acknowledge rather than minimize this aspect of family labor, but argue that it would be odd for affection to detract from rather than add to the value of that labor.[164] But that is not the only basis for treating them equally: wages and housework can be treated as though they are equivalent because they are *both* expressions of affection as well as materially beneficial. I do not defend their similarity solely on a claim for a materialist view of household labor; instead, I defend their similarity on a claim about the multi-faceted nature of wages *in families*.

This is the surprising claim: money in marriage is highly intimate. Couples fight over money more than anything else in marriage.[165] The ability to financially support one's family is an accomplishment about which individuals feel proud.[166] At one level, it should be completely unsurprising; people work hard for wages all day *in order to support their families*.[167] Families organize many of their aspirations for their children's education and future well-being around savings and the ability to provide safe and healthy housing and food by earning adequate wages. Wages are appreciated within families, as is the work that produces those wages, as an act of familial responsibility, commitment, and affections. Squandering or hoarding money within families evokes an emotional response because it is considered an act of personal disloyalty, as when a noncustodial parent fails to pay child support, or when an alcoholic parent drinks her wages. There is nothing profane about wage work when compared with housework; wages are extremely intimate to family life.

And yet, some law surrounding the family would lead one to think that money is *not* intimate to family workings. This is particularly true with respect to premarital contracts. Courts are willing to hold finances out as separate from the rest of the marriage; contracts with respect to finances do not go to the heart of marriage, whereas contracts over unpaid labor do. Thus, courts believe you can alter the legal consequences of marriage with respect to money through the use of contract without undermining marriage itself, but not so for nonmonetary labors. This seems wrong: the flow of

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[163] *See* Silbaugh, *Turning Labor into Love*, *supra* note 8, *passim*.

[164] *See* Silbaugh, *Commodification*, *supra* note 8, *passim*; Silbaugh, *The Polygamous Heart*, *supra* note 8, at 99-100.

[165] *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX, 53, 77-93 (1983); Daniel P. Sternberg & Ernst G. Beier, *Changing Patterns of Conflict*, 27 J. COMM. 97, 97-100 (1977) (indicating that after one year of marriage, money is the number one source of conflict for both husbands and wives, while it was the third biggest source of conflict in newlyweds married three to six months).

[166] *See* BLUMSTEIN & SCHWARTZ, *supra* note 165, at 67-77; DANA VANNOY-HILLER & WILLIAM W. PHILLIBER, EQUAL PARTNERS: SUCCESSFUL WOMEN IN MARRIAGE 118, 126 (1989); Talcott Parsons, *Age and Sex in U.S. Social Structure*, 7 AM. SOC. REV. 604, 608-09 (1942).

[167] *See* BLUMSTEIN & SCHWARTZ, *supra* note 165, at 67-77; ZELIZAR, *supra* note 135. In a less direct way, money can be a highly significant sublimation device for managing other family emotions. *See generally* MARCIA MILLMAN, WARM HEARTS, COLD CASH (1991).

money within families is just as central to both the legal and social meaning of marriage as the flow of services. The social meaning of marriage, that which gives it institutional meaning, includes the exchange of both the monetary and nonmonetary components on an equal footing.[168]

I submit that the only difference between the nonmonetary and the monetary aspects of marriage is that it is easier to place a dollar value on the monetary aspect; a return to the question of the ease of adjudication. I argue below that this is not an adequate reason for creating a legal inequality between these two labors, nor is it the way the different treatment is justified by courts. But first I meet some objections to the view of marriage as an exchange at all, now that my description of the exchange is on the table.

E. The Problems with Characterizing Marriage as an Exchange

The preceding exercise of setting out the exchange components is problematic as an understanding of marriage. What relevance should we give to the claim that in many marriages the parties don't think of these acts as an exchange, but are motivated by desires that won't fit well into the self-interested bargaining framework that we have come to associate with the economic discourse of exchange? If my exchange description is read uncharitably, it appears to be the nightmare of economic rhetoric. I will call this a commodification concern.

My aim is not to reduce marriage to a self-interested commercial exchange. Rather it is to illuminate the understandings and commitments between spouses so that our legal responses to marriage can best reflect and respect all aspects of a marriage understanding. This section will first look at the nature of exchange within marriage against the background of different legal understandings of marriage: marriage as a contract versus marriage as a status.[169] This examination will lead us to a more complex view of the characterization of marriage as an exchange than we might have of a commercial exchange. I will posit that exchange itself is not always arms-length and entirely self-interested. We will then consider the commodification concern directly, in light of the more complex understanding of the exchange characterization of marriage.

1. Marriage as Contract, Marriage as Status.—A familiar family law question of characterization underlies the exchange idea both doctrinally and in understanding the family economy. Whether, and in what way, is

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[168] *See* Lessig, *supra* note 10, at 951-52. Without any stability of terms, what does it mean to say "I am married to X?" The stability is what gives that cultural statement meaning beyond the wishes of the parties.

[169] These characterizations dominate the field, though they do not exhaust it. For a promising attempt to mediate between the two, see Margaret F. Brinig, *Status, Contract, and Covenant*, 79 CORNELL L. REV. 1573 (1994) (reviewing MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993)) [hereinafter Brinig, *Status, Contract, and Covenant*].

marriage itself a contract? Perspectives on this single question could influence discussion of premarital agreements. If the marriage is itself a contract, then family law is just a set of default terms to that contract. The premarital agreement is an individually tailored modification of the default terms of the greater marriage contract.[170] But there is an alternative understanding of marriage. One might view legal marriage as primarily a status relation. Premarital contracts, then, decide what will happen to money when that status relationship ends, but the contract stands outside of the marriage, not affecting the definition of the institution. To those who see the premarital agreement as a written fine-tuning of a larger contract, certain conclusions about presumptive enforceability follow that may differ from the conclusions of a person who sees the premarital agreement as a contract between two individuals who are in a status relationship.

The difference between these perspectives on the premarital agreement—as modification of contractual defaults, or as a side agreement in a status relation—bears further exploration. It is a particularized subset of a tension in the family law literature between contractual and communitarian understandings of marriage. There is a tendency to treat contractual understandings of marriage as commercialized, and status understandings as emotional—a tendency that I will argue is not warranted.[171] The particular doctrinal question—are premarital agreements modifications of default terms of marriage or instead side deals in the otherwise nonmodifiable marriage status—provides a concrete programmatic reason to consider the contract/status tension.[172] From the vantage point of a particular doctrinal question, we're able to see that neither a contractual nor a status conception of marriage can sensibly be said to prevail, as a legal understanding of marriage will reflect aspects of both. Here, I am briefly placing the premarital agreement issue within a greater debate about the marriage institution, because some readers will hope that this can add something to the question of enforcement of premarital agreements. I will conclude that the debate cannot resolve this issue, as the distinction between contract and status cannot be sharply drawn when particular doctrinal practices are being examined.

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[170] This characterization greatly distinguishes the premarital agreement from a separation agreement. Separation agreements are signed at divorce when spouses are agreeing on post-divorce consequences. They set the terms of divorce, not the terms of the marriage. Although premarital agreements do routinely govern what will happen at divorce, they do so as a condition of the marriage itself, making them a part of the marriage bargain. Separation agreements are not signed in consideration of the existence of the marriage.

[171] *See* Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777 (showing that shunning contract because of its commercial connotations does a disservice to the true complexity of contract law and history).

[172] Margaret Brinig, a well-respected law and economist in the family law field, has gently criticized the communitarian discussion of status within the family because it lacks a program. *See* Brinig, *Status, Contract, and Covenant*, *supra* note 169, at 1574 (Brinig is herself a communitarian-sympathetic contractarian, making her one who has sympathetically entered the complexities of the debate from a contracts perspective).

a. Contract?—It is useful to begin the exploration by asking what is meant by "contract" when we are talking about marriage as a contract. We need to distinguish the idea of a literal legal conception of contract from an abstract, metaphorical, or nonlegal notion of contract. There is both a normative and a descriptive element to these questions.

Let's begin with whether marriage is literally a contract—an exchange of promises that will be enforced by the coercive power of the state. Here, I'm employing a strict form of contract where all terms are defined by the parties, an unrealistic idea about contract that I will relax below. I believe the case for describing marriage as the strong form of contract is very weak. As we have seen in Part II, there are and always have been substantial restrictions on what spouses may do to alter the legal consequences of marriage. A very limited set of terms are negotiable, and those are often subject to fairness review at both the procedural and substantive level that is foreign to commercial contracts.[173]

With respect to the division of property upon divorce, one might argue that the modern era has moved *farther* from a contractual conception of marriage by enacting equitable distribution laws that increase uncertainty in financial outcomes at divorce.[174] In addition, there are countless ways that becoming spouses obligates third parties, including the state, to provide benefits ranging from constitutional privacy rights to evidentiary privileges and all types of regulatory entitlements. It is hard to imagine an ordinary

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[173] We do see progress toward contract in prenuptial enforcement itself, but the distinctions between premarital contracts and ordinary commercial contracts are still prominent.

[174] Before their enactment, the disposition of property upon divorce was fairly mechanical, going with title. In that respect, parties to a marriage could anticipate at the time they married, and based on financial decisions that they made throughout the marriage, what would happen upon divorce. In most states they could control the outcome at divorce by rearranging title during marriage. With the advent of equitable distribution laws, the court decides the disposition of property upon divorce without regard to title. Couples cannot predict at the time of marriage what the terms will be at divorce. The terms are in fact not set at the time of marriage. In that respect, couples now consent to a property regime that is in the hands of judges, while before they consented through marriage to a property regime that they could privately order, albeit with some social and legal constraints that led to unequal bargaining power. Modern commentators usually understate the degree to which status increasingly describes property distribution at divorce: third parties make those decisions in the absence of a premarital agreement, an important caveat.

Moreover, if between the beginning of a marriage and its end, a state's family law changes—divorce becomes easier, or harder, or property, alimony, or custody rules change—individuals can claim no expectancy in the legal rules underlying marriage at the time they entered it. *See, e.g.*, Gleason v. Gleason, 256 N.E.2d 513, 519 (N.Y. 1970). The U.S. Supreme Court has addressed a claim about a change in property rights during marriage by saying: "It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away." Randall v. Kreiger, 90 U.S. 137, 148 (1874); *see also Gleason*, 256 N.E.2d at 519. This even applies to the law with respect to the enforceability of contracts within families. *See, e.g.*, Bramson v. Bramson, 404 N.E.2d 469, 471 (Ill. App. Ct. 1980) (contract at separation includes agreement that cohabitation with third party of either spouse will not terminate alimony; subsequent background change in substantive law providing that couples may not contract around the rule that cohabitation does terminate alimony overrides contract provision).

contract so thoroughly engaging commitments on the part of non-parties. While marriage requires the consent of the parties at the outset, and in that respect resembles a contract, the doctrinal similarity to contract diminishes greatly after that point as long as we maintain the strong description of contract whereby the parties define the terms of the agreement.

At first blush, accepting the weakness of describing marriage as a legal contract may take some of the wind out of the argument that it is abstractly a contract. But it is here, at the abstract or metaphorical level, that the roots of contract run fairly deep.

The claim that marriage is a contract could be a normative claim that is meant more abstractly than doctrinally. The normative claim that marriage is a contract could include a belief that, to the extent that there are dissimilarities between contracts and marriage, they ought to be reduced or eliminated, as contract is the advanced and appropriate model for marriage.[175]

This concept underlies much of the literature on premarital agreements, in some cases more explicitly than in others.[176] For some, describing marriage as a contract is not intended to invoke a legal understanding of contract at all, but rather this metaphor of contract is intended to describe an exchange of promises with an intent to bind oneself morally to those promises.[177] The idea here is that the life of a marriage is, with various caveats for children and acts of violence, not of legitimate concern to anyone but those within it. The importance of children to an understanding of marriage in particular is implicitly minimized to make this description viable. Questioning a valid community stake in marriages sufficient to override the privacy interests of spouses is a modern phenomenon, but one that resonates in the culture and legal response to the institution. Tied to this is the notion of

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[175] The abstract claim could be an expression of Henry Maine's thesis that the movement of a progressive society is from status to contract. That description also applies to marriage as a cultural institution, as far more diversity in marriage practices is tolerated than a century ago. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 297 (1989). To historians of family law, the relevant question might be whether marriage has less substantive content than it once did, making it a more private institution between the parties. *See id.* That again is a slightly different question than whether marriage is a contract in the contract law sense.

Marriage certainly has fewer legal obligations than it once did. But what makes that contract? Contract is a mechanism for taking on obligations, but once agreed to, contractual obligations are legally binding. By contrast, the parties in the marriage with diminished legal content may make a range of self-styled promises to one another, inventing their own vision of a good life or good marriage, but those promises aren't in the nature of a legal contract. Marriage law is still a status law.

[176] *See* WEITZMAN, *supra* note 2 (favoring contract on nonproperty aspects of relationship); Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 1 (1986) (finding that state terms mimic what would be agreed upon for kids); Haas, *supra* note 2, at 880, 891; Shultz, *supra* note 2; Stake, *supra* note 2, at 399 n.7; Weitzman, *supra* note 2; Zelig, *supra* note 2, at 1237.

[177] The modern value placed on privacy within marriage may provide support for this description of marriage as a contract. But it may also be used to justify not enforcing contracts. *See, e.g.*, Howard O. Hunter, *An Essay on Contract and Status: Race Marriage and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1069 (1978).

marriage as an institution whose purpose is individual self-fulfillment, not the fulfillment of obligations to extended family or community.

If this is the claim, that marriage is metaphorically a contract—an exchange of *morally* binding promises—without necessarily being a legal contract—an exchange of promises that will be enforced by the coercive power of the state—we might decide it makes more sense to use the language of exchange, or of an understanding, rather than contract.[178] If the claim that marriage is a contract requires abstraction from doctrinal questions, then we need to be careful when invoking the notion of marriage as a contract to back up a doctrinal argument for the enforceability of written marriage contracts.

b. Status?—By contrast, what is meant by marriage-as-status? Status too, might be broken into the literal and the abstract. Marriage is not the most offensive sort of status—the kind to which one is born and cannot escape. This is the strictest notion of status inherited from common law England, and might be its most literal form. But there is a more common usage of the concept of status in American law. We see status as an institution, entered into voluntarily, but without individualized redefinition of the institution. Concretely, marriage must in large part be a status relation, as the state maintains a great deal of control over entry into marriage, obligations of marriage, and the issues that arise upon the dissolution of marriage.[179]

There is substantial public rhetoric about the social and political interest in marriage as an institution that extends beyond the concerns of the individuals within a given marriage. The public stake is justified by third-party interests ranging from crime and poverty reduction to future produc-

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[178] In either case, I believe that the communitarian objection to marriage-as-contract is not as strong against marriage-as-exchange, a claim I will address after a closer look at the communitarian objection. *See* Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 CARDOZO L. REV. 1987, 2057 (1998) ("[Luhmann] identifies 'contract' as the legal name for a mechanism of structural coupling that economic communication identifies as 'exchange.'"). I am distinguishing contract from exchange, in the sense that exchange can and does occur routinely without contract.

[179] Despite the increasing enforceability of some premarital agreements, and the decreasing state interest in some of the nonlegal attributes of diverse marriages, such as sharing a domicile, the literal description of legal doctrines relating to marriage still retains a strong status norm, as discussed above.

tivity of children,[180] and extends to maintaining a coherent cultural definition of the institution itself.[181]

The claim for a public stake in marriage based on third-party interests is separate from, but supported by, a claim that individual self-fulfillment does not always flow from free individual choice. The former claim is a justification based on community interests for overriding individual preferences. The latter is a claim that the unfettered pursuit of individual preferences is not ultimately fulfilling. The latter claim is most clearly described by Milton Regan, who advocates for an understanding of marriage as status.[182]

Regan describes the contractarian image of marriage as based on a problematic view of identity. In that view, we can only make our true selves, discover and develop our true identities, in the absence of the constraints of others. Community is an impediment to identity. Contract pro-

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[180] This idea has recently received some popular attention as well. Barbara Dafoe Whitehead likens the current divorce rate to an environmental problem requiring raised awareness and a social response to prevent social harms external to the marriage itself. *See* BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1997). This is not to suggest that the cultural interests are always justified empirically—single parenting, for example, is often blamed for things with which it may simply be correlated, such as poverty. But whatever its particulars, the belief that the marriage of two individuals has an impact beyond those two is quite widely held. This point surfaces among law and economists as well. *See* Brinig, *Status, Contract, and Covenant*, *supra* note 169, at 1597 n.161 (families create positive externalities and are public goods).

[181] The Defense of Marriage Act is explicitly grounded on this public interest in the marriage relation. This should by no means be understood as an endorsement of the Defense of Marriage Act. But the drive to achieve legal recognition of same sex marriage shows some belief in a community interest in marriage. Gay and lesbian couples could solve many, though by no means all, of the legal issues associated with long-term relationships contractually. *See* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996). Though advocates may want same sex marriage primarily for its additional legal benefits, I suspect that the community meaning that accompanies legal marriage is equally valuable to those same sex couples who already "privately" consider themselves married and for whom marriage is a meaningful social and cultural concept.

[182] *See* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993). For a clear discussion of the importance of the communitarian understanding of marriage, see Carbone, *supra* note 160. For another strong case for a nonindividualistic view of identity, see MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997).

Regan doesn't fight the battle over doctrinal descriptions; his account is deliberately normative. Says Regan, descriptively, we have moved to a more contractual understanding of marriage, but that movement is not for the better. Regan's argument in favor of status invokes the Victorian conception of status, but carefully pulls that image apart in the hopes of eliminating its sexist attributes while leaving behind a powerful core of valuable material. Regan argues that the Victorian marriage has not received its due, as the "Cult of True Womanhood" associated with Victorian Marriage has been severely criticized in recent historical works. Regan doesn't deny the difficult gender roles incorporated into Victorian marriage, but he wants us to see some of its better instincts. Victorian marriage was constructed as a response to the increasing individualism of the market. In that sense it was an act of rebellion against that individualism in favor of communities. Obligations within families were emphasized in the culture as a way to counteract individualism. While the sacrifices in the tension between individual and community had to be made by women, which was unfair, the idea of sacrifice for family has value.

motes the liberty to develop that "decontextualized" self, as Regan calls it. Under the contractarian notion, the only justification for state intervention is to prevent harm; in families that means to prevent domestic violence. Beyond that, individuals are free to order their affairs as they please, with the idea that such a regime will give them the maximum opportunity to find fulfillment. This image of self-fulfillment is also described by Carl Schneider as the rise of "psychologic man."[183] The contractarian notion is that community cannot produce intimacy, it can only impede it.

But Regan argues that expecting to find, or more specifically to invent, individual self-fulfillment in marriage sets the stage for divorce, because fulfillment within marriage waxes and wanes over the course of a lifetime.[184] Regan rejects the link between individualism and identity, arguing that our identities ought to be a product of our relationships and our environment. Context is not an impediment to relationships, it is a creative force in them.[185] Roles are a source of identity, not a constraint on them.

Regan is skeptical of a contractarian notion of marriage because he believes it does not lead to the self-fulfillment that it promises on the surface, devoid as it is of satisfying communally-informed roles. Others think that self-fulfillment can legitimately be subordinated to third-party interests such as the creation of healthy environments for the rearing of children. But both reject the notion that marriage ought to be cast as a privately defined agreement between consenting adults who are accorded the ability to make of it what they choose. This is the anticontract impulse.

2. Does the Contract-Status Debate Give an Answer to the Premarital Agreement Question?—What difference does it make whether we look at marriage as a contract or a status? I believe that this debate does not yield an answer to the doctrinal question with respect to premarital agreements, but the possibility that it might is so tempting that it bears further examina-

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[183] *See generally* Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

[184] Elizabeth Scott has argued that marriage should work as a precommitment, as with Ulysses and the Sirens, against just these vicissitudes. Because the long-term preference is to remain in a marriage, the short-term desire to exit should be prevented in order to fulfill the long-term preference. *See* Scott, *supra* note 5, at 91. Note though that this argument employs the language of individual fulfillment as the moral basis for a stronger marriage law, even as it argues against exit at-will.

Regan argues that the contractarian image that freedom from community is needed to create identity is also applied by many to the creation of intimacy. According to this modern view, we cannot have intimacy without privacy, meaning privacy from community. That this insight for identity extends to intimacy is somewhat surprising, as intimacy involves more than one individual, and is in that sense a community. This basic, nonindividualistic aspect of intimacy may put the lie to the most extreme version of the contractarian ideal of marriage.

[185] Status reflects that important element of identity. We're not individuals who *practice* parenthood, we *are* parents, and spouses, and children. Those relationships produce our identities. Here one thinks of Martha Fineman's notion of inevitable dependency: we must all at some time be in a dependent relation with others. *See* FINEMAN, *supra* note 107, at 161-64.

tion. The most natural uses to which one might put the contract versus the status paradigm in considering premarital agreements, though plausible, become weaker under examination.

If one believes that marriage is at its base a contract, primarily of no public concern, and defined by individuals, then it is far easier to support the enforcement of premarital agreements. There may still be objections to enforcement, but they are likely to be grounded in reasons internal to contract law. So, for example, there might be administrability problems and problems with enforcement of contracts over items of small value, but those are not objections to modifying the institution itself. For those for whom these practicalities are not important, contracts seem almost uniformly good.

On the other hand, by this first blush account, to Regan and others, premarital agreements are not inherently good. They would need to be substantively evaluated in order to decide whether they strengthen or instead weaken marital obligations, between spouses as well as to others. From this perspective, one might argue that courts have been fairly sophisticated doctrinally when they have insisted that a prenuptial agreement will not be enforced if it tends to encourage divorce, for example, or when it is "substantively" unfair.

We should doubt the strength of the descriptive opposition between status and contract. There are those who ask that we comprehend that status and contract aren't decisive concepts themselves. Consider Nathan Isaac's response to Henry Maine: status and contract cycle rather than move in a progression. Status is the norm that is created when more and more individuals order their affairs (contract) the same way—from individualized relations to standardized relations. And social norms change as more frequent individualized relations deviate from the standard, until they again become the standard.[186] Without entering that debate with respect to contracts on the whole, it might caution us with respect to describing the possible legal understandings of marriage in oppositional terms.[187] Carol Weisbrod has argued that the rejection of exchange language is based on a caricature of contract that is drained of both what is valuable about contract, as well as the ability of contract to handle complex long-term, nonmercan-

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[186] *See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 41 (1917) (as discussed in Weisbrod, *supra* note 171, at 786-88).

[187] See Siegel, *supra* note 13, at 2181-96, for an argument that the contract movement in 19th-century family law was interpreted to modernize status relations within marriage. Seigel's is a theory by which the contract rights are degraded through judicial interpretations so that they remain status relations for the purpose of maintaining stratified gender relationships within marriage. Her argument is about the careful denial of contract where it counts, the careful *preservation of status through the appearance of contract.* Siegel remains agnostic about today's doctrine, but her argument is that we have a persistent movement back toward status and that status, as it is used in marriage contract cases, is harmful to women. In that sense, her argument, though it contains no such advocacy, appears to be implicitly contractarian.

tile relations.[188] She points out that the notion that contracts are about rights, rather than the creation of obligations, reflects "a cultural overlay more than the contractual idea itself."[189]

The descriptive opposition between contract and status is further weakened by the overwhelmingly voluntary nature of modern-day status relations, in which parties willingly take on set obligations associated with a given status, such as doctor-patient, common carrier-passenger, attorney-client, and so forth. Whether to describe these relationships as contract or status relations is not a matter of verifiable factual accuracy. Rather, we would call it status or contract depending on which aspect of the relation we would like to highlight and analyze. Likewise, I had posited above that contract law is the thin enforcement of privately negotiated agreements without concern for terms; but in practice it is not. Many kinds of contract terms are not modifiable, legally or practically, but they are part of what we would call contracts nonetheless.[190]

We need not decide whether status or contract is "right." With a descriptive tension set up in such oppositional terms, one cannot expect to see one argument extinguish the other. Instead, we might ask *to what use* one or the other lens on marriage may be put. Because we are considering premarital contracts, and because they are enforced on contractarian grounds, we can ask whether the contract paradigm of marriage can illuminate the role of the premarital agreement within family law. This does not mean casting a normative vote for progressing toward an increasingly contractual form of marriage. It simply means asking whether a metaphorical exchange model can be made coherent in the face of the selective enforcement of premarital agreements. That requires considering the exact nature of the exchange that makes up marriage, which is why I have set out the most common exchanges in the prior Part of this Article. I will conclude that it cannot—that a contractarian model of marriage cannot achieve doctrinal coherence, given that much of the marriage exchange cannot effectively be made the subject of contract. This does not, though, suggest that the status

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[188] Weisbrod has argued that contract never has been limited to arms-length commercial negotiations; whether marriage compares well to merchants doesn't tell us everything about whether it is an implicit exchange agreement. Weisbrod is extremely respectful of the communitarian understanding of marriage, but cautions that when thinking about marriage, "the rejection of contractual themes (or possible contractual solutions to certain problems) cuts us off from some interesting ideas in the traditional contract literature." Weisbrod, *supra* note 171, at 782. *See also* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (emphasizing that the complex nature of relationships underlies all exchanges). Weisbrod seems to have in mind a range of contractual situations, from the contractualized jewish marriage, to contracts of adhesion, landlord-tenant, physician-patient, insurance contracts, and the many other forms of contract that have been channeled by contract law because of the social relations under the contract itself. *See* Weisbrod, *supra* note 171, at 782.

[189] Weisbrod, *supra* note 171, at 782.

[190] I contract with my employer for a pension, but the terms are largely governed by ERISA. I contract with Sony to see a movie, but this contract of adhesion's terms are not in practice modifiable.

model of marriage forms the truth about the institution. This is because it does not completely comprehend exchange.

The status-contract debate cannot lead us to a solution to the premarital agreement puzzle. This is because of the distinction between the literal contract and the metaphorical contract of marriage. The literal, the doctrinal description, is weak, even if the metaphorical one is strong. We might agree that the description of exchange set out in this Article strengthens the metaphorical understanding of marriage as a contract, given the role of exchange in contracts. But given that the abstract and metaphorical description is already divorced from doctrine, it cannot help us to resolve the essentially doctrinal question of whether premarital agreements should be enforced. The doctrinal description does not undermine their enforcement, but it simply doesn't yield the practical answer one might hope it would.

Finally, neither side of the debate yields a doctrinal answer to premarital agreement enforcement, because it is possible to make a coherent argument that both enforcement and nonenforcement of monetary premarital agreements have the potential to support or undermine either model stated in the abstract. Enforcement of premarital agreements may support a contractarian vision simply because they are contracts. Nonenforcement may support a contractarian model of marriage because it recognizes and responds to all the components of an exchange in a manner that captures the entire relationship as an exchange, but recognizing that contract enforcement would not be meaningful where only a slim part of the overall contract can be managed by a court. Nonenforcement of premarital agreements may be more consistent with a status understanding of marriage, as the state's role in defining the meaning of marriage, and controlling individual roles within marriage, is vindicated. Enforcement of monetary premarital agreements may be consistent with a status understanding of marriage because it may show the distinction between money, which is ancillary to marriage, and the status of marriage itself, which is made up of nonmonetary obligations. The point is that one cannot be certain of how to be effective in bringing the contract-status debate into solving a single doctrinal question.

3. Exchange and the Commodification Concern.—Here then, is my response to the concern that the exchange description commodifies marriage. If Weisbrod is right that actual contract law has always had mechanisms for taking into account noncommercial transactions, then surely a contract metaphor, not discussed as a legally binding exchange, must be able to encompass noncommercial subtleties as well. I am describing the components of marriage as exchanges in order to be less rigid than contract. We could also call marriage an understanding. In any case, the exercise of describing an exchange does not lead inexorably to commercializing that exchange. Looking at the exchange as an exchange comes prior to the policy question over legalizing a market in it.

Consider the alternative of ignoring exchange within marriage. We might think that all action within marriage is altruistic, without thought of individual gain even if through gain for the family. If we allow for no exchange, if we see only sharing principles based on gift, we obscure the injustices that can occur when promises go unfulfilled by one party to a marriage at the expense of another. We also obscure the role law plays in creating property rights in some spousal behavior while denying it in others, and the distributive effects of that process. In the words of Carol Rose, "When we see the unspoken property within arrangements that masquerade as sharing, we can also see their injustice."[191] As long as exchange illuminates some aspects of marriage, it is dangerous to shy away from exchange discourse in legal analysis altogether.

The fear, of course, is that exchange discourse will impoverish the emotional content of marriage. But emotional and economic understandings are not a zero-sum game; family labor, as well as much wage labor, is motivated and rewarded by both material and nonmaterial benefits.[192] The tendency, however, to require the banishment of one discourse for the preservation of the other provides the opportunity for exploitation of which Carol Rose speaks. Exploitation can occur from looking away from this exchange, as much as looking toward it. Care must be taken when speaking of intimate relations not to exaggerate either aspect.

Some wish to abandon the economic exchange understanding altogether, because it is impoverished. I think the contract metaphor, at least as tempered by a focus on exchange or understanding, is apt, but that complications are inherent when monetizables exchange with nonmonetizables. Exchange illuminates this potential injustice, it doesn't impoverish it. People do negotiate over these things within marriage constantly. We must decide what to do with that negotiation as a matter of law, but we should not do so by believing that the only things negotiated within marriages are financial.[193]

The exchange concept makes the intimacy of monetaries more visible. The exchange concept shows up obliquely in some premarital agreement literature, but it is not identified as an "economy." For example, Gail Brod expressly says she is not dealing with nonfinancial agreements in her treatment of gender issues around premarital agreements, but she says that the enforcement of the monetary ones may undermine the sharing principles of marriage. She even argues that economic principles may dictate the enforcement of agreements, but other goals, including protecting the welfare

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[191] Rose, *supra* note 136, at 2415.

[192] *See* Silbaugh, *Commodification, supra* note 8; Silbaugh, *The Polygamous Heart, supra* note 8.

[193] I would also note in response to commodification concerns that might be raised in the face of an exchange description of marriage that in this case, the exchange description leads me to advocate for scaling down the use and enforcement of marriage contracts, a policy result that may be the opposite of the one feared by anticommodification commentators.

of weak parties, ought to prevail over economic ones.[194] Brod's analysis misses the economic contributions of her weaker parties—she unnecessarily concedes that economic principles cannot benefit a monetarily weaker spouse. The new literature on the family economy unpacks the meaning of these "sharing principles" such that we see nonmonetary bargains or trade-offs. The nonmonetary components of marriage gain an equivalence with the monetary ones, and the term sharing principles begins to refer to the exchange of these components. An important social meaning of marriage includes the exchange of both the monetary and nonmonetary components on an equal footing. The image of the exchange might not simply impoverish the nonmonetary components of marriage, it might help us to see the intimate nature of the monetary side of the exchange. It is the monetary aspect of the marriage that has itself become impoverished when we fail to see it on a par with the intimacies of marriage. The exchange metaphor could bring us into a richer understanding of money rather than a poorer understanding of family care.[195]

Moreover, scholars like Brod are concerned about bargaining power problems with premarital agreements. Many free market advocates would answer that limiting contracts on a bargaining power theory makes no sense, as people ought to be able to make the best bargains they are able given their background wealth positions, which are, the argument goes, not created or maintained by law. But the argument in this Article suggests that the unequal bargaining positions are in fact created by law through the selective creation of property rights in some labor and not in other labor.

IV. THE SOLUTION: NO FREEDOM TO CONTRACT

Here, I will make the case for my solution to the difficulties raised above. The inability to gain legal security in domestic labor, as contrasted with wage labor, is a pervasive feature of American law.[196] An equivalence, if not an exact equality, between the legal status of domestic and wage labor, including entitlement and security, should be sought if practical. This should be based on the equal economic and emotional significance of the monetary and nonmonetary components of a marriage to family members' well-being, combined with the unequal rates at which they are contributed by husbands and wives. The method of doing so may differ according to the context of a particular legal rule. With respect to premarital agreements, the goal of legal parity necessitates a solution that changes the legal status of wage labor within marriage, rather than the status of domestic labor. In order to treat the monetary and nonmonetary aspects of mar-

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[194] *See* Brod, *supra* note 2, at 286.

[195] Here, I think of Radin's argument that we concede too much to the market when we allow that economic understandings will always win when the two co-exist. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 103 (1996).

[196] *See* Silbaugh, *Turning Labor into Love*, *supra* note 8, *passim*.

riage equally, we should not enforce monetary premarital agreements. In other words, because there are valid reasons to avoid adjudicating contracts around unpaid labor and child custody, we should be wary of adjudicating contracts that govern wages.

I will make the argument in five subparts. First, I will recall that one cannot use a contract to gain legal security in nonmonetary aspects of marriage. Second, allowing contracts over money commodifies the role of money in marriage, overlooking its important intimate aspects. Third, there are valid reasons for not enforcing nonmonetary agreements, including child welfare concerns. Fourth, treating monetary and nonmonetary components of marriage equally, then, requires us to deny enforcement of monetary agreements. The fifth subpart addresses some implications of the argument.

A. The Priceless Economic Nature of the Nonmonetizable Aspects of Marriage: Nonmonetary Means Not Secured

As it turns out, the law prevents a person from using a premarital agreement to gain security in nonmonetary aspects of marriage. Almost every jurisdiction will enforce a premarital that governs property distribution, and most will enforce one governing the financial support obligation. By signing a premarital agreement limiting the support obligation, a spouse may keep his income entirely separate from his spouse after divorce, just as he is entitled to keep his income separate from his spouse during marriage in the forty-two common law jurisdictions, even without such an agreement. But courts almost never enforce a premarital agreement that pertains to other aspects of a marriage. In particular, it is impossible to gain security in household labor, including childrearing work. In the eyes of the law, the nonmonetary aspects of marriage become insecure in the true sense of the word: without the ability to secure them. The nonmonetary aspects of marriage are doctrinally stripped of their value, or more precisely, those who make nonmonetary contributions are stripped of entitlements based thereon.

A person may bring wages to a marriage on several terms: either by keeping them for himself,[197] or choosing to share them. But if a person is to bring nonmonetary goods to a marriage, the terms on which she will do so are dictated by the state: she will share entitlement, and she may not contract around that state of affairs.[198] Sometimes invoking the concept that

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[197] This can include transforming them into property, which is almost always the valid subject of a premarital agreement, or simply holding them apart for consumption during marriage.

[198] Moreover, it is more difficult, by degree, to hold apart domestic labor for individual consumption without sharing the benefits than it is to hold apart wages for the same purpose. The benefit of some tasks may be separated: laundry, for example, or cooking, though the act of doing so would present a more immediate conflict than does keeping wages separate. More important, the most significant efforts, including childrearing, benefit both parents by discharging the legal and moral duties. *See supra* notes 142-57 and accompanying text.

these components of marriage are simply *too* important, *too* valuable, or *too* core to the institution, courts refuse them legal value at all. In the words of one such court, "even if few things are left that cannot command a price, marital [services] remain one of them."[199]

B. The Commodification of Money: Monetary Means Marginal

But no such pricelessness attaches to money. The Louisiana Supreme Court in a 1995 opinion called the property aspects of marriage "marginal" to the institution, justifying the enforcement of contracts governing them only, as compared with the more significant components of marriage:

> [o]nly marginal aspects of these essentially personal relationships may be open to private ordering through contract proper or other expression of volition.[200]

The next year, the same court reversed itself upon rehearing and implicitly added alimony to the list of marginal aspects open to private ordering.[201]

The rules communicate that monetary agreements don't alter the fundamentals of marriage: money is marginalized by law, pushed away from the center of the marriage. In light of our earlier discussion of money's integral role in the intimacies of a marriage, it would seem that *premarital agreements commodify money.* They commodify the role of money in intimate relations. Almost every reason that courts give for balking at enforcing nonmonetary agreements—that they deal with exchanges within marriage that ought to be freely given, or that spouses are legally obliged to make, or that they violate the public policy of supporting the marriage institution—also applies to the role of wages within a marriage. The single difference—disparity in the ease of administering the different agreements—may be valid (though I argue below that this difference is overstated), but that is not the way courts tend to discuss the problem with nonmonetary agreements. Rather, courts seem generally reluctant to subject so much of the substance of the marriage relation to independent advantage-taking by spouses, or to encourage the erosion of sharing behavior within marriage.[202] This concern applies equally to wages. Even third-party concerns, such as child welfare, that might counsel against the enforcement

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[199] Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 20 (Cal. Ct. App. 1993).

[200] McAlpine v. McAlpine, No. 94-C-1594, 1995 WL 71495, at *1 (La. Feb. 9, 1995), *rev'd*, 679 So. 2d 85 (La. 1996). In the first opinion, the court offered this observation in the increasingly unusual defense of nonenforcement of support agreements, indicating that the Louisiana court saw a role for the significance of some forms of money, though not all. The court later reversed itself, allowing alimony agreements as well.

[201] *See McAlpine*, 679 So. 2d 85, 86 (La. 1996).

[202] *See, e.g., Borelli*, 16 Cal. Rptr. 2d at 20 (court expressed offense at and the need to discourage bargaining at the bedside of an ill man seeking physical care from his wife).

of custody premaritals, also counsel against the enforcement of monetary premaritals, as discussed below.

What do I mean that the enforcement of monetary premarital agreements commodifies the role of money within marriage? Just that the practice among courts of treating money as having a negotiable role in marriage has the effect of helping us to minimize the centrality of money to the intimate substance of marriage. With respect to many other things, we call that process commodification.[203] This alone does not make the case against monetary premaritals, but it does make the case that they do as much damage to the legal institution of marriage as do nonmonetary premaritals, such that their fate should rise or fall together.

C. Valid Reasons for Not Enforcing Nonmonetary Agreements: Problems of Adjudication and Child Welfare

We have discounted illegitimate reasons for the disparate enforcement of nonmonetary and monetary agreements. Examples of such reasoning are that marriage is only degraded by enforcing nonmonetary agreements, or that more value is at stake with respect to monetary agreements.[204] But some genuine objections remain to contracting over nonmonetary components of marriage.

1. Child Welfare.—One substantial reason given for nonenforcement is that there are third-party interests at stake, particularly those of children. This is an extremely powerful argument. Despite a spouse's greater contribution of the nonmonetary benefits surrounding children—both childcare and the ability to parent itself—that spouse cannot claim a presumptive entitlement based on that labor to greater enjoyment of that child, or even to monetary payment conditioned on giving those benefits,[205] because that may not comport with what is best for that child.[206] Child welfare is a primary interest of the state in regulating family law, and insofar as state involvement in family law is justified, this is the clearest case. If a premarital agreement assigns entitlement to wages to a wage-earner, and entitlement to

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[203] *See, e.g.*, RADIN, *supra* note 195, *passim*.

[204] Professor Chused challenges the distinction between wages and nonmonetary labor succinctly, critically characterizing the view that "[e]mployment produces wealth; family produces community." Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L.J. 2213, 2224 (1994).

[205] A court will not enforce an agreement that pays a parent for caring for children. An example of a recent decision refusing such a contract is State v. Bachmann, 521 N.W.2d 886 (Minn. Ct. App. 1994) (holding that "homemaking" did not constitute employment for purposes of work release despite presence of contract).

[206] Many states believe that giving a presumptive entitlement to the primary caregiver bears some relation to the child's welfare, as who is the primary caretaker plays some part in many states' assessment of what is in the Best Interest of the Child for custody purposes. 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4.09 (Rev. ed. 1993).

child custody to a primary caregiver, it is possible the assignment of custody will run against the children's interests even as it recognizes the interests of the primary caregiver.[207]

A custody premarital agreement giving custody to a parent who is not best for the child is a serious risk, but there is an additional risk posed by such an agreement. To some the very nature of that agreement commodifies *the child,* not just the labor in producing the child, as the entitlement of the person who has devoted herself more fully to the child. This precise distinction between commodifying the child, which almost all believe to be unacceptable, and commodifying a woman's labor in producing and caring for that child has divided commentators on other family law debates, including surrogacy contracts[208] and private markets in adoption.[209] Would an anticommodification argument against premarital custody agreements prevail alone without the additional concern that parents cannot close the state out of deciding what is in a child's best interest? That depends on whether as a community we see the custody issue as more comparable to surrogacy, a practice contested but in many jurisdictions partially legal, or more comparable to markets in adoption, which are not explicitly permitted.[210]

Many will immediately object that as questionable for child welfare as a custody agreement may be, it cannot be any worse than the judicial determinations of the child's best interest performed on a daily basis by courts. But imagine an agreement that provided both that in the event of divorce the parents will share identical joint physical custody, splitting each week in half, and that neither spouse will invoke child welfare in an attempt to interfere with the other's ability to relocate out of the jurisdiction. Even our courts, lacking a fine instrument to determine a child's best interest, still may easily be able to decide that if one parent vehemently opposes such an

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[207] If an agreement gives custody for primary caregiving, it may ordinarily align with a child's best interests; this is the view taken by the ALI tentative draft on child custody. But an agreement might just as easily give a guarantee of joint custody, for example, which might not. That was the case in *In re* Marriage of Littlefield, 940 P.2d 1362 (Wash. 1997) (en banc) (refusing to enforce prenuptial joint custody agreement that proved not to be in the child's best interest).

[208] *Compare* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW MED. & HEALTH CARE 72 (1988) (critiquing many of the current arguments opposing surrogacy and asserting that these positions might undermine feminist movements) *and* Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,* 5 J. CONTEMP. HEALTH L. & POL'Y 21, 26 (1989) ("There is, in short, no persuasive evidence that contracts of surrogate motherhood are less likely to maximize value than the classes of contracts that the law routinely enforces.") *with* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 168-89 (1993) *and* Bartlett, *Re-Expressing Parenthood, supra* note 151, at 335.

[209] *Compare* Elizabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) *with* Jane Maslow Cohen, *Posnerism, Pluralism, and Pessimism*, 67 B.U. L. REV. 105 (1987) *and* J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341 (1984).

[210] Many jurisdictions find nothing unlawful about payment to a surrogate mother for her labor, sometimes in the form of payment for medical expenses and lost wages, but they will not enforce an agreement to give up a child pursuant to a surrogacy contract, because unlike payment for labor, such an agreement makes the child the commodity. *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998).

arrangement at the time of divorce because it would require a child to travel across school districts or suffer psychologically from a lack of continuity, that parent might be correct as to the child's welfare. Parental agreement and cooperation are routinely cited as important to the success of joint custody arrangements.[211] It was a mandatory joint custody agreement that the Washington Supreme Court, sitting en banc, recently refused to enforce because it was too disruptive to the child's welfare.[212] While in the abstract we might say parents are just as good as courts at determining children's best interests, in circumstances such as these, we can see more clearly the case for a court overriding the parents' premarital expression of will in favor of child welfare. This justifies a court retaining jurisdiction over such cases.

Beyond an agreement regarding custody, consider an agreement that went to securing the benefit of *being a parent.* This might mean that a mother would agree never to seek the termination of parental rights against the father, regardless of his post-divorce involvement or willingness to pay child support, and even where such a termination is sought in favor of adoption by a stepfather who is involved with and committed to the child. Or the reverse: this might mean that a father would agree to terminate his parental rights in the event of a divorce, agreeing not to seek either custody *or visitation.* Even one who is skeptical of a court's ability to do any better than the parties in allocating child custody might be concerned about the child welfare implications of enforcing such a no-visitation agreement signed before the birth of children. There is currently a reasonable amount of agreement within the practice of family law that visitation by a noncustodial parent is usually beneficial to a child regardless of whether the noncustodial parent would make an equally appropriate custodial parent. Enforcement of such an agreement would ask a court to overlook what is conventionally believed to be a simple, by family law standards, benefit to children.[213]

The very existence of this agreement raises child welfare concerns. Knowing either that one parent had been willing from the outset of a marriage to relinquish child custody, or that the other had considered the child a commodity, might well leave an unfavorable psychological impression on

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[211] As one court said:

> Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a strong finding for a potential for such contact in the future.

Taylor v. Taylor, 508 A.2d 964, 971 (Md. 1986); *see, e.g.*, Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 745-46 (1983).

[212] *See In re* Marriage of Littlefield, 940 P.2d 1362.

[213] *But see* GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 23, 27 (1996) (discussing absolute authority of one parent).

children, who we already know suffer from parental conflict over custody and from feelings of abandonment by the noncustodial parent. Even if custody agreements were allowed, knowing that an agreement could have this effect may make a person who has devoted significant energy to a child reluctant to secure custody rights through contract.

Child welfare reasonably justifies nonenforcement of agreements about children, but also seriously strips this major nonmonetary component of marriage of security and entitlement that otherwise would go to a parent whose labor makes parenting more possible.[214] So significant is the parental interest in children that the inability to secure it hopelessly disrupts the family economy. The effect that the insecurity of the custody interest has on the bargaining behavior of divorcing primary caregivers has been viewed as a central problem of child custody law since it was discussed by Robert Mnookin and Lewis Kornhauser in 1979.[215] A person with a great interest in custody will bargain away rights in property at divorce to avoid the uncertainty of litigation, even in cases in which the background rules might give her better odds of success. The uncertainty could be removed by allowing contractual entitlement, similar to the manner in which premarital contracts remove uncertainty from property and alimony decisions. Because child welfare concerns weigh against such an agreement, the effect is that an earner's interest in wages can be secured, leaving the person whose stronger interest is in children in a weaker position during and after a marriage.

Finally, current premarital agreement law ignores an important child welfare question. Financial agreements, almost no matter what they provide, have child welfare implications. This is particularly so in jurisdictions in which the child support payments of extremely wealthy parents top out at an absolute dollar level reflecting what is needed for a child's reasonable comfort, but which is usually far less than a custodial parent would spend on the child were a wealthier family intact. In other words, some states will not require a wealthy noncustodial parent to share a percentage of his wealth, but rather to pay a fixed fee that might be capped at, for example, $1,000 per month for a high income parent. Were such an order the state's norm for a noncustodial father who took home $20,000 per month, the child would almost certainly suffer a drop in standard of living from the marriage

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[214] It is important to stress that this is, on average, a woman, though not always. To the extent that custody premaritals were used to protect the primary caregiver's stake in custody, they would probably ordinarily track what the state would do if joint custody is not chosen, and track what is in a child's best interests. The difference, of course, is that the threat of unpredictability would be removed, which in turn would have some influence on the property and support awards the custodial parent would receive. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[215] *See id.*

standard.[216] The noncustodial father in such a situation can enforce a premarital agreement limiting alimony and holding his property separate from his ex-wife, assuring that her standard of living will sink. Enforcing such an agreement will have a practical impact on child welfare, as a custodial parent's standard of living and that of her minor child are inextricably linked.[217]

2. Adjudication Difficulties.

a. The claims are too trivial.—After child welfare, the second strongest reason for not enforcing nonmonetary agreements is concern over adjudication difficulties. This concern has two faces. The first is that the subject matter is simply too insignificant to be in court. This concern is suggested by the second half of the Restatement comment a to Section 190: "the courts lack workable standards *and are not an appropriate forum for the types of contract disputes that would arise if such promises were enforceable.*"[218] It is suggested more explicitly by commentators.[219] When considering this claim, we must keep in mind that however we think a couple should act toward one another ideally, a couple who signs such an agreement has demonstrated a preference for having a court serve as the "appropriate forum" for disputes.

Here we might imagine a parody of my argument: "judges will be deciding whether the house was dirty or clean? how often one spouse changed the other's bedpan?" This objection to enforcing premaritals is unpersuasive for several reasons. First, while any one day of the above described activities might yield an amount of positive welfare too small to make access to the courts worthwhile, it is hard to imagine how any one day or particular instance would be the subject of a lawsuit over a premarital agreement, unless the agreement actually provided that one spouse should provide nursing care, uninterrupted, each and every day until the other spouse's death. Cur-

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[216] *See, e.g.*, MINN. STAT. ANN. § 518.551 (5)(a) (West 1990 Supp.); State v. Hall, 418 N.W.2d 187 (Minn. Ct. App. 1988) (holding that a father who took home $116,000 every month should pay the same amount of child support as a parent who takes home $4,000 per month; both pay $1,000 per month, the maximum guideline amount under Minnesota law). Note that as rare as such high income obligor's may be, one might expect them to be precisely the class of individuals using premarital agreements.

[217] *See, e.g.*, Simeone v. Simeone, 581 A.2d 162 (Pa. 1990) (alimony severely limited by contract despite the birth of a child to the marriage); Simeone v. Simeone, 551 A.2d 219, 220 (Pa. Super. Ct. 1988) (one child born to the marriage). The child's existence did not even warrant mention in the Pennsylvania Supreme Court opinion deciding the legal principle in favor of enforcement.

[218] RESTATEMENT (SECOND) OF CONTRACTS § 190 cmt. a (1981) (emphasis added).

[219] *See id.*; McDowell, *supra* note 4, at 49. On the other hand, the Restatement may not be explicitly intended to trivialize the interests at stake, but instead to express concern that adjudicating those interests will change the nature of them. This point is about the way the potential to adjudicate can change the social meaning of a practice. *See* Lessig, *supra* note 10; Posner, *supra* note 10, at 186-93; *see also infra* text accompanying notes 226-27 (discussing beneficial meaning of an absence of adjudication with respect to children).

rent contract law can already handle the occasional lapse. Parties to a premarital agreement are not likely to avail themselves of the legal system until there *is* something important at stake, including a long pattern or practice of violating an agreement. In that case, my second answer to this objection comes into play, and that is that the stakes are not at all trivial when litigating over a long-term relational contract. I believe that the discussions in section III.B of the value of nonmonetary labors to family welfare should put to rest this objection to the enforcement of premarital agreements.

Alternatively, the reference to "appropriate forums" may mean that adjudicating some family disputes in court will change the nature of the dispute. This is similar to the claim that breaking a lunch date should not give rise to a contractual cause of action, because it would change the meaning of and the norms that govern all lunch dates.[220] I believe this claim is tied, however, to the claim that the stakes are not particularly high, at least in comparison to agreements governing wage labor. At the least, this claim implicitly endorses the distinction between waged and nonwaged labor in marital disputes—a distinction that Professor Chused has succinctly caricatured as: "employment produces wealth; family produces community."[221] It may be appropriate to change the nature of these disputes if doing so would support other social values surrounding marriage, including the equal importance of different labors.

b. Courts lack workable standards to evaluate the adequacy of the performance of the nonmonetary components.—The second face of adjudication concerns cannot be as easily dismissed. That is not that the issues are too trivial for a court to decide, but that they are too difficult to litigate. This is the concern expressed in the first portion of comment a of the Restatement Second of Contracts, Section 190: "*the courts lack workable standards* and are not an appropriate forum for the types of contract disputes that would arise if such promises were enforceable."[222]

First, I want to set aside concerns about the problem of calculating actual dollar values for nonmonetary labor. In other areas of law where family labor is treated differently than wage labor, this point is raised against a claim for equalizing treatment. For example, it is raised against the call to tax the imputed income from household labor,[223] or to mandate appropriate social security contributions and benefits by unpaid household workers. It has been difficult for scholars to add detail to gain-thinking aspirations for the legal conception of household labor because of the challenge of devel-

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[220] *See* Posner, *supra* note 10, at 186-97.

[221] Chused, *supra* note 204, at 2224.

[222] RESTATEMENT (SECOND) OF CONTRACTS § 190 cmt. a (1981) (emphasis added).

[223] *See* EDWARD J. MCCAFFERY, TAXING WOMEN (1997); Staudt, *supra* note 107, at 1619, 1627; Lawrence Zelenak, *Tax and the Married Woman*, 70 S. CAL. L. REV. 1021, 1046 (1997).

oping valuation criteria for sometimes extremely difficult items that are of value, such as the ability to be a parent.[224]

Here by contrast, it is not up to the state, in the form of a regulatory agency or a court, to place a dollar value on the nonmonetary components of marriage. That is done by the parties to an agreement governing nonmonetaries. If a will is to provide for a spouse in exchange for nursing care, then the contract defines the value of that nursing care as the amount that will be provided in the will. While a court has to decide whether the nursing care was actually delivered, this does not require the court to place a monetary value on the care. For another example, a contract that provides that one party will receive child custody upon divorce if the other leaves the marriage weighs the importance of custody to one party against the importance of free exit from a marriage to the other. A *court* is not asked to decide how much compensatory property should go to the parent who does not receive custody.

Rather, the difficulty for a court is in deciding whether the nonmonetary promises have been fulfilled. In other words, if a contract does give child custody to the primary caregiver, there will still be a question as to who the primary caregiver is. Some courts make this determination today as a statutory factor in child custody cases, and so it is not impossible, especially when compared with the noncontractual alternative of deciding what is in the best interest of the child. But what if instead the agreement guarantees the mother, assuming she is fit, child custody, if she makes substantial and lasting career sacrifices in favor of time with her children? Courts will need to determine her job prospects in the event she had not had children in order to determine whether her sacrifices were substantial and lasting. Again, this is a determination made in tort law when calculating the economic damages of, for example, a 20 year old whose career path is suggested but not set. But what if we add to the agreement a requirement that she must be a loving and devoted parent, emotionally available to her children, in order to gain custody? I have argued that these efforts *are* a relevant part of the marriage exchange. But when a court adjudicates them, will it really be by reference to the terms of the contract, or rather by determining as a court does today what is in the child's best interest, employing the court's view of what are loving and emotionally available practices. What of a contract that said that the party who makes the most sacrifices for children shall have child custody? There a court *will* have a difficult task developing standards for deciding what counts as a sacrifice, personal time with a child, for example, or time away from a child spent earning money

[224] Consider here the exchange between Ira Ellman and Carl Schneider over Ellman's failure to take nonmonetizables into account in his theory of alimony. Ellman's response concedes that it would be better to do so, but rests on the premise that such an accounting simply cannot be done. If that is the case, however, that in itself has implications. To do an accounting of what can be accounted, but not to do one of that which is harder to value, will systematically bias results in favor of those who contribute easy-to-value components of marriage. *See* Ellman, *supra* note 156, at 282-84.

for the child's care. Presumably the choice will be made by reference to family law practices, undermining contract as the source of authority.

In many types of contracts in which custody is at issue, the children will be prime witnesses to performance. Unlike a child custody dispute, in which courts endeavor not to force children to testify for fear of harming future relations with either parent, ordinary contract principles would suggest that a child would be compelled to serve as a witness to the adequacy of the performance of contract terms. Again we see potential harms to children of the existence of this sort of agreement.

Consider the contract that does not take effect until the death of one party, in which the agreement is that one spouse will provide full-time nursing care to the other in exchange for consideration in a will. Discovering whether the nursing care was actually delivered may not seem to raise problems any more difficult than those that appear for many personal service contracts. But the individuals who will be challenging the agreement, in all likelihood the deceased spouse's children, will not have access to facts with which to refute compliance. The living spouse may be prevented by evidentiary rules from admitting evidence that the deceased spouse expressed satisfaction with the nonmonetary performance.[225]

Or consider a contract whereby the parties agree to split nonmonetary labor equally, if not identically, with financial penalties to be assessed upon divorce against the party who failed to live up to the agreement. The court would need to examine every aspect of the marital exchange to determine both the facts of that exchange within the marriage at bar and what makes an equal division of labor. Finally, consider an agreement whereby either party will pay a penalty if she or he commits adultery or seeks a divorce without fault. Courts would be investigating to find adultery again, a finding that courts were so reluctant to do under fault-based divorce that their concerns substantially influenced the divorce reforms of the past thirty years away from fault divorce.

I have made a few comparisons between determinations made in other areas of law and in hypothetical premarital agreements for a reason: I do not believe that it would be impossible to create workable standards for determining performance of many nonmonetary terms. It could, though, be very difficult. Family law courts have shown great reluctance to engage in some of these determinations, and have tailored substantive law specifically to avoid the litigation of these questions.[226] The no-fault divorce revolution was fueled in substantial part, though not exclusively, by a desire on the part of courts to avoid litigating questions of marital fault. It would take a substantial effort to overcome that reluctance. While this would not be

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[225] The evidentiary issues surrounding events that occur in private are similar to those involving intrafamily crimes. But there the victim is ordinarily available to testify as to the events in question.

[226] In practice trial judges may take account of particularities of the give and take of a marriage, but not in a systematic or predictable way.

enough on its own to advise against these agreements, when combined with concerns over child welfare, it leaves the remedy of permitting full negotiation of all terms quite weakened.

Moreover, these adjudication concerns can intersect and reinforce child welfare concerns. The problem of child testimony has already been mentioned, but other issues of child welfare are embedded in adjudication. Developing workable standards for deciding whether one parent has contributed the promised form of the ability to parent to another may be impossible, if, for example, the promise is to endeavor to raise a healthy, well-nurtured child. The distinction between doing a high-quality job providing the ability to parent, and providing a "quality child," is probably practically meaningless. Perhaps this is in large part a normative objection, as we are concerned about commodifying children by charging courts with assessing the child herself to decide if the child meets an agreed upon standard. While by comparison to many in family law I am cautious about raising commodification concerns, when talking about children themselves, or the quality of children, those concerns prevail. Perhaps in addition to normative concerns, we would hesitate to develop standards for valuing the ability to parent because of practical difficulties. Those include accounting for the benefit of a child's company to either parent or a child's existence to either parent.[227] That we don't want to count the parental interest in kids, or make it negotiable, doesn't negate its existence. It would be harmful for children to have courts recognize that interest, but it is still an interest. Thus, child welfare issues are replayed in the adjudication context.

Some might think that I've made the case for the particular difficulty of adjudication with respect to a few issues, but perhaps courts could decide the rest on a case by case basis, with a presumption of enforceability. The thesis of this Article is that to do an accounting of what can be accounted, but not to do one of that which is harder to value, will systematically bias results in favor of those who contribute easy-to-value components of marriage.

D. The Demands of Equity: No Premarital Contracting

It is important to remember the gendered aspect of the monetary-nonmonetary divide. The nonmonetary *inputs* to the marriage are greater by women, the monetary *inputs* are greater by men. This basic insight brought by the foregoing picture of the family economy leads us to rethink the fairness of the selective enforceability of premarital agreements. Under current law, the monetary sharing forced by family law may be rescinded

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[227] The same difficulty arises in trying to take account of a child's existence as a benefit to society at large. *See* Rolf George, *On the External Benefits of Children, in* KINDRED MATTERS 209-17 (Diana Tietjens Meyers et al. eds., 1993) (parents are unable to internalize positive externalities that children bring to sustaining adult wealth by sustaining the economy with future labor).

by contract, while the nonmonetary sharing may not be rescinded by contract.

This is an appropriate place, however, to take up a key objection to my argument. Why do I think that the inability to secure the nonmonetizables hurts those who perform them, rather than those who earn wages? In other words, in the typical marriage in which men bring more wages and women bring more domestic labor to the family, couldn't we argue that the husband is deprived of the ability to enforce the wife's promises to provide domestic labor, while she may enforce his promises to provide her with cash? This objection overlooks two important points, one legal and one practical. The legal point is that she cannot, in fact, enforce his promise to give her cash, if that promise is conditioned on her performance of domestic labors of any sort, as courts reject both halves of a cash-for-services agreement. The acceptable consideration for the ordinary premarital agreement is not future domestic services, but the agreement to marry: marriage, the future promise, is given by the person who receives a greater guarantee of money in exchange. *That* is acceptable consideration.

The second, practical answer to this objection is that premarital agreements are overwhelmingly drafted in practice to benefit the person who has cash, to prevent what would otherwise become monetary sharing from occurring. In the early 1980s feminists advocated for enforceable marriage contracts over all terms, with precisely this vision: contracts would be negotiated whereby women would gain greater economic rights than they were afforded by the background family law regime.[228] There was little explanation for how women would gain leverage to achieve that bargain. Some might say that if women could not achieve that leverage, it is because marriage is worth more to them, and the ordinary marriage without a premarital agreement works in their favor. But the critique in this Article offers another reason why women could not gain the leverage to make equal bargains—their inability to achieve property rights in their labor. In later years, this early literature was criticized for being optimistic about the kinds of bargains that would be struck in a freedom of contract world.[229] It is a rare, odd occurrence to see a premarital agreement drafted so that the person who has more money promises to turn more of it over to his future spouse than state family law would require.[230] Because nonmonetary agreements are unenforceable, we simply don't know whether in that same agreement the poorer spouse would have been able to secure a promise that the richer spouse would not fight the poorer spouse for child custody.

A final note about this objection is that even if the current law favors homeworkers over wage workers (which I doubt), the asymmetrical en-

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[228] *See* Shultz, *supra* note 2; Weitzman, *supra* note 2.

[229] *See* Atwood, *supra* note 2, at 133 n.29; Brod, *supra* note 2, at 234-52.

[230] *See* Atwood, *supra* note 2; Brod, *supra* note 2, at 234-40.

forcement argument put forth in this Article would still hold; it would simply cut the other direction.

E. Some Implications of Refusing to Permit Contracts

The foregoing leads to the conclusion of this Article: we must treat monetaries and nonmonetaries equally both to preserve the equity between them implicit in a positive social meaning of marriage, and to prevent a sex-imbalanced injustice that is the product of differences in the creation of property rights in labor. We have seen that enforcement of nonmonetary agreements could present serious difficulties for child welfare and may have a negative impact on our understanding of the marriage relation. Therefore, I conclude that courts should not enforce premarital agreements that govern monetary issues, or should at least review them with extreme skepticism. Now I will take up some substantial objections to my argument.

1. This is a Serious Departure from Current Law.—While my view would have been perfectly sensible in 1969, it would require a massive restructuring of the law with respect to premarital agreements as it has developed over the past 27 years. Since 1970 virtually all states have permitted property agreements to be enforced upon divorce, as distinct from death, and increasingly states are permitting enforcement of agreements limiting alimony. As a practical matter, I suspect most courts would not be willing to turn back to a time when contracts within marriage were entirely impermissible. I think it is a perfectly appropriate recommendation nonetheless, but I would like to comment on the usefulness of my analysis to the more likely legal decisionmaking engaged in by courts.

Remember that while most courts now enforce these agreements, many retain the right to reject enforcement if a review of the terms of the agreement suggests unfairness will result. Judges refuse to enforce agreements much more freely here than they do when reviewing a commercial contract for unconscionability. And several state courts have affirmed the appropriateness of this review quite recently.[231] These courts have various tests for deciding whether a premarital contract meets the standards of procedural fairness—appropriate advice of counsel, disclosure of assets, and time for review, for example. But there is no clear standard for deciding whether a contract is substantively fair, though courts are willing to find fairness on a case by case basis.

My account both of the exchange within marriage and of the doctrine that selectively enforces premarital contract terms may guide a court in performing a substantive review of terms. A court could ask whether the contract terms permit the party seeking to enforce the agreement to gain an

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[231] *See, e.g., In re* Dechant, 867 P.2d 193, 195-96 (Colo. Ct. App. 1993); Kolflat v. Kolflat, 636 So. 2d 87, 90 (Fla. Dist. Ct. App. 1994).

advantage through expropriation of the nonmonetary aspects of a marriage. Note that this analysis would not require the kind of dollar accounting that raises valuation difficulties, as it would be a threshold question. Did the person invoking the contract to avoid monetary sharing also do more nonmonetary sharing during marriage? If so, the agreement would be substantively fair. If not, the agreement would bear closer scrutiny. This would preserve some role for the most conventional premarital agreement signed between parties to second marriages who are interested in avoiding the state's elective share law upon death. Not all such agreements would be enforced in practice, but those with equal nonmonetary sharing would. Preserving this role for premarital agreements would go a long way toward meeting the objection that a premarital agreement between older spouses to a marriage that produces no children of its own is less problematic than one signed before a first marriage with the potential to produce children. As long as it can be shown in those marriages that one party has not gained an advantage because there is an unequal legal mechanism for obtaining security in different kinds of labor, enforcement of a monetary premarital agreement will not produce the strongest injustice.[232]

Courts frequently say, when enforcing premarital agreements, that it seems reasonable to permit spouses to order their own affairs. My argument permits a judge to see that the premarital agreement before the court may not truly reflect the complete ordering of the marital exchange, but rather the parties' understanding, on advice of counsel, of their financial arrangements. The judge has only a half picture of their understanding, and so she has no way of knowing whether the unwritten conditions have been met that make its enforcement fair. It should leave a judge questioning whether the contract is the complete expression of the spouses' private agreement, as courts currently assume it is.

The case of enforcement upon death, which we need to remember covers the majority of premarital agreements, may not raise as many issues as the case of marriage among the young, as enforcement at death usually presupposes that any children are from prior marriages, and so labor on behalf of children of the common marriage is not an issue. These parties are primarily concerned about overriding elective share law rather than preventing alimony at divorce, so we might ask what harm is there in these contracts? The answer is that several of the money-for-housework contracts that have been denied enforcement have been second-marriage death cases, because they have involved one spouse nursing the ill and elderly other spouse be-

[232] Ideally, even these agreements would not be enforced, as there is still some risk that an effective retrospective substantive review for the inequities discussed in this Article will still not reveal possible problems. This is because one cannot tell what provisions were left out of an agreement on the ground that they were not enforceable; in other words, a judge cannot know for certain what the agreement would provide were it a full freedom of contract regime.

fore death, in exchange for consideration in a will.[233] Elder care in second marriages may be the moral equivalent of childcare in first marriages.[234]

2. What's the Alternative? Weaknesses of Enforcing the Family Law Default Rules.—My description of the premarital agreement is one in which couples seek a legal marriage, but wish to opt out of the state-imposed rules of marriage. My proposed prohibition on marriage contracts implicitly relies on the notion that the background rules of distribution—family law—can handle the complexities discussed herein better than a contract can. Are decisions about the justice of things like money and custody better when handled by the parties at the outset of a marriage, or by the parties negotiating in the shadow of legal rules at the end of one, or in the worst case, by the court itself? The background rules of family law may be much worse than anything the parties could devise themselves.

This objection has force. These background rules have not historically functioned very well. They provide a disincentive to marry in some cases, courts lack workable standards for applying them justly, and there is an unusual level of uncertainty and unpredictability as to outcomes. In addition, one might argue that marriage is a private relationship, and there is no justification for the state to override the legal meaning that the individual couple intends that marriage to have.

The last argument, that there is no legitimate reason to have a substantive marriage law that overrides the wishes of the parties, may prove too much. It is the same as asking why the state sanctions marriage at all. The traditionally cited legitimate interests are child protection and supporting family stability because the family provides an alternative to the state in nurturing and socializing children to become free individuals in a democracy. This interest covers a concern for children themselves, but also for the culture that relies on family structure to create independent citizens. Supporting the marriage institution can include paternalistically protecting people from foolishness, short-sightedness, and cognitive errors, on the principle that it is not only the individuals involved who suffer when these characteristics lead to the failure of a marriage or, in our case, the waiver of rights and obligations designed to make childrearing less risky.

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[233] *See* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 19 (Cal. Ct. App. 1993); Hughes v. Lord, 602 P.2d 1030, 1031 (N.M. 1979). Older couples who do not like the elective share law need not seek a civil marriage if they wish to opt out of marriage law altogether; religious ceremonies need not depend on civil marriage.

[234] There may be a case, though, for distinguishing property acquired before marriage from property acquired during marriage, as property acquired before marriage does not reflect marital efforts. That property is still relevant to the marriage as it is used during the marriage and can affect a couple's decision about allocation of resources during marriage; for example, a couple might spend income more freely in reliance on one spouse's property. If the property were in no sense used during the marriage, it would be possible to pass it along to the intended heirs, usually children of a prior marriage, before the marriage took place.

One might respond that we have background rules of family law so that those who do not have an individualized vision for their marriage may benefit from collective wisdom or external authority if that is their preference. This view would have the background marriage rules as helpful defaults aimed at approximating what most couples would agree upon ex ante if they did agree. This is a model of marriage whereby the state is to facilitate individuals in having their expectation of marriage met. But given the ways in which marriage transforms individuals, in which individuals change over time, expectations are something of a fiction. With respect to divorce, they are particularly a fiction, as almost all couples predict at the outset of marriage that they will not themselves divorce, despite their actual knowledge that divorce rates suggest otherwise.[235]

The problems discussed in the contract literature on relational contracts is even more prominent in a marriage, where the parties are always individuals and not institutions, always developing new preferences and discarding old ones in a process of maturation that as a culture we *encourage* rather than discourage. A legal framework that punished those whose view of themselves or their spouse evolved over the course of their marriage when measured against expectations upon marriage entry would seem perverse: it runs counter to the ideal of growth within marriage. But that is precisely what a premarital agreement does. Part of what makes contracts valuable is knowing what to expect; that may not be what makes marriage valuable. Family law gives the parties the ability to remain open to change within marriage. Finally, in the words of Professor Elizabeth Clark, holding people to their expectations at the date of marriage entry does not merely punish selfish and superficial people, but also the "indecisive, the deluded, the trusting, and the optimistic."[236] Some of these are qualities that make a good spouse. The public interest in marriage stability is furthered by supporting behavior that makes a person a good spouse.

Moreover, the idea that we might have family law only to provide default to those who don't wish to tailor their own marriage neglects the public interest in *defining* marriage through some uniform concepts of rights and obligations. If spouses used a premarital contract to nullify each and every right or obligation undertaken through marriage, what would make their version of the institution marriage at all? Courts and legislators have always claimed some right to protect the institution of marriage and to prevent it from becoming a vacant concept. The concept of "marriage," as compared to "private contract," suggests a meaning that can be interpreted by third parties without knowing anything about the particularities of the

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[235] *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (couples know the general divorce rate, but in their own case predict a much lower chance of divorce).

[236] Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 L. & HIST. REV. 25, 27 (1990).

spouses. Without defending each one of these, legal efforts at symbolic protection of the parameters of the institution include age restrictions, restrictions on the number of parties to a marriage, to the consanguinity of the parties, and to the sex of the parties. Congress explicitly invoked this power to police the symbol of marriage in passing what is pointedly titled "The Defense of Marriage Act."[237] While some, including Martha Fineman, have advocated the complete privatization of adult relationships,[238] such a privatization would both depart tremendously from current law, and would eliminate the need for any discussion of a unique species of contract called premarital agreements. My argument, as much as it pushes current premarital agreement doctrine, works much more within the framework of family law by drawing out and supporting positive aspects of marriage, than does Fineman's proposal.

The current treatment of family law issues upon divorce attempts to respect the principle that some equality between monetary and nonmonetary contributions is central to the meaning of marriage. Family courts often fail in this effort, but it must be said that they do endeavor to improve. For example, there has been an evolution toward greater predictability in the division of assets upon divorce, as state courts have developed presumptions of equal divides. In addition, courts and legislatures have struggled openly to devise appropriate remedies for precisely the distribution of labor problems discussed in this Article. In that respect, the default rules contain an expression of the principle that monetary and nonmonetary components of marriage should both be valued, though courts differ in their attempts to operationalize that ideal, and some are more successful than others. Relying on the background regime, fallible as it is, means relying on a regime that embeds this principle into legal marriage; permitting override of the state's financial terms means allowing this principle to be removed from marriage.

In the child custody area, states that articulate the best interest of the child standard are adding common law or statutory factors, some of which are concretely easier to determine than the abstract best interest. An example is the common rule that courts should consider who the child's primary caregiver has been, an inquiry that relies on past facts rather than future speculation.

Those efforts at improving family law are dependent on the notion that there is a public interest in coming up with the best rules for the distribution of assets at divorce, and that the society has a legitimate stake in those rules. In other words, that debate depends on the notion that there is a public interest in marriages beyond the interests of the parties themselves, as

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[237] While I disagree with the policy expressed in the Defense of Marriage Act, it is not because the government oversteps its authority in maintaining the meaning of the marriage institution, but rather that same sex marriages in my view do not undermine that meaning.

[238] *See* FINEMAN, *supra* note 107, at 228-33 (tort and contract law enough to handle adult relationships).

well as an interest in protecting the parties from decisions they make as more youthful selves.[239] Children raised in families eventually become adults who impose all sorts of negative and positive externalities on society, and so the impact that family structure has on children's development is not hard to justify as a matter of public interest, even beyond the conventional interest in the protection of minors who cannot protect themselves.[240]

Finally, for all of family law's inadequacies, few would argue that parents' already strong rights to decide what is best for their children should become irrebuttable in the face of clear evidence that before the birth of those children they made an agreement reflecting their then view of their children's future best interests. Even allowing that an agreement would require a floor of parental fitness, there is little reason to privilege the parties' understanding of what is best for not-yet-living children. To the contrary, one might think that even a fallible court can determine a child's interests better once the court has the benefit of the child's life from which to draw evidence.

3. The Problem of Discouraging Marriages Altogether.—One criticism of my proposal is that it will discourage marriages. This argument takes the form of a "minimum wage analysis," which predicts that raising the minimum wage will raise the financial well-being of those who retain jobs, but displace some workers because employers will decide to do with fewer workers or decide to reallocate wages into labor-reducing capital goods. The point is simply that raising the minimum wage will have some positive and some negative effects on low-wage workers, though there is little agreement about the extent of the effect. This analysis can be applied to preventing premarital agreements. Some individuals who would currently get married after signing away monetary rights using a premarital agreement would probably come out ahead if these agreements were not enforced, as the marriage would simply happen without the relinquishment of those rights. But some similarly situated individuals would end up with no marriage at all, as some marriages that are contracted with a premarital agreement would not happen at all without one. Thus, some marriages will be prevented or discouraged by my proposed reform. I have three responses to this argument. The first two question the extent of this effect. The last asks whether we care if this result occurs.

The first cut at questioning the effect raises the question of how easy it is for a rich person who wants to marry someone with less wealth to withdraw from a proposed marriage and find satisfaction elsewhere. I'm not suggesting that this would never happen, but a blackboard minimum wage analysis can't tell us about the extent of the effect. In an economist's terms,

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[239] *See* RICHARD A. POSNER, AGING AND OLD AGE 84-95 (1995).

[240] The child welfare interest in stabilizing marriage does not mean that only marriages with children need to share a common public concept. All marriages contribute to the meaning of marriage.

it depends on the elasticity of demand for contracting that particular marriage. That is an empirical question that is difficult to test other than with intuitions which may not be consistent from one observer to the next. While many see love motivating marriage and love as being about the unique, entirely nonfungible characteristics of its object,[241] others see premarital agreement marriages motivated by gold-digger young women and wealthy sex-seeking older men who look for something rather fungible from one potential spouse to the next. A third group will feel the disincentive must be taken seriously so long as marginal analysis of any kind applies: no matter the degree of the effect, some marriage will be discouraged—"at the margins" as they say. I believe that the most that can be said is that assuming that demand is not 100% inelastic, nonenforcement will discourage *some* marriages. But beyond that, the effect is hard to predict without knowing more about demand. If demand is relatively inelastic, might it be said that premarital agreements signed today permit a nonideally thin set of commitments in a marriage that would occur with a thicker one?

The second objection to the importance of this effect is to ask how many marriages are in effect discouraged today by the inability to enforce *nonmonetary* premarital agreements? How many marriages would take place that currently don't if a person could be assured that there would never be a wrenching child custody issue, that she would receive good counseling support from a spouse, that household labor would be divided equally? If one accepts the equal significance of the monetary and nonmonetary components of marriage, then the minimum wage effect would already be in play to the same extent, and with the same limitations discussed above, now. Yet no one now characterizes this as a loss.

That leads to the final response to this critique. Why do we care if some marriages are discouraged? First, as I have said, we are discouraging some marriages today by not enforcing nonmonetaries, and it doesn't seem to be causing much outrage. In the words of one court that denied enforcement of a housework agreement: "it is not the policy of this state to encourage people to marry for money."[242] This was used to deny money to a spouse who performed nursing care. It was thought that she should not extract money for the nursing care, as that care should be done one way or the other within marriage, or no marriage should happen. Might not the same be said of one who marries for the nonmonetary benefits without sharing money? Might a person who benefits from monetary premaritals not be marrying to extract nonmonetaries from a spouse without adding monetary wealth to the exchange? If so, why are we invested in seeing that marriage take place—remembering that these couples seek to avail themselves of the benefits of an institution rather than to keep their relations entirely private? Compare the two kinds of marriage that are discouraged. One is discour-

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[241] *See* Martha C. Nussbaum, *Venus in Robes*, NEW REPUBLIC, Apr. 20, 1992, at 36.

[242] Hughes v. Lord, 602 P.2d 1030, 1031 (N.M. 1979).

aged because a person who will bring extraordinary monetary wealth to a marriage does not want to lose security over that wealth. The other is discouraged because a person who is planning to make extraordinary nonmonetary efforts does not want to lose security over that wealth. Is it clear which marriage is more consistent with the public policy of encouraging marriage?

V. SOME IMPLICATIONS FOR ECONOMICS AND THE FAMILY

Today we have a regime in which premarital contracts will be enforced unless there is a strong reason against enforcement. That doctrine is consistent with a presumption that freedom of contract should be the baseline norm, deviation from which requires justification. With respect to nonmonetaries, the justification is that child welfare and adjudication concerns override ordinary contract norms. For monetary agreements, all reasons not to enforce have been stripped away over the past several decades, as women achieve greater labor market equality and divorce becomes more routine. I offer a new reason not to enforce monetary agreements—the maintenance of respect for the equal valuation of money and services within marriage. In other words, my reason for not enforcing monetary agreements is that we are not going to enforce nonmonetary ones, and that in itself is adequate reason for concern. This argument is premised on a view that monetary and nonmonetary components of marriage need to be treated equally in order to properly value unpaid family labor. My proposal values this equality goal more highly than the freedom of contract goal, where the two are in tension. For the contracts scholar, the challenge of this Article is in thinking about how to approach contract rules that, neutral in their intent, have a disparate impact on a class of individuals; prioritizing the value of norms will be necessary.[243]

One might conclude that I would generally take a dim view of freedom of contract, but this is not the case. I am interested in creating whatever property rights are possible in unpaid labor, and in this instance, that may mean limiting contract. My view is that each doctrinal piece of the law of housework needs to be examined in light of a particular background norm of the family economy that values unpaid labor equally with paid labor.

This particular doctrinal proposal does not solve the problems of the undervaluation of household labor. That is because premarital agreements by definition only apply to married couples and, in practice, only to a very small number of married couples whose wealth upon entering a marriage warrants attention to the effects marriage will have on property and support rights.[244] Because the problems of the undervaluation of household labor

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[243] See Rakoff, *supra* note 15, at 69, on the excessive emphasis placed on intent.

[244] Articles about premarital agreements frequently assert that their use is on the rise. The evidence cited to date is always anecdotal, and it is not clear that it is accurate. It may simply be that litigation over premarital agreements has increased as they are increasingly employed at divorce, rather than at

are by no means limited to married couples, much less to married couples with written contracts, this is a small piece of any effort to value household labor. But the implications are great: the ability to contract over labor has a history in our legal tradition of marking that labor's importance; restricting that ability can only be justified by some larger notion of public interest in families that requires us to look at the entire marital relation.

Moreover, arguably this reform proposal is part of a questionable tradition of unpaid workers relying on a wage-earner for wealth. That reliance is probably not the long term solution to undervaluation in a world where dependence means easy transition to poverty as relations break, and where unpaid workers may decide they do not prefer marriage to any given individual, or at all. But the narrower question is this: is the foregoing an acceptable view of wealth within marriage where marriage exists? I believe that is separate from the question whether marriage is to be the sole or predominant mechanism for valuing domestic and caregiving labor.

The law with respect to premarital agreements represents an important legal expression of the components of marriage. If it were to be reformed for the reasons set out in this Article, it could, in combination with many other efforts in other areas of law, contribute to a cumulative rethinking of the relationship between women's family labor and women's economic status.

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death. *See, e.g.*, Julie Salamon, *Domestic Manners: Popping the Pre-Nup Question*, THE NEW YORKER, Aug. 25 & Sept. 1, 1997, at 4, 70-79 (without data on increase in use of premarital contracts, author says, "Now that the rest of the country is following the Donald Trump approach to the eternal commitment, will the marriage bond become like the junk bond?" and "[W]hy, if prenuptial agreements are so universally hated, does it seem that everyone now wants one?" and "[F]ormerly the exclusive province of the very rich[,] prenuptial agreements are increasingly being sought by young professional people who have never been married."); *see also* Brod, *supra* note 2, at 231; Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1037 (1993).