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Marital Contracting in a Post-Windsor World

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MARITAL CONTRACTING IN A POST-WINDSOR WORLD

MARTHA M. ERTMAN*

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“Any intelligent woman who reads the marriage contract and then goes into it, deserves all the consequences.”¹

INTRODUCTION

Isadora Duncan poked fun at “the” marriage contract. But the terms of marriage today differ considerably from the state-provided terms of Duncan’s 1922 marriage to a poet eighteen years her junior, which in turn differed from Duncan’s parents’ marriage. Those ever-changing marital rules belie claims that marriage is an unchanging status mandated by God or Nature. To the extent that changes increase freedom to enter and exit a marriage, as well as to tailor the financial rights and duties of spouses vis-à-vis one another, they also reveal contractual aspects of marriage. If marriage is indeed a con-

* Carole & Hanan Sibel Research Professor, University of Maryland Francis King Carey Law School. Many thanks are due to the University of Maryland law school for generous financial support, to the outstanding staff at its Thurgood Marshall Law Library for research support, and to Fred Hertz, Margy Klaw, and participants at the Florida State University College of Law’s *After Marriage* symposium and a University of Maryland faculty workshop for helpful comments that clarified my thinking on key issues addressed in this Article.

1. ISADORA DUNCAN, *MY LIFE* 200 (1928).

tract—defined in black letter law as a legally binding promise²—instead of an immutable status controlled by forces divine or biological, then most arguments against same-sex marriage bite the dust.

Long before marriage equality became a front line in the culture wars, family scholars recognized the deep vein of contract running through family law,³ though disagreement persists on its particulars and policy implications. Elizabeth Scott and her husband Robert see marriage as a relational contract, “a long-term commitment to pursue shared goals, the fulfillment of which will enhance the joint welfare of the parties.”⁴ Margaret Brinig, in contrast, sees the law of commercial contracts as lacking the concepts of “love, trust, faithfulness, and sympathy” which she dubs “essential[]” to family life, so she argues for a covenantal model of marriage that accounts for the “solemn vows” that shape families.⁵ My contribution to this legal academic literature has been analogizing marriage to both corporations and lending relationships.⁶ My forthcoming book, *Love’s Promises*, goes a step beyond law, contending that both contracts and non-binding agreements that I call “deals” shape all kinds of families.⁷ But even the most contractarian commentators agree that marriage is not entirely contractual. Instead most scholars see marriage as moving along a continuum from status to contract, taking on a different mix of status and contract at various times and places.⁸ Different proportions serve different social, political, and economic ends.

Today, the ratio of contract to status in American family law is particularly high, between no-fault divorce, the general enforceability of cohabitation and marital agreements, the rise of collaborative lawyering, widespread recognition of reproductive technology agreements, and the increasing enforceability of open adoption agree-

2. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

3. See, e.g., Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 208 (1982).

4. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1229 (1998).

5. See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 1, 3 (2000).

6. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R. C.L. L. REV. 79 (2001).

7. MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (forthcoming 2015) (on file with author).

8. See, e.g., Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 10 (2012). Janet Halley, however, contests this view, instead seeing the very contract/status distinction as a vehicle for imposing classical legal formalism into family law. Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 6 7 (2011); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 190 93 (2011).

ments.⁹ Yet many people—judges and scholars included—persist in seeing love and contracts as opposites.¹⁰ This Article seeks to counter that misperception by exploring a post-*Windsor* legal landscape through a lens of contracts and deals.

I explore the question of what marital contracts might look like in a post-*Windsor* world by zooming in on a common exchange in which partners swap financial support for care of home, hearth, and children alongside a promise of sexual relations. I call it the “pair bond exchange.” Because it plays an important role in marriage and other long term relationships, focusing on it helps answer the question of whether gays will change marriage or marriage will change gays (or both). In 2015, over a decade after Massachusetts became the first state to recognize same-sex marriage and two years into federal recognition of marriage equality, the terms of the average pair bond exchange in gay couples differ from the terms of most straight couples’ pair bond exchanges. Unless marriage equality makes gay couples act like straight spouses, that difference could lead same-sex couples more frequently to contract around default family law rules like sharing retirement savings that accrue during the marriage or providing post-divorce income sharing through alimony.

This Article proceeds in four parts, each addressing a different aspect of this exchange. Part I begins with an overview of the role of exchange in marriage by cataloging four different disciplines’ approach to that exchange (sociobiology, economics, anthropology, and sociology). It then examines cases that illustrate family law’s treatment of the three elements of that exchange—money, housework, and sex.

Part II discusses quantitative data about pair bond exchanges that show the different pair bond exchanges entered by straight and gay couples. Part III switches the focus to qualitative data about differences between gay and straight pair bond exchanges. Both numbers and stories indicate that generally speaking, gay couples have more egalitarian relationships. They share housework more equitably and have more comparable incomes. But that is largely because straight couples are more likely to have kids. Researchers who study gay and straight couples raising kids find that about a third of straight and gay-male couples have one parent at home full-time, just a bit more than the one out of four lesbian-mom couples in which one person keeps house full-time.¹¹ Moreover, while comparative data is

9. See ERTMAN, *supra* note 7, at xiii.

10. See, e.g., HARVILLE HENDRIX, GETTING THE LOVE YOU WANT: A GUIDE FOR COUPLES 237–39 (1988); Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2416–18 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)).

11. Dan A. Black et al., *The Economics of Lesbian and Gay Families*, 21 J. ECON. PERSPECTIVES 53, 62–63 (2007). That exchange may be less common among some sub

scarce, there is some indication that heterosexual couples have become more equal over the past few decades, with men changing more diapers and women earning a greater percentage of the family income, while gay couples are, as one researcher put it, becoming “heterosexualized,” exhibiting less equality in housework and wages.¹²

While the third element of pair bond exchanges—sex—matters less for family law than it used to, the law largely ignores agreements about sex, from frequency to fidelity. But because the law is not everything, it is worth noting the social science research indicates that in this respect lesbian and gay-male couples part ways. While only about five percent of straight and lesbian couples explicitly agree that sex outside the marriage is okay, half of gay male couples make agreements that allow for sex with other people.¹³

Part IV concludes the Article by predicting how marriage equality could change heterosexual marriage and/or same-sex coupling. If the pair bond exchanges of most couples change, then family law doctrine could and should adjust its default rules to reflect couples’ new expectations. A glance at demographics suggests that forecasters of family law evolution ought to follow three things: (1) the children of same-sex couples, (2) the ethnographers who document how couples actually divide financial and housekeeping responsibilities, and (3) the heterosexuals.

Heterosexual practices are likely to be the most accurate predictor of changes in marriage and the legal rules governing it. As of 2011, around 114,000 same-sex couples were married (and another 108,000 or so in civil unions or registered domestic partnerships), compared to fifty-six million different-sex couples.¹⁴ It is hard to see how such a tiny percentage of married couples could change the rules unless much more powerful social and economic forces were behind these changes. As Stephanie Coontz observes, marriage has been moving in the direction of a partnership of equals seeking personal fulfillment

groups of gay couples. An in depth study of fifty black lesbian couples found that they highly value economic self sufficiency and thus are less likely to embrace that stark version of the pair bond exchange. MIGNON R. MOORE, *INVISIBLE FAMILIES: GAY IDENTITIES, RELATIONSHIPS, AND MOTHERHOOD AMONG BLACK WOMEN* 153, 157, 160 61 (2011).

12. Gabrielle Gotta et al., *Heterosexual, Lesbian, and Gay Male Relationships: A Comparison of Couples in 1975 and 2000*, 50 *FAM. PROCESS* 353, 372 (2011). One scholar suggests that the pre and post marriage equality comparisons of households provide a “natural experiment” that should inform both policy and future research. Deborah A. Widiss, *Changing the Marriage Equation*, 89 *WASH. U. L. REV.* 721, 722 (2012).

13. See Gotta, *supra* note 12, at 368.

14. Brief of Gary J. Gates as *Amicus Curiae* on the Merits in Support of Respondent Windsor at 25 26, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12 307) (using 2010 census data to estimate the number of same sex married couples and registered domestic partnerships or civil unions); Jonathan Vespa et al., *America’s Families and Living Arrangements: 2012*, U.S. CENSUS BUREAU at 3 (2013), available at <http://www.census.gov/prod/2013pubs/p20-570.pdf>.

for over a century.¹⁵ Though change will likely flow in both directions, I suspect that marriage equality is more likely to change pair bond exchanges among gay and lesbian couples than the marriages of heterosexual spouses. If social, legal, and economic support leads more gays to have children, then the caregiving work those children require is likely to induce those couples who can afford it to have one partner focus more on bread-winning while the other tends to the health, education, and welfare of everyone in the household. Indeed, as Nan Hunter predicts, that pattern could be one factor that pushes family law to move away from providing different rules based on sexual orientation to dictating one set of rules for parents and another for couples without children.¹⁶

I. THE LONGSTANDING LINK BETWEEN CONTRACT AND MARRIAGE

This Part explores the tight link between contract and marriage by first mapping some ways that contractual thinking has shaped marriage historically and then examining a few contemporary legal doctrines that continue to presuppose an exchange of financial support for caregiving in marriage. It begins at a macro level, looking at scholarship on intellectual frameworks that shape families and family law, and concludes with a more micro-level analysis of how family law treats the property-sharing, care-giving, and sexual fidelity elements of the pair bond exchange.

A. *The Big Picture of Contract in Marriage*

Many scholars have viewed marriage through a contractual lens. Most recently, William Eskridge, a long-time scholar of same-sex marriage, provided a convincing account of changes in marriage rules using the tools of contract theory: default rules, immutable rules, and the rules designating how to opt out of a default, which he dubs “override rules.”¹⁷ By tracing family law’s general move from mandatory rules to default rules over the last century, he reaffirms Henry Maine’s 1861 dictum that the move in progressive societies is often from status to contract.¹⁸ Where Eskridge provides an overview of doctrines ranging from who is allowed to marry to grounds for divorce, I focus on one exchange that shapes daily life in many families,

15. Stephanie Coontz, *The Heterosexual Revolution*, N.Y. TIMES (July 5, 2005), <http://www.nytimes.com/2005/07/05/opinion/05coontz.html>.

16. Nan D. Hunter, *Introduction: The Future Impact of Same Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855, 1877 78 (2012).

17. William N. Eskridge, Jr., *Family Law Pluralism: The Guided Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1889 (2012).

18. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 168 70 (16th ed. 1897).

the pair bond exchange. Analyzing spouses' division of financial and homemaking obligations should help lawmakers and law-shapers make more informed decisions about the evolution of default rules since default rules generally reflect what the people involved would have agreed to had they talked about it.¹⁹

No-fault divorce and marital contracting are nodal cases illustrating the trend toward private ordering. Both make marriage more contractual by treating marriage as a relationship with an existence and terms dictated, in good part, by the people involved. Indeed, the Uniform Marriage and Divorce Act reflected that move away from status and toward contract by re-naming divorce "dissolution," a term borrowed from the winding down of a business.²⁰ Consequently, baseball star Barry Bonds could divorce his Swedish-born wife Susann in 2000 for irreconcilable differences and keep for himself much of the \$43 million he brought home playing for the San Francisco Giants in addition to the homes, cars, and other things purchased with that money.²¹

Before courts enforced contracts that limited property-sharing and alimony on divorce, marriage was more of a status—permanent once entered, with largely unalterable terms. Courts justified the mandatory nature of those rules by citing marriage's immense value to families, society, and even civilization itself. As the Supreme Court famously put it in the 1888 case *Maynard v. Hill*,

Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.²²

Though *Maynard* concerned legislative divorce,²³ the long shadow it has cast over family law has supported marriage-as-status arguments against a wide range of reforms. Today that means same-sex marriage, but back in the 1880s the Court was more likely concerned with interracial marriage.

Just five years before deciding *Maynard*, the Court opted to uphold miscegenation laws, rejecting a contract-based argument that

19. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89-93 (1989).

20. U.M.D.A. §§ 301-16 (1974).

21. *In re Marriage of Bonds*, 5 P.3d 815, 817, 838 (Cal. 2000); see also Ken Hoover, *Barry Bonds Wins Big in Divorce Court/He Gets Both Houses Pay to Ex Wife Cut 50%*, S.F. GATE (Mar. 9, 1996, 4:00 AM), http://www.sfgate.com/sports/article/Barry_Bonds_Wins_Big_in_Divorce_Court_He_gets_2991024.php.

22. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

23. See *id.* at 203.

had made some headway in state courts.²⁴ A number of states in the former Confederacy had overturned bans on interracial marriage on the grounds that marriage was a contract and miscegenation laws ran afoul of the Fourteenth Amendment and the Civil Rights Act of 1866's provision giving any citizen the same right that a white citizen has to make and enforce contracts.²⁵ However, in the 1880s, white supremacists sought to reinstate the ban, claiming that it did not violate principles of equal protection since the laws prevented both blacks and whites from marrying outside their race.²⁶ In 1883, the U.S. Supreme Court accepted this rationale as grounds for upholding the ban on interracial marriage in *Pace v. Alabama*.²⁷

Rules about marriage have immense influence on other aspects of social, political, and economic life. According to historian Peggy Pascoe, the bans on interracial marriage formed the backbone of the entire system of racial subordination.²⁸ Judicial and cultural resistance to interracial marriage was so strong that the Court avoided those cases even after the twentieth century's civil rights movement was well underway.²⁹ Not until 1967 would the Supreme Court finally overrule *Pace* in *Loving v. Virginia*.³⁰ Little did those justices guess that they were greasing the cultural and legal tracks for same-sex couples to sign on to the state-supplied terms of the marriage contract.

But marriage is far too old, varied, and complex an institution to be pinned down to either contract or status. Sociologist Kimberly Richman captured this truth in interviews with same-sex newlyweds in California and Massachusetts.³¹ Kathy, who married her partner Andrea in Massachusetts, initially wanted to marry in order to ensure access in an emergency, a fear borne of a trip to the emergency room early in their relationship.³² But, Kathy told Richman, the experience of going to City Hall to pick up their marriage license exceeded those practical bounds:

I felt almost as moved by that than at any part of the ceremony, to see this official form that was stamped with our names on it and our parents' names on it, our address and that said it was "legal."

24. See *Pace v. Alabama*, 106 U.S. 583, 584 85 (1883).

25. U.S. CONST. amend. XIV; Civil Rights Act of 1866, 42 U.S.C. §§ 1981–82 (2012).

26. PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 68 (2009).

27. 106 U.S. at 584 85.

28. PASCOE, *supra* note 26, at 201.

29. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHL. KENT L. REV. 371, 415 16 (1994).

30. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

31. See KIMBERLY D. RICHMAN, *LICENSE TO WED: WHAT LEGAL MARRIAGE MEANS TO SAME SEX COUPLES* (2014).

32. *Id.* at 146 67.

It said we were married as if solemnizing this document. That was an incredible thing.³³

Aleda, a San Francisco woman, newly wed to her partner Anne Marie after a decade together, marveled at a “lovely feeling” of legitimacy and “being part of a big picture”: “It’s like you just dismiss something . . . you may want to be part of it but you know that you can’t be . . . there was just something incredibly legitimate about it that I finally got to experience.”³⁴

Aleda summed it up with the phrase “socially recognizable contract,” explaining that she used to think of “the whole marriage thing” as “really just a legal contract,” but now sees its “social implications.”³⁵

I, too, remember my trip to City Hall with my now-wife to pick up our marriage license, back in 2009. The delight that comes with a happy marriage, as well as the great good fortune to live in the era when the law decided to honor our family, landed that green license, framed, on our dining room wall.

Marriage seems to retain a mix of status and contract through its many incarnations. Take fault-based divorce. On first glance, no-fault divorce looks like a move from status to contract because it allows unhappy spouses to terminate a marriage in much the way that unhappy business partners can terminate their “us-ness.” But fault-based divorce also contained contractual elements. If a husband breached his promise to forsake all others, his wife could cancel the marriage contract (divorce) and get damages (more property, alimony).³⁶ If the wife was the cheater, her husband could get a divorce and recover damages by being excused from paying alimony.³⁷

The complex interplay between status and contract in marriage is hardly surprising given the many roles that marriage plays in social, economic, psychological, and other aspects of peoples’ lives. The importance of marriage—and pair bond exchanges within marriages—has generated an immense literature on marriage. The next Section focuses on one aspect of that literature, the way that scholars in four disciplines have conceived of the pair bond exchange. Each discipline, we will see, has coined a phrase to describe the swap that reflects each discipline’s particular focus.

33. *Id.*

34. *Id.* at 144.

35. *Id.* at 145.

36. No fault regimes sometimes continue to account for fault. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No Fault Era*, 82 GEO. L.J. 2525, 2532-38 (1995).

37. *Id.* at 2535-38, 2558.

B. One Swap with Many Names

The pair bond exchange involves one partner doing more to keep up the bank balance while the other does more to keep the home front functioning, with sex as part of the deal. Its importance to family life is shown by the fact that scholars of evolution, economics, anthropology, and sociology have all recognized and examined it. While scholars in these fields use different terms, I propose the term “pair bond exchange” as a cross-over term that captures much of the various disciplines’ views.

1. Sociobiology: The Sex Contract

According to socio-biologists like Helen Fisher and E.O. Wilson, our proto-human ancestors entered an exchange that Fisher calls the “sex contract.”³⁸ Women exchanged sexual exclusivity and foraged food for men’s bounty from the hunt, a bit of protection, and help with the children.³⁹ The deal served the larger goal, they contend, of getting their genes to the next generation.⁴⁰ As Wilson explains, the especially slow, expensive process of raising a human infant to maturity required a lot of help, giving our ancestors who could strike deals with one another a leg up in getting their genes to the next generation:

Human beings, as typical large primates, breed slowly. Mothers carry fetuses for nine months and afterward are encumbered by infants and small children who require milk at frequent intervals through the day. It is to the advantage of each woman of the hunter-gatherer band to secure the allegiance of men who will contribute meat and hides while sharing the labor of child-rearing. It is to *the reciprocal advantage* of each man to obtain exclusive sexual rights to women and to monopolize their economic productivity. If the evidence from hunter-gatherer life has been correctly interpreted, the *exchange* has resulted in near universality of the pair bond and the prevalence of extended families with men and their wives forming the nucleus.⁴¹

But even assuming the primacy of natural selection in shaping human social arrangements, first-generation socio-biologists like Wilson failed to notice that genes need a lot more than bare reproduction to get to the next generation.

38. HELEN E. FISHER, THE SEX CONTRACT: THE EVOLUTION OF HUMAN BEHAVIOR 85 105 (1982); EDWARD O. WILSON, ON HUMAN NATURE 137 40 (rev. ed. 2004).

39. FISHER, *supra* note 38, at 89 91; WILSON, *supra* note 38, at 139 40.

40. See RICHARD DAWKINS, THE SELFISH GENE 117 23 (2d prt. 1977); see also WILSON, *supra* note 38, at 137 40.

41. WILSON, *supra* note 38, at 139 (emphases added).

As the saying goes, it takes a village to raise a child. A second type of relationship-creating exchange has more recently come to light in work by anthropologist Sarah Blaffer Hrdy and psychologist Shelley Taylor. Both document ancient as well as contemporary exchanges among women—often mothers—to help raise their children and care for other close intimates.⁴² If these evolutionary scientists are correct, both pair-bonding and tending enabled us to evolve into a species apart.

Family law could, and perhaps should, recognize all of the tending exchanges that shape family life, but it does not.⁴³ For better or for worse, marriage remains the defining feature of “family” for purposes of legal doctrine, so this Article focuses on the role of the marital pair bond exchange. The reciprocal exchange at the heart of the general rules of property and income sharing in marriage may well explain why legal rules have long described marriage as a civil contract.⁴⁴

2. Economics: Specialization

Economists have their own language to describe pair bond exchanges, though many economists’ view of families—and thus family law—fits so well with sociobiology that Richard Posner’s 1992 book *Sex and Reason* posits what he dubs a “bioeconomic” theory of sexual conduct and regulation.⁴⁵ Following Gary Becker, scholars of the area of

42. SARAH BLAFFER HRDY, *MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING* (2009); SHELLEY E. TAYLOR, *THE TENDING INSTINCT: WOMEN, MEN, AND THE BIOLOGY OF OUR RELATIONSHIPS* (2002).

43. For various models of how family law might recognize relationships beyond marriage, see, for example, MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (Michael Bronski ed., 2008); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47 (2007); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

44. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *433. Family law, of course, has changed greatly since Blackstone. In the eighteenth century, the common law treated women and children as essentially property of men, subject to the control and discipline of the man of their household. Over the past 150 years, however, family law rules have changed to treat women and children as more fully human, for example, by recognizing wives’ rights to contract and own property, protecting women and children from domestic violence, and also treating fathers of non marital children as legal fathers. See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994); Joseph Warren, *Husband’s Right to Wife’s Services*, 38 HARV. L. REV. 421 (1925). Accordingly, I make no claim that the ancient provenance of the pair bond deals I discuss has produced identical legal rules over time and place. Such a claim would be patently false.

45. RICHARD A. POSNER, *SEX AND REASON* (1992). The family resemblance may be in part because sociobiology and legal economics came of age together, between Richard Dawkins’ 1976 *The Selfish Gene*, Wilson’s 1975 *Sociobiology*, and Gary Becker’s 1979 *A Treatise on the Family*. As early as 1976, Becker sketched out the complementarity of the two approaches. Gary S. Becker, *Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology*, 14 J. ECON. LITERATURE 817 (1976).

research known as the new home economics call the pair bond exchange “specialization.”⁴⁶

These home economists presuppose a division of household tasks that characterized U.S. households more in the 1950s than today.⁴⁷ In this view, a wage earner “specializes” in bringing home the bacon, and his homemaking spouse specializes in frying it up in a pan. That is efficient, according to these economists, because each person can get really good at his or her role, and they do not have to waste time deciding who will make dinner every night.

Contract is central to this view of marriage, though most commentators acknowledge that marriage is a special kind of contract with many terms provided by the state instead of the spouses themselves. Posner explicitly compares marriage contracts to a business partnership, contending that courts’ failure to fully value homemakers’ contribution to families “destabilizes marriage, just as business partnerships would be destabilized if courts systematically undercompensated one of the partners upon the dissolution of the partnership.”⁴⁸ Homemakers, Posner asserts, need the equivalent of contractual protection to invest time, financial resources, and effort in the marriage.⁴⁹

In this view no-fault divorce coupled with limited alimony rights discourages specialization by making marriage more like employment-at-will than a long-term arrangement in which partners can safely invest their time and effort.⁵⁰ No-fault and lack of alimony, according to these home economists, could inefficiently discourage specialization.⁵¹

Some new home economists see biological differences between men and women as providing an additional element of efficiency. Lloyd Cohen, for example, posits that men and women play gender roles in marriage because doing so is economically efficient, and perhaps biologically determined.⁵² Thus, he argues, women make mar-

46. GARY S. BECKER, A TREATISE ON THE FAMILY 30 (Harvard Univ. Press rev. ed. 1991); Robert A. Pollak, *Gary Becker’s Contributions to Family and Household Economics*, 1 REV. ECON. HOUSEHOLD 111, 112 (2003) (“[T]he economics of the family is Gary Becker’s creation.”).

47. JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 90 (1996).

48. POSNER, *supra* note 45, at 248.

49. *Id.*

50. See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, “I Gave Him the Best Years of My Life,”* 16 J. LEGAL STUD. 267, 299 (1987); see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 164 (5th ed. 1998). It is important to note that this insight differs from saying that one spouse employs the other, because the central economic premise is that they employ each other. See *id.* at 157.

51. See, e.g., BECKER, *supra* note 46, at 39; see also Lloyd R. Cohen, *Rhetoric, the Unnatural Family, and Women’s Work*, 81 VA. L. REV. 2275, 2284–85 (1995).

52. See Cohen, *supra* note 51, at 2285.

riage-specific investments early in marriage, such as specializing in the domestic rather than market labor (by, for example, taking primary childcare responsibility) and foregoing the opportunity to marry someone else. Men, he argues, have little to invest in the early years of marriage and instead invest in their personal human capital.⁵³ As the marriage progresses, according to Cohen, the wife's value on the remarriage market declines (even more so if she has children), as do her options to compete in the wage labor market.⁵⁴ This pattern, traditionalist legal economists contend, encourages opportunism by the husband by allowing him to benefit from the wife's early-marriage contributions to his earning potential and then leave.⁵⁵ A divorce rule imposing exit costs (i.e., alimony, having to prove fault) would deter this opportunism.⁵⁶ While the new home economics may seem hopelessly dated, recent data confirm that the longer a couple is married the more specialized husbands and wives become in either providing or homemaking.⁵⁷

Feminists have long criticized economists' valorization of gendered specialization of household labor, pointing out that specialization arguments ignore nonmonetary costs, possibilities of non-gendered specialization, and the law of diminishing returns.⁵⁸ Economist Barbara Bergmann dismisses its conclusions as "preposterous," based on an approach she deems "fatally simplistic and, where not irrelevant . . . misleading."⁵⁹ Legal economist Robert Pollak critiques the assumptions on which it rests.⁶⁰ When it comes to the complementary claims of sociobiology, paleontologist Steven Jay Gould derides them as simplistic "Just So stories."⁶¹

53. See Cohen, *supra* note 50, at 287.

54. See *id.* at 273.

55. Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35, 40 (1978).

56. Cohen, *supra* note 50, at 285. While the bulk of Cohen's analysis seems aimed at critiquing no fault divorce, and he initially sees fault as a "powerful" solution to the problems of male opportunism in marriage, he stops short of endorsing a return to fault based divorce because of the impossibility of a specific performance remedy. Cohen, *supra* note 50, at 299-300.

57. Arielle Kuperberg, *Reassessing Differences in Work and Income in Cohabitation and Marriage*, 74 J. MARRIAGE & FAM. 688 (2012).

58. See, e.g., Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461, 2469-73 (1994); Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 3-4 (1996); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification of Alimony*, 82 GEO. L.J. 2423, 2437-53 (1994).

59. Barbara R. Bergmann, *Becker's Theory of the Family: Preposterous Conclusions*, 39 CHALLENGE 9, 9 (1996).

60. Pollak, *supra* note 46.

61. Stephen Jay Gould, *Sociobiology: The Art of Storytelling*, NEW SCIENTIST, Nov. 16, 1978, at 530. Numerous law professors, myself included, sharply criticized Posner's book *Sex and Reason* for its views of women and the role of reproduction in sexuality as well as its deployment of economic theory to human sexuality. See Martha Ertman, *Denying the*

But the evidence that most undermines Becker's view of gendered specialization is the economy itself. With the demise of manufacturing in the United States and the rise of service and information sectors, women have begun to fare better in many job markets than men.⁶² That pattern has translated to more women supporting their families and more men doing more of the shopping, cooking, cleaning, and homework help that keeps a family happy and healthy. Yet gendered patterns remain. In 1989 sociologist Arlie Hochschild documented what she called the "Second Shift" of house work that women do in addition to wage labor, a pattern that has not changed much, according to journalist Brigid Schulte's 2014 book *Overwhelmed*.⁶³

Schulte urges women to let go of being the go-to person for tending, delegating tasks like dinner and diapers to husbands even if that means no vegetables and backwards diapers.⁶⁴ It is a popular message these days, also made by Facebook COO and *Lean In* author Sheryl Sandberg.⁶⁵ Journalists Paula Szuchman and Jenny Anderson's 2011 book *Spousonomics* likewise supports decoupling gender from tasks around the house, though they do argue for the efficiency of specialization.⁶⁶

For the moment, at least, gendered differences persist. Mothers in particular face daunting obstacles to fully engaging in wage labor between employment discrimination that law professor Joan Williams has dubbed "the maternal wall" and social and emotional pulls toward the home front.⁶⁷ While a 2013 Pew study reported that forty percent of women are the prime breadwinners in their household, many of those women are single mothers.⁶⁸ On an average day in

Secret of Joy: A Critique of Posner's Theory of Sexuality, 45 STAN. L. REV. 1485 (1993); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992) (book review).

62. See LIZA MUNDY, THE RICHER SEX: HOW THE NEW MAJORITY OF FEMALE BREADWINNERS IS TRANSFORMING SEX, LOVE, AND FAMILY (2012); HANNA ROSIN, THE END OF MEN: AND THE RISE OF WOMEN 3 5 (2012).

63. ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT (1989); BRIGID SCHULTE, OVERWHELMED: WORK, LOVE, AND PLAY WHEN NO ONE HAS THE TIME 16 (2014).

64. SCHULTE, *supra* note 63, at 283.

65. See SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD 108 09 (2013).

66. PAULA SZUCHMAN & JENNY ANDERSON, SPOUSONOMICS: USING ECONOMICS TO MASTER LOVE, MARRIAGE, AND DIRTY DISHES 14 19 (2011). The common tendency to resist that kind of mixing of love and economic rhetoric seems to have led the publisher to re title the book in paperback *It's Not You, It's the Dishes: How to Minimize Conflict and Maximize Happiness in Your Relationship* in 2012.

67. JOAN C. WILLIAMS, RESHAPING THE WORK FAMILY DEBATE: WHY MEN AND CLASS MATTER 5 (2010); see also MARGARET KLAW, KEEPING IT CIVIL: THE CASE OF THE PRENUP AND THE PORSCHE & OTHER TRUE ACCOUNTS FROM THE FILES OF A FAMILY LAWYER 239 42 (2013).

68. WENDY WANG ET AL., PEW RES. CTR., BREADWINNER MOMS (2013), available at http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf.

2013, only nineteen percent of men did housework like cleaning or laundry, compared to forty-nine percent of women.⁶⁹ Mothers of young children spent 1.1 hours bathing or feeding them each day, two and a half times more than fathers, who spent just twenty-six minutes on these tasks.⁷⁰ Not surprisingly, men, on average, enjoy thirty minutes more leisure time a day than women do.⁷¹

All that data supports two points that relate to marital contracting in a post-*Windsor* world. First, families need both homemaking and financial support to thrive. Second, in most families one spouse still does more of one than the other, though the link between gender and that labor is not as tight as it once was.

3. *Anthropology: Gift Exchanges*

Anthropologist Marcel Mauss's model addresses the concerns some scholars raise about economic views of how families operate by acknowledging the role of emotion and culture in the pair bond exchange. According to Mauss, a gift usually comes with an obligation to reciprocate, transforming the seemingly unilateral gift into a back-and-forth transaction that creates a social and even spiritual bond.⁷² A slacker husband, in this view, dishonors himself by failing to reciprocate all of his wife's "gifts." She would be better off finding someone more adept at holding up his end of what Mauss calls "gift exchanges."

Expectations of reciprocity also hold sway outside the family. Tithing ten percent of your income is part of many religious communities, and some people say it helps pave the way to eternal life. Parents take turns carpooling to soccer practice. Colleagues swap information to get ahead at work. It is hard to imagine any kind of genuine, lasting relationship that does not include both giving and getting. People do not experience this pattern as a tit-for-tat with precise accounting, but instead something more along the lines of a tit-for-two-or-three-tats, a mix of gift and exchange.⁷³

4. *Sociology: Economic Lives*

To my mind Princeton sociologist Viviana Zelizer's work on overlaps between love and exchange provides the best analytic framework to explore pair bond exchanges because it incorporates the insights of

69. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, American Time Use Survey 2013 (June 18, 2014, 10:00AM), available at <http://www.bls.gov/news.release/pdf/atus.pdf>.

70. *Id.*

71. See Liana C. Sayer, *Gender, Time and Inequality: Trends in Women's and Men's Paid Work, Unpaid Work and Free Time*, 84 SOC. FORCES 285, 296 (2005).

72. MARCEL MAUSS, *THE GIFT* 13-14 (W.D. Halls trans., 1990).

73. See RICHARD DAWKINS, *THE SELFISH GENE* (3d ed. 2006).

economics and anthropology alongside her home discipline, sociology. Her major contribution is giving us language to differentiate various views of what happens when love and contracts overlap.⁷⁴ First, she dubs the most common view as “Hostile Worlds.”⁷⁵

Hostile Worlds approaches see sharp, impermeable boundaries between money and contested commodities like love, babies, and body parts and claim that any overlap between markets and intimacy will contaminate one or both.⁷⁶ Hostile Worlds analysis treats love and contracts as realms so far away from each other that one’s currency has no meaning or value in the other.⁷⁷ For example, the court in the 1988 *Baby M* surrogacy case refused to enforce a surrogacy contract between Mary Beth Whitehead and William Stern, declaring that “[t]here are, in a civilized society, some things that money cannot buy.”⁷⁸ Yet if people could not contract in and out of parenthood for a price, sperm banks like the California Cryobank, which buy sperm from “donors” and sell it to would-be mothers, could not exist.⁷⁹ Those sales are entirely lawful, protected by both state statutes and judicial opinions.⁸⁰

Courts also have taken a Hostile Worlds approach when examining pair bond exchanges. Back in 1889, the Iowa Supreme Court treated Nancy Miller’s homemaking labor as a pure gift when it refused to enforce her husband Robert’s formal, written promise to pay her two hundred dollars a year to “keep her home and family in a comfortable and reasonably good condition” in exchange for his providing “the necessary expenses of the family.”⁸¹ The Millers were trying to patch things up after Robert ran around with other women.⁸² Alongside promises to pay for homemaking, they agreed that “past subjects and causes of dispute, disagreement, and complaint” would be “absolutely ignored and buried.”⁸³ But rather than enforce the Millers’ carefully worded reconciliation agreement, the court demoted it to a mere deal because, it reasoned, Nancy did only what “the law [already] required her to do.”⁸⁴

74. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 22 (2007).

75. *Id.* at 20.

76. *Id.* at 26–27.

77. *Id.* at 22.

78. *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

79. See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 39 (2006).

80. ERTMAN, *supra* note 7, at 27–66.

81. *Miller v. Miller*, 42 N.W. 641, 641 (Iowa 1889).

82. The detail about Mr. Miller’s wandering appears in an earlier opinion in the same case. *Miller v. Miller*, 35 N.W. 464, 464 (Iowa 1887).

83. *Miller*, 42 N.W. at 641.

84. *Id.* at 642.

Zelizer also coined a term that captures the essence of the main alternative to Hostile Worlds views. Seeing Chicago-school law and economics scholars like Becker and Posner as reducing family to “nothing but” rational market exchanges, she labels that analytical error “Nothing But.”⁸⁵ A Nothing But approach sees the world as transacting business of all sorts in a single currency, from sex to strawberries.⁸⁶ Through that lens, an interaction is all economic exchange or all something else like coercion.⁸⁷

According to Zelizer, both Hostile Worlds and Nothing But views distort the reality of family life. Seeing a marriage as Nothing But a self-interested maximization of one’s wealth or presence in the gene pool ignores crucial aspects of social and emotional life,⁸⁸ just as a Hostile Worlds view of marriage cannot explain why legal rules carefully calibrate spouses’ financial rights and duties.⁸⁹ Nothing But views bleach out love and other emotions, while Hostile Worlds approaches bleach out exchange elements of intimacy. Out of the rubble of the now-discredited Hostile Worlds and Nothing But views of family exchanges, Zelizer offers her own approach, which maps the way that markets both shape and are shaped by social ties. She calls it “Economic Lives.”⁹⁰

Viewing the details of exchange within families through the lens of Economic Lives would allow emotions that make marriage, as the newly-wed Aleda put it, “a socially recognized contract”⁹¹ and also help law do a better job at valuing the tending half of the pair bond exchange.

C. Family Law Treatment of the Pair Bond Exchange

Family law has long recognized the pair bond exchange, though its rules have treated the elements—property-sharing, homemaking, and sex—differently over time. Moreover, like the scholarship reviewed above, family law has its own terminology to describe the exchange.

The traditional “essentials” of marriage are a swap of financial support for domestic services, with sexual access and exclusivity included.⁹² Historically, the rules of coverture required a husband to

85. ZELIZER, *supra* note 74, at 29.

86. *Id.* at 30.

87. *Id.* at 30–31.

88. *Id.* at 32.

89. *Id.* at 27.

90. VIVIANA A. ZELIZER, *ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY* (2011). In earlier work, she dubbed the interplay between exchange and intimacy “connected lives.” *Id.* at 4; ZELIZER, *supra* note 74, at 32–35.

91. *See supra* note 35 and accompanying text.

92. Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 *YALE J.L. & FEMINISM* 1, 8–9 (2003).

pay for his wife's "necessaries" and required a wife to care for the home and children.⁹³ Until the 1970s, the sexual access element justified the marital rape exception, relieving a husband of liability for taking that which was already his (sexual access to his wife).⁹⁴

Though today marital rape is a crime, thanks to the feminist movement,⁹⁵ sex remains an "essential" of marriage in some ways. Some states impose lighter penalties for marital rape than rape by a stranger.⁹⁶ Outside the rape context, refusal to engage in sexual relations can be grounds for divorce in some states, and concealed impotence can be grounds for an annulment.⁹⁷ The essentials of marriage, sometimes called "the duty of support and services," remain "deeply entrenched" in family law doctrines.⁹⁸ Entrenched as the idea is, the seismic changes in marriages over the twentieth and early twenty-first century make both judges and scholars shy away from the phrase "essentials of marriage."

My term—pair bond exchange—may fare better. New language helps us think in new ways, and the phrase "pair bond" evokes the emotional closeness that our contemporary ideals of companionate marriage strive for. It also remains relatively free from some of the gendered constraints of the old view of marital obligations like obedience of wives to husbands. Finally, the term "exchange" recognizes the role of reciprocity in marital relationships, which has both material and emotional benefits.

Exchange, in my mind, is often more important than whether a particular exchange is legally binding. Families are shaped by both legally binding agreements—contracts⁹⁹—and agreements that courts would not enforce, which I call "deals."¹⁰⁰ Some agreements—like selling babies or a swap of I'll-cook-if-you-clean-up—are mere deals because they violate public policy or are too small or informal for courts to get involved with.¹⁰¹ Some deals, like baby-selling, are also crimes. But most are entirely lawful. They matter despite the fact that the people involved never expect them to get to court. Think of common household arrangements like agreeing to keep a kosher kitchen or spouses' half-joking pact that "no one gets fat." No one would sue, yet these deals structure relationships. Deals can be big things like sex-

93. *Id.* at 3.

94. *Id.* at 30.

95. Eskridge, *supra* note 17, at 1914 15.

96. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1490 91 (2003).

97. Perry, *supra* note 92, at 30.

98. *Id.* at 7.

99. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

100. See ERTMAN, *supra* note 7.

101. RESTATEMENT (SECOND) OF CONTRACTS §§ 33, 110, 126 27 (1981).

ual fidelity or casual, implicit, daily household exchanges about laundry and lawn care. They shape intimate relationships by creating expectations of reciprocity and grounds for changing the relationship when one person is not holding up his or her end of the deal.

The distinction between contracts and deals becomes particularly useful in discussing family law's treatment of pair bond exchanges. Legal doctrine treats the property-sharing part of the pair bond exchange as contractual, the sex part as a mere deal, and the homemaking part as something in between.

1. *Property and Income Sharing*

Most marriages are governed by the terms of the state-supplied marriage contract. As a general matter that means that courts do not enforce contracts that spouses enter with one another during a marriage, but when a marriage ends by divorce, family law mandates that spouses split property they acquired during the marriage.¹⁰² (Likewise, when one spouse dies, the other gets a share of marital property.) That sharing is justified by an oft-implicit presumption that both wage-earning and homemaking contribute to families.¹⁰³

The 2008 divorce of Claire and Samuel Faiman illustrates the presumption, though the court did not explicitly justify its holding on the grounds that marriage is a partnership.¹⁰⁴ Claire and Samuel Faiman married late in life, when she was sixty-one and he ten years older.¹⁰⁵ Both were divorced, with children from their earlier marriages.¹⁰⁶ Because Samuel's home and real estate business were in Connecticut, Claire had to leave her twenty-five-year job in a Scarsdale, New York, synagogue, the house she had lived in for over three decades, and the community where she had raised her children.¹⁰⁷ While neither Claire nor Samuel was rich, his net worth (around \$2.2 million) was around ten times hers.¹⁰⁸ As with many couples, their arrangement reflected the pair bond exchange, though he was stingier and more controlling than most providers.

Samuel paid for most household expenses, giving Claire a weekly shopping "allowance" of one hundred fifty to three hundred dollars,

102. See 3 ARNOLD H. RUTKIN, FAMILY LAW & PRACTICE (2014); Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 235 (2011).

103. See U.M.D.A. § 307 (1974).

104. Faiman v. Faiman, No. FA074028181, 2008 WL 5481382 (Conn. Super. Ct. Dec. 5, 2008).

105. *Id.* at *1.

106. *Id.* at *2.

107. *Id.* at *1.

108. *Id.* at *8.

but withholding it when they went on trips.¹⁰⁹ He kept control over the bank accounts and did not make her an owner of their home.¹¹⁰ She paid for her personal expenses out of her modest social security payments.¹¹¹ Despite Samuel's tightfisted ways, Claire performed her part of the exchange, shopping, cooking, and caring for him during a triple bypass surgery, colon cancer, and leukemia that required chemotherapy.¹¹² In addition to changing his bandages and colostomy bag, she also managed the household and business accounts when he could not, though he removed her name from the accounts as soon as he recovered.¹¹³ Even during their divorce trial she served him breakfast, lunch, and dinner every day.¹¹⁴ Though Samuel had many faults—the judge described him as “secretive and controlling,” “rude, and even physically abusive”—he at least was honest, testifying at trial that Claire was a “dutiful wife who kept a nice home.”¹¹⁵

You cannot help but wonder why she put up with him. She did consider leaving when, two years into the marriage, he went to visit an old girlfriend in New Hampshire, leaving a note on the refrigerator saying he would be back the next day.¹¹⁶ Claire stayed because, she explained to the court, she “loved him very much” and didn't want a divorce.¹¹⁷ Though she did not say so on the record, she also may have stayed because she had given away to her son her Scarsdale house—her only significant asset—and because Samuel had demanded a prenup three days before their wedding.¹¹⁸

Six weeks before the ceremony, Samuel had said that he wanted a prenup.¹¹⁹ But after Claire talked to an attorney and the couple went to the library to look at some forms, Samuel decided he did not need a prenup.¹²⁰ Then he changed his mind again.¹²¹ He called Claire in New York, where she was still working for the synagogue, and told her she had to come to Connecticut because they had “some papers to sign.”¹²² She got permission of her rabbi—also her employer—to leave

109. *Id.* at *2.

110. *Id.* at *3 4.

111. *Id.* at *2.

112. *Id.* at *1, *4.

113. *Id.* at *4.

114. *Id.*

115. *Id.* at *3 4.

116. *Id.* at *3.

117. *Id.*

118. *Id.* at *1, *5.

119. *Id.* at *4.

120. *Id.*

121. *Id.* at *5.

122. *Id.*

work early, and drove an hour and a half to his house.¹²³ He was waiting for her in the driveway and drove the two of them to his lawyer's office.¹²⁴ There she met Samuel's lawyer and the lawyer he had gotten for her, and she saw the prenup for the first time.¹²⁵ She was "all shook up," she testified, and surprised because she thought the papers would be about Samuel giving her \$100,000 so she wouldn't have problems with his children.¹²⁶ Instead, the agreement said that he would keep all the money and property to himself.¹²⁷ The attorney who met with her for fifteen or thirty minutes testified that she seemed "surprised at what was being discussed."¹²⁸ Samuel told her "no agreement, no wedding."¹²⁹ Claire didn't sign it right away. Instead, she took it home, and the next day she signed it without ever reading it.¹³⁰

Claire and Samuel did divorce in 2008, after twenty years together.¹³¹ She was eighty-one and he was ninety-one but still strong enough to try to fight off her claim to any wealth acquired during their marriage.¹³² The question at trial was whether to enforce the prenup that waived Claire's right to alimony or any property held in Samuel's name.¹³³ That meant nearly all the property, because he had made sure that just about everything was his and his alone. The court ruled in Claire's favor and refused to enforce the premarital agreement.¹³⁴

In *Faiman v. Faiman*, the judge reasoned that Claire should get alimony from Samuel because her signature was not fully voluntary.¹³⁵ She did not have time to review the agreement, Samuel's lawyer drafted the agreement and picked Claire's lawyer, and no one told her what she was giving up.¹³⁶ Although the formal holding turns on voluntariness, partnership reasoning seems to underlie that outcome. A footnote mentions that "[t]he investment of human capital in homemaking has worth,"¹³⁷ and the court's detailed account of all

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at *7.

128. *Id.* at *6.

129. *Id.* at *6, *9.

130. *Id.* at *5.

131. *Id.* at *1.

132. *Id.*

133. *Id.* at *1, *7.

134. *Id.* at *10.

135. *Id.* at *9.

136. *Id.*

137. *Id.* at *4 n.7 (quoting *O'Neill v. O'Neill*, 536 A.2d 978, 984 (Conn. App. Ct. 1988)).

Claire did for Samuel suggests that the judge found it simply unfair to allocate all marital property to Samuel, leaving Claire with “absolutely nothing other than the five-year-old car that she is driving.”¹³⁸ The court may have also seen Samuel visiting that old girlfriend as a breach of his promise to forsake all others, though as the case on fidelity agreements below shows, courts generally refuse to enforce that part of pair bond exchanges.

Samuel could, of course, have contracted around at least some of this property sharing by fully disclosing his assets and giving Claire sufficient time to review the prenup’s terms and get independent legal counsel. The fact that some states impose additional limits like refusing to enforce alimony-limiting agreements, requiring substantive fairness, or placing the burden of proof on the person seeking to hoard property further suggests that family law can make the property-sharing element of the pair bond exchange a particularly sticky default rule.¹³⁹

Before the 1970s, most courts treated any attempt to contract out of property sharing at divorce as merely a deal because, they reasoned, the government set the terms of the marriage contract, not the spouses themselves.¹⁴⁰ Some scholars argue family law should correct the problem of devalued caregiving by returning to the old rule that treated prenups that limited property sharing on divorce as mere deals.¹⁴¹ But the long history of family exchanges argues for spouses holding onto their contractual freedom. Instead, courts could recognize that a property-hoarding prenup fundamentally alters a couple’s pair bond exchange. That would mean recognizing as contractual the homemaking part of the pair bond exchange.

2. *Homemaking*

The pair bond exchange is embedded so deeply in the infrastructure of family law that it can be hard to see. While cases like *Faiman* and law review articles recognize marriage as a partnership in which both spouses reasonably expect to share in the money that comes in the door during the marriage, family law discourse tends too often to see homemaking as a gift.

The 1993 divorce of Michael and Hildegard Borelli illustrates this pattern.¹⁴² Seventy-something San Francisco businessman Michael

138. *Id.* at *4.

139. Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318–19, 321 (2012).

140. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11 (2000).

141. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 135 (1998).

142. *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

Borelli married Hildegard in 1980, when she was thirty-nine.¹⁴³ The day before their wedding, they signed a premarital agreement that reserved most of his property—worth around \$1.5 million—for his daughter from a prior marriage.¹⁴⁴ Unlike Claire Faiman, Hildegard did not challenge the prenup's validity. Instead, she sought to enforce an oral agreement they made later to modify it.¹⁴⁵ That oral agreement brought their arrangement back toward the pair bond exchange and California's general rule that spouses share property acquired during the marriage.¹⁴⁶

Within a few years of getting married, Michael suffered heart problems and a stroke.¹⁴⁷ By 1988, his doctors recommended that he live in a nursing home because he needed constant care.¹⁴⁸ Understandably, he preferred to live at home, even though he and Hildegard would have to modify their house.¹⁴⁹ Maybe he realized that his reduced marital obligations under their prenup would justify Hildegard in feeling less obliged under the caretaking half of the pair bond exchange. In any case, Michael offered to alter the prenup by changing his will to give Hildegard some of his property—around \$500,000, including money for her daughter's education—if she would disregard the doctors' advice and provide the nursing care herself at their home.¹⁵⁰

Hildegard accepted and performed her part of their agreement, personally providing 'round-the-clock nursing care for Michael until his death a year later.¹⁵¹ But Michael never changed his will.¹⁵² She sued and lost because family law clung to the fiction that her caretaking was a pure gift even when Michael did not keep up his end of the gift exchange.¹⁵³

To apply this double standard, the court had to ignore that Michael himself had slipped out of his obligations. Instead of noticing Michael's property-hoarding prenup, it chastised Hildegard for trying to do what Michael actually did—tailor the terms of the marriage contract—declaring that Hildegard could not adjust those terms because “a wife is obligated by the marriage contract to provide nursing

143. *Id.* at 17.

144. *Id.*; Wendy L. Hillger, Note, *Borelli v. Brusseau: Must a Spouse Also Be a Registered Nurse? A Feminist Critique*, 25 PAC. L.J. 1387, 1414-16 (1994).

145. *Borelli*, 16 Cal. Rptr. 2d at 17-18.

146. *Id.*

147. *Id.* at 17.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 18.

153. *Id.*

type care to an ill husband.”¹⁵⁴ Citing pre-World War II cases, the court in *Borelli* said that a husband’s agreement to compensate a wife undermines the public policy of wives caring for husbands.¹⁵⁵ Hildegard, as the spouse whose contributions came in the form of care, feeding, and cleaning, had no right to contractually adjust her side of the deal. The court waxed sentimental to justify depriving her of that contractual freedom:

[T]he marital duty of support under [California law] includes caring for a spouse who is ill. . . . [It] means more than the physical care someone could be hired to provide. Such support also encompasses sympathy[,] comfort[,] love, companionship and affection. Thus, the duty of support can no more be “delegated” to a third party than the statutory duties of fidelity and mutual respect.¹⁵⁶

The court’s contempt for Hildegard’s conduct as “sickbed bargaining” and “unseemly” is unfair, given Michael’s earlier bargaining to get out of his support obligations.¹⁵⁷ By concluding that “even if few things are left that cannot command a price, marital support remains one of them,”¹⁵⁸ the court simply ignored the fact that family law allowed Michael, as a financial provider, to contract out of his side of the pair bond exchange. I have criticized this double standard elsewhere, as have other scholars.¹⁵⁹

While family law treats the caregiving part of pair bond exchanges as something between a binding contract and a mere deal, the next Section shows that it treats promises of fidelity—the third element of pair bond exchanges—as a mere deal.

3. Fidelity

Over the past few decades family law has demoted promises of marital fidelity from contracts to mere deals. Until the 1970s, divorce required a showing of “fault” like adultery, the equivalent of a material breach of the marital contract that justified the state severing the relationship through divorce.¹⁶⁰ In addition, the wronged spouse

154. *Id.* at 19.

155. *Id.* at 18–19.

156. *Id.* at 20 (citation omitted).

157. *Id.*

158. *Id.*

159. See ERTMAN, *supra* note 7, at 182–83; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 114–20 (2000); ZELIZER, *supra* note 74.

160. Lynn D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79 (1991) (“In the 1970s, a movement to reform divorce laws swept the United States, leading to the widespread adoption of no fault grounds for divorce. Between 1970 and 1975, more than half of the states adopted some modern no fault ground for divorce, and by 1985, every American jurisdiction except one had adopted some generally available, explicit non fault ground for divorce.”).

could obtain the equivalent of damages through child custody, a wife obtaining more property or alimony, or a husband getting to keep more property and pay less alimony.¹⁶¹

Today's rule of no-fault divorce no longer requires a showing of adultery or other wrongdoing. Instead incompatibility is sufficient to justify divorce.¹⁶² In the language of contract doctrine, no fault divorce allows spouses to terminate a contract by ending it for a reason other than breach. Consequently, even the most formal—signed, sealed, delivered—fidelity agreement can get treated as a mere deal.¹⁶³

Take the agreement of Bernard and Vergestene Cooper.¹⁶⁴ After twenty-eight years of marriage Bernard had an affair in 2000, and Vergestene wanted to separate.¹⁶⁵ But Bernard wanted to stay married, so he signed a notarized, written promise that “if any of my indiscretions lead to and/or are cause of a separation or divorce . . . I will accept full responsibilit[y] of my action.”¹⁶⁶ That responsibility, they agreed, meant that Vergestene would get \$2600 a month for household expenses, half of Bernard's retirement accounts, and life and health insurance.¹⁶⁷

Things seemed fine for five more years, until Bernard abruptly leased an apartment and moved out without telling Vergestene.¹⁶⁸ When she and their daughters finally located him, Bernard admitted to continuing his affair. Vergestene filed for divorce and the trial court entered an order that largely tracked the reconciliation agreement.¹⁶⁹

On appeal the Iowa Supreme Court demoted Bernard and Vergestene's formal written reconciliation agreement to a mere deal.¹⁷⁰ It reasoned that spousal relationships cannot be governed by “contracts that are plead and proved in the courts as if the matter

161. Woodhouse, *supra* note 36, at 2532.

162. In some states, a spouse can unilaterally allege the incompatibility, so that one spouse can end the marriage when the other prefers to stay married. 24 AM. JUR. 2D *Divorce and Separation* § 23 (2014).

163. In *Diosdado v. Diosdado*, the agreement was signed during the marriage, but the property would be transferred to the non cheating spouse only upon divorce. 118 Cal. Rptr. 2d 494, 495 (Cal. Ct. App. 2002). Another property transfer borne of adultery did get legally enforced. When the husband transferred marital property to his wife to induce her not to divorce him after she discovered an affair, finalizing the transfer while they were still married, the court refused to find that the agreement violated public policy and enforced it. *Dawbarn v. Dawbarn*, 625 S.E.2d 186, 188 (N.C. Ct. App. 2006); *see also* *Atwood & Bix*, *supra* note 139, at 321 22.

164. *In re Marriage of Cooper*, 769 N.W.2d 582 (Iowa 2009).

165. *Id.* at 584.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 587.

involved the timely delivery of a crate of oranges.”¹⁷¹ Holding Bernard to his formal, written promise, the court said, would “create a bargaining environment” in marriage, and courts should not be part of “the complex web of interpersonal relationships and the inevitable he-said-she-said battles that would arise” if the agreement were enforced.¹⁷² Following a California case, the court concluded that enforcing the reconciliation agreement also would undermine the no-fault provisions of divorce law, reintroducing “acrimonious” proceedings that no-fault divorce meant to banish from the courtroom.¹⁷³

Cooper is wrongly decided. Nothing in the reported case indicates that the Coopers tried to make adultery or other fault a precondition for divorce. The formal, signed, notarized writing merely provided an incentive for Bernard to keep his promise by allocating property to Veregene if he strayed again. Rather than protecting some imagined state of marriage that is free of all bargaining, the Iowa court created an opportunity for cheaters to prosper by virtue of trusting spouses’ reliance on the cheaters’ empty promises.

Marriage equality for same-sex couples may offer family law, family lawyers, and same-sex couples themselves a chance to make legal obligations better match a couple’s reasonable expectations in fidelity as well as property-sharing, caregiving, and other matters. The remainder of this Article reviews empirical data on the pair bond exchanges of same-sex and different-sex couples, looking first to numbers and then to stories. A sense of how gay couples do and do not adopt different pair bond exchanges could help policy makers and couples themselves make informed choices about how the law does and should treat couples’ agreements about money, housework, and sex.

II. QUANTITATIVE DATA COMPARING HETEROSEXUAL AND GAY PAIR BOND EXCHANGES

Heterosexual couples, by definition, include one man and one woman, while gay couples are made up of either two men or two women. This gender difference has led sociologists to compare gay and straight couples to tease out the role of gender in relationships.¹⁷⁴ While that research has delved into many aspects of intimacy, here we focus on differences in the three main elements of the pair bond exchange: money, housework, and sex.

171. *Id.* at 586.

172. *Id.*

173. *Id.* at 586 87 (citing *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 496 (Cal. Ct. App. 2002)).

174. See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* (1983).

University of Chicago economist Dan Black and his colleagues used data collected in the 2000 Census to compare same-sex and different-sex couples.¹⁷⁵ Black reasoned that couples who do have children would specialize more because the expenses (time, finances, effort, opportunity costs) of raising children are most efficiency borne by one partner specializing in homemaking and the other in wage labor.¹⁷⁶ He predicted that if gays are less likely than straights to have children, then they would specialize less. That lack of specialization, he hypothesized, would result in gay men not engaging as intensely in wage labor as heterosexual men, and lesbians engaging in wage labor more intensely than straight women.¹⁷⁷ Likewise, he predicted that gay and lesbian couples would more equitably share household chores than straight couples.¹⁷⁸

To compare gay and straight couples requires comparing whether gays and straights couple at equivalent rates. According to the General Social Survey, a commonly used database which pools data from surveys from 1989 to 2004,¹⁷⁹ lesbians and heterosexuals partner at about the same rate—sixty-three percent and fifty-nine percent, respectively—and gay men at a slightly lower rate of fifty percent.¹⁸⁰ Thus, data about gays, lesbians, and straight men and women generally should tell us something about the kind of pair bond exchanges each kind of couple is likely to make.

A. *Property and Income Sharing*

While women have enjoyed higher earnings over the past few decades, and men's relative earning power has declined as the American economy has transitioned from manufacturing to services and information,¹⁸¹ men still make more than women, on average. True, women represent half of the American workforce, bringing home more of the family income than they used to. A 2005 study found that about a quarter of married women make more than their husbands.¹⁸² But that pattern lasted more than three years for only sixty percent of those couples, and on average women still work fewer hours for lower wages, only bringing home thirty-seven percent of the average fami-

175. Black et al., *supra* note 11.

176. *Id.* at 61, 66.

177. *Id.*

178. *Id.* at 62.

179. NAT'L OPINION RESEARCH CTR., GENERAL SOCIAL SURVEY, <http://www3.norc.org/GSS+Website/> (last visited Feb. 17, 2015).

180. Black et al., *supra* note 11, at 56.

181. *See generally* MUNDY, *supra* note 62, at 51-55.

182. *See* Shelly Lundberg & Robert A. Pollak, *The American Family and Family Economics*, 21 J. ECON. PERSPECTIVES 3, 7-8 (2007).

ly's income as of 2009.¹⁸³ Along the same lines, a 2004 study showed that over their prime earning years American women earn thirty-eight percent of men's wages.¹⁸⁴ Because less than five percent of people identify as gay or lesbian,¹⁸⁵ most of the people in these studies were heterosexual.

Those income differences are due in part to patterns in what majors and careers heterosexuals, gay men, and lesbians choose. According to the 2000 Census, a comparison of partnered men and women aged twenty-five to sixty indicates that men in gay partnerships have "moderately" lower wages and income than men in heterosexual relationships (married or unmarried).¹⁸⁶ Partnered lesbians, in contrast, have "moderately higher wages and substantially higher income" than corresponding heterosexual women.¹⁸⁷ Along the same lines, gay men are more likely than other men to work in stereotypically female occupations like education and the fine arts, and are slightly less likely than other men to pursue graduate education. Gay men also tend to work fewer hours per week and fewer weeks per year.¹⁸⁸ Likewise, lesbians are more likely than other women to work in stereotypically masculine occupations like engineering, economics, and business and more likely to pursue more education, opt for a profession that enjoys higher pay, remain continuously attached to the labor force, and work long hours.¹⁸⁹ These patterns produce more income equality within gay and lesbian couples than within straight couples.¹⁹⁰

Household income reflects these patterns. A household made of lesbian partners is similar to a heterosexual couple, while a gay male couple enjoys about twenty-five percent more income.¹⁹¹ That difference may well be due to the presence of children in people's lives. Children, of course, require tending that results in their caretakers—often female—engaging less in income-generating activities than they might otherwise.

Many gay people have kids, though not as many as heterosexuals. One would expect as much, given the history of social and de jure dis-

183. *Id.*; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 2 (2011), available at http://www.bls.gov/cps/wlf_databook_2011.pdf.

184. WILLIAMS, *supra* note 67, at 26.

185. Black et al., *supra* note 11, at 54.

186. *Id.* at 64.

187. *Id.* at 65.

188. *Id.* at 65-66.

189. *Id.* at 64-66.

190. *Id.* at 62; Gotta et al., *supra* note 12, at 364; Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 565-67 (2005).

191. Black et al., *supra* note 11, at 67.

crimination against gay people and the biological fact that gay sex does not produce unintended pregnancy. According to Williams Institute demographer Gary Gates, the 2008 General Social Survey reports that forty-nine percent of lesbians and bisexual women and twenty percent of gay and bisexual men say they have had a child.¹⁹² Heterosexuals, in contrast, have parenthood rates of between forty and forty-eight percent.¹⁹³ A 2005 study compared gay couples who entered civil unions in Vermont and gay couples who did not get “civil unionized” with the heterosexual married siblings of both groups. It found that eighty percent of the married women had children, compared to thirty-four percent of women in civil unions and thirty-one percent of women not in civil unions.¹⁹⁴ In contrast, eighty-two percent of heterosexual men in that study had children, compared to fifteen percent of the men in civil unions and just ten percent of the gay men not in civil unions.¹⁹⁵ Together, these data suggest that heterosexuals are most likely to have children, followed by lesbians, with gay men least likely to be parents.

Those structural factors—more engagement in well-remunerated wage labor for straight men and lesbians and greater likelihood of heterosexual women to have kids than gay men—both reflect and reinforce cultural norms. Boys and men are generally socialized to believe that being a good provider translates to being a good man, while women and girls are still socialized to believe that being a good mother and caretaker translates to being a good woman.¹⁹⁶

B. *Homemaking*

Because gay and lesbian couples are less likely than their heterosexual counterparts to be parents, they are less likely to have one partner at home full-time.¹⁹⁷ But among the gay and lesbian couples that have children, rates of stark specialization—one partner at home full-time—are comparable to the rates among heterosexual parents. As of the 2000 Census, about a quarter of lesbian households raising children had one partner at home full-time, just below the

192. GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

193. *Id.*; GARY J. GATES, NAT'L COUNCIL ON FAM. RELATIONS, FAMILY FORMATION AND RAISING CHILDREN AMONG SAME SEX COUPLES, at F2, F3 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf>. These data are made messy by the fact that a good number of gay people with kids conceived them in a heterosexual relationship and then came out, so that the same child would count for both categories.

194. Solomon et al., *supra* note 190, at 565.

195. *Id.* at 568.

196. See, e.g., MOORE, *supra* note 11, at 168; SCHULTE, *supra* note 63, 158-59.

197. Black et al., *supra* note 11, at 62-63.

rate—one-third—for heterosexuals and gay male parents.¹⁹⁸ Among heterosexuals, women are more than twice as likely to be the at-home parent.¹⁹⁹ For all three types of couples, the one pursuing wage labor is likely to be more educated.²⁰⁰

But differences emerge between heterosexual and LGBT households when it comes to paying the mortgage and divvying up household chores, even among households raising kids. A 2010 study reported that when one lesbian mom is home full-time and the other works outside of the home, the two share parenting much more than heterosexual couples.²⁰¹ Pepper Schwartz and Philip Blumstein's classic 1983 study *American Couples* found that gay men who had been married to women shared housework more equitably with their male partners than they had with their wives.²⁰² A 2005 study found that same-sex couples more equitably divided housework even when one earned more money.²⁰³

That pattern may be changing. A 2011 study compared data on straight, lesbian, and gay relationships in 1975 and 2000. Consistent with other research, it found that in both time periods lesbian and gay couples reported more equality in household tasks than heterosexual couples.²⁰⁴ But it also revealed that while heterosexual couples in the 2000 data set still tended to assign household tasks based on gender (vacuuming for women, household repairs for men), during the two periods studied, men in straight couples took on more feminine household labor and gays and lesbians reported less equitable sharing of household labor in 2000 than they did in 1975.²⁰⁵ As we will see in Part III on qualitative measures of pair bond exchanges, gay and lesbian couples may become more willing to recognize and discuss inequality in their household arrangement as the legitimacy that comes with same-sex marriage and other victories of the LGBT rights movement reduces the need for gay couples to see themselves as different—and sometimes better—than heterosexuals in some other way.

C. Fidelity

Differences play out in different ways when it comes to sex. One element of conventional pair bond exchanges—sexual exclusivity—is

198. *Id.*

199. *Id.*

200. *Id.*

201. See Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164 (2010).

202. MUNDY, *supra* note 62.

203. See, e.g., Solomon et al., *supra* note 190, at 572.

204. See Gotta et al., *supra* note 12.

205. *Id.* at 361.

generally deemed not legally relevant. In the 1980s and 1990s, when no state allowed same-sex couples to register their relationships, sex did play a role in the terms of relationship agreements, which were the most common way to create legal “us-ness.” Prior to the widespread acceptance of cohabitation agreements, same-sex sexuality was so outré that merely mentioning sexuality in a living-together agreement could get it kicked out of court for being “meretricious,” or akin to prostitution.²⁰⁶ For some years now, however, courts have been willing to treat sex as just one part of a relationship.²⁰⁷ Just to be safe, however, practitioners strongly counsel against including any mention of a couple’s sexual relationship in their cohabitation agreement.²⁰⁸

Yet agreements about sex play a crucial role in many, if not most, couples’ relationships. That mismatch between legal rules and the lived experiences of couples can be addressed by finding a term to describe the agreements that family law ignores. I call them “deals” to distinguish them from “contracts,” which black letter law defines as promises that the law enforces.²⁰⁹

Unlike the money and—to a lesser extent—housework provisions of the pair bond exchange, the sex terms of pair bond exchanges are generally quite different in gay male relationships than straight and lesbian ones. Gay men are much more likely to make agreements that allow for sex with partners outside of the relationship. A 2005 study by Sondra Solomon fleshes out these differences by comparing three groups: “civil-unionized” gay-male and lesbian couples, gay and lesbian couples not in civil unions, and the heterosexual married siblings of the other subjects.²¹⁰ The researchers found that only half of gay men in civil unions reported having explicit agreements that sex outside their relationship was not okay, a much lower rate of monogamy agreements than heterosexual husbands had with their wives (seventy-five percent).²¹¹ Among gay male couples not in civil unions, only a third made agreements to remain monogamous.²¹² Consistent with these agreements, over half of all the gay men studied had sex outside their relationship, compared to only fifteen percent of the heterosexual men.

206. *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Cal. Ct. App. 1981).

207. *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 407 (Cal. Ct. App. 1988).

208. RALPH WARNER, TONI IHARA & FREDERICK HERTZ, *LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES* 25 (15th ed. 2013).

209. ERTMAN, *supra* note 7, at xi.

210. Solomon et al., *supra* note 190.

211. *Id.*

212. *Id.* at 571.

Surprisingly, all that extra-curricular sex seems not to make gay male couples more likely to break up.²¹³ While gay men are less likely to couple-up than lesbians, when they do establish a life together as a couple, those gay male couples are more likely to stay together.²¹⁴ That may be due to explicit deals about the conditions under which they can have sex with people outside of the relationship. Agreeing that sex outside the relationship—often with conditions about where and with whom—is much more common in gay male relationships than among either lesbians or heterosexual spouses.²¹⁵ More than forty percent of the gay male couples—both registered and non-registered—in the Solomon study had agreements that allowed sex with people outside their relationship, compared to only five percent of lesbians and heterosexual couples.²¹⁶ Another study, published in 2010 and based on data collected in 2002, surveyed thirty-nine gay male couples in San Francisco’s Bay Area about their agreements about monogamy. Those researchers found that only thirty-one percent of the couples reported agreeing to be monogamous, and even those conceded that they defined monogamy to allow for situations like a masseur giving his clients a “happy ending,” which is spa lingo for an end-of-the-massage orgasm.²¹⁷ Explicit non-monogamy agreements were twice as common—reported by sixty-four percent of the Bay Area couples—but even then, many of the couples set limits like both of them being present at the encounter or separating emotional from sexual interaction by designating friends and ex-lovers as forbidden fruit.²¹⁸

In marked contrast to the often open relationships of gay men, the lesbian and straight couples in Solomon’s Vermont study reported very different agreements. Only five percent of both lesbian and heterosexual married couples had non-monogamy agreements (a rate that held for both registered and non-registered couples).²¹⁹

Those numbers, while important, do little to convey the social, emotional, and other details of pair bond exchanges. Accordingly, we now turn to qualitative material.

213. Fewer than ten percent of the gay men in the study reported having had a “meaningful love affair” outside their relationships, much less than one would expect with fifty percent rates of extra relationship sexuality. *Id.* at 574.

214. RICHMAN, *supra* note 31, at xx; Hunter, *supra* note 16, at 1867.

215. Colleen C. Hoff & Sean C. Beougher, *Sexual Agreements Among Gay Male Couples*, 39 ARCHIVES SEXUAL BEHAV. 774, 778 (2010).

216. *Id.*; Solomon et al., *supra* note 190, at 573.

217. Hoff & Beougher, *supra* note 215, at 777. For a definition of “happy ending,” see Anitra Brown, *Happy Ending Massage*, ABOUT.COM, http://spas.about.com/od/spaglossary/g/Happy_Ending_Massage.htm (last visited Feb. 17, 2015).

218. Hoff & Beougher, *supra* note 215, at 778.

219. Solomon et al., *supra* note 190, at 573.

III. QUALITATIVE DATA COMPARING THE PAIR BOND EXCHANGES OF STRAIGHT AND GAY COUPLES

Stories of family life and family law breathe life into all the numerical data in the prior Section. As with Part II, the following discussion illustrates the numerical data on pair bond exchanges with stories drawn from the trenches of family law and ethnographic work on same-sex couples. As a whole, they indicate that many same-sex couples commonly expect different things from family—and thus from family law—than different-sex spouses do.

Philadelphia lawyer Margaret Klaw's book *Keeping It Civil* vividly portrays the details of a family lawyer's docket.²²⁰ Among the sometimes surprising stories she tells from three decades of practicing family law is Klaw's observation that men getting divorced are generally "fundamentally comfortable with the idea that [they] will need to provide for [their wives] after they're no longer married."²²¹ Rather than resist the very idea of alimony or property sharing, most men "take[] pride" in being "a provider," so much so that Klaw says that a man's ability to keep his family comfortable after a divorce is often a "mark of social status" for both high-earning and other men.²²² The tight link between masculinity and financially supporting your family is illustrated by a conversation she had in the course of representing the wife in a divorce. The attorney for the husband—a rough-around-the-edges fellow who also practices criminal law—told Klaw that he had discouraged his male client from pursuing alimony from Klaw's client: "My guy asked me if he could get alimony from your lady, and I told him, yeah, maybe, but don't be a pussy."²²³ Klaw's female clients do not expect to share their retirement accounts with their husbands and "almost to a woman, they become apoplectic at the prospect of paying alimony."²²⁴ She believes that these women who earn more than their underemployed or non-working husbands are "deeply disappointed that they married men who didn't carry their weight financially" because the women did not grow up expecting to be the main providers for their families.²²⁵

Many gay people feel differently. Though some gays come out in mid-life, after years or even decades in heterosexual relationships, a good number of gay people know early on that they are unlikely to be either a provider or someone who takes care of the home front as part of a heterosexual pair bond exchange. One couple, Scott and Mike,

220. Klaw, *supra* note 67.

221. *Id.* at 64.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 65.

who had been together for a dozen years before getting married in a small civil ceremony at Cambridge City Hall in Massachusetts, purposely kept it small to reflect their “adamant” belief that “they did not seek any kind of blessing, religious or otherwise.”²²⁶ They told sociologist Kim Richman that their feelings about marriage were different than straight couples:

If your whole mind-set is that it’s not an option you kind of change your whole life around that it doesn’t mean what it might mean to straight people. As a gay person you just don’t think there’s ever that option so you don’t look to that for your security. *You make your own security.*²²⁷

Mignon Moore’s recent study of African-American lesbians reported that this view was held by “the overwhelming majority” of the couples studied. As one subject in Moore’s study put it, “I don’t give a damn who you’re with, you always need to be able to be independent and take care of yourself.”²²⁸

While Richman’s subjects Scott and Mike emphasized the link between their gay identity and self-sufficiency, Moore’s subjects had a different focus depending on their class. Women from working class backgrounds saw everyone in the household as having an equal responsibility to contribute financially, and they also wanted to have the income to escape an unstable or unhealthy relationship.²²⁹ Middle and upper middle class women in her study, in contrast, viewed economic self-sufficiency as important because it furthers personal growth and self-actualization.²³⁰ In either case, Moore’s black lesbian couples saw prolonged unemployment as a “deal breaker,”²³¹ a phrase that underlines the contractual expectations within the relationship.

Gay people coming of age in a post-*Goodrich* and post-*Windsor* world may feel differently, and subgroups of gay people (African-Americans, say, or lesbians) may well retain a preference for economic self-sufficiency. Moore and Richman both collected their data in the first decade of the twenty-first century.²³² That data is largely drawn from pre-Millennials who came of age when sodomy was still a crime and were old enough to have begun and ended a few big relationships before marriage equality began to become a legal reality. Since the state would not recognize their “us-ness,” they logically re-

226. RICHMAN, *supra* note 31, at 70.

227. *Id.* (emphasis added).

228. MOORE, *supra* note 11, at 153.

229. *Id.* at 158.

230. *Id.*

231. *Id.* at 160.

232. *Id.* at 14; RICHMAN, *supra* note 31, at 1.

sponded by building their lives around self-sufficiency more than similarly situated heterosexual men and women.

In the 1990s many same-sex couples created living-together agreements, powers of attorney, and wills to cobble together a semblance of the legal, social, and emotional “us-ness” that the state grants through marriage. Many used forms provided in Nolo books like *Living Together: A Legal Guide for Unmarried Couples*.²³³ The latest edition of this series reflects the altered landscape that *Windsor* and *Goodrich* have created by giving specific advice on whether couples should formalize their relationship through contracts, marriage, or registering with the state under domestic partnership or civil union laws.²³⁴ In chapters titled “What it Means to be Married,” “Ten Steps to a Decision,” “To Prenup or Not to Prenup,” and “Avoiding the Ugly Gay Divorce,” seasoned practitioner Fred Hertz counsels same-sex couples to think carefully through the financial, social, and emotional consequences of exercising their newly acquired right to marry.²³⁵ As he quips, “the right to marry is not the duty to marry.”²³⁶

Hertz focuses on fairness as well as people knowing what they are signing onto in getting married, including practical and emotional aspects of whatever family form a couple chooses. Pragmatically, he instructs, it is easier to not share money socked away in a retirement account during the relationship because dividing that asset is notoriously complex.²³⁷ But that may be unfair if one person has a much higher income or more savings, especially if they have a pair bond exchange where the other focuses on maintaining order on the home front. Speaking from years of experience counseling clients, Hertz acknowledges a disconnect between most gay people’s expectations about property sharing and family law’s general unwillingness to divide property based on bad actions like cheating or abuse:

Many, many people feel fine about taking care of a partner while the relationship is intact and can even imagine splitting up assets if the relationship ends by mutual agreement. But those same people often balk when they think about sharing with a partner who has betrayed them sexually or left them precipitously for reasons they don’t understand.²³⁸

233. DENIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES (14th ed. 2007).

234. FREDERICK C. HERTZ & EMILY DOSKOW, MAKING IT LEGAL: A GUIDE TO SAME SEX MARRIAGE, DOMESTIC PARTNERSHIPS & CIVIL UNIONS (Lina Guillen ed., 3d ed. 2014).

235. *Id.*

236. E mail from Frederick Hertz, attorney, to author (Aug. 15, 2014) (on file with author).

237. HERTZ & DOSKOW, *supra* note 234, at 176.

238. *Id.* at 166.

That advice suggests that family lawyers may be in the habit of counseling clients that property-hoarding may be the easiest way to go, at least for the higher-earning person in a couple. But if *Windsor* alters the social meaning of marriage—and being gay—practitioners may come to encourage more “us-ness” among same-sex spouses, reflecting spouses’ evolving expectations.

Sociologist Judith Stacey provides another front-row account of the intricacies of same-sex relationships, but from the perspective of an ethnographer rather than a legal problem solver. Her book *Unhitched* documents the details—including contracts and deals about money, house-keeping, and sex—of a number of gay-male family arrangements in Los Angeles.²³⁹ Unlike attorney Fred Hertz, who tends to see clients when they are either in, anticipating, or trying to avoid legal disputes, Stacey collected a snowball sample of gay couples, asked them lots of questions, and observed how they live their lives. Having done most of her data collection before her subjects could get married or otherwise register with the state, she witnessed gay couples’ ingenuity in cobbling together deals that work for them, concluding that gay people are “at once freer and more obliged than most of the rest of us to craft the basic terms of their romantic and domestic unions.”²⁴⁰ The agreements she documents among gay parents, which she describes as “thoughtful, magnanimous, [and] child-centered,” must help them function as a family, because most of them were still intact and getting along when she checked in with them a decade after her initial research.²⁴¹

But most couples do not hire attorneys to commit these promises to paper, nor do they even talk through their intentions about who owns how much of what or for how long, as Stacey’s subjects did. Moreover, changed circumstances can decrease the usefulness of even the most carefully thought-through agreement. Consider Sandy and Fran, a couple whose break-up Fred Hertz characterizes as “explosive.”²⁴² Though they started off with roughly equal commitments to wage earning and tending the home fires, that changed when their disabled son came into the picture and Sandy’s aging parents needed help. Sandy cut back on her high-tech consulting business, while Fran upped the on-call hours of her medical practice, moving more into the husbandly provider role. Resentment on both sides bubbled

239. JUDITH STACEY, *UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA* (2011).

240. *Id.* at 83.

241. *Id.*

242. HERTZ & DOSKOW, *supra* note 234, at 178.

up over the years and eventually boiled over, leading to an acrimonious divorce.²⁴³

One reason that break-ups like Sandy and Fran's can get so ugly is that many couples live out a different pair bond exchange than at least one of them thinks they have. The studies that show equal sharing of household tasks in same-sex couples generally gather data by having couples self-report their practices. Two sociologists who have done ethnographic research on same-sex couple households—Christopher Carrington and Mignon Moore—contend that couples believe in equality but divide homemaking labor unequally.

According to Carrington, studies of gay and lesbian couples prior to the 1970s reported role specialization, with one partner playing a butch role by providing financially and the other playing a femme role by taking on responsibility for many or most household tasks.²⁴⁴ This is quite different from the conventional wisdom about relative equality in gay couples that researchers since the 1970s have documented based on the couples' self-reporting. Yet both Carrington's 1998 study and Mignon's 2011 study suggest that couples do not divide the housework as equitably as they report. The couples that Carrington and Mignon interviewed and observed closely over time reflected the belief in equity, reporting equal sharing of housework.²⁴⁵ But their actual observations, painstakingly recorded during days—and in Carrington's case, weeks—of observing couples cooking, cleaning, grocery shopping, and otherwise keeping house, revealed a different story.²⁴⁶

The couples' actions were actually closer to the pair bond exchange in which one person in a couple performs most of the work that makes a house a home. Take Narvin and Lawrence, a couple in Carrington's study. Narvin's Ivy-League MBA yielded a much higher income than Lawrence's nursing degree and required many more hours of work each week.²⁴⁷ After a difficult period in which Lawrence's research job kept him away evenings, he scaled back by taking a day-shift nursing position and taking care of "stuff . . . from laundry to shopping . . . trying to get the house to feel more like a home."²⁴⁸ Carrington suggests that what he calls the "egalitarian myth" is supported by homemakers themselves, who downplay their contributions or actively conceal the many tasks it takes to keep a

243. *Id.* at 178-79.

244. CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 12, 176-77 (1999).

245. *Id.* at 5, 176-77; MOORE, *supra* note 11, at 161.

246. See CARRINGTON, *supra* note 244, at 176-77; MOORE, *supra* note 11, at 161.

247. CARRINGTON, *supra* note 244, at 198.

248. *Id.* at 199.

household running smoothly.²⁴⁹ He describes a conversation he had with Sarah, a graphic artist who works at home, squeezes in domestic tasks throughout the day, making sure to get the laundry folded before her partner Andrea gets home.²⁵⁰ When pressed to say why it had to happen then, Sarah explained, “I just don’t want her to have to deal with it. I really like us to be able to have quality time when she gets here. She has enough pressure to deal with at work, so I try to keep this kind of stuff out of the way.”²⁵¹

Moore’s couples, who included many women who had become mothers in earlier relationships with men, tended to allocate most of the homemaking labor and financial decision-making to the biological mothers.²⁵² The lesbian partners of bio-moms value this work, Moore found, when she realized that the stepmothers reported that the bio-moms spend more time each week on household labor than the bio-moms did themselves.²⁵³ (Heterosexual men, in contrast, exaggerate the time they spend on homemaking tasks and underestimate the time their female partners spend on those tasks.)²⁵⁴ As Jocelyn, a bio-mom in Moore’s study put it,

I’m the domestic person, I do the cooking, I do the laundry. . . . I just think I wash dishes faster than her. So instead of her standing over the sink for an hour, we can have more quality time. So she does volunteer to do it, and I’ll say, “Oh no, I’ll do it.”²⁵⁵

Sarah and Jocelyn’s careful management of the emotional tenor of their evenings—not to mention the laundry and the dishes—is the kind of task that remains invisible when done well. Yet that invisibility, coupled with larger social, legal, and economic devaluation of much of this work as menial or inferior “women’s work,” may make it harder for same-sex couples to see the extent to which their relationships include the kind of pair bond exchanges that shape many different-sex marriages.

Same-sex couples’ self-reporting may more closely reflect their pair bond exchanges as the day-to-day reality of living in a relationship that both law and society recognize sinks into gay couples’ consciousness and habits. The fourth and final Part of this Article identifies three additional things that researchers should notice as they study the evolution of families and family law in the age of marriage equality.

249. *Id.* at 176 84.

250. *Id.* at 203.

251. *Id.* at 204.

252. MOORE, *supra* note 11, at 161.

253. *Id.* at 162.

254. *Id.*

255. *Id.* at 163.

IV. FORECASTING WHETHER MARRIAGE EQUALITY WILL CHANGE MARRIAGE AND MARRIAGE-RELATED DOCTRINES

This Article's examination of pair bond exchanges helps ground predictions about whether marriage equality will change marriage or gay people, or both. While there is not much data yet, the studies done to date suggest that the change may well go in both directions. Therefore students of the family should keep an eye on three things: (1) same-sex couples' children, (2) ethnographers who chart the way families actually divvy up financial and homemaking tasks, and (3) the heterosexuals. But only the third item is likely to alter family law.

A. *Watch the Children*

One would expect that as gay and lesbian couples enjoy more legal and social support, more of them will be raising children. But that change will play out differently among subgroups in the LGBT community.²⁵⁶ As of the 2010 Census, same-sex couples who consider themselves to be spouses are more than twice as likely to be raising biological, step, or adopted children when compared to same-sex couples who say they are unmarried partners.²⁵⁷ We saw in Parts II and III, above, that many of these parents are investing in their families by having one spouse spend more time and effort as breadwinners and the other spend more time making sandwiches, with gay couples raising children being just about as likely as straight couples to have one person at home full-time. But contrary to that expectation, the so-called "gayby boom" has not steadily increased the prevalence of gay men or lesbians raising children.

According to Williams Institute demographer Gary Gates, U.S. Census Bureau data indicate that in 1990 twelve percent of unmarried same-sex couples were raising kids, a rate that increased to nineteen percent in 2006 and then decreased again to sixteen percent in 2009.²⁵⁸ Gates explains these surprising data by pointing out that some ways that gays and lesbians become parents have increased—as one would expect—while others have decreased. The likelihood of becoming a parent via adoption nearly doubled between 2000 and 2009, increasing from ten percent of unmarried same-sex partner households to nineteen percent.²⁵⁹ That increase, however, is offset by decreases in LGBT becoming parents at a young age. Those two trends are compatible if we assume that marriage equality and other

256. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014) (discussing the effect of race and socioeconomic class on marriage rates and practices).

257. GATES, *supra* note 192.

258. GATES, *supra* note 193.

259. *Id.* at F2.

forms of legitimacy of gay and lesbian relationships has made birth moms, agencies, and others in the adoption process more open to placing a child with a same-sex couple at the same time it eased the way for young adults to acknowledge their sexuality and thereby avoid having a child in a heterosexual relationship before coming out.²⁶⁰

If Dan Black and his colleagues are correct that the expectation and experience of raising children causes men to engage in wage labor more heavily, and women less heavily, on average, and gay people increasingly have children, then marriage could well be pushing same-sex couples to enter pair bond exchanges more like heterosexual couples. Indeed, Nan Hunter sees “at least some indicators that the degree of difference between gay and straight, although still significant, is decreasing.”²⁶¹ A 2011 study that compared same-sex and heterosexual couples in 1975 and 2000 found that while straight couples report more equal sharing of housework in 2000 than twenty-five years earlier, the reverse trend—a reduction of equality—occurred for same-sex couples.²⁶² Consistent with theories about the efficiency of having one person spend more time keeping house while the other spends more time keeping up the bank account, gay and lesbian couples divided financial obligations for the household less equally in 2000 than in 1975.²⁶³

Different people will interpret these data differently. Hunter, for example, expects that fewer people will have children—gay or straight—and that family law may evolve to provide different rules for relationships with kids than relationships without them.²⁶⁴ I expect to see differences based on race, class, and age. If whites and college graduates are more likely to marry than African-Americans and those without college degrees, that pattern is likely to play out with black same-sex couples. Millennials who came of age with same-sex marriage as either a reality in their jurisdiction or a possibility on the horizon may tailor their educational and occupational plans with children in mind. In contrast, many Boomers, and perhaps Generation X as well, who came of age thinking of themselves as different from their heterosexual counterparts, may expect and experience more self-sufficiency than specialization in their couple relationships. Take forty-something lawyer Lisa Padilla, who married fifty-something businesswoman Allison Klein in 2011. Instead of merging

260. *Id.*

261. Hunter, *supra* note 16, at 1865 66.

262. Gotta et al., *supra* note 12, at 361 62.

263. *Id.* at 370. On the sexual front, all three kinds of couples were more monogamous in 2000 than in 1975—a result likely due to the AIDS epidemic and other cultural changes—and more couples made explicit agreements to remain monogamous in 2000 than in 1975. *Id.* at 366, 371.

264. Hunter, *supra* note 16, at 1877.

all of their finances, they signed a prenup to protect the retirement funds each had built up during successful careers.²⁶⁵

Many of the same-sex marriages currently taking place represent a back log of people who were blocked from marrying for years or even decades of their relationship. Data may change once gay couples are marrying around the same age as different-sex couples do.

B. Watch the Ethnographers

Family ethnographers such as Judith Stacey, Christopher Carington, and Mignon Moore provide equally relevant data about the fine-grained details of family life. By charting the deals and contracts that couples make, and the extent to which their daily lives match those agreements, ethnographies can chart the differences between the marital arrangements people think they have and the ones they are actually living out.

Columbia law professor Katherine Franke is not a demographer, yet she has flagged an issue that bears watching as well. As same-sex marriage becomes an accepted part of the doctrinal and social landscape, Franke worries that the patterns of equality that same-sex couples experience and expect may erode protections for primary homemaking spouses in heterosexual marriages.²⁶⁶ Although that prospect seems unlikely, since same-sex marriages represent much less than one percent of all marriages,²⁶⁷ minority vanguards can herald major social changes.²⁶⁸ It may well be that, as Nan Hunter has predicted, family law could adapt to these changes by crafting one set of rules for couples with children and another for childless couples.

C. Watch the Heterosexuals

While minorities can and have brought about social and legal change, it seems more likely that the LGBT community is just a convenient marker of social, economic, and political changes that the larger society has its own reasons to embrace. As the U.S. economy continues to move away from manufacturing and toward service and information technologies, the economic and homemaking contributions of men and women, on average, are likely to continue undergo-

265. Louise Rafkin, *If "Forever" Doesn't Work Out: The Same Sex Prenup*, N.Y. TIMES, (Mar. 23, 2012), <http://www.nytimes.com/2012/03/25/fashion/weddings/same-sex-marriage-and-prenuptial-agreements.html?pagewanted=all>.

266. KATHERINE FRANKE, WED LOCKED: THE RELATIONSHIP OF MARRIAGE TO FREEDOM FOR AFRICAN AMERICANS AND SAME SEX COUPLES (forthcoming 2014) (on file with author).

267. Hunter, *supra* note 16, at 1863.

268. See ALISSA QUART, REPUBLIC OF OUTSIDERS: THE POWER OF AMATEURS, DREAMERS, AND REBELS (2013).

ing an expansion of women's wage earning and a contraction of economic opportunities of middle and working class men.²⁶⁹ If heterosexual spouses seek out a more egalitarian version of pair bond exchanges, it will be because it works for them, not because the gays got there first.

CONCLUSION

In a post-*Windsor* world both marriage and marital contracting are likely to look a bit different than they have in the past, as will gay and lesbian coupling. As of late 2014, when over half of the states and the federal government have extended marriage equality to same-sex couples, couples in states that deny marriage equality will continue to enter cohabitation and other agreements to create "us-ness" as same-sex couples have done for decades to make up for the state's longstanding refusal to create rights and obligations and recognize same-sex couples as legitimate families. The terms of those agreements likely reflect the lived experiences of many same-sex couples, with more equal sharing of financial obligations and housework than in most heterosexual couples.

When, and if, the U.S. Supreme Court recognizes a fundamental right to marry that requires the states that still ban same-sex marriage to change course, that may change. When same-sex couples can marry in every state, a good number of same-sex couples may balk from the full-throttle property-sharing that the default rules of marriage entail. But I expect that just as the vast majority of regulated communities opt for default rules instead of crafting their own through private agreements, most people getting married will not enter premarital agreements. Moreover, as the years expand the number of same-sex spouses who interact with schools, hospitals, government agencies, and houses of worship—let alone family members, friends, neighbors, and colleagues—gay and lesbian couples may be less likely to think of themselves as different from different-sex couples. That assimilation may come alongside the continued heterosexualization of same-sex coupling, with more specialization in their pair bond exchanges, especially among those couples with children.

269. MUNDY, *supra* note 62.

