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### Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?

Amy L. Wax

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## ARTICLE

### BARGAINING IN THE SHADOW OF THE MARKET: IS THERE A FUTURE FOR EGALITARIAN MARRIAGE?

*Amy L. Wax\**

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## INTRODUCTION

WOMEN'S quest for equality faces many obstacles. Perhaps the most important is conceptual. What do we mean by "equality for women?" How will we know when women have achieved equality with men?

This Article examines the issue of equality for women within an institution that is central to their fate and crucial to their prospects: marriage. As marriage rates decline and divorce rates rise,<sup>1</sup> the institution of marriage has become the focus of a polarized debate

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<sup>1</sup> The divorce rate stands at about 50% of marriages, but has declined slightly in the past decade. See Arthur J. Norton & Louisa F. Miller, U.S. Dep't of Commerce, *Marriage, Divorce, and Remarriage in the 1990's*, at 1 (1992). Marriage rates have declined steadily over the past 25 years, and both men and women are marrying later. For example, in 1970, 88.4 men per 1000 over the age of 15 were married, but by 1988 that number had dropped to 57.4 men per 1000. See 3 U.S. Dep't of Health & Human Servs., *Vital Statistics of the United States 1988: Marriage and Divorce* 8, 9 tbl.1-7 (1996). Likewise, in 1975, 62.5% of 20- to 24-year-old women were married, but by 1990 that figure had dropped to 38.5%. See Norton & Miller, *supra*, at 3. For 25- to 29-year-old women, 87.2% were married in 1975, but only 69% were in 1990. See *id.* Between 1970 and 1988, the average age of first marriage for women rose from 20.6 to 23.7, and for men from 22.5 to 25.5. See U.S. Dep't of Health & Human Servs., *supra*, at 12 tbl.1-8. As matters stand, however, 90% of women are expected to marry during their lifetimes. See Norton & Miller, *supra*, at 4.

between, on the one hand, social conservatives who regard traditional marriage as an unalloyed boon and social good,<sup>2</sup> and, on the other, feminist critics who view marriage as a patriarchal strait-jacket that is antagonistic to women's interests.<sup>3</sup> This Article aims to mediate between these extremes, arguing that both camps are right, but for different reasons. Marriage presents women with a paradox. Women greatly value marriage because it significantly increases their well-being within society. But the fundamental structure of the institution of marriage makes it almost impossible for women to reap its benefits while maintaining their social equality with men.

A review of the literature on the institution of marriage reveals a striking imbalance: There is an enormous body of work on divorce and marital failure, but relatively little on the anatomy of *successful* relationships. Some divorce scholars delve into marital dynamics in considering how some aspects of marital relations—especially the division of labor, responsibility, and reward—may affect the positions of the partners when marriage fails.<sup>4</sup> But there is remarkably little sustained or systematic discussion of the reverse of that relationship: how extramarital prospects, or other preexisting factors and partner attributes, might affect the allocation of effort and reward between spouses who are not contemplating divorce.

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<sup>2</sup> See, e.g., David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (1995); Maggie Gallagher, *The Abolition of Marriage: How We Destroy Lasting Love* (1996); Barbara Dafoe Whitehead, *The Divorce Culture* (1997); Karl Zinsmeister, *Why the Traditional Family Will Never Become Obsolete*, *Am. Enterprise*, Mar.-Apr. 1997, at 28; *Promises to Keep: Decline and Renewal of Marriage in America* (David Popenoe, Jean Bethke Elshtain & David Blankenhorn eds., 1996).

<sup>3</sup> See, e.g., Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (1995); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 *Geo. L.J.* 2127 (1994); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *Geo. L.J.* 2227 (1994).

<sup>4</sup> See, e.g., Lloyd Cohen, *Marriage, Divorce, and Quasi Rents*; or, "I Gave Him the Best Years of My Life," 16 *J. Legal Stud.* 267 (1987); Ira Mark Ellman, *The Theory of Alimony*, 77 *Cal. L. Rev.* 1 (1989); Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 *Roundtable* 517 (1995); Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 *U. Toronto L.J.* 533 (1991). See generally Symposium on Divorce and Feminist Legal Theory, 82 *Geo. L.J.* 2119 (1994).



The lack of a comprehensive framework for understanding day-to-day relations within marriage has also led to serious blind spots in the analysis of women's fate within society as a whole.<sup>5</sup> A black box lies at the center of the elaborate explanatory structure that commentators and legal scholars have struggled to erect in the quest to understand the sources of women's predicament and to fashion policies that might improve their lot. By taking women's marital position—most notably, their weight of domestic responsibility—for granted in analyzing women's social standing and economic status, scholars have avoided the need to provide a fully satisfying or searching theory of why families operate as they do.<sup>6</sup>

This Article aims to lift the lid on the black box of marital relations and take a sustained look inside. It argues that there are good reasons—both empirical and theoretical—to believe that, on average, men and women share unequally in the benefits of marriage. What precisely does it mean to say that men and women are unequal within marriage? And what evidence supports this conclusion, once defined? This Article takes on these difficult questions using the tools and concepts of economic analysis. Part I examines the empirical literature that compares some aspects of the benefits and burdens of marriage for men and women and concludes that men typically gain a larger share of what marriage has to offer. Part II draws on game theory to model marriage as a bilateral, monopolistic bargaining relationship between rational ac-

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<sup>5</sup> Sociologists have been most active in attempting to formulate theories to explain observed marital roles and decisionmaking, but they have failed to put forward a unified and comprehensive paradigm that fully accounts for existing patterns. See, e.g., Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 *Am. J. Soc.* 652 (1994) [hereinafter Brines, *Economic Dependency*]; Julie Brines, *The Exchange Value of Housework*, 5 *Rationality & Soc'y* 302 (1993); Paula England, *A Feminist Critique of Rational-Choice Theories: Implications for Sociology*, 20 *Am. Sociologist* 14 (1989); Paula England & George Farkas, *Households, Employment, and Gender: A Social, Economic, and Demographic View* (1986); Paula England & Barbara Stanek Kilbourne, *Markets, Marriages, and Other Mates: The Problem of Power, in Beyond the Marketplace: Rethinking Economy and Society* 163 (Roger Friedland & A.F. Robertson eds., 1990); George Farkas, *Education, Wage Rates, and the Division of Labor between Husband and Wife*, 38 *J. Marriage & Fam.* 473 (1976).

<sup>6</sup> See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 *Colum. L. Rev.* 2001, 2002 (1996) (observing, without trying fully to explain, that women take on a greater burden of domestic responsibilities); Cohen, *supra* note 4, at 285; Williams, *supra* note 3, at 2229.

tors in which husbands and wives engage in a process of allocating the benefits and burdens of married life under conditions of conflict—that is, where spouses' interests do not perfectly coincide and one partner's welfare can sometimes come at the other's expense. After proposing various possible standards for egalitarian marital relationships, Part II then adopts a working definition of egalitarian marriage. The analysis predicts that, although egalitarian marriage is possible in some cases, it will be the exception rather than the rule. Bargaining principles suggest that the deep structure of marriage is indeed "patriarchal" in the following sense: Although both partners benefit from marriage, men on average have more power in the relationship. That is, men are in a position to "get their way" more often and to achieve a higher degree of satisfaction of their preferences.

Parts II and III explore the sources of this power imbalance, examining both the structural features of the institution and the manner in which those features interact with the traits and preferences that men and women bring to marriage so as to strengthen men's bargaining position. Part IV reviews how the imbalance is worsened by a feedback process that parlays small and morally neutral differences between men and women into more pronounced marital and social disparities. It also discusses how the failure to see marriage as a paradigmatic bargaining relationship and to understand the dynamics of marital bargaining leads to fundamental misconceptions about the choices men and women make in marriage and in life. Specifically, the analysis demonstrates how, contrary to common wisdom, women's supposedly greater "taste" and skill for domestic and nurturing activities cannot fully explain observed patterns of behavior or divisions of labor and rewards of family life. Rather, a complete understanding of marital dynamics must take into account the inevitable conflicts that arise in any bargaining relationship between distinct, albeit loving, individuals and the role of power in resolving those conflicts. And, any explanation of men's and women's "choices" must confront women's relative lack of power to bargain for a different or a better deal.

Finally, Part V discusses possible solutions for bargaining imbalance between men and women in marriage. It discusses a number of devices that might help to mitigate the degree of imbalance, but concludes that all have their limitations and their price. Measures

to change the balance of power encounter formidable practical obstacles grounded in the nature of marriage as an exclusive, relational contract between parties who stand in different positions at the outset. Many measures will not work well in the current legal climate of no-fault divorce, and introducing fault creates as many problems for women's bargaining position as it solves. And some correctives may have problematic consequences because bargaining takes place in the shadow of markets—specifically, the labor market and the marriage market. Attempts to change the balance of power by regulating the marital relationship directly may have the effect of deterring or delaying men's decision to marry or may change the quality of mates women can obtain. These side-effects may undermine or partially offset efforts to achieve marital balance.

This Article also asks what the future holds for egalitarian marriage, for families, and especially for children within marriages in which men hold the balance of power and women fill multiple roles. The number of married women with children entering the workforce is rising steadily.<sup>7</sup> This trend has many positive effects

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<sup>7</sup> See Barbara R. Bergmann, *The Economic Emergence of Women* 22-24 & tbl.2-3 (1986); Victor R. Fuchs, *Women's Quest for Economic Equality* 77 (paperback ed. 1990); Daphne Spain & Suzanne M. Bianchi, *Balancing Act: Motherhood, Marriage, and Employment Among American Women* 147 fig.6.2 (1996); Claudia D. Goldin, *The Role of World War II in the Rise of Women's Employment*, 81 *Am. Econ. Rev.* 741 (1991).

Most marriages now have two workers, and most married women work just to prevent an erosion of their family's standard of living. The economists Barry Bluestone and Stephen Rose, using data from the Panel Study of Income Dynamics' examination of Michigan families between 1967 and 1989, have calculated that husband-wife couples have increased their combined annual market work time an average of about 684 hours, or four months, of full-time work for that period. Barry Bluestone & Stephen Rose, *Overworked and Unemployed*, *Am. Prospect*, Mar.-Apr. 1997, at 58, 66. That means that "[t]he typical dual-earner couple at the end of the 1980s was spending an additional day and [a] half on the job every week." *Id.*

Most families did not gain economically from the increased effort, which came largely in the form of wives' time devoted to paid work. Indeed, most lost ground on the measure of wage per hour of market labor during that 20 year period. Families with spouses without a college degree gained no more than 4% in real earnings from the extra effort, even though they put in between 11% and 18% more family hours of paid work. See *id.* at 67 tbl. Those families actually experienced between an 11% and 18% decrease in the "family" hourly wage. See *id.* Only college educated couples, who worked 16.6% more hours during that period, saw a gain of 13.6% in family hourly wage, and a 32.5% increase in total real earnings. See *id.*; see also Lawrence Mishel, Jared Bernstein & John Schmitt, *The State of Working America 1996-97*, at 80-83 (1997) (noting wives' increasing contribution to family income from 1970-1992);

for women: It increases their security outside of marriage (i.e., after divorce) and adds to their leverage within that relationship. The evidence indicates, however, that the salutary effects of women's greater earning power are outweighed by other factors that impede women's ability to obtain a better deal within marriage. The result, paradoxically, may be that married women's increased workforce participation exacerbates the inequality in marital bargains. Women might bear the burdens of both family life *and* breadwinning, while obtaining fewer of the benefits than were sometimes forthcoming within more traditional relationships. Moreover, because women have generally served as children's principal champions within marriage and have been their main source of attention, the increased burdens placed on working women due to their bargaining weakness may well redound to children's detriment. Finally, this Article suggests that the structural persistence of marital inequality despite progress in other arenas poses an increasingly important threat to marriage as a social institution. As women become more disillusioned with their position within marriage, increasing numbers are seeking to end their relationships and are making fewer investments in them. This is also an unfortunate development for children and for society as a whole.

## I. EGALITARIAN MARRIAGE: WHAT DOES THE EVIDENCE TELL US?

### *A. From Choices to Preferences*

Any attempt to come up with a concept of equality within marriage must confront many of the same puzzles that plague attempts to define social equality in general. The central dilemma can be summarized: "equality of *what*?"<sup>8</sup> For the purpose of assessing marital equality, this Article employs a rational actor model and adopts a utility metric for measuring equality of welfare.<sup>9</sup> Although a utility-based concept might make some sense in theory, it is quite a different matter to detect deviations from the ideal in

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id. at 93 (marshaling data to show that "in the 1980s families worked longer for less" and that "husbands' earnings declines were offset by wives' increases in both hours and earnings").

<sup>8</sup> Amartya Sen, *Inequality Reexamined* 1, 12 (1992); Ronald Dworkin, *What is Equality?* (pts. 1-2), 10 *Phil. & Pub. Aff.* 185, 283 (1981).

<sup>9</sup> See *infra* Part II.



practice. According to economic theory, individual preferences can only be inferred by reasoning backward from what individuals agree to do for a price or from the exchanges they are willing to accept. In the case of marriage, it is tempting to explain away any voluntary arrangements that do not appear to comport with one spouse's best interests with "fudge factors" of the necessary magnitude, such as altruism; interdependent utility functions; disparate spousal preferences, tastes, or skills; and other sources of intrinsic "psychic income."<sup>10</sup> The same rationalizations are available to explain general patterns that are systematically sex-skewed. If women usually specialize in housework and men in waged work, or if women agree to move for the husband's job more often than vice versa, these patterns can be attributed to some combination of economic and noneconomic satisfaction of each partner's self-interest, where those elements are assumed to differ systematically by sex in the population at large. What seems unequal can be rendered equal by positing hidden costs or benefits, or adjusting the subjective value of the apparent terms of the exchange. The burden of proving inequality is on the observer.<sup>11</sup>

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<sup>10</sup> See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 *Geo. L.J.* 2071, 2118-19 (1996) ("[V]irtually any behavior—no matter how ostensibly altruistic or irrational—can be viewed as consistent with the model of rational utility maximization."); Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 *Ariz. L. Rev.* 1, 2 (1997) (noting that "'psychic income,' of which there is evidently an unlimited supply" is needed to explain those circumstances "in which norms and principles push people to do things that seem to make no sense if self-interest is the only goal"); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economics Theory*, 6 *Phil. & Pub. Aff.* 317, 335-36 (1977) (observing that rational actor models that can be adapted to try to take into account unselfish motives and altruistic impulses run the risk of explaining nothing by explaining *all* observed behavior as a manifestation of self-interest).

<sup>11</sup> While economists have shied away from analyzing marital allocation both because of the theoretical and methodological obstacles and because of their dominant interest in efficiency, sociologists have not harbored similar reservations. In testing the assumption that marriage short-changes women, researchers have examined, among other things, marital decisionmaking; control over wealth, income, and finances; and priority attached to each spouse's job or career goals. See Robert O. Blood, Jr. & Donald M. Wolfe, *Husbands & Wives: The Dynamics of Married Living* (1960); see also Belinda Fehlberg, *Sexually Transmitted Debt* 77-85 (1997) (reviewing the extent of sharing of a wide variety of resources and privileges between married couples across cultures and finding that "[i]nvariably, sociologists have concluded that women receive the lesser share"); Monica Biernat & Camille B. Wortman, *Sharing of Home Responsibilities Between Professionally Employed Women*

*B. The Work-Leisure Gap*

The divorce literature suggests that one place to look for women who are unequal within marriage might be the traditional role-divided relationship. Women who have invested in traditional domestic roles come away from divorce with far fewer resources than their husbands, and they suffer a decline in economic well-being and standard of living.<sup>12</sup> One might simply conclude that these

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and Their Husbands, 60 *J. Personality & Soc. Psychol.* 844 (1991) (noting the traditionally unequal distribution of childcare responsibilities among professional couples and wives' greater self-criticism of their own domestic performance); Philip Blumstein & Pepper Schwartz, *Money and Ideology: Their Impact on Power and the Division of Household Labor*, in *Gender, Family, and Economy: The Triple Overlap* 261, 264-66 (Rae Lesser Blumberg ed., 1991) [hereinafter *Gender, Family, and Economy*] (attempting to measure spouses' "decision-making power," "leadership power," and "conciliation power," and to correlate these with spouses' market income); England, *supra* note 5, at 24 (reporting on studies determining that husbands on balance more often get their way); England & Kilbourne, *supra* note 5, at 165 (citing surveys concluding that husbands have more power than wives); Dair L. Gillespie, *Who Has the Power? The Marital Struggle*, 33 *J. Marriage & Fam.* 445 (1971) (examining multiple areas of marital decisionmaking and resolution of conflict); Gerald W. McDonald, *Family Power: The Assessment of a Decade of Theory and Research, 1970-79*, 42 *J. Marriage & Fam.* 841 (1980) (examining the sources of power in marital decision-making); Janice M. Steil & Karen Weltman, *Marital Inequality: The Importance of Resources, Personal Attributes, and Social Norms on Career Valuing and the Allocation of Domestic Responsibilities*, 24 *Sex Roles* 161 (1991) (determining that men overall have more say at home and less responsibility for children and the household). For a recent summary of studies relating to marital resource division, see Janice M. Steil, *Marital Equality: Its Relationship to the Well-Being of Husbands and Wives* 43-61 (1997).

Studies of financial arrangements among married couples suggest patterns of unequal control over spending, with men having greater unilateral discretion and decisionmaking power. For example, in one study in which most men were the primary, although not the exclusive wage-earners, the majority of husbands had "an apparently unquestioned right to personal spending money," whereas wives rarely made personal expenditures, and then not without consultation or consent. Carole B. Burgoyne, *Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power*, 38 *Soc. Rev.* 634, 648 (1990). Another study of family finances reveals that wives tend to be responsible for budgeting and spending only when "money is short [and] managing and budgeting become chores rather than a source of power within the household." Jan Pahl, *The Allocation of Money and the Structuring of Inequality Within Marriage*, 31 *Soc. Rev.* 237, 257 (1983). In both studies, the wife's marital contribution did not generally translate into an equal control over spending or an equal allocation of monetary resources to personal needs.

<sup>12</sup> See Ellman, *supra* note 4, at 5. See generally Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985) (examining the impact of economic decisions on spouses



wives were getting less from marriage than their husbands because when their marriages dissolve, they take away less. The post-divorce situation, however, does not necessarily imply an overall inequality of welfare during the course of the marriage. The factor of timing has to be taken into account: The conventional wife's investments (intensive domestic and childcare services) tend to be made early in the relationship, with the payoff (in economic security provided by her husband) expected late.<sup>13</sup> The extreme first performer element of this type of relationship gives rise to the potential for opportunistic defection but does not necessarily show that, in the absence of such defection, a traditional wife in a successful marriage gets less out of the marriage overall.<sup>14</sup>

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and children involved in a divorce). Although Weitzman's groundbreaking study has come under attack and her data have been reanalyzed, subsequent studies support her basic conclusions. See Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 *Demography* 485, 489 tbl.2 (1985) (finding that women's post-divorce income is 70% of their pre-divorce income while men's post-divorce income is 93% of their pre-divorce income); Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30 *Can. Rev. Soc. & Anthropology* 205, 218 (1993) (finding that women have post-divorce incomes that are 57% of their pre-divorce incomes while men have post-divorce incomes that are 82% of their pre-divorce incomes); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 *Am. Soc. Rev.* 528, 532 (1996) (finding that women's standard of living fell 27% after divorce while men's standard of living increased 10%).

<sup>13</sup> See Cohen, *supra* note 4, at 287; Ellman, *supra* note 4, at 25-29; Trebilcock & Keshvani, *supra* note 4, at 552-53.

<sup>14</sup> For a discussion of the first performer problem, see *infra* Section IV.C. An alternative way to see the traditional wife's greater vulnerability after divorce as revealing something about her comparative well-being during marriage is to view her as bearing a disproportionate risk of loss during the life of the marriage. A traditional wife lacks the quality and type of "insurance" against the consequences of marital breakup that her husband typically enjoys. This relative lack of insurance may detract from her share of marital well-being. But the perception of imbalance in marital shares that stems from fewer hedges against insecurity depends crucially on assumptions about subjective preferences for risk and perceptions of probability of divorce, which vary from person to person. Looking at the overall risk of divorce will not do, because husbands and wives may not (and probably do not) judge their own risk of divorce as equivalent to that of the overall population. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *Law & Hum. Behav.* 439, 443 (1993) (indicating that 100% of individuals about to marry reject the likelihood of their own divorce). Also, women may believe (not without justification) that their risk of divorce is at least partly within their own control so that they can take steps to reduce or minimize their own risk. The fact that many women may be wrong in their prospective assessment of their divorce risk suggests that many are in fact underinsured,

In fact, the traditional marriage is probably the least likely to provide persuasive evidence of marital inequality. The data on marital use of time, for example, indicate that men and women in traditional marriages, in which the division of labor is sharp, work similar hours and enjoy roughly similar amounts of leisure time.<sup>15</sup> This information provides little basis for asserting that the spouses in such relationships are not working equally hard on average, or that they do not enjoy equivalent well-being from the relationships overall. There is, of course, considerable individual variation from couple to couple. But the aggregate pattern makes it difficult to argue persuasively that the division of labor in such families is systematically unfair to one spouse, in the sense that one partner unceasingly gains at the expense of the other.

In contrast, the dual-earner couple<sup>16</sup> presents a more convincing story of marital inequality. There is good evidence of a systematic difference in the *total* number of hours worked—in both the paid and unpaid sectors—by each dual-earner spouse for the benefit of the household unit.<sup>17</sup> The average wife in a dual-earner couple de-

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but this is perhaps better conceptualized as a form of market failure or information deficit rather than as evidence of a lopsided allocation of marital well-being.

<sup>15</sup> See Joseph H. Pleck, *Working Wives/Working Husbands* 30 tbl.2.1 (1985) (presenting data showing that husbands and housewives do similar amounts of work); Maximiliane E. Szinovacz, *Changing Family Roles and Interactions*, in *Women and the Family: Two Decades of Change* 163, 175 (Beth B. Hess & Marvin B. Sussman eds., 1984) (same).

<sup>16</sup> Empirical studies of working spouses have different criteria for inclusion of working couples into various categories for purposes of comparison. See *infra* note 18. For the purposes of this Article, a "dual-earner couple" is rather arbitrarily defined as one in which each spouse works for pay at least half-time (about 20 hours per week or more). This cutoff is unlikely to leave out many couples in which both partners do some work for pay: Because of discontinuities in the labor market's demand for part-time work (i.e., the paucity of jobs requiring less than a half-time commitment), it is not unreasonable to assume that most dual-earner families consist of spouses working at least half-time. See Francine D. Blau & Marianne A. Ferber, *The Economics of Women, Men, and Work* 223-24 (1986) (discussing problems with part-time employment opportunities); Rhona Mahony, *Kidding Ourselves: Breadwinning, Babies, and Bargaining Power* 210-11 (1995) (discussing reasons why part-time employment is rare); Spain & Bianchi, *supra* note 7, at 84 fig.4.2, 88 tbl.4.4, 151 fig.6.4, 152 tbl.6.4 (citing data indicating a steady increase in the number of employed women, especially women employed full-time); Maureen Perry-Jenkins & Karen Folk, *Class, Couples, and Conflict: Effects of the Division of Labor on Assessments of Marriage in Dual-Earner Families*, 56 *J. Marriage & Fam.* 165 (1994) (reporting that the majority of employed women are employed full-time).

<sup>17</sup> Work can be distinguished from leisure by a "third-party" criterion, which defines "work" as the production of goods or services that could be provided by another per-

votes significantly more time to work of one form or another (domestic or wage work) than does her husband. The difference in the number of hours spent working by members of dual-earner couples has been dubbed by sociologists the "work-leisure gap."<sup>18</sup>

son or economic unit without any utility loss to the consumer of those goods and services. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. Rev. 1, 11 ("An activity is leisure rather than work if a person must do it herself to enjoy its benefits."). So "a person can eat a meal and enjoy its benefits whether she cooks it or whether someone else cooks it for her. A person cannot enjoy the benefits of reading a book unless she reads it herself. Thus cooking is work, and reading is leisure." *Id.* It should be apparent that some activities (e.g., childcare) mix work with leisure in supplying both fungible productive value and performer-specific consumption value. See discussion of childcare, *infra* note 117.

<sup>18</sup> There is a large body of empirical work that documents spouses' participation in domestic labor. For some of the most careful findings in the sociological literature, see Pleck, *supra* note 15. The data clearly show that "women perform more hours of work than men when paid and unpaid work is combined." Silbaugh, *supra* note 17, at 12; see Sarah Fenstermaker Berk, *The Gender Factory: The Apportionment of Work in American Households* (1985); Marion Tolbert Coleman, *The Division of Household Labor: Suggestions for Future Empirical Consideration and Theoretical Development*, in *Gender, Family, and Economy*, *supra* note 11, at 245, 248-49; Shelley Coverman, *Explaining Husbands' Participation in Domestic Labor*, 26 Soc. Q. 81, 93 (1985); Myra Marx Ferree, *The Gender Division of Labor in Two-Earner Marriages*, 12 J. Fam. Issues 158, 158 (1991); Heidi I. Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 J. Women Culture & Soc'y 366, 379 (1981); Suzanne Model, *Housework by Husbands: Determinants and Implications*, in *Two Paychecks: Life in Dual-Earner Families* 193 (Joan Aldous ed., 1982); Catherine E. Ross, *The Division of Labor at Home*, 65 Soc. Forces 816, 830 (1987); Beth Anne Shelton, *Women, Men and Time: Gender Differences in Paid Work, Housework and Leisure* 112 (1992); Joann Vanek, *Household Work, Wage Work, and Sexual Equality*, in *Women and Household Labor* 275, 277 (Sarah Fenstermaker Berk ed., 1980); Sara Yogev, *Do Professional Women Have Egalitarian Marital Relationships?*, 43 J. Marriage & Fam. 865, 868 (1981).

The work-leisure gap varies widely (from about 7-30 hours per week) from study to study, and depends on the size and type of population examined and the methods for measuring household responsibility. But the gap is uniformly observed and always favors the husband. See Berk, *supra*, at 8 (men do only 15% of housework); Pleck, *supra* note 15, at 56 (wives spend 3 more hours per day on "family work"); Shelton, *supra*, at 99 (15 hours per week on household labor); Susan M. Shaw, *Gender and Leisure: Inequality in the Distribution of Leisure Time*, 17 J. Leisure Res. 266, 274 (9 hours per week less leisure time for women); Szinovacz, *supra* note 15, at 175 (3½ hours per day); Yogev, *supra*, at 867 tbl.1 (11 hours per week for women without children and 30 hours per week for women with children). Most studies show that men and women generally perform different types of tasks, with women doing more routine, everyday, "low-control" work that cannot be put off; men take more sporadic, discretionary, or "high-control" jobs. See Rosalind C. Barnett & Caryl Rivers, *She Works/He Works: How Two-Income Families Are Happier, Healthier, and Better-Off* 179-82 (1996). In the area of childcare, women do more routine physical work and care while men do more play and education. See Scott Coltrane, *Family*

Man 79 (1996). Even when husbands' participation is relatively high, women tend to retain both control over and responsibility for making domestic decisions and insuring that household tasks are performed. See Helen J. Mederer, *Division of Labor in Two-Earner Homes: Task Accomplishment Versus Household Management as Critical Variables in Perceptions About Family Work*, 55 *J. Marriage & Fam.* 133 (1993). Although the trend over the past 25 years or so has been in the direction of husbands' taking on a greater share of domestic responsibility, this is largely explained by a reduction in the total number of hours women and families devote to children and domestic tasks rather than by an increase in the absolute amount of time men devote to these pursuits. See Pleck, *supra* note 15, at 31; Shelton, *supra*, at 145; Silbaugh, *supra* note 17, at 9; see also John P. Robinson & Geoffrey Godbey, *Time for Life: The Surprising Ways Americans Use Their Time* (1997) (arguing that male and female uses of time are converging, but basing this conclusion on data that do not focus precisely on marital status, employment of spouses outside the home, or the presence of children).

There are substantial methodological difficulties in gathering housework data. See Joanne Miller & Howard H. Garrison, *Sex Roles: The Division of Labor at Home and in the Workplace*, 8 *Ann. Rev. Soc.* 237, 239 (1982), on the methodological difficulties with research. For a review of methodological techniques for data collection and their problems, see Silbaugh, *supra* note 17, at 8 n.18. Studies of household labor have collected principally two types of data: time budgets (a form of diary kept by the subject) and survey questionnaires on the distribution of responsibility for various household and childcare tasks. See Glenna Spitze, *Women's Employment and Family Relations: A Review*, 50 *J. Marriage & Fam.* 595, 600 (1988).

Some studies either include childcare time or consider it separately, while some exclude it altogether. A review of studies of child-rearing practices reveals that "fathers on average are considerably less involved [with children] even when mothers are working." Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 26 (1992) (citing Michael E. Lamb et al., *A Biosocial Perspective on Paternal Behavior and Involvement, in Parenting Across the Lifespan—Biosocial Dimensions* 111 (Jane B. Lancaster et al. eds., 1987)).

Even when childcare time is excluded, employed women spend considerably more time on domestic tasks than men do, with time in housework outside of childcare correlated with number of children in the household. See Shelton, *supra*, at 100 (each additional child costs women on average six more hours per week of housework, and men one more hour). For excellent data on time in housework, as correlated with paid labor time, marital status, and number of children, showing that even women employed full-time (more than 40 hours per week) do about twice as much housework as men, see *id.* at 63-88; see also *id.* at 96-99 (showing through regression analysis that gender is an independent variable determining time spent doing housework, even after controlling for number of children, marital status, time in paid labor, education, and occupational status, though earnings were not included in the regression analysis). The gap carries through in the amount of time working men and women spend caring for children. Even controlling for total hours of paid work and unpaid housework (minus childcare), women have less leisure time than men. See *id.* at 139. Shelton attributes this gap to the extra time women spend on childcare. *Id.*; see Berk, *supra*, at 7; Pleck, *supra* note 15, at 50-51; Biernat & Wortman, *supra* note 11, at 855-58; Yoge, *supra*, at 867 tbl.1.



Although women on average engage in fewer hours of employment and earn less than their husbands,<sup>19</sup> many married women have achieved parity in number of hours and earnings from market labor.<sup>20</sup> But the work-leisure gap does not close significantly as women work more hours or earn more money.<sup>21</sup> Nor is it avoided by women in any social class.<sup>22</sup> This difference in the total work

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<sup>19</sup> See Barnett & Rivers, *supra* note 18, at 178; Vanek, *supra* note 18, at 280. In 1993, almost half of mothers with children under 17 worked less than full-time, with 28% of women with children under six working full-time and year round. See Spain & Bianchi, *supra* note 7, at 147.

<sup>20</sup> Although women on average earn less than their husbands, working couples in which the wife makes an equal monetary contribution are increasingly common. In 1993, in a survey conducted by the Bureau of Labor Statistics, 48% of married women provided half or more of the family income, and fully 23% earned more than their husbands. See Tamar Lewin, *Women Are Becoming Equal Providers*, N.Y. Times, May 11, 1995, at A27. Married women who worked full-time contributed an average of 41% of family income. See *id.* Nine of ten women, whether employed or not, said that care of people in their families was their responsibility. See *id.*

<sup>21</sup> Studies on this issue consistently generated data showing that women do most of the domestic work even when the wife works for pay, and the gap does not disappear (although it narrows) when the wife's hours of paid work and amount of wage income approach or equal that of her husband. See Glenna Spitze, *The Division of Task Responsibility in U.S. Households: Longitudinal Adjustments to Change*, 64 Soc. Forces 689, 692-95 (reporting data from the National Longitudinal Surveys of the Labor Market Experiences of Young and Mature Women, compiled in the 1970s, showing that "women who earn 20 to 40 percent of couple income have the same decrease in tasks as those who earn over 40 percent"); see also Pleck, *supra* note 15, at 55-57 (questioning the empirical relationship between men's paid work time and domestic work time); Shelton, *supra* note 18, at 107 (showing that time in domestic labor is not significantly related to the ratio of spouses' earnings); Brines, *Economic Dependency*, *supra* note 5, at 682 ("[D]ependent husbands do less housework the more they depend on their wives for income."); Coverman, *supra* note 18, at 93 (surveying studies that found that wives' employment status had no effect on husbands' domestic participation); Farkas, *supra* note 5, at 482 (finding that wages were not a satisfactory explanation of the division of labor); Ferree, *supra* note 18, at 178-79 (noting that a one-to-one tradeoff of wages earned does not explain why women continue to do most of the housework); Mary Clare Lennon & Sarah Rosenfield, *Relative Fairness and the Division of Housework: The Importance of Options*, 100 Am. J. Soc. 506, 511-17 (1994) (finding in a sample survey of 13,000 couples that, although the women in dual-worker couples earned an average of 43% of the family income, they performed an average of about 68% of the domestic work); Model, *supra* note 18, at 202 (finding only slightly higher husband participation in couples with equal wages); Ross, *supra* note 18, at 821 (reporting on studies finding that "the ratio of husbands' [to wives'] earnings does not significantly affect the household division of labor").

<sup>22</sup> In fact, there is evidence that women with the most time-consuming and demanding jobs work the longest hours overall. Because husbands' hours of domestic labor appear consistently insensitive to wives' hours of work across the social spectrum, the hardest-working women tend to endure the largest work-leisure gap. Three

time of spouses in dual-earner couples gives rise to the notorious "double day" or "second shift" for women wage-earners.<sup>23</sup> Thus, the data indicate that in many homes there are periods when husbands are at leisure while wives work. The husband devotes the time freed up by the wife's efforts at home not to a form of produc-

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studies show lopsided patterns among professional couples. Donna Hodgkins Berardo, Constance L. Shehan & Gerald Leslie, *A Residue of Tradition: Jobs, Careers, and Spouses' Time in Housework*, 49 *J. Marriage & Fam.* 381 (1987); Biernat & Wortman, *supra* note 11; Rebecca B. Bryson et al., *The Professional Pair: Husband and Wife Psychologists*, 31 *J. Am. Psychol.* 10 (1976).

Donna Hodgkins Berardo and co-authors define "dual-career" families as those in which "both spouses have high aspirations to achieve in the world of work" and take on demanding professional or managerial jobs in which they are called upon to perform tasks that "are highly productive or that carry great responsibility." Berardo, Shehan & Leslie, *supra*, at 382. In non-career dual-worker families, the jobs held by the spouses tend to be routine, demand fixed hours of work, or entail less independent responsibility. See Jane C. Hood, *Becoming a Two-Job Family* 183 (1983) (discussing the differences between "dual-career" and "dual-worker" families, and finding that only about 10% of dual-earner families fall into the former category).

Equality of earnings is more common among low-income, dual-worker families than among high-income families: Women's percentage of total household earnings generally increases as household income declines. See Spain & Bianchi, *supra* note 7, at 154 tbl.6.5. Most couples with equal earnings or job prestige are at the low-earning end of the scale. See Spitze, *supra* note 21, at 695 ("[W]ives who are the primary earner tend to have low-earning husbands rather than to be unusually high earners themselves."); Model, *supra* note 18, at 201-02 (finding that most equal-income families were in the low-income range). Nonetheless, higher-earning ("dual-career") wives spend somewhat less time in domestic pursuits than lower-earning women who work full-time ("dual-worker" wives). That pattern generally reflects dual-career wives' spending less time in domestic work than others, not their husbands' spending more. High-earning and well-educated wives still spend significantly more time doing housework than their husbands. See Shelton, *supra* note 18, at 70-72, 99, 107, 116. Thus, "[t]here is no evidence . . . that higher relative earnings lead incrementally to higher levels of interpersonal power" as measured by the ability to shift responsibility for domestic labor to the male partner in the marriage. Spitze, *supra* note 21, at 695. Rather, existing evidence quite decisively indicates that women rarely succeed in "buying their way out" of an unequal share of domestic responsibility by increasing their work commitment or earning power. See Berardo, Shehan & Leslie, *supra*, at 387; Biernat & Wortman, *supra* note 11, at 855-56; see also Yogeve, *supra* note 18, at 868 (finding that work weeks of professional women with children were 29.7 hours longer than their husbands').

<sup>23</sup>See Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989); Shelton, *supra* note 18, at 108. Women with children experience the greatest burden in the second shift, since they perform the majority of childcare and housework, and their housework burden increases with each additional child. See Shelton, *supra* note 18, at 104.



tion that benefits both parties,<sup>24</sup> but to leisure, a form of consumption that benefits mainly (if not solely) the consumer.

The work-leisure gap offers promise in the search for real-world evidence of inequalities in the distribution of marital welfare. Leisure, or discretionary time, is one marital resource available for distribution to individuals within the marital unit. Although leisure may sometimes have productivity-enhancing side-effects,<sup>25</sup> it functions primarily as a pure consumption good. As such, it carries positive utility for the person who enjoys it. Individuals surely vary in the degree to which they value leisure, but leisure is almost always considered valuable after a significant amount of paid work, which is the context in which the work-leisure gap among dual-earner couples appears.<sup>26</sup> Moreover, leisure is not a public good. Although couples can enjoy their leisure together (which can generate some extra joint utility in excess of each person's consumption value), each individual's period of leisure is enjoyed separately by that individual and can be enjoyed alone.<sup>27</sup> Because it is possible to exclude others from the enjoyment of one's discretionary time, leisure can be unevenly distributed within families and "hogged" by one or more family members. Furthermore, periods of leisure can be measured and compared by applying an objective metric (time). More leisure has greater value than less, although the law of diminishing returns applies.<sup>28</sup> Finally, there is no reason to believe that men's taste for leisure differs systematically from women's. Although men and women might differ in their preferences for different types of work and individuals might differ in their energy level and thus the intensity of their preferences for lei-

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<sup>24</sup> See *supra* notes 18, 21, 22.

<sup>25</sup> See *infra* note 186 for a discussion of the "rejuvenation" and "flexibility" effects.

<sup>26</sup> Most people derive some "consumption value" or intrinsic satisfaction from paid work, with some—especially professionals with interesting or prestigious jobs—enjoying a considerable amount. These persons experience no sharp division between leisure and work because "free" time is often used for work-related activities. See *supra* note 17. That pattern is almost certainly the exception rather than the rule in the general population; the subjects in the work-leisure studies seemed to have little trouble distinguishing leisure time from work.

<sup>27</sup> There may be a small vicarious component in the enjoyment of leisure, but, assuming equal love between the spouses, that component should be shared equally by husbands and wives.

<sup>28</sup> See *infra* note 188.

sure, there is little evidence that either sex has a stronger desire for leisure as such.

The existence of the work-leisure imbalance in dual-earner families gives rise to two distinct questions. First, is the gap good evidence of marital inequality? The gap certainly seems to suggest sharp inequality, at least with respect to certain measurable components of intramarital effort and reward. The persistence of the gap over the past several decades has prompted one prominent scholar of family time use to comment that current arrangements assign "the cost of increased economic benefits the whole family enjoys thanks to the wife's employment to her alone."<sup>29</sup> Is there reason to believe that this scholar is correct—that women are bearing more of the costs and enjoying fewer of the rewards of the family's collective efforts? Second, if the imbalance in the allocation of effort and reward within families is real, why does it occur and why does it persist? Why do women acquiesce in arrangements that entail absolute sacrifice for them compared to other "deals" the family might adopt?

A number of stories can be told about the work-leisure gap that are consistent with more or less equality between spouses and that provide some explanation for women's voluntary acquiescence in this arrangement.<sup>30</sup> For example, it is commonly supposed that the wife will perform unpaid domestic services more efficiently—that is, at least cost per unit of output. If that were the case, allocating domestic responsibility mostly to the working wife might be Pareto-superior to a more even split, so long as the wife receives side-

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<sup>29</sup> Joseph H. Pleck, *Husbands' Paid Work and Family Roles: Current Research Issues*, in *3 Research in the Interweave of Social Roles: Families and Jobs* 251, 284 (Helena Z. Lopata & Joseph H. Pleck eds., 1983). If the baseline for comparison is the single breadwinner family of 25 years ago, the evidence indicates that the wife's employment often does not issue in "increased economic benefits" for the family. See *supra* note 7 (explaining that most families have not gained real income through increased extra hours of paid work, which have come in the form of wives' paid employment). Women's "break even" contribution to family earnings, however, must be offset by the cost of decreased time for domestic work, which must still be performed by someone despite women's paid employment. The evidence shows that it is women who are bearing a disproportionate amount of the costs of maintaining household services, with other family members enjoying the benefits of the maintenance of prior—or higher—income levels through women's paid employment. For further discussion, see *infra* Section IV.A.2.

<sup>30</sup> See *infra* Section IV.A.1.

payments from the extra surplus her efforts generate that are large enough both to cover her "extra" costs and to make her better off than under an arrangement of more equal sharing of responsibility.<sup>31</sup> But the bargaining model discussed in this Article shows that this is not the only, nor indeed even the best, explanation for these observed patterns. It is more likely that women go along with this regime because they lack the power to alter family life in their favor and to capture more of the gains of their efforts for themselves. By this account, observed patterns are consistent with a marked degree of inequality in the welfare of members of intact families.

## II. A MODEL OF MARRIAGE: THE UNION OF RATIONAL UTILITY MAXIMIZERS

### *A. The Generation and Allocation of Resources in Marriage*

Marriage can be modeled as a relationship between two people that generates a series of inputs and outputs. The process of generating those elements is bound up with allocation of burdens and rewards between mates and other family members. The model assumes that, in deciding how to allocate costs and benefits, household members behave as rational utility maximizers. They seek to increase their own individual well-being or satisfaction—their "psychic utility."<sup>32</sup>

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<sup>31</sup> See *infra* Section IV.A.1 (discussion of side-payments).

<sup>32</sup> The concept of utility makes use of a subjective measure of overall well-being, in which each party's interests are defined in terms of psychological states: "pleasure, happiness, desire, preference satisfaction, and the like." Alan Wertheimer, *Exploitation* 207 (1996). On the rational utility maximizer model, see Cotter, *supra* note 10, at 2115; Harrison, *supra* note 10, at 2; Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 *Yale L.J.* 1441, 1441-42 (1990) (distinguishing the "rational choice approach," which postulates "a type of human agent who seeks rationally to maximize the satisfaction of his own wants in a context where others are engaged in a similar enterprise, against a finite stock of resources" from the "economic analysis of law" which "seeks to characterize certain areas of law in terms of the pursuit of efficiency").

Much of the analysis in this Article takes men's and women's preferences as exogenous, or given. It also equates welfare or well-being with the maximization of utility, which in turn is understood as the satisfaction of "revealed preferences," while devoting little attention to the large body of research indicating that choice is subject to cognitive distortions that deviate from rationality. See, e.g., *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982). The concept of utility used here is quite capacious, and can include the satisfaction of second-order preferences such as the desire to adhere to moral ideals and principles.

Applying the principle of rational utility maximization to individuals operating within the family, although a commonplace in the economics literature, meets resistance from those who believe that family life is not premised on self-regarding motives and that the principles governing family and market are, or at least should be, radically distinct.<sup>33</sup> But rational self-interest does not entail absolute selfishness: The model does not exclude altruism, love, or concern for other family members.<sup>34</sup> It is not inconsistent with the partial dependence of each spouse's individual well-being upon the well-being of other family members nor does it rule out a spouse's

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The adoption of a streamlined model of rational choice is not meant to affirm its validity. For example, the analysis acknowledges that preferences bearing on the conduct of marriage appear to interact with social conventions and expectations in complex ways, see *infra* notes 161-163 and accompanying text, but does not seek to resolve the question of whether those preferences are the product of social experience or whether they are socially manipulable. The validity of the Article's main thesis—that women have less power to act on their preferences than men in marriage, whatever those preferences may be and however they are formed—does not depend critically on how welfare is defined or on whether preferences can be changed. Nor is it undermined by taking a very broad view of utility or “psychic income.” See *infra* note 35.

For further discussion, see Susan Moller Okin, *Justice, Gender, and the Family* 165 (1989) (suggesting that the difference between men's and women's remarriage prospects are “socially constructed” and hence malleable; Amartya K. Sen, *Gender and Cooperative Conflicts*, in *Persistent Inequalities: Women and World Development* 123, 148 (Irene Tinker ed., 1990) (suggesting that women's greater involvement in the outside world may shape their expectations of household divisions); L.W. Sumner, *Welfare, Happiness, and Ethics* 66 (1996) (restating Sen's argument as the view that “[w]elfare cannot consist in utility . . . because an individual's tastes, ambitions, and aspirations are too malleable by processes of indoctrination, manipulation, and socialization”); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689 (1984) (suggesting a preference-shaping function for law); Cass R. Sunstein, *Social Norms and Social Rules*, 96 *Colum. L. Rev.* 903 (1996) [hereinafter Sunstein, *Social Norms*] (same); see also Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 *Tex. L. Rev.* 1567, 1580-94 (1997) (criticizing the notion that well-being or welfare is nothing more than subjective, experiential preference satisfaction); Robert A. Pollak, *For Better or Worse: The Roles of Power in Models of Distribution within Marriage*, 84 *Am. Econ. Rev.* 148, 151 (1994) (discussing preferences as endogenous or exogenous to distributional bargaining models).

<sup>33</sup> See *infra* Section IV.B.1.d; *infra* note 228.

<sup>34</sup> Nor does the concept of utility maximization rule out pursuit of the full range of nonmonetary and intangible goods that give marriage so much of its value. It also allows consideration of the various motives and sentiments that operate within the marital sphere. See Gary S. Becker, *Accounting for Tastes* 151 (1996) (“The interactions between husbands, wives, parents, and children are more likely to be motivated by love, obligation, guilt, and a sense of duty than by self-interest narrowly interpreted.”).



taking vicarious pleasure in the other's happiness or satisfaction.<sup>35</sup> But the model does assume less than perfect altruism and, hence, a less than perfect coincidence between family members' interests. This means that there will be conflict within the relationship, not necessarily in the active sense of harsh words and recrimination, but in the sense that one spouse's well-being may sometimes come at the other's expense.<sup>36</sup>

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<sup>35</sup> Another way to look at motivation within marriage is to posit that spouses always act out of self-interest, but that self-interest is sometimes advanced by the well-being of the partner, because spouses take vicarious pleasure in the others' satisfaction. That is, spouses' utility functions are partially interdependent, although the degree of interdependence may vary widely and in complex ways, depending on the characteristics of the individuals and the distribution of marital surplus goods. See Cotter, *supra* note 10; Sen, *supra* note 10.

<sup>36</sup> Thus, the model rejects Gary Becker's construct of the "altruistic head of household," which assumes away tradeoffs in well-being of family members by positing a household leader who automatically transfers resources to other family members to induce them to maximize the family's net utility. See Gary S. Becker, *A Treatise on the Family* (1981) [hereinafter Becker, *Treatise*]. In Becker's model, the family acts as a single decisionmaker, with the collective utility function effectively replacing the individual members' utility calculus as the determinants of behavior. See, e.g., Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 *Int'l Econ. Rev.* 31, 31 (1980) (stating that a model such as Becker's "assumes that the two individuals who have formed, or are contemplating forming a household, pool their incomes and maximize a neoclassical household utility function").

Becker's "altruistic head" has been roundly criticized in the economics literature for failing to reflect actual family dynamics, for papering over real-life conflicts among family members, and for ignoring the differences between men's and women's fates within marriage. See Edward P. Lazear & Robert T. Michael, *Allocation of Income within the Household* 12 (1988) (noting that economic models that concentrate on the family unit, not the individual, divert attention away from the distributional issues of "what happens *within* the family"); see also Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 *Wm. & Mary L. Rev.* 989, 996 (1995) (noting the tendency among economists, in the "absence of empirical knowledge about distributions within the family," to "assume that a family's resources are equally distributed among its members"). See generally Estin, *supra* (exploring the limits of economic theory as applied to family law); *Beyond Economic Man: Feminist Theory and Economics* (Marianne A. Ferber & Julie A. Nelson eds., 1993) (same); Marianne A. Ferber & Bonnie G. Birnbaum, *The "New Home Economics": Retrospects and Prospects*, 4 *J. Consumer Res.* 19 (1977) (discussing problems with Becker's model of household economics); Lazear & Michael, *supra*, at 1 ("[F]rom casual and personal observation, one knows that the household does not always distribute income or other resources evenly among its members. . . . Yet the myth persists in economic modeling of well-being and in many social policy contexts that once we know the level of resources available to the household, that is all we need to know."). By sidestepping household allocational issues, Becker's model does

*B. Positive-Sum Marriage*

A bedrock principle that can be derived from the rational self-interest assumption is that couples will initially decide to marry only when the marriage is a positive-sum or potentially Pareto-superior arrangement: Each spouse expects to be better off married than he or she would be single<sup>37</sup> or married to another available person.<sup>38</sup> Moreover, each spouse must receive something over and above the value of any positive investment that the person expends in maintaining the marriage—that is, each spouse in a viable marriage must receive some form of compensation for his or her contribution to the relationship. Finally, couples stay married as long as each partner is better off than he or she would be if divorced.<sup>39</sup>

It follows that spouses will stick with a marriage only if it produces a marital surplus—in the form of potentially utility-enhancing gains for each party—and only if each spouse receives some share of the surplus.<sup>40</sup> How much and what kind of marital surplus will

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have the virtue of avoiding the difficult conceptual exercise of comparing the well-being of family members, which helps account for the paucity of attention to allocational issues in the economics literature. See *supra* notes 32-35 and accompanying text.

<sup>37</sup> See Becker, *supra* note 34, at 149 ("The point of departure of my work on the family is the assumption that when men and women decide to marry, or have children, or divorce, they attempt to raise their welfare by comparing benefits and costs. So they marry when they expect to be better off than if they remained single, and they divorce if that is expected to increase their welfare."); Gary S. Becker, A Theory of Marriage (pt. 1), 80 J. Pol. Econ. 813, 814 (1972) ("[S]ince marriage is practically always voluntary, . . . the theory of preferences can be readily applied, and persons marrying . . . can be assumed to expect to raise their utility level above what it would be were they to remain single.").

<sup>38</sup> Since the decision to marry takes place on a marriage market, people will also consider prospects for alternative matches, including the search costs and discounted probability of making a comparable or superior marriage, in deciding when and whether to marry. See, e.g., Gary S. Becker, Elisabeth M. Landes & Robert T. Michael, An Economic Analysis of Marital Instability, 85 J. Pol. Econ. 1141, 1147-52 (1977).

<sup>39</sup> More specifically, each spouse's willingness to remain married is contingent upon the marriage's offering more utility than the alternatives available upon giving up the relationship, net of any losses and transaction costs occasioned by divorce.

In order not to complicate further an already complicated analysis of the basic elements of marital bargaining, this Article largely ignores information problems and information costs, which figure prominently in actual decisions to marry or divorce, and must be taken into account in any truly complete analysis of behavior in this area.

<sup>40</sup> The term "marital surplus" encompasses all utility-enhancing effects that would not exist in the absence of the relationship. See Allan M. Parkman, No-Fault Divorce: What Went Wrong? 27 (1992) ("[T]he economic analysis of the decision



be produced? Decisions about the production side of marriage are inextricably bound up with the consumption patterns of the unit. That is because most marital decisions have implications for the distribution of both rewards and burdens to members of the household. The payoffs that result from the division of the marital assets are determined by the allocation of productive responsibilities as well as by the assignment to family members of resources for consumption.<sup>41</sup> Because inputs have costs, the costs will be borne by the person who makes a particular contribution to the unit. Although some of the outputs available to the marriage (such as market income generated during the life of the relationship) are liquid and easily divisible, outputs in the form of unpaid and in-kind services are not so easily transferable, but tend to redound to the fixed benefit of the family members for whom the services are performed. Thus, decisions concerning the specific contributions made by real-life marital partners can carry important distributional con-

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to marry focuses on the parties' expectation that... marriage will expand the 'commodities' available to them compared with those available if they remained single."); see also Becker, *Treatise*, *supra* note 36, at 15-21 (discussing surplus generated by specialization in the household). Marital partners invest resources in the form of material and intangible assets (such as previously accumulated wealth and talent) and productive labor at home and work. They reap gains in the form of increased utility from public goods, "own" children, economies of scale, and a host of intangible benefits (such as love, emotional support, companionship, and vicarious pleasure in the other's well-being) that are available for enjoyment and consumption within the unit. See Blau & Ferber, *supra* note 16, at 45-46 (discussing advantages of joint production and consumption, including economies of scale, public goods, externalities—or interdependent utility functions—and economic benefits of families); Becker, *supra* note 37, at 816 (noting that marriage produces market and nonmarket products, including such elements as "the quality and quantity of children, prestige, recreation, companionship, love, and health status"). Moreover, marriage appears to induce behavioral changes (harder work, sobriety, savings and investment, risk-averse strategies) and specialized activities and efforts that would not otherwise be expended. See Linda J. Waite, *Social Science Finds: "Marriage Matters," Responsive Community*, Summer 1996, at 26. Finally, there is added utility from coordination and cooperative effort in activities of daily life.

<sup>41</sup> The "total utility" that a marriage can generate—the sum of the utilities for the partners—is not a fixed quantity, but is a function of the actions and decisions of the partners, which can vary over a wide range. So the size of the marital surplus varies with the decisions as to its distribution. See Yoram Weiss, *The Formation and Dissolution of Families: Why Marry? Who Marries Whom? And What Happens Upon Marriage and Divorce?* 15 (Aug. 1993) (unpublished manuscript, on file with the Virginia Law Review Association) ("In general, associated with each marriage, there is a set of feasible actions. Each action yields an outcome which is the utility values (payoffs) of the two partners.").

sequences for family members, because they go a long way towards determining the allocation of in-kind costs and benefits.<sup>42</sup>

### *C. What Is Egalitarian Marriage?*

#### *1. Utility as the Metric for Egalitarian Marriage*

Within the framework of the rational actor model, what counts as an egalitarian marriage? The popular conception of an egalitarian marriage seems to conform most closely to a partnership in which the spouses play quite similar roles.<sup>43</sup> I would term this type of role-sharing relationship an "equalitarian" marriage (as opposed to an egalitarian one). But a notion of marital equality that seeks more or less to match roles and externally observable contributions without regard to talents, preferences, or desires, is too rigid—and too narrow—to be useful. If a couple "shares everything," one partner may still feel (quite sensibly) that he or she is getting less than a truly equal share. A more theoretically useful way to measure input and output—and one that respects individual differences

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<sup>42</sup> The utility derived by a family member from a productive contribution is the net sum of the separable costs and benefits to that person from engaging in production and consuming what is produced (which includes the pleasure of producing it). For example, if someone prepares a meal shared by everyone in the family, the cook bears the costs of cooking it alone while enjoying some of the benefits, whereas the others enjoy the rewards of a good meal without bearing the costs. To be sure, costs and benefits can be rearranged somewhat by means of "side-payments": the reallocation of other resources—including contributions in kind and money—to "compensate" for a contribution. See *infra* notes 135-136 and accompanying text (noting, among other things, that the possibility for side-payments will be limited by practical considerations in many relationships).

<sup>43</sup> One thinks of the family in which the husband and wife make similar investments in their human market capital and in "marriage-specific capital": Both husband and wife work at jobs of roughly similar status and demands, and both share in unpaid work and responsibility at home in roughly equal measure. See Hood, *supra* note 22, at 9 (defining the egalitarian marriage as one in which the "husband and wife share household, income-producing, and decision-making roles in roughly equal proportions"); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault*, 60 U. Chi. L. Rev. 67, 126-27 (1993) ("In an egalitarian marriage, both spouses work full-time and each performs fifty percent of the household chores and childcare."); see also Linda Haas, *Role-Sharing Couples: A Study of Egalitarian Marriages*, 29 Fam. Rel. 289 (1980) (studying 31 role-sharing couples in Madison, Wisconsin).

For a discussion of a range of conceptions of marital equality, in part reflecting studies of couples' own ideas of "equality," see Steil, *supra* note 11, at 59-71.

in utility functions for various assets and resources<sup>44</sup>—makes use of the concept of psychic utility, both negative and positive, that lies at the heart of the rational actor model. The strength of this approach is that it is quite latitudinarian. It does not rule out the possibility that a quite even balance of psychic utility can prevail in highly role-divided marriages—including those with a conventional male breadwinner and female homemaker—as well as in relationships that conform more closely to the “equalitarian” model.

One problem with using utility as the currency for comparing spouses’ positions is that utility is difficult to compare intersubjectively, especially in situations, such as marriage, in which utility functions can be expected to diverge.<sup>45</sup> It is possible to avoid

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<sup>44</sup> See Wertheimer, *supra* note 32, at 223 (“Given differently shaped utility functions for different goods, the utility derived from transactions will vary considerably . . .”).

<sup>45</sup> See *supra* note 10. The welfare of family members—either absolute or relative—cannot be known without calculating utilities, but utilities are functions of preferences, and preferences are revealed only through “voluntary” choices. But choices only tell us whether a person believes that his or her welfare will be improved by the transition from one state to another among a limited range of options, and not whether her welfare compares favorably or unfavorably with another person’s. Put another way, the fact that two people engage in an exchange that makes both better off tells us nothing about whether one is better off than the other. See Lazear & Michael, *supra* note 36, at 5 (“The value to the recipient of a transfer may not be the same as its value to the giver.”); see also Richard A. Posner, *The Economics of Justice* 79 (1981) (“The ‘interpersonal comparison of utilities’ is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison.”); Wertheimer, *supra* note 32, at 222 (discussing the incommensurability of welfare); Harrison, *supra* note 10, at 2 (discussing the methodological limitations on interpersonal comparisons of utility); Sen, *supra* note 10, at 133, 147 (discussing interpersonal comparisons); Waldron, *supra* note 32, at 1456-57 (distinguishing between two objections to interpersonal comparisons of utility: “ontological”—which relates to the difficulty of finding a conceptual basis for expressing the difference between one person’s well-being and another’s—and “epistemic”—which concerns the problem of being “sure that we have chosen the right convention of comparability” and determining how “such a standard [is] to be applied in practice”). But see Robert A. Pollak, *Welfare Comparisons and Situation Comparisons*, 50 *J. Econometrics* 31 (1991) (suggesting that interpersonal utility comparisons are not incoherent and are a useful construct in some areas of welfare economics).

Marriage presents perhaps the most difficult case for interpersonal utility comparisons. The economic aspect of marital exchange is only one facet of a relationship with considerable noneconomic or intangible elements. Also, much of what family members “consume” or enjoy consists of public goods or of goods and services (both market and nonmarket) that generate consumption value for the producer. Family members also experience considerable “vicarious” utility from other members’ well-being. These factors contribute to the difficulty of measuring and comparing the efforts and rewards of each partner to the marital exchange. See Lazear & Michael,

some—although not all—of the awkwardness of comparing utilities by introducing a normalized concept that does not directly require comparisons between persons: the utility each person would enjoy within a relationship relative to the maximum potential welfare available if all marital resources were allocated, and arrangements made, according to that partner's wishes. The benchmark notion of maximum potential welfare or utility would correspond roughly to the idea of each person consistently "getting his or her way" within the relationship. The concept of "percentage relative utility" can be defined as the ratio of each spouse's actual utility relative to that person's maximum potential utility. Each person's percentage relative utility can then be compared without worrying about differing utility functions.

## 2. Rival Conceptions of Marital Equality

Assuming that utility is the basic metric, and making use when appropriate of the concept of percentage relative utility to ease the problem of interpersonal comparisons, is it possible to describe marital arrangements that comport with an intuitive notion of what an egalitarian marital relationship would look like? Some alternative conceptions follow.

### a. A "Substantive" Concept of Equal Division of the Marital Surplus

Each person's costs or inputs, measured as negative utility, are returned to him or her out of resources available to the marriage. Beyond that, resources (tangible and intangible) are divided so that each spouse achieves an equal net share of utility relative to that person's maximal utility. That is, each spouse enjoys an equal percentage relative utility.<sup>46</sup>

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supra note 36, at 19-21 (noting difficulties in measuring intrafamily distribution of income and resources).

<sup>46</sup> If there is a simple one-for-one tradeoff, or linear relationship, then the egalitarian point will lie where each person receives half of his or her personal maximum possible utility—which corresponds to a 50 percent share of maximal utility for each. Where the relationship is not strictly linear—where, as in most viable marriages, there are public goods for sharing, or where the spouses experience vicarious utility due to altruism or caring—each spouse can simultaneously satisfy a greater percentage of his or her desires consistent with the other spouse receiving a similar "normalized" amount of utility. The greater the vicarious component (the more love



*b. A "Procedural" Concept of Equality*

The metric here is the input/payoff deal that would be negotiated if two people started from a hypothetical initial position of equal premarital baseline utility and identical negotiating skills,<sup>47</sup> with equal, and inferior, outside alternatives available to each (either no marriage at all, or an equal probability of an equally inferior alternative marriage for each). Under those conditions, it is not unreasonable to assume that the couple would agree to make equal contributions or efforts on behalf of the marriage (as measured in their own negative subjective utility) and to take equal shares of the output relative to each person's "best deal"—which once again amounts to equal percentage shares. Even if the spouses agreed to unequal inputs, they might still agree to an equal split once costs are covered (i.e., after costs are compensated to each contributor) which is equivalent to arrangement (a).<sup>48</sup>

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and sharing), the happier each person can be, and the more each will get of what he or she wants. The higher will be each person's percentage relative utility consistent with satisfying the egalitarian condition.

The definition of an egalitarian relationship advanced here is similar to that proposed by H. Peyton Young in his recent book, in which he defines an egalitarian bargain as one in which there is an "allocation of divisible property [such that] every claimant is indifferent between his portion and the same fraction of the entire property." H. Peyton Young, *Equity: In Theory and Practice* 148 (1994). Since the value of resources in our definition has already been translated into the metric of subjective utility, an egalitarian bargain would be one in which each person has gained the "same fraction" of the entire amount of utility available to him within the relationship. This would appear to satisfy Young's indifference principle. This definition also bears some resemblance to David Gauthier's "minimax relative concession" principle, which also seeks to equalize the gains of persons engaging in a bargaining relationship relative to the most favorable outcome available to each. David Gauthier, *Morals by Agreement* 136-56 (1986).

<sup>47</sup> See *infra* notes 145-151 and accompanying text.

<sup>48</sup> For why the ideal rational couple could be predicted to agree to an equal split once costs are covered, see *infra* notes 140-143 and accompanying text; see also Douglas G. Baird, Robert H. Gertner & Randal C. Picker, *Game Theory and the Law* 224 (1994) (suggesting that bargainers will split profits equally absent complicating factors).

c. An "Equal Gain" Concept of Equality

Each spouse gains the same utility (as a percentage of the maximum net utility) over premarital (i.e., unmarried) baseline utilities, where that baseline might be equal or unequal.<sup>49</sup>

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Which of these rival suggestions—which may well fail to exhaust the possible list—best comports with our idea of egalitarian marriage? There is no need to make a definitive choice among the suggested options, because the major conclusions of this Article apply to all: By whatever measure we select, most marriages are inequalitarian.

This conclusion derives from applying bargaining theory principles to egalitarian conceptions of marriage as outlined above. The egalitarian models gauge marital equality on the basis of each spouse's utility inputs and outputs within a closed and private world of marital relations. They attempt to capture an ideal of reciprocity in which spouses match (subjective) effort with effort and (subjective) reward with reward. But bargaining theory teaches that the allocation of marital contribution and benefit will often deviate from equality as we define it. Distributions will be influenced in large part by factors other than and external to those that inform our intuitive concept of an egalitarian relationship, which looks to the value spouses give to and take from one another.

What are the factors that determine allocation and why do they matter? One is markets, which cast a shadow in which couples live and interact. This Article shows how markets for work and markets for mates put pressure on spouses to deviate from egalitarian conditions within marriage. The other key element is the deep structure of marriage. As explained below, marriage can be viewed as a bilateral and monopolistic bargaining game in which parties are relegated to self-help for the enforcement of any agreements within the ongoing relationship. External markets interact with that structure to constrain the deals struck by spouses with different preferences, tastes, and desires. Those constraints operate to undermine marital equality.

To illuminate these points, this Article adopts concept (a) above as a working definition of an egalitarian marriage.<sup>50</sup> Although this

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<sup>49</sup> See *infra* Section II.D.3.a (discussing baseline premarital well-being).



definition has its flaws,<sup>51</sup> it nevertheless provides a useful basis for unpacking, identifying, and examining the host of forces that cause intramarital arrangements to deviate from the chosen, egalitarian baseline in directions that favor men or women, and what the social consequences of the deviations might be.

In applying the working definition, this Article will also adopt, for the purpose of exposition, the simplifying assumption that the utility inputs expended prior to marriage by the spouses to generate their initial contributions to married life are roughly similar, at least at the point of entering the relationship.<sup>52</sup> Although that assumption will obviously not apply to some real marriages (in that, for example, one person may have put more "psychic" effort into self-development or into the accumulation of assets brought to the marriage than the other), it is probably a safe one for the great majority of middle-class marriages in which personal, financial, and educational endowments more or less match at the outset.<sup>53</sup> Thus, the paradigmatic marriage is the marriage of persons who are roughly equally—and also moderately—endowed in attractiveness, education, wealth, property, and other resources and attributes that

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<sup>50</sup> This concept—equal percentage shares net of effort expended—allows for transiently lopsided gains and investments. Transient imbalances often represent the most efficient strategy and should not be considered inequalitarian as long as the allocations balance out during the life of the relationship, whatever its duration.

<sup>51</sup> The model is overly simple because it fails to take account of the fact that each spouse's well-being is a function of changes in *marginal* utility that result from particular allocational shifts. But the marginal utility gains or losses from a particular allocational choice cannot be considered in isolation. Rather, utility effects are contextual and path dependent. The value of marital decisions for each spouse depends on the way things currently are, which in turn depends on prior decisions. For example, the effect on each partner of the birth of a child depends on the presence of other children and how their care has been arranged.

<sup>52</sup> As noted, compensation to each spouse for his or her effort expended on behalf of the union is taken into account in defining egalitarian marriage. The equality-of-inputs assumption means that, as a practical matter, spouses have expended roughly equal premarital effort (generating equal negative utility) in accumulating assets or cultivating endowments that are put to work to create value within the marriage. Those elements would include, for example, efforts expended on developing earning power through education or on accumulating tangible assets and property. See *infra* Section IV.B.2 (discussing problems that arise from the calculation of inputs and outputs to marriage, and the puzzle of how to treat "premarital endowments").

<sup>53</sup> This is especially true recently, due to the rise of educational assortative mating. See *infra* note 286.

are important within marriage.<sup>54</sup> Our model is Jane and Jim—the secretary married to the telephone lineman, the nurse married to the middle manager, or the computer repairman married to the college-educated housewife. How will these couples work out their marital relations?

#### *D. Marriage as a Bargaining Game*

The idea that marriage can be modeled as a bargaining game is not new. Scholars from various fields have recognized that game theory potentially provides an intellectually satisfying framework for addressing the problems of allocation within marriage, although none have undertaken a sustained and systematic analysis of the implications of the model for various aspects of domestic life, law, or public policy.<sup>55</sup> In addition, economists have created a number of theoretical and quantitative models of marital or familial relations as a form of bargaining game.<sup>56</sup> Those models provide the basic framework for the discussion here.

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<sup>54</sup> This would appear to be a dubious assumption, given the salience in the popular imagination of the well-heeled, powerful older man marrying the toothsome younger woman of more modest means. But marriages in this mode are almost certainly a small minority of all unions in the population as a whole. Leaving aside the far right tail of the curve, where very wealthy or high status marriageable men are to be found, the differences in resources, attributes, and investments as between the sexes at the time of the typical marriage are probably not pronounced. There is, however, one caveat: A potential source of a small but perhaps not insignificant differential in endowments in the population as a whole is the age gap between husbands and wives. The fact that older persons tend to be better educated and to have accumulated more market and other types of capital may give husbands a slight edge. See *infra* note 104.

<sup>55</sup> The most sustained effort to take the model seriously as applied to marriage is Rhona Mahony's popular book. Mahony, *supra* note 16. A few legal scholars have also brought game-theoretic insights to bear on some aspects of family relations. Most notably, see Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 Va. L. Rev. 421 (1992); Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. Legal Stud. 869 (1994); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tul. L. Rev. 953 (1991); Cohen, *supra* note 4; Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 Geo. L.J. 89 (1993). Commentators in other disciplines have also made some use of bargaining principles in the context of broader discussions of family and gender issues. See, e.g., Okin, *supra* note 32; Bergmann, *supra* note 7, at 266-74; England & Farkas, *supra* note 5, at 53-54; J. Richard Udry, *Marital Alternatives and Marital Disruption*, 43 J. Marriage & Fam. 889 (1981).

<sup>56</sup> See, e.g., Theodore C. Bergstrom, *Economics in a Family Way*, 34 J. Econ. Literature 1903 (1996); Paul S. Carlin, *Intra-Family Bargaining and Time Allocation*, 7 Res.

### *1. The Exclusivity and Pooling Conditions: Marriage as Bilateral Monopoly*

The bargaining model views a marital relationship as a bilateral monopoly that defines an arena of exclusive contribution as well as exclusive dealing. With respect to contribution and reward, it is necessary to define what the spouses bargain over. This Article assumes a "worldly goods"<sup>57</sup> or "pooling" condition under which each partner brings into the relationship, and places on the table for bargaining, everything each possesses at the time of marriage and everything generated through that person's presence or efforts during the life of the marriage. Nothing of value is initially held back or earmarked for exclusive use.<sup>58</sup> The parties' contributions

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Population Econ. 215 (1991); Shelly Lundberg & Robert A. Pollak, Bargaining and Distribution in Marriage, *J. Econ. Persp.*, Fall 1996, at 139 [hereinafter Lundberg & Pollak, Bargaining and Distribution]; Shelly Lundberg & Robert A. Pollak, Noncooperative Bargaining Models of Marriage, 84 *Am. Econ. Rev.* 132 (1994) [hereinafter Lundberg & Pollak, Noncooperative Bargaining Models]; Shelly Lundberg & Robert A. Pollak, Separate Spheres Bargaining and the Marriage Market, 101 *J. Pol. Econ.* 988 (1993) [hereinafter Lundberg & Pollak, Separate Spheres]; Manser & Brown, *supra* note 36; Marjorie B. McElroy, The Empirical Content of Nash-Bargained Household Behavior, 25 *J. Hum. Resources* 559 (1990); Marjorie B. McElroy & Mary Jean Horney, Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand, 22 *Int'l. Econ. Rev.* 333 (1981); Robert A. Pollak, A Transaction Cost Approach to Families and Households, 23 *J. Econ. Literature* 581 (1985); Sharon C. Rochford, Symmetrically Pairwise-Bargained Allocations in an Assignment Market, 34 *J. Econ. Theory* 262 (1984); Sen, *supra* note 32, at 134-40.

<sup>57</sup> The "nothing held back" idea is neatly captured in this phrase, which appears in the Church of England marriage vows: "With this ring I thee wed, with my body I thee worship, and with all my worldly goods I thee endow . . ." Book of Common Prayer (1886).

<sup>58</sup> Although strong conventions ordinarily create the expectation that members of a couple will throw all preexisting assets in the marital pot and make available all premarital as well as intramarital fruits of each partner's efforts for potential allocation within the family unit, this initial "pooling" or "worldly goods" condition does not always obtain in every marriage. For example, wealthy persons may sequester or otherwise set aside assets or wealth in a manner that makes those resources effectively unavailable to the other spouse and thus takes them permanently out of the pool of marital resources available for bargaining and allocation. For simplicity, however, this discussion adopts the pooling condition as a normative baseline.

The pooling condition should not be confused with household members' enjoying any particular share of resources including resources the other partner brings in. As discussed below, the share that each household member actually enjoys is the product of the outcome of a bargaining process that may allocate marital value in ways that increase welfare quite unevenly. For example, there is good evidence that men, women, and children do not always share equally in the wages that a breadwinner

include various resources and endowments that would exist regardless of the marriage (such as monetary income or mechanical ability)<sup>59</sup> as well as elements that are generated by virtue of the relationship. The latter elements comprise the marital surplus. Each spouse's income, for example, is not surplus to the partner who earns it. But marital surplus can be generated when each spouse enjoys public goods purchased with the other's income, or provides services or emotional satisfaction in exchange for a share of the other's income.<sup>60</sup>

These resources, and the costs of generating them, must be allocated among spouses during the life of the marriage.<sup>61</sup> The couple bargains over an array of choices concerning the balance of costs and payoffs for each spouse, deciding together who will make particular kinds of effort and who will enjoy certain rewards. The size and composition of the pool, and the payoffs to each spouse, are obviously not fixed, but depend on each partner's individual and

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brings into the household, and that sharing patterns vary among couples. See, e.g., Silbaugh, *supra* note 17, at 44 & n.162; see also *supra* note 11 (citing findings by Pahl and Burgoyne that a wife's control over spending and allocation of monetary resources to personal needs is not dictated by her marital contribution).

<sup>59</sup> Tangible resources are not all that spouses may contribute to the relationship. They may also bring along such (initially) intangible assets as their developed human capital, earning power, financial acumen, capacity to love, talent for childrearing, family connections, extended family's security and conviviality, beauty, and winsomeness. Those personal attributes or abilities are then put to work within the relationship to generate more value, which includes but is not limited to "marital surplus" (which comprises the *enhanced* value that exists solely by virtue of the marriage). Those resources are then available for reallocation among family members. For further discussion of initial attributes of endowments, see *infra* Section IV.B.2.

<sup>60</sup> It should be apparent that the total "marital pool" as defined here is larger than the marital surplus, since the pool exists prior to any compensation for costs and includes some elements that partners would generate or enjoy whether they were married or not. Marital assets in the pool are available for surplus-generating investment (such as, for example, investing in a family business or in professional activities), for the creation of common goods, or for direct redistribution among family members.

<sup>61</sup> Allocations are assumed to be made between married couples. The interests of other family members (most importantly, children) are assumed to be represented by their parents within this model (although that representation is not perfect, since the overlap between parents' and children's interests—as with the interests of spouses—is not complete). In economic modeling of the family, children are often seen as adding to the marital surplus: They generate value as a "productive" output or, alternatively, add to the "consumption" value of their parents. See Becker, *Treatise*, *supra* note 36, at 7-8.



coordinated choices and actions.<sup>62</sup> There may be many different ways to arrange a family's affairs to effect a division—including an egalitarian division—with only some being the most efficient (i.e., generating the greatest possible total utility for all). In effect, there is always the possibility of expanding or contracting the pool of total resources available for distribution.

The marital bargaining process covers all sorts of issues and choices that extend well beyond the balance of productive effort and leisure, and the couple's use of time. Decisions relating to where to live; where and how much to work; what to buy; how much to spend, save, or invest; the priority given to the husband's and wife's careers; the conduct of sexual relations; the choice of friends; interactions with extended family; disciplining children; and myriad other matters are up for grabs within a relationship and are resolved on a daily basis in a continuous process of adjustment and readjustment, negotiation and compromise.<sup>63</sup> The resolution of those issues determines both the scope and composition of the marital pool and the marital surplus, as well as the well-being of each spouse.

The marital bargain also includes an exclusivity condition: Partners agree to go only to one another for certain types of resources and services. For the life of the marriage, certain "market" opportunities will necessarily be forsaken. The couple must decide on an allocation of most marital resources without direct recourse to a market pricing mechanism. These exchanges take place "off-market"; there is one buyer and one seller for a host of services and commodities. In deciding, for example, who shall get to take the children to the grocery store on Saturday and who shall play golf,

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<sup>62</sup> For example, one partner may, through unilateral action—such as sexual infidelity—dramatically decrease the size of the marital surplus by simultaneously destroying marital capital and depriving the other spouse of much of the value of the marriage. See *infra* Section IV.A.3 (discussing sexual and fidelity issues).

<sup>63</sup> See Ira Mark Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 *BYU L. Rev.* 259, 292-302 (giving examples of complex marital compromises and "exchanges"); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 *BYU L. Rev.* 197, 207, 211-13 (same). Caution is also in order because the marital balance has a significant temporal component, which makes it difficult to keep accounts by taking a snapshot of some finite period. As suggested, see *supra* notes 12-14 and accompanying text, the relationship must be assessed over its entire duration before it can be said with confidence that there is a shortfall for one spouse or the other.

partners do not ordinarily go out on the general or "spot" market and suggest "purchase prices" to strangers to procure family services.<sup>64</sup> Rather, the understanding is that the tasks and rewards will be allocated within the family circle. In such circumstances, "price determination [is] ill-described by standard economic theory."<sup>65</sup> Each person must bargain with the other to decide who gets what. Finally, the enforcement of such a bargain is left to the parties. Courts will not enforce agreements between spouses intramaritally,<sup>66</sup> so there is no standing legal mechanism for remedying a breach of such an agreement so long as the partnership remains a going concern. Rather, recourse is had only to informal enforcement mechanisms, such as retaliation or other forms of self-help, which are largely—although not exclusively<sup>67</sup>—confined within the family unit.

## 2. *Marriage as a Split-the-Pie Game*

Under the rational choice paradigm, a couple marries if marriage offers a Pareto-superior result: Both parties must be no worse off by virtue of the union. But "embedded in all institutional arrangements that provide the opportunity for mutual gain is a bargaining game over relative shares."<sup>68</sup> The allocational possibilities that characterize marriage can be modeled as a two-person bargaining game of "split-the-pie." The key to the game is that a failure to settle on a mutually agreeable allocation will result in a reduction in welfare (a reduced payoff) for each bargainer. Without

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<sup>64</sup> As noted, see *infra* notes 129 & 188, some families have recourse to the "cash solution" (that is, hiring household help) for a portion of family services, but those families are quite unusual. There are many key marital functions for which no market substitute can be found or where such a substitution (e.g., sexual services) would defy the core conditions of the relationship or be inimical to it.

<sup>65</sup> Eric Rasmusen, *Games and Information: An Introduction to Game Theory* 227 (1989).

<sup>66</sup> See Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 *Law & Contemp. Probs.* 221, 225 (1995); Silbaugh, *supra* note 17, at 29 (discussing the legal taboo against intramarital enforcement of antenuptial agreements); see also Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *Va. L. Rev.* 1089 (1981) (discussing relational contracts generally).

<sup>67</sup> Social disapproval and other informal sanctions may play some, albeit a now diminishing, role. For a discussion of informal social norms, see *infra* Sections V.C, V.F.

<sup>68</sup> Jules L. Coleman, *Markets, Morals and the Law* 272 (1988).

agreement, both partners lose. This risk creates an incentive to come to a mutually satisfying agreement within the relationship.<sup>69</sup>

The condition that both partners must gain by agreement establishes the central constraint for a feasible bargain: The possible set of rational allocations within the bargaining relationship is limited by the alternatives available to each participant in the bargained-for agreement. Although proposed game-theoretic bargaining models of marriage differ in some particulars, they share the feature that the bargain struck will be some function of the consequences for each party of failing to reach agreement.<sup>70</sup> The alternatives awaiting the parties in the absence of a bargained-for agreement are variously known in game theory parlance as the "fallback alternative," "threat point," "threat advantage,"<sup>71</sup> "next best alternative,"<sup>72</sup> or "best alternative to a negotiated agreement."<sup>73</sup> The next best alternative is determined by the situation each party confronts in the absence of a negotiated agreement, and can include the option of forgoing any transaction at all or of transacting with another party. The value of each party's "threat point" (as determined by the next best alternative) reflects the potential value of an agreement for each party, which in turn determines each party's "reservation price." That price is equal to "the minimum threshold value that he or she is prepared to accept for entering into an agreement. A party gains from a transaction when he or she re-

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<sup>69</sup> Baird, Gertner & Picker, *supra* note 48, at 220; Rasmusen, *supra* note 65, at 228. The analogy between marriage and "split-the-pie" is not perfect, because the latter assumes fungible, continuous, and infinitely divisible shares, and in marriage there may be some discontinuities of division. Such discontinuities, and other features of marriage such as the dominance of public goods, may sometimes make it quite difficult to bargain freely over "side-payments" to rectify imbalances of shares that may result, for example, from adopting a more efficient but lopsided allocation of productive effort. See *infra* Section IV.A.1.

<sup>70</sup> See Pollak, *supra* note 56, at 600 (reviewing proposed bargaining models of marriage).

<sup>71</sup> Wertheimer, *supra* note 32, at 67.

<sup>72</sup> See Pollak, *supra* note 56, at 600. There is some semantic confusion in the literature over whether the person with the better set of alternatives to an agreement has a "high threat point" or a "low threat point." I have chosen, as more intuitively sound, to describe the party with better outside alternatives as having a "high threat point." But see Mahony, *supra* note 16, at 44 (suggesting that the party to a marriage who has more alternatives—usually the man—has a lower threat point).

<sup>73</sup> See, e.g., Mahony, *supra* note 16, at 43; Howard Raiffa, *The Art and Science of Negotiation* 45 (1982); Wertheimer, *supra* note 32, at 211.

ceives more than the reservation price."<sup>74</sup> Each party's reservation price in turn fixes the magnitude of the bargaining surplus, which consists of the resources available for allocation between the parties through bargaining once each party's reservation price is met.

Each party's best alternative to an agreement is one of the factors that bear on each party's bargaining power. The term "bargaining power," although often used, is rarely understood or precisely defined.<sup>75</sup> In bargaining among rational, self-interested utility maximizers, bargaining power has a formal aspect and a behavioral one. Formally, threat points determine the limits of the negotiation set—the range of utility payoffs that each bargainer could rationally accept within the bargaining relationship.<sup>76</sup> That range is governed by a simple principle: If a party can do better outside the bargain than by striking a deal, he or she will not agree to a deal. Although the threat points set limits, they do not, in themselves, uniquely determine the precise arrangement within the negotiation set that will be selected by the parties. That selection is a matter for the two parties to work out, and a division will be arrived at through some kind of negotiating process for dividing up the bargaining surplus. Therefore, predicting or specifying the likely marital bargain and the respective payoffs to the players would require knowing something about the spouses' individual alternatives to striking a deal (the threat points), as well as something about their bargaining abilities and the determinants of the bargaining process.

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<sup>74</sup> Wertheimer, *supra* note 32, at 211 (footnote omitted); see also Raiffa, *supra* note 73, at 45 (applying the reservation price).

<sup>75</sup> See Wertheimer, *supra* note 32, at 64-68 (discussing confusion surrounding "bargaining power"). The term is genuinely useful in the context of off-market, monopolistic bargaining games. Its meaning is far more ambiguous in the context of market transactions, where the terms of exchange and price are more closely fixed by aggregate supply and demand. See, e.g., Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 Cal. L. Rev. 769 (1997) (attempting to explore the concept of "market power" in the labor market).

<sup>76</sup> See Pollak, *supra* note 56, at 600. That negotiation set can include both Pareto-optimal and non-Pareto-optimal arrangements between the parties. See Mahony, *supra* note 16, at 38-48 (discussing suboptimal or "inefficient" marital deals).



### 3. "Threat Points" in Marriage

What determines the threat point of the partners to a marriage? The two competing game-theoretic models in the literature assume two different fallback positions that confront the couple if they fail to acquiesce in a mutually agreeable arrangement for the conduct of the marriage. Both fallback positions represent a loss of potential marital surplus and a reduction in the size of the pie or the pool available for distribution.

One possible fallback option for nonagreement is the breakup of the relationship—divorce.<sup>77</sup> That outcome risks loss for both parties of all benefits of the marriage. Another possible outcome is an uncoordinated or discordant living arrangement in which the partners are at odds, but remain married and continue to live together—the "harsh words and burnt toast" alternative.<sup>78</sup> The parties are worse off than if they agreed on how to coordinate their efforts, but may be better off than if they divorced. If they would be better off "at war" than apart, the threat points that effectively determine the parties' conduct are intramarital.

Since both partners to a potentially positive-sum marriage will lose if the marriage either dissolves through divorce, or degenerates into domestic strife, the partners have some incentive to come to an allocational agreement. Their incentives may not be the same, however. There is reason to believe that, on average, the fallback positions may differ significantly for husband and wife. Specifically, there is evidence suggesting that men will on average have better alternatives to a marital agreement—both inside and outside of marriage—than women.

#### a. Exit Options

The alternatives to getting married to a particular person are to remain single or to marry someone else. The alternatives to remaining married are to become single or marry again. In the words of one economist of family bargaining, the value of these alternatives is determined by the "extrahousehold environmental parameters" encompassing "every variable that affects how well each fam-

<sup>77</sup> See Bergstrom, *supra* note 56, at 1924.

<sup>78</sup> *Id.* at 1926; see also Lundberg & Pollak, *Separate Spheres*, *supra* note 56, at 1007 (discussing intramarital and extramarital threat point models).

ily member could do in the next best alternative outside of the family."<sup>79</sup> Variables include subjective preferences for being married or unmarried; the resources each member controls individually (most notably, market earnings and wealth); social and community ties and support; the sexual consequences of being unmarried; the costs or harms to third parties—most notably children—from divorce and how concerned the partner is about these harms; the amount of sunk cost or lost investment entailed by divorce; the social stigma and status consequences attached to being single or divorced; the legal rules that determine property divisions, alimony, and child support following the termination of marriage; and taxes and transfers conditioned on marital status (such as Aid to Families with Dependent Children ("AFDC") and other welfare payments). Related to all these elements is how a person who contemplates divorce would fare in the remarriage market.

Many of these variables operate in favor of men. Setting aside remarriage prospects, there is reason to suppose that single women may be less happy than single men within the unmarried state. That is, single women's baseline level of well-being may, on average, be lower than single men's. First, assuming an otherwise similar intensity of desire to marry, even young women at the peak of marriageability cannot afford to wait as long to get married, because their marriageability declines more rapidly than men's.<sup>80</sup> Thus, the cost of each additional period of being single is greater for women than men. This temporal factor alone introduces a difference in men's and women's average demand for marriage.

There are yet other reasons why women may, on average, be less satisfied being single than men. Many of the services that men once sought within marriage—"everything from sex to food preparation to old-age insurance"<sup>81</sup> as well as, in some cases, the production of "own" offspring<sup>82</sup>—are readily available outside of marriage or can be purchased on the open market. On the other hand, what

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<sup>79</sup> McElroy, *supra* note 56, at 578.

<sup>80</sup> See *infra* notes 95-98 and accompanying text.

<sup>81</sup> Shirley P. Burggraf, *The Feminine Economy and Economic Man: Reviving the Role of Family in the Post-Industrial Age* 4 (1997).

<sup>82</sup> See Becker, *Treatise*, *supra* note 36, at 28-29 (discussing the importance of producing one's "own children" as a benefit of marriage); see also *infra* note 338 (discussing the demographics of out-of-wedlock birth rates and their relationship to men's extramarital well-being and willingness to marry).

women traditionally seek within marriage—emotional security, financial support, prestige, power, and a father's authoritative help and financial "sponsorship" for their children—are hard for women to obtain outside of marriage and generally cannot be purchased.<sup>83</sup> Moreover, factors like sex-specific differences in the costs and benefits of sexual variety or exclusivity may elevate men's baseline well-being relative to women's outside of marriage, at least under current social conditions.<sup>84</sup> Women's distaste for being single may also stem from women's need for a "protector": Single women may feel more threatened, vulnerable, lonely, or socially despised than single men.<sup>85</sup> Finally, labor market factors are influential. Women generally make less money than men, although there is evidence that the gap is closing rapidly for unmarried childless women as compared to men in comparable jobs.<sup>86</sup> Women's occupational choices differ from men's, which can result in somewhat lower earnings. Finally, discrimination against women in the job market may place important limits on women's earnings and career prospects compared to men's. Thus, women may start out less well off on the primary marriage market.

Women, notoriously, also do less well by divorce. Their labor market value is often impaired by marriage. Women generally make greater idiosyncratic, marriage-specific investments than men, and those investments often come at the expense of labor market opportunity costs.<sup>87</sup> Women also face direct loss of their marital investments, which function as sunk costs if a marriage dissolves.<sup>88</sup> Their preference for the custody of children imposes additional fi-

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<sup>83</sup> But see *infra* Section V.E.3 for a discussion of the role AFDC plays in substituting for a husband's income and services.

<sup>84</sup> See *infra* Section IV.A.3 (discussing men's and women's attitudes and tastes with respect to fidelity and sex); *infra* note 338 (discussing recent changes in the availability of "respectable" premarital sex).

<sup>85</sup> See, e.g., Roberta S. Sigel, *Ambition and Accommodation: How Women View Gender Relations* 43-89 (1996) (surveying women's feelings of second-class citizenship, which some women may believe marriage will alleviate).

<sup>86</sup> See June Ellenoff O'Neill, *The Cause and Significance of the Declining Gender Gap in Pay*, in *Neither Victim Nor Enemy* 1, 7-8 (Rita J. Simon ed., 1995).

<sup>87</sup> See Cohen, *supra* note 4; Trebilcock & Keshvani, *supra* note 4; see also *infra* note 186 (discussing why women tend to start out making greater investments in domesticity).

<sup>88</sup> Women tend to specialize in nurturing and family work, whereas "men typically make fewer relationship-specific investments than women, accumulating instead resources which are as useful outside as within their current relationship." England & Farkas, *supra* note 5, at 55.

nancial burdens.<sup>89</sup> Men, in contrast, customarily make a greater investment in labor market capital, which is portable in the event of divorce. But, even if the sex differential in active marriage-specific investment could be completely eliminated—which is unlikely in the face of *other* sources of men's superior bargaining power<sup>90</sup>—men would still come out ahead. Given their relatively short reproductive lives, women bear a sex-specific "passive" opportunity cost that their husbands do not.

This leads us to perhaps the most significant difference in men's and women's fate outside of marriage, which lies in their currency on the remarriage market. On the assumption that marriage to a *suitable* partner generates surplus value for the pair to share over and above what each spouse can generate alone, remarriage to such a partner is by definition a more desirable option than remaining single. Indeed, the ability to remarry confers a bargaining advantage precisely because the opportunity to remarry can be very valuable. Remarriage has the potential to be a positive-sum game—that is, to produce a surplus for distribution to the participants. When there is a positive-sum game, everyone wants to play.

But not everyone gets to play. A woman's attractiveness and appeal to the opposite sex declines rapidly with age, causing a precipitous falling off of her remarriageability.<sup>91</sup> If her investment of her youth in her husband fails to yield future payoffs (because, for example, a marriage fails), that resource is effectively depleted.<sup>92</sup>

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<sup>89</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 979 (1979).

<sup>90</sup> See *infra* Sections III.C-D for a discussion of the interaction of roles and bargaining power.

<sup>91</sup> See Cohen, *supra* note 4, at 278-87. Divorce scholars have noted that "women lose value in the marriage market more rapidly than do men." *Id.* at 284. Ira Ellman notes that "[t]he more precipitous decline in the woman's sexual appeal" with age is exacerbated by its corollary, which is the age differential in marital partnerships. Ellman, *supra* note 4, at 43. He further observes that this "relatively universal and apparently intractable" male preference for marrying younger women is an important "noneconomic factor" (which nevertheless has economic consequences) that tends to exacerbate women's preexisting disadvantage upon divorce. *Id.* That factor operates to deprive many women of the benefits of remarriage.

<sup>92</sup> As Lloyd Cohen puts it, the wife experiences a "stochastic fall in value" during the life of the marriage, both because much of her active investment typically takes place during the early years of a relationship and because her passive currency on the remarriage market declines more rapidly. Cohen, *supra* note 4, at 288; Mahony, *supra* note 16, at 19-22.



In contrast, her husband's appeal is relatively unaffected by age, and is even enhanced somewhat by the human capital and earning power he accumulates during marriage.<sup>93</sup>

The loss of value of women on the marriage market as a function of age is driven by the social customs of male hypogamy (that is, men marrying down in age, education, and earnings) and female hypergamy (marrying up). These practices seem to be fueled by observed male preferences for marriage to young or younger women, and their aversion to partners of greater status, education, and ambition.<sup>94</sup> Female preferences may also play a role. Women seem not to mind marrying older men, and may positively prefer men of higher status and earnings.

But perhaps the most important factor driving remarriage patterns is the relatively shorter reproductive life of women compared to men. As women age, their capacity to bear additional children declines rapidly, whereas men can become fathers well into old age. Many prospective husbands, regardless of age, greatly value a woman's fertility.<sup>95</sup> This tends to diminish women's value on the remarriage market relative to similarly aged men's, and goes a long way towards explaining observed patterns of male hypogamy. The importance to the creation of unequal marital bargaining power of the difference in remarriage prospects grounded in the short reproductive life of women should not be underestimated. This pattern is ultimately driven by ineluctable biological facts.

Since the factors that disadvantage women all correlate with age, the end result is that divorced women on average find it harder than men to replace their mates, and these difficulties increase

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<sup>93</sup> See Cohen, *supra* note 4, at 286-87; Ellman, *supra* note 4, at 43.

<sup>94</sup> See Cohen, *supra* note 4, at 281 (citing Jessie Bernard, *The Future of Marriage* 158 (1972)).

<sup>95</sup> Indeed, it is possible to construct an economic model that derives observed divisions of household labor solely from male-female differences in reproductive lifespan. The model posits a marriage market of fecund women and fertile men, and a post-divorce remarriage market in which all men and all previously unmarried women (but no divorced women), can remarry and have children. The model predicts that rational men and women will invest differentially in market and domestic human capital, respectively, based on the constraints introduced by these marriage-market assumptions alone. See Aloysius Siow, *Differential Fecundity, Markets and Gender Roles*, 106 *J. Pol. Econ.* 334 (1998).

sharply with advancing age.<sup>96</sup> Finding a replacement is made even more difficult by the likelihood that a woman will bring another man's children into her new family.<sup>97</sup> In contrast, the man's legacy from his first marriage—his earning capacity—is valuable “both in the marriage market and the commercial world.” A man can “take much of the gain realized from his first marriage into a second and he can more easily find a replacement mate.”<sup>98</sup>

Prospects for men and women outside of marriage are important to marital bargaining because the dissolution of the entire marital bargain as a going concern (i.e., divorce) always looms as a possible consequence of failure to agree. The relative importance of the divorce threat alternative to coming to mutual agreement, as compared to what partners face under conditions of marital discord, is difficult to assess, but surely depends in part on the costs of divorce. The current social and legal climate creates few external barriers to divorce, and provides for minimal redistribution among spouses following a marriage's dissolution.<sup>99</sup> The stigma of divorce

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<sup>96</sup> Although remarriage is popular among both sexes, data gathered in the late 1980s indicate that the remarriage rate for women aged 35-44 is about two-thirds the rate for men, with the ratio dropping to less than one-half for women over 45. Barbara Foley Wilson & Sally Cunningham Clarke, *Remarriages: A Demographic Profile*, 13 J. Fam. Issues 123, 126 tbl.2 (1992); see also Weitzman, *supra* note 12, at 204 (reporting that divorced women under 30 have a 75% chance of remarriage, but women over 40 have only a 28% chance of remarriage).

Two other factors also affect the remarriage prospects of women. First, women with children remarry at a lower rate than women without children, regardless of age of divorce. Children have no effect on remarriage for men. See Larry Bumpass, James Sweet & Teresa Castro Martin, *Changing Patterns of Remarriage*, 52 J. Marriage & Fam. 747, 751-52 (1990); Helen P. Koo, C.M. Suchindran & Janet D. Griffith, *The Effects of Children on Divorce and Re-Marriage: A Multivariate Analysis of Life Table Probabilities*, 38 Population Stud. 451 (1984). Second, education is inversely correlated with the incidence of remarriage among divorced women. This relationship of education to remarriage does not obtain for men. See 3 National Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs., *Vital Statistics of the United States, Marriage and Divorce*, 1988, at 41 tbl.1-32 (1996).

<sup>97</sup> See England & Farkas, *supra* note 5, at 57-58; see also *supra* note 96 (noting evidence that children depress a divorced woman's chance of remarriage).

<sup>98</sup> Ellman, *supra* note 4, at 44.

<sup>99</sup> Only two states require both spouses' consent to obtain divorce for breakdown of the marriage, and in 40 states one spouse may obtain a divorce over the other's objection after a separation of one year or less. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 17 n.23 (1990). The role of fault, if any, in the award of alimony and the division of property is more complex

has all but disappeared, at least insofar as it carries concrete occupational or financial consequences.<sup>100</sup> To be sure, there are lost sunk costs and transaction costs from divorce for both parties, which operate as internal restraints on divorce for many couples.<sup>101</sup> But if staying married loses its intrinsic value to one partner—if one partner faces an intramarital payoff that lies below his or her reservation price—the law itself imposes few additional costs on exiting the marriage. Thus, marital bargaining is informed by the substantial possibility that the marriage will not last.

Because the ease or difficulty of obtaining a divorce is in large part (although not exclusively) a function of the law of domestic relations, all marital bargaining can be said to take place “in the shadow of the law.”<sup>102</sup> But because the law creates a right of easy exit, and in many cases leaves both partners more or less where they stood at the time the marriage dissolved, the law is perhaps better described as a window. Through that window, two markets cast their shadows upon bargainers: the labor market (which determines who can earn how much on his or her own) and the mar-

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and varied. See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 *Ariz. St. L.J.* 773, 781-82 (1996).

Although the law of domestic relations does effect some redistribution of marital assets, it does not generally adopt the conventional contract measures—such as restitution, expectancy, or reliance damages—that govern the allocation of assets following an ordinary contract breach. Thus, post-divorce redistributive measures are modest, at best, and routinely fall short of equalizing the parties' welfare following divorce. See Ellman, *supra* note 4, at 49-53; Estin, *supra* note 4, at 559-60; Trebilcock & Kevshani, *supra* note 4, at 551-60. Alimony is uncommon and temporary, see Scott, *supra*, at 18, and although the law provides for the division of marital property, there is little tangible property in most marriages. The most important marital assets (such as human capital) are rarely reallocated. See Trebilcock & Keshvani, *supra* note 4, at 552-53; Weitzman, *supra* note 12, at 269-78, 289-309; Williams, *supra* note 3, at 2250; see also Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *Geo. L.J.* 2423, 2454-56 (1994) (proposing income sharing alternatives).

<sup>100</sup> See *infra* Section V.F (discussing the social stigma surrounding divorce).

<sup>101</sup> These include accumulated marriage-specific investments, harm to children, costs from liquidation, relocation, reordering of affairs, the psychological distress of breakup, insecurity, search for a new spouse, and the violation of religious or other beliefs about the permanence of marriage.

<sup>102</sup> Cf. Mnookin & Kornhauser, *supra* note 89 (suggesting how bargaining at divorce takes place “in the shadow of the law”).

riage market (which determines who will have the benefits of a new spouse).<sup>103</sup>

Because men generally have better options in these markets than women, the value of the right to exit from a marriage is on average greater for men than for women.<sup>104</sup> This means that where failure to agree increases the probability of divorce, men stand to lose less from disagreement than women. Not only is men's extra-marital exit threat generally higher than women's, but the difference grows over time. And such would be the case even if men and women equalized patterns of wage and non-wage human capital investment and earning power, even if they did not have different preferences for children, and even if they did not have different absolute or comparative advantages (whether natural or acquired) in domestic and nondomestic pursuits. Because remarriage is quite valuable both financially and emotionally, all that would be required to generate a quite significant inequality in exit options is a difference in men's and women's currency on the marriage market with advancing age. That difference is a longstanding feature of the social landscape.

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<sup>103</sup> With respect to the marriage market, the American marriage system has been described as involving an individual's "permanent availability" as a spouse, a system in which "every adult can be thought of as permanently available as a marital partner, regardless of the fact that the individual is presently married." Udry, *supra* note 55, at 889 (citing the work of Bernard Farber). Thus, each person

continuously compar[es] his or her marital bargain with other marital bargains which he or she might be able to negotiate with other persons, and with his or her potential benefits from not being married at all. If an individual's present marital partnership is strikingly less favorable than the alternatives, he or she will opt for one of the alternatives if the cost of the exchange (barrier) does not obliterate the advantage to be obtained.

Id.

<sup>104</sup> Patterns of hyper- and hypogamy, which are more pronounced on the remarriage market, can give rise to systematic differentials in the labor market position of husbands and wives even in the absence of population-wide differences in men's and women's labor market prospects. The dual tendencies of women to marry somewhat older men and men to marry somewhat younger women leads to a systematic average gap in the ages of husbands and wives, a gap that can create a systematic differential in couples' earning power. See Ellman, *supra* note 4, at 43-44. As a general rule, persons with longer job market experience earn more, and older persons tend to have longer tenure on the job. This means that the combination of male hypogamy and female hypergamy carries with it a chronic initial gap in earning power as between couples, which would persist even if the average differences in wages and earnings for men and women in the economy were wiped out. This intracouple gap, even if modest, exacerbates the effect of the remarriage differential. See *supra* note 54.



*b. Intramarital Options*

Ultimately, the difference in men's and women's exit options is always relevant to bargaining because divorce defines the absolute outer limits of the scope for bargaining within an ongoing marriage.<sup>105</sup> Nevertheless, the immediate importance of "divorce bounds" to the actual bargaining process and the parties' bargaining power is minimized in the case where both parties anticipate that even forced togetherness is better than divorce. In that case, the threat point that actually matters to the couple and that will most immediately influence their conduct, is an intramarital one.

Just as with the exit threat, men's intramarital threat point can be expected to exceed women's. The "burnt toast and harsh words" model of marital interaction recognizes that there are times in every marriage when spouses will both be better off if they agree on a coordinated course of action.<sup>106</sup> In many cases, failure to agree

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<sup>105</sup> See Lundberg & Pollak, *Bargaining and Distribution*, supra note 56, at 154 ("Individual rationality ensures that no individual will accept less than he or she would receive in the next best alternative and implies that the divorce bounds apply to all bargaining models, both cooperative and noncooperative.").

<sup>106</sup> This situation corresponds to a game-theoretic model of marriage created by Lundberg and Pollak, which they term the "separate spheres" model. Lundberg & Pollak, *Separate Spheres*, supra note 56. In that model, the threat point for an agreed-upon bargain—that is, the situation that would prevail in the absence of an agreed-upon allocation—is not divorce but a "noncooperative . . . equilibrium within marriage." *Id.* at 992-93. The choices available to the spouses in the absence of agreement are given the game-theoretic designation of "noncooperative" situations. *Id.* The stable arrangements within this set—of which there are many—are designated "noncooperative equilibria." The bargain that is struck within the negotiation set created by the noncooperative equilibria (which function as threat points) is termed a "cooperative" agreement, and the model is designated a "cooperative model." *Id.* at 1007. The same authors have also created an alternative and so-called "noncooperative" model of marriage, which is a dynamic model predicting the outcome of repeated, costly offers and counteroffers by husband and wife who control different resources within marriage. See Lundberg & Pollak, *Bargaining and Distribution*, supra note 56, at 150; Lundberg & Pollak, *Noncooperative Bargaining Models*, supra note 56; see also Baird, Gertner & Picker, supra note 48, at 221 (describing dynamic or Rubinstein bargaining games).

The terminology that Lundberg and Pollak employ in their papers is unfortunate. The designations "cooperative" and "noncooperative" as they apply to game-theoretic agreements are terms of art referring to agreements that are, respectively, binding (i.e. externally enforceable) or nonbinding. See Rasmusen, supra note 65, at 29. As Lundberg and Pollak themselves acknowledge, however, it is probably inaccurate to refer to marital agreements as "cooperative" agreements in this sense, because there are no legal or other formal mechanisms for enforcing agreements during

will result in a less efficient arrangement than could otherwise be achieved by coordination of effort, as when failure to settle on one family dinnertime results in cold food for some family members. In other cases, failure to achieve a "meeting of the minds" on a mutual course of action will lead to a breakdown in the trust necessary to coordinate a *sequence* of contributions. That trust would ordinarily lead each party to put forward optimizing "best efforts" in anticipation of agreed-upon reciprocation.<sup>107</sup> Without coordination, some lesser degree of effort will be forthcoming, which will shrink the size of total output available to share.

In the absence of agreement, the intramarital threat point model assumes that one spouse decides how to go about his or her business without the other's consent, with each spouse independently choosing a "level of her private good and the public good that she supplies to maximize her own utility, subject to her budget constraint."<sup>108</sup> In this discordant or "uncoordinated" state, each spouse strategizes to inflict the most misery on the partner (as a spur to reaching agreement of some type) while doing the least damage to himself or herself in the process. The game-theoretic models sug-

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the life of the marriage. There are only informal social sanctions and self-help. Lundberg & Pollak, *Noncooperative Bargaining Models*, *supra* note 56, at 133 (recognizing that marriage is best modeled as a noncooperative bargaining game). To reduce terminological confusion, the situation that prevails in the absence of mutual agreement—the "harsh words and burnt toast" situation—will be termed in this paper the "uncoordinated" or disharmonious marriage, and the bargain that would be struck against the background threat of such possible disagreement is termed the "coordinated agreement." Coordinated agreements, even though technically noncooperative (because externally unenforceable) nevertheless may be more efficient than uncoordinated behaviors, because they bring gains from mutually orchestrated actions.

<sup>107</sup> See, e.g., Goetz & Scott, *supra* note 66, at 1116-19 (discussing a "best efforts" convention as an informal way to optimize output in a long-term relational contract).

<sup>108</sup> Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 148. As Lundberg and Pollak write:

Within an existing marriage, a noncooperative [that is, uncoordinated] equilibrium corresponds to a utility-maximizing strategy in which each spouse takes the other spouse's strategy as given. . . . What distinguishes a noncooperative marriage from a pair of independently optimizing individuals? Joint consumption economies are an important source of gains to marriage, and even noncooperative family members enjoy the benefits of household public goods. . . . As one might expect, public goods are undersupplied in this noncooperative equilibrium, and there are potential gains to cooperation. Additional gains can be expected if coordination of individual contributions is required for efficient household production.

Lundberg & Pollak, *Separate Spheres*, *supra* note 56, at 993.

gest that there are many ways that spouses can arrange their affairs in the absence of marital harmony (that is, there are "multiple equilibria" for marital discord), depending on initial conditions or conventions.<sup>109</sup> Since many marital activities involve public goods and have secondary effects on the other spouse, each spouse inevitably benefits (or suffers) to a certain degree from the other's choices during the period of marital discord. As the examples above and discussion below show, however, the surplus loss from failure to coordinate may not fall equally on each partner.

Where both spouses are better off within the range of "uncoordinated equilibria"<sup>110</sup> than they would be if the marriage fell apart, then marital bargaining towards agreement will take place in the shadow of noncoordination or "marital warfare." The best alternative to agreement, which determines the negotiation set and the actual bargaining surplus, will not be divorce, but how miserable or well off each person will be in the uncoordinated state. That, in turn, will depend on how much deprivation and distress each spouse can inflict on the other without hurting himself or herself too much.

Do women suffer more from marital incoordination? The answer is not as clearcut as in the simple divorce threat-point model. As an initial matter, the spouse with more domestic responsibility stands to lose more because that party cannot withdraw his or her

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<sup>109</sup> Lundberg and Pollak suggest that the range of intramarital threat points presented by the specter of an uncoordinated or warring household may be heavily affected by social conventions regarding appropriate sex roles. When family cooperation, coordination, and communication break down, people may fall back on well-worn roles in determining how to conduct themselves. See Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 150-52. As the authors state, "[t]he existence of multiple equilibria in repeated noncooperative games and the need to choose among them suggest how history and culture might affect distribution within marriage." *Id.* at 151. Because there may be a "self-evident way to play" that is dictated by social conventions regarding "the rights and responsibilities of husbands and wives," what will often emerge without explicit bargaining or agreement is a division of labor based on traditional roles. *Id.* One glaring variation on marital disharmony is, of course, domestic violence, which can drastically lower the threat point of a woman's failure to acquiesce in her husband's wishes.

<sup>110</sup> The effect on actual bargaining of the uncoordinated equilibria represented by the potential for marital disharmony is complicated by the fact that there are multiple uncoordinated equilibrium conditions possible. Thus, whereas there is only one—or theoretically only one—divorce threat point, there are multiple intramarital equilibrium threat points generating different potential negotiation sets.

services (which generally produce public goods) without hurting himself or herself along with the other partner. The person who contributes cash or other tangible assets is in a better position to withhold benefits from the marital pool than the person who performs in-kind labor for the unit.<sup>111</sup> The difference, of course, is a matter of degree: Some domestic work is severable, just as "some monetary wealth must be shared in the form of housing" and other public goods.<sup>112</sup>

But these observations are not completely satisfying because they require assuming a division of labor as a starting point or background condition for deciding which bargainer stands to lose more. Ideally, the bargaining analysis should tell us how duties and benefits will be split. Its goal is to explain observed patterns of allocation, not to assume them. What determines the level of goods and services that each spouse will supply within the context of forced togetherness? Specifically, is there reason to believe that one party (the wife) might spontaneously supply the greater amount of public-goods producing domestic service, which then redounds to the benefit of her partner? Although the person who does more domestic work is less likely to withdraw that contribution in an uncoordinated situation than the person who contributes other resources, we still do not know why, in the absence of a bargained-for assignment, the wife will be performing the majority of those tasks. The answer could lie in a different preference structure concerning the costs and benefits of domestic labor for men and women.

### c. *The Parable of Neat and Slob*

To explain how observed patterns come about, assume there are two law students—Neat and Slob—who are assigned as roommates. Suppose each would incur extreme financial liability for breaking the lease; it is so costly for each to get rid of the other (i.e., "divorce") that neither considers it. Neat cares more about cleanliness than Slob. Neat either is less averse to (that is, experi-

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<sup>111</sup> As one scholar of housework has observed, the benefits of whatever housework is performed will, as a practical matter, be shared. That is because it often is not feasible to perform housework for oneself without providing a benefit to all members of the household. See Silbaugh, *supra* note 17, at 34.

<sup>112</sup> See *id.* at 35.



ences less negative utility from) cleaning the apartment, or derives greater positive utility from having a clean place to live, or both. Slob hates cleaning more—or cares less about having a clean apartment—than Neat. He nevertheless prefers a clean apartment to a dirty one and will clean it himself if it gets sufficiently dirty. The apartment is cleaned by an outsider on the weekend, but it gets progressively dirtier as the week wears on. Their respective preferences are such that Neat will clean the apartment on Tuesday, but Slob will not clean until Thursday. Neat and Slob neither coordinate their efforts nor bargain over allocation of labor. As a result, Neat cleans the apartment every Tuesday, and Slob, who studies while Neat cleans, reaps the benefits of the public good of the clean apartment.

If Neat and Slob are “forced” to live together and share public goods, their strictly rational and individually optimizing behavior will result in very lopsided costs and benefits to each member of the pair. If Neat gets fed up and decides to try bargaining with Slob—that is, tries to get Slob to take a larger share of the responsibility—the bargain he can hope to strike will be a function of how badly off Slob anticipates being if no agreement is reached. If they do manage to forge a compromise that shifts some work to Slob, Neat will be better off than before, and Slob will be worse off. Since Slob does not realistically anticipate being worse off in the absence of agreement than with one (because it is unlikely that Neat will make good on a threat to underperform), Neat will probably not get very far in his attempt to shift some responsibility to Slob.

The Parable of Neat and Slob shows how the marital game of “split-the-pie” can be transformed into a variation on the game of “chicken.”<sup>113</sup> Here, each player is worst off if the task (cleaning) is not performed at all. And each is best off if the other player, and not he, performs it. Each prefers a compromise to doing all the work himself, but each prefers not doing it to a compromise. Slob’s advantage can be attributed to the asymmetry of the hypothetical payoffs, which results from different costs and benefits to the parties either from performing the task or from enjoying the fruits of

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<sup>113</sup> See Rasmusen, *supra* note 65, at 73-74 (describing the chicken game).

labor.<sup>114</sup> As the game is played out, the person with the most to lose from mutual nonperformance will more often end up performing the task, and the other person will free ride on the other's willingness to bear the costs.

Of course, this example is oversimplified, for it assumes rational actors who will not make good on threats that prove costly in a single round of a game. In reality, if Slob were a spouse he would have a somewhat greater incentive to agree on a compromise, because in marriage partners usually suffer additional costs from prolonged discord and lack of coordination, and intransigence on one issue can spill over into negotiations on others. Also, as discussed below, real-life bargainers might make good on disadvantageous threats because there might be plausible long-term strategic reasons for doing so.<sup>115</sup> Nevertheless, the basic principle illustrated by the example is quite pertinent: Where divorce is not a credible threat on the part of either spouse, the one who stands to lose more from the loss of a public good will suffer more in the absence of an express agreement. The spouse who can better tolerate an under-supply of a public good has less to lose from refusing to compromise.

It is quite possible that women care more about the sorts of public goods that are supplied to a marriage through unpaid domestic labor. For example, women may place a higher value on order and quality in domestic matters, may find domestic disorder more irksome, or may find the effort needed to bring about a high level of domestic order less onerous (because they mind doing housework less, they are more accustomed to doing it, or it carries less of a stigma for them).<sup>116</sup> Women's standards of childcare may also dif-

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<sup>114</sup> A possible array of asymmetric payoffs to Neat and Slob is:

		SLOB:	
		STUDY	WORK
NEAT:	WORK	3, 8	8, 4
	STUDY	-3, 0	12, 2

For each roommate, the payoff is lowest when both study and no one works. It rises for each person to the maximum through the sequence of (1) doing the work alone, (2) sharing the work, and (3) having the other person do it. Neat gets a smaller payoff than Slob if the work is undone, but a larger payoff in all other situations.

<sup>115</sup> See *infra* note 153 (discussing failure to cooperate despite potential mutual gains).

<sup>116</sup> A number of feminist commentators have recognized the critical role of a marital dynamic that corresponds to a chicken game in the allocation of family responsibility.

fer from men's—for example, in their views of how much parental care children should get. The wish for children to have parental care is analogous to the desire for a clean apartment: The desire is to have it done, preferably at least cost to oneself. Absent that condition, however, it still proves worthwhile to do it oneself and bear the cost.<sup>17</sup> This is not inconsistent with the fact that men en-

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See, e.g., Pat Mainardi, *The Politics of Housework*, in *Sisterhood Is Powerful: An Anthology of Writings from the Women's Liberation Movement* 447, 449 (Robin Morgan ed., 1970). Joan Williams describes a typical marital scenario in the following terms:

Is it important to you to have a clean house? It's not to me; you clean it if it's important to you. You think it's important to pick the children up from school, go to the Halloween parade, be home before 7:00 p.m., spend extra time with the children during vacations, be a room parent, get involved with the PTA? I don't. But if you feel you must, then by all means do so.

Williams, *supra* note 3, at 2240 (footnotes omitted). Williams also quotes one male commentator who points out that "[o]verinvolvement with children may operate to discourage many husbands from fully sharing because they do not accept the ideology of close attention to children." *Id.* at 2240 n.56 (quoting S.M. Miller, *The Making of a Confused Middle-Aged Husband*, in *Men & Masculinity* 44, 50 (Joseph H. Pleck & Jack Sawyer eds., 1974)).

<sup>17</sup>The issue of how women in particular and parents in general regard unpaid domestic responsibilities is far more complex for childcare than for other domestic tasks. Most people would not ordinarily perform routine housework for its own sake, but only for its productive payoff. In contrast, the care of children has significant components of both work and leisure or, alternatively, of production and consumption value. See, e.g., Silbaugh, *supra* note 17, at 12.

Women may differ on average from men both in the degree to which they regard childcare as intrinsically enjoyable and in the degree to which they want their children to have more time with a *parent* as opposed to a *nonparent* (without necessarily wanting to provide it personally—as in, "I wish you would spend more time with the children, dear"). Both preferences—which are quite distinct, but are often conflated—will affect women's choices within a circumscribed set of options, but the choices that depend on the consumption value of childcare will not be influenced by bargaining strength or by the bargaining partner's choices. Childcare will be willingly supplied by the consumer as long as its consumption value holds out, compared to the benefits of other uses of time.

The component that predominates in childcare—whether work or leisure—can depend both on the circumstances in which childcare is performed, the specific childcare tasks at issue, and the peculiar preferences and tastes of the person caring for children. On the first of these, it has been noted that women and men care for children in different contexts, with women tending "to overlap the time during which they supervise children with shopping, laundry, or food preparation, while men tend to supervise children as their sole use of time." *Id.* at 12. There is evidence that men's childcare time is predominately spent in play, while women take on a disproportionate share of routine care. See Pleck, *supra* note 29, at 261. Entertaining, teaching, and playing with children would appear to have more "consumption" value than dressing, bathing, feeding, and changing them, although it is unclear whether the

joy the fruits of domestic labor or reap the benefits of a well-cared-for child. Nor is it inconsistent with women experiencing most housework and much childcare as work—where “work” is defined as an activity that, despite producing valuable benefits, one would prefer, if given a choice, to have performed by someone else. Nevertheless, the prediction that women will do more of the work that generates significant “positive” externalities for the family effectively creates divergent intramarital threat points, which will necessarily influence the agreements that couples will strike.<sup>118</sup>

### III. THE BARGAINING MODEL AND EGALITARIAN MARRIAGE

This Article has identified several ways in which women’s threat points within marriage might differ on average from men’s. In short, men are generally better off premaritally, extramaritally, and intramaritally. In light of the general observation that men tend to have better alternatives to marital agreement than women, what does bargaining theory have to say about the prospects for egalitarian marriage?

To answer this question, one must return to the observation that the marital bargain is a function both of threat points (which fix the negotiation set and the size of the bargaining surplus) and the process of negotiation (which determines the allocation of the bargaining surplus). The most fundamental insight of the bargaining model is that the alternatives to agreement that are available to each partner limit how good a bargain the other partner can obtain;

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sexes differ in their assessments of these activities. Finally, it may be the case that men on average get less intrinsic satisfaction (or consumption value) from caring for children, or that the positive marginal utility of the activity drops off more rapidly for men than for women, so that the crossover from leisure to work happens sooner for men. Thus, men may find a given amount of childcare responsibility more onerous than women.

<sup>118</sup> There is yet another reason why women may be more reluctant than men to withdraw their contribution to the marriage under conditions of marital discord, regardless of the nature of that contribution. When both spouses are better off at odds than divorced, the wife is likely to be more cautious in choosing her strategy because the husband’s divorce utility will lie closer to his disharmonious intramarital utility than will the wife’s. That is because the husband’s exit threat point will on average be higher than the wife’s, and this higher extramarital utility might tend to “crowd,” or more closely shadow, the husband’s intramarital utility in the event marital relations break down. If that is the case, the wife might be more wary about adopting a strategy that inflicts too much unhappiness on her husband, because she might “overshoot” and drive him away.



those alternatives set a lower limit on the share each spouse will rationally accept. This conclusion follows from the simple assumption that each bargainer seeks to maximize his or her own utility.<sup>119</sup> If we make the further assumption that the marriages that are contracted will run the full gamut of potential mutually advantageous relationships, then we can show that there will be some number of marital deals that will be egalitarian. There will be some, however, that have at least the potential for equal division. Among those in which equality is at least a possibility, we can identify the conditions that tend to be conducive to equal, or more equal, allocations of well-being within marriage. Finally, we can apply additional principles that govern the actual conduct of bargaining to predict that, even among those relationships with the potential for equality, egalitarian deals will probably be the exception rather than the rule.

#### *A. Is Egalitarian Marriage Possible?*

To derive these conclusions, it is helpful to consider a more familiar commercial analogy of a typical long-term bargaining relationship. Imagine an agreement between a firm (say, IBM) and a supplier (designated S). After initially shopping around on the market, IBM and S agree to deal with each other because each considers the arrangement the best presently available. The units invested or brought to the relationship by each partner represent, in effect, all its worldly goods. All holdings and efforts are plowed back and made available for dividing between the partners. Assume that, as in marriage, there are no legal means for enforcing any deal for a division of proceeds, and assume that each unit of output brings an identical amount of utility to each party when distributed as a payoff to that party. Thus, units of output (utility) in-

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<sup>119</sup> It should be obvious that if most marital partners can do as well or better, after accounting for transaction costs and sunk costs, by switching partners—that is, when “divorce bounds” are tight, see Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 153-54—then there is little scope for bargaining within marriage. But bargaining models of marriage “are motivated by the assumption that, in at least some marriages, surpluses are large enough that their distribution is worth modeling.” *Id.* at 154.

crease each partner's welfare to the same degree. (This assumption effectively makes utility payoffs equivalent to percentage shares.)<sup>120</sup>

Assume IBM and S have similar pre-deal "endowments," and both agree to invest 30 units of effort and/or assets in the relationship—so their initial negotiated inputs are the same. The deal is expected to generate a profit net of the 60 unit investment of 300 units (from 360 units *total* output). The parties enter the relationship with the knowledge that IBM has the potential to enter into an alternative deal with another company, S-1, which offers IBM a net payoff (in excess of input) of 200 units. S, on the other hand, faces a maximum anticipated net payoff of 50 from an alternative deal with a company called MS.

Negotiations conducted according to our egalitarian working definition—where both partners are equally well-off, net of costs, relative to a monopoly on the pie—would produce a deal in which the partners were left with equal payoffs net of investment. In this example, where inputs are equal, those payoffs are equivalent to an equal split of the profits from the deal. Each partner gets 150 units. (It is assumed for this discussion that each partner has already recouped its 30 unit investment out of total proceeds.)

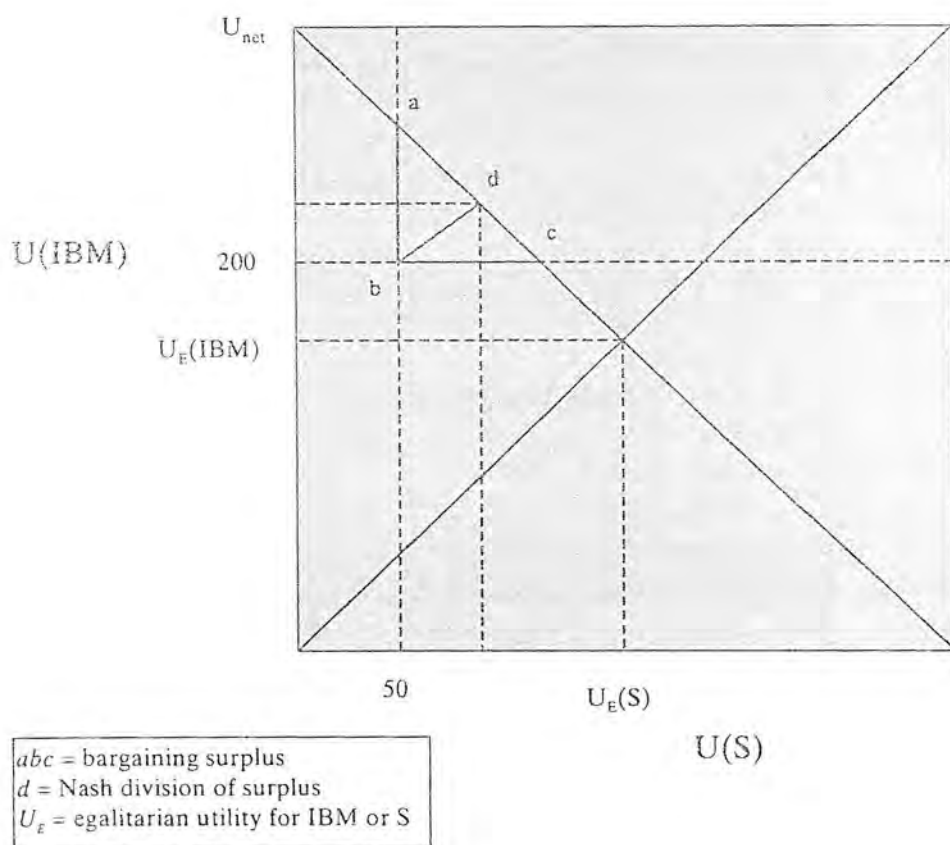
The problem with the "egalitarian" solution, however, is that it is not a feasible one for this relationship. IBM would never rationally agree to such a division, because it could do better elsewhere. If such a "solution" to any bargaining problem were demanded, IBM would seek out the partner from whom it could anticipate a share of 200.<sup>121</sup> IBM must receive at least 200+ units net payoff to make the deal worthwhile. For purposes of the ensuing discussion, the type of bargain in which an egalitarian division is not one to which both partners could rationally agree will be designated as a relationship that is *never egalitarian* ("NE"). See Figure 1.

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<sup>120</sup> For a discussion of egalitarian marriage as equal percentage shares, see *supra* Sections II.C.2.a, II.C.2.c.

<sup>121</sup> Similarly, if IBM were offered less than 200 units by S as an inducement to enter into the relationship in the first place, IBM would decline. Of course, the share IBM would receive from an alternative deal is to some degree speculative, since that deal would also presumably be subject to the condition that any allocation that is agreed upon before the fact is unenforceable. It is assumed that IBM has sized up the situation—including anticipated total payoffs to itself and the quality of S-1's respective outside options—and feels relatively certain that the payoff from the outside deal will be greater than that produced by an egalitarian division with S.

Figure 1. "NE" Bargain



The only realistic bargaining options for IBM and S are those that take into account the alternatives available to the partners outside the relationship—the potential partnerships between IBM and S-1, and S and MS. Because IBM and S can receive outside, net of investment, 200 units and 50 units respectively, that is the minimum each can be expected to accept from the current bargain. Once the two have received their minimum demands, there are 50 units up for grabs ( $300 - (200 + 50)$ ). That is the bargaining surplus. Assuming that the units are infinitely divisible, there is theoretically a limitless number of ways to split the 50 units between the parties, each of which would allow the parties to maintain the relationship consistent with rational self-interest. None of those, how-

ever, coincide with the egalitarian division, which requires each to receive 150 units.

Suppose the bargaining surplus were to be split equally; each party would receive 25 additional units.<sup>122</sup> IBM would take away a net payoff of 225 ( $200 + 25$ ), and S would net 75 ( $50 + 25$ ). That division diverges quite markedly from the egalitarian relationship described above. That divergence is a function of the size of the bargaining surplus—that is, the amount of joint gains available for division after each partner has received its reservation payoff. The better the outside alternatives for one partner or the other—the closer the alternatives approach the maximum possible payoff for each within the relationship—the smaller the bargaining surplus. For purposes of the example, however, it is important to see that it is not the fact that one partner has invested more in the relationship that is driving the inequality (since each partner's investment is the same). Rather, it is that something better than an egalitarian payoff awaits one partner outside the relationship. That party's superior prospects are the sole obstacle to equality in this relationship.

But, holding the outside alternatives constant, the bigger the size of the pie—corresponding to the pool for allocation—the bigger the bargaining surplus. The importance of the size of the pie—which corresponds here to the partnership proceeds—to the possibility for an egalitarian split is illustrated by modifying the example. Assume now that the deal generates a joint net payoff of 600 units, instead of 300. If the alternatives available to IBM and S on the market remain constant, then the egalitarian rule of division outlined above would generate a different result. Under an egalitarian rule of division, both partners receive total payoffs, net of their 30 unit investment, of 300 units. In contrast with the example above, this egalitarian split might satisfy both partners. Each will receive more than its expected alternative payoff (200 for IBM, and 50 for S). To be sure, the egalitarian deal described here would not coincide with an equal split of the bargaining surplus—the latter

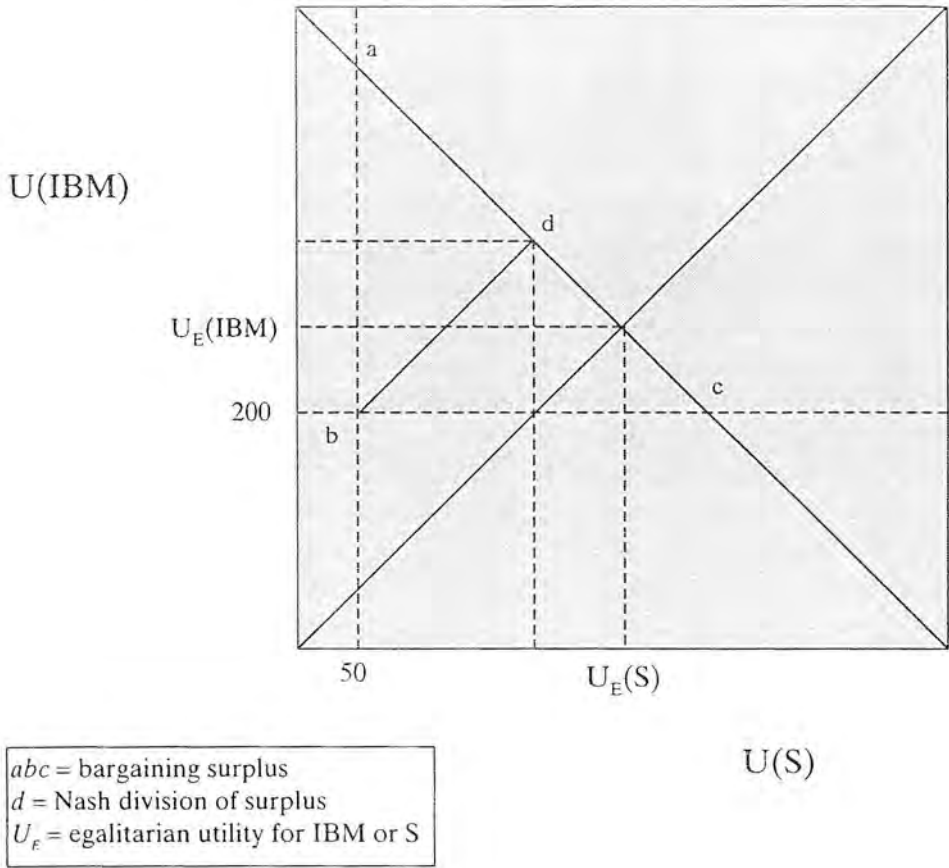
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<sup>122</sup> This would correspond to the so-called Nash bargaining solution to "splitting the pie" consisting of the 300 unit payoff. See Rasmusen, *supra* note 65, at 229-31 (discussing Nash bargaining solutions to the split-the-pie game, in which parties take an equal portion of the bargaining surplus); see also McElroy & Horney, *supra* note 56 (calculating a Nash solution to a cooperative bargaining game of household allocation); *infra* Section III.C (discussing Nash bargaining solution).



arrangement would necessarily be better for IBM, the partner with the best outside alternative.<sup>123</sup> The important point for now, however, is that the existence of a large enough profit, which has the effect here of generating a bigger bargaining surplus, allows for the possibility of conducting an egalitarian relationship consistent with both partners' rational self-interest. Such a relationship will be designated as *potentially egalitarian* ("PE"). See Figure 2.

Figure 2. "PE" Bargain



<sup>123</sup> If the bargaining surplus of 350, which is calculated by subtracting the sum total of the value of each party's outside alternatives from the 600 unit total proceeds, or  $600 - (200 + 50)$ , were to be split equally (yielding 175), then IBM would enjoy a net payoff from the deal of 375 ( $200 + 175$ ) and S would enjoy 225 ( $50 + 175$ ).

*B. Factors Affecting the Potential for Equality*

Because maintaining such a relationship would benefit both parties, it can be predicted that there will be a considerable number of NE marriages—those within which equality of percentage shares of welfare is impossible because inconsistent with one person's (typically, the husband's) rational consent to continue within the relationship. But there will also be many PE relationships—those in which an egalitarian allocation is possible.

What can be said about PE marriages? Those are relationships in which there are enough resources available for sharing between the spouses to permit each to receive equal percentage utility, or to get their way to the same extent, without making the relationship less desirable (net of transaction costs) than alternatives available to either party.

A simplified paradigm using parameters relevant to marital division suggests that the potential for equality is greatest where the woman's or man's contribution (or marriage-specific investment) in the present marriage is small, or the man's specific investment in any alternative to the marriage is large relative to the investment in the current marriage and the man's expected payoff outside the marriage is small.<sup>124</sup>

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<sup>124</sup> Assuming units of utility are normalized interpersonally, this would mean that the marital surplus (MS), which is the sum of payoffs net of costs, must be greater than twice as much as the next best alternative for the spouse with the best alternative to an agreement, assumed here to be the husband. That best alternative is designated as TH (or husband's threat point). Therefore:  $MS/2 > TH$ .

MS is assumed to be some function of the wife's income  $I(W)$ , the husband's income  $I(H)$ , and all other resources generated within or contributed to the marriage ( $R$ ), net of each partner's contribution, which is the total utility expended to generate all monetary and nonmonetary resources and other potential benefits accruing to the unit. Those contributions are designated as  $C(W)$  (wife's contribution) and  $C(H)$  (husband's). The latter factors are assumed to have negative value. For simplicity, children's efforts are ignored, and their value and consumption included in  $R$ . The husband's threat point is assumed to be a function of his income  $I(H)$  and his expected utility from divorce—the best alternative awaiting him outside the marriage. That alternative is represented by some cumulative function of the husband's income plus any additional expected payoff outside the marriage,  $A(H)$  (which takes into account the probability of remarriage, and its attendant benefits), minus a term representing the total effort the husband must expend outside of marriage,  $CA(H)$ . A PE marriage, then, is one in which:

$$MS(I(W), I(H), R, C(H), C(W)) > 2TH(I(H), A(H), CA(H)).$$

In general, any large divergence in the spouses' prospects outside the marriage, from whatever source, makes equality in marriage less likely. For example, the paradigm reveals that the difference between spouses' earned incomes affects the possibility of an egalitarian marriage. The more the husband's income exceeds the wife's, the less likely is the possibility of an egalitarian allocation. As the husband's earnings rise relative to the wife's, his extramarital position relative to hers improves. To be sure, the husband's high earnings tends to enlarge the pool of assets to bargain over, which favors equality. But that effect will be offset by the elevation of the husband's relative exit threat, which tends to move the egalitarian point outside of the negotiation set. As the wife's income rises to the level of the husband's, the wife's exit advantage is bolstered, which decreases the size of the bargaining surplus.<sup>125</sup> But this reduction makes it more likely that an egalitarian allocation will fall within the feasible negotiation set. In sum, for a fixed amount of total income, and a fixed size of the marital pie, there is more room for equality as incomes converge. Concomitantly, the more unequal the incomes (in favor of the husband), the smaller the possibility, *ceteris paribus*, of an equal split.

All else, however, is not always equal. In the equation, the size of the marital surplus also affects the possibility for an egalitarian split. The marital surplus includes those resources that owe their existence to the marriage. The size of the marital surplus is determined by the amount of resources available for allocation within the marriage, and the amount of resources available for division affects the possibility of equal division, as the IBM/S example demonstrates. Holding constant the parties' threat points or alternatives to agreement, a larger marital surplus translates into a larger bargaining surplus. The larger the pool of resources available for division, the greater the possibility of equal division.

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MS increases as  $I(W)$ ,  $I(H)$ , and  $R$  rise and  $C(H)$  and  $C(W)$  fall. TH increases as  $I(H)$  and  $A(H)$  rise and  $CA(H)$  falls. This indicates that the possibility of an egalitarian marriage is more likely when the following factors are large:  $R$ ,  $I(W)$ , and  $CA(H)$ . It is less likely when the following factors are large:  $I(H)$ ,  $C(W)$ ,  $C(H)$ , and  $A(H)$ .

<sup>125</sup> Bargaining theory predicts that equal spousal incomes, all else being equal, will destabilize marriage by reducing the space for possible bargaining. This effect would be independent of the absolute level of income for each. See Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 148.

In considering the factors that affect the potential for marital equality, it is helpful to divide marriages into two types, recognizing that the latter includes a variety of relationships: traditional marriages and dual-earner marriages. Traditional marriages are uniform at least insofar as the spouses take on conventional sex roles; the husband is the breadwinner, and the wife works solely in the domestic sphere. In dual-earner marriages, on the other hand, the husband and wife both work for pay. Dual-earner marriages are quite varied, with the continuum anchored by relationships in which both spouses earn roughly comparable incomes and spend roughly comparable amounts of time at paid work.

Which type of marriage is more likely to be compatible with egalitarianism? The answer is not at all obvious. For traditional marriages, there are two conflicting sets of factors at work. The sharp disparity in earned income tends to raise the husband's threat point relative to the wife's, pushing the negotiation set away from equality. Offsetting that asymmetry, however, are factors that tend to increase the net marital surplus, or the utility for sharing among family members.

One important factor determining the size of the surplus is the degree of concern that each spouse has for the other and, thus, the degree of vicarious utility each spouse gains from the other's satisfaction. The performance of an unpaid service can generate benefits of various kinds. If the spouse who performs a task (say, cooking a meal) gets vicarious satisfaction from the other's enjoyment (which is above and beyond any consumption value from eating the food) then the total utility generated by a particular quantity of effort will rise, and this will add to the marital surplus. Increasing the marital surplus increases the marital pool (or size of the pie), which increases the possibility, *ceteris paribus*, for an equal split of relative satisfaction. This indicates that the possibility for equality may be enhanced by active love, caring, and altruism within marriage. Moreover, the more the cook enjoys cooking, the greater the contribution to the net marital surplus, because the effort costs the cook less.<sup>126</sup> Either way, the possibility of equality is increased.

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<sup>126</sup> In the foregoing calculation, this reduces the value of  $C(W)$  for the cook, rather than directly adding to the value of  $R$ . See *supra* note 124.



Today, women are not forced to adopt the role of traditional wife. They have a spectrum of choices. It follows that women who elect conventional roles may comprise a self-selected and unrepresentative sample of all women. Women who stay home may thus have a greater than average taste for domestic work or may derive more than average satisfaction from nurturing or from rendering direct services to others. At a given level of service provided for family members, a woman of this type may experience a higher level of well-being, and comparatively less of her well-being will come at other family members' expense. Putting marital caring to work through domesticity may decrease the degree to which one spouse's utility is directly traded off with the other's.<sup>127</sup>

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<sup>127</sup> As the economist Yoram Weiss puts it, altruism can have the effect of "reduc[ing] the range of disagreement. That is, the parties, if they had power to determine the outcome unilaterally, will choose actions which are relatively close." Weiss, *supra* note 41, at 19.

It is possible to overstate the difference between women who choose to work for pay and those who choose to work exclusively at home. One can speculate that there has been an evolution over time in the "utility profile" of women who choose to stay home full-time to care for their children. See, e.g., Danielle Crittenden, *Turning Back the Clock*, *Women's Q.*, Autumn 1996, at 6, 6-7 (comparing the "old traditionalist"—who places greater emphasis on housekeeping and catering to husbands—to the "new traditionalist"—who is primarily focused on attentive childrearing). One at-home mother, in describing her motivation for staying home, has asserted that at-home moms "look upon housework the same way everyone else does: as a tedious necessity. Our real job . . . is caring for and teaching our children." Pauline A. Connole, *Letter to the Editor*, *Mother, Not Housekeeper*, *Wash. Post*, Jan. 29, 1997, at A20. This suggests that most variation among women will currently be observed, not in utility functions for homemaking tasks, but in preferences for time with children and views about the importance of intensive parental attention.

There are other reasons to exercise caution in advancing generalizations about working and stay-at-home women. The taste for domesticity is only one component of the decision whether to work for pay. That decision is also influenced by such factors as the market wage a woman can command (which is in turn based on educational, geographic, and economic factors) and the direct and opportunity costs of going out to work (such as transportation, childcare, taxes, clothing, possible decreased quality of household production, and psychic costs of separation from children). Moreover, the so-called "bargaining squeeze," see *infra* Section IV.C, describes the perpetuation of role divisions that does not depend on pronounced differences in preferences, but requires only that there be some small initial inequality in responsibility for household work. As that analysis reveals, women's choices may be as imperfect a guide to the magnitude of their differences with each other as they are to their differences with men, because choices are a complex function of many factors that include the power to "get one's way." Nonetheless, where economic and social factors bearing on the costs and payoffs of work are similar, different women will still make different choices. These could turn on variations in the "taste for domesticity" or for caring

Of course, a working woman serves her family by earning income and may get considerable consumption value from her work, just as the housewife does from hers. This would appear to complicate a comparison between the payoffs different women receive from the range of services they provide their families. By definition, however, some considerable part of the yield from paid work is not part of marital surplus. Although marriage makes possible the purchase of public goods and enjoyment of economies of scale, most of the paid work would presumably be done, and the income enjoyed by the earner, regardless of marital status.<sup>128</sup>

Some comparison is possible, however, because even in dual-earner families domestic services must somehow be performed. The foregoing analysis provides reason to believe that domestic services provided in dual-earner families generate less utility than equivalent services within traditional households. That is not just because the dual-earner provider—usually the wife—probably gets less consumption value and less vicarious pleasure from providing domestic services than a housewife. It is also because the services are provided under conditions that may increase their cost of production, and probably decrease their quality.<sup>129</sup> The housewife's

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work carried on within a private sphere, as compared to the taste for the kinds of work available for pay.

Finally, to assert that housewives may get greater enjoyment from "doing for others" than working women is not to imply that dual-earner marriages lack love or caring. Rather, the difference may lie in the choices of how, and to what degree, to "put love to work" in direct service to others. Many husbands who do not do any housework surely consider themselves "loving." The ways in which they choose to exercise their caring tendencies—if at all—will be affected by other tastes and preferences, as these play out under bargaining constraints and in the face of more or less material scarcity. See *infra* note 133.

<sup>128</sup> Marriage may induce spouses—especially men—to work harder and earn more. That increment in earnings will count as part of the surplus. See Linda J. Waite, *Does Marriage Matter?*, Presidential Address to the Population Association of America 6 (Apr. 8, 1995) (transcript on file with the Virginia Law Review Association) (discussing the increased earnings of married men); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, J. Econ. Persp., Winter 1998, at 137, 143 (describing as "well-established" the fact that married men earn more than single men); Waite, *supra* note 40, at 28-30 (noting, in addition to other benefits, the higher household wealth among most married individuals, compared to unmarried ones).

<sup>129</sup> Because the housewife spends more time overall on housework, she may be able to generate gains from specialization for each additional hour of work and provide a higher quality product for a given amount of effort. For dual-earner spouses who must perform domestic tasks in off-work hours, the specialization function is far

first and last hours of effort go into providing household services. Domestic services provided by wage earners require greater effort, and cost more, because that effort is added to many hours of paid effort.<sup>130</sup> Moreover, the housewife's first and last hours of effort go into direct service to others, and they bring her vicarious pleasure. Even if the working wife enjoys doing for others as much as the housewife, fewer of her total working hours are spent in hands-on caring or nurturing activities. Consequently, she gets less of the extra vicarious satisfaction from her efforts (although this effect may be mitigated somewhat by the housewife's diminishing returns in vicarious satisfaction with each hour of work). Finally, the pace and pressure of domestic work are greater for wage earners, who may attempt to complete each task in a shorter period of time. The frantic working wife's preparation of dinner, squeezed into half an hour, may come at greater cost (and produce a less tasty meal) than the housewife's two hours spent in unhurried preparation. In sum, a housewife/breadwinner arrangement, other factors being equal, may produce a larger marital pie than a comparable dual-earner arrangement by wringing larger positive utility gains from the sum total of activities (wage plus non-wage production) that all households must conduct.<sup>131</sup>

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shallower, and the quality of the product is probably reduced. This is another way of saying, as Gary Becker has asserted, that housewives are more efficient producers of domestic services than members of working couples. See Becker, *Treatise*, *supra* note 36, at 21-32.

This does not exclude the possibility, as already discussed, see *supra* note 64, that the most efficient arrangement for some couples—especially the high earners—is to hire household help. One of the criticisms of Gary Becker's economics of the household is that he takes too little account of the gains from specialization by women through the hiring of paid help and contracting out of services. See Bergmann, *supra* note 7, at 260 (discussing the "cash-paying" solution); Margaret F. Brinig, Comment on Jana Singer's *Alimony and Efficiency*, 82 *Geo. L.J.* 2461, 2471 (1994) (noting that Becker and others "assume it is not 'efficient' to hire someone else to do the wash or clean the house").

<sup>130</sup> The more that responsibility is exclusively placed on one member of the couple, the steeper the increase in costs for an equal amount of work. See *infra* note 188 (discussing diminishing returns on work and leisure as each person moves towards relative monopoly on each).

<sup>131</sup> The main objection to this conclusion would stem from the observation that the dual-earner wife's efforts in the market also contribute to the well-being of others: She earns money that can be invested in public goods or other items for family members. But that is just a direct measure of the production value of her work. Working to provide goods for the enjoyment of oneself and others, and getting vicarious pleasure from others' enjoyment of those goods (or services provided in lieu of them)

If traditional role-divided couples do indeed come out somewhat ahead, as speculated, in generating utility from comparable effort, Gary Becker's "altruistic head of household" model<sup>132</sup> is turned on its head. To the extent there may be greater gains to traditional households, it is the altruism of the household caretaker—usually a woman—that makes those marginal gains possible.<sup>133</sup> That larger pie will tend to offset the inequality-producing influence of the disparity between incomes. It does not follow, however, that the cause of egalitarian marriage would be advanced by moving women back into the home since the equalizing effect is only partly dependent on the mechanics of division of labor. It is also a function of the idiosyncratic preferences and tastes of those who feel comfortable

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are conceptually distinct. The latter can be added to the former, but need not be. Still, a working wife may take "extra" vicarious pride in providing materially for her family, in a way that may at least partly offset the loss of vicarious pleasure in forgone nurturing work.

<sup>132</sup> See *supra* note 36 (discussing Becker's model).

<sup>133</sup> This discussion does not entail the conclusion, nor does it require the assumption, that women generally are more altruistic than men, or that housewives are more altruistic than working women. (It also does not rule out, however, that both propositions might be true.) See *infra* Section IV.B.1 (discussing lessons of bargaining theory). It is necessary to distinguish here between altruism as a general trait (which is the tendency or capacity to enjoy contributing to others' well-being) and the specific ways in which altruism is actually brought to bear. The gender role conventions surrounding the conduct of marital relations; women's possibly average greater taste for domestic activities and hands-on, unmediated caretaking; and the power balance created by the bargaining relationship may all combine to push women of altruistic bent to express their altruism through direct service to family members—what is commonly referred to as "nurturing." The point is that nurturing is not the same as altruism. Rather, nurturing is one form that altruism can take.

Performing domestic services and being responsible for caring for others within the family is still costly for the caretaker, man or woman. It thus generates some negative utility. The person with more power in the family (generally the husband) will thus do less caretaking, even if that person is more altruistic than the average person and even if more altruistic than his or her spouse. Second, altruistic persons may choose very different avenues for expressing their concern for others, depending on interests and tastes that have nothing to do with altruism as such. (Ralph Nader could be said to be altruistic, but he might not make a very good housewife.) Expressing altruism through domesticity may carry different appeal for the average man and woman, and thus the private domestic realm may in fact provide fewer opportunities to men than to women to act on their altruism in preferred ways.

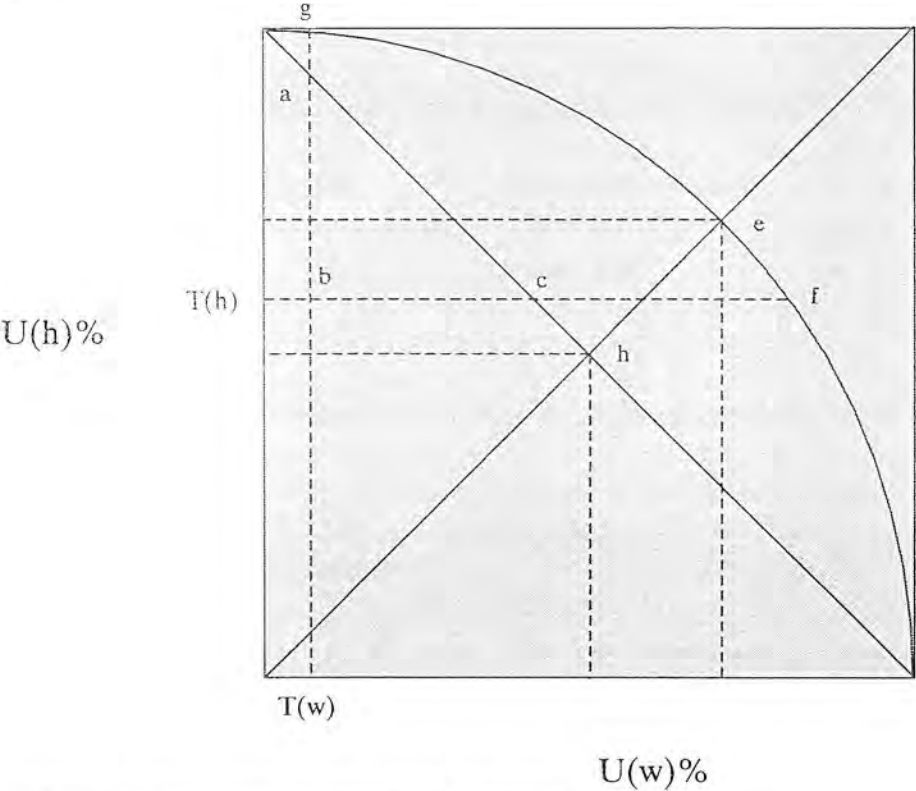
Finally, there are strong social conventions that make domestic activity generally more costly to men than women. See *infra* Section IV.A.1. The existence of these factors explains why the fact that family caretakers are usually women is not necessarily inconsistent with the proposition that men and women are equally altruistic.



in traditional female roles. Increasing the number of housewives who hate domesticity will not generally make marriage more equal.

The foregoing discussion reveals a broader point: The more love, the more the possibility for equality. When spouses care about each other, there is more overlap in their utility functions. One spouse's satisfaction automatically increases the other's happiness, at least to some extent. Where there is little altruism and little satisfaction in the other person's happiness, the spouses move closer to a zero-sum game in which one person's gain is the other's loss. The most efficient marriages may be those in which there is not just caring, but *active* caring. In such relationships, there is an even more pronounced divergence from strict linearity in the tradeoff of utilities because one or both spouses find happiness engaging in activities that directly increase the well-being of the other. This increases the effective size of the marital surplus. And the greater the surplus, the greater the room for equality as compared to a relationship marked by a more linear zero-sum tradeoff. Active caring can sometimes transform an NE deal into a PE one. See Figure 3.

Figure 3.



$T(h)$  and  $T(w)$  = threat points of husband and wife  
 $U(h)$  and  $U(w)$  = utility of husband and wife  
 $abc$  = bargaining surplus for zero-sum deal  
 $gbf$  = bargaining surplus for non-zero-sum deal  
 $e$  = egalitarian split for non-zero-sum deal (which lies within negotiation set for that deal,  $gbf$ )  
 $h$  = egalitarian split for zero-sum deal (which lies outside negotiation set for that deal,  $abc$ )

Two other factors merit further discussion, as they affect the possibility for an equal split of resources between the parties. The first is monetary income. As has already been suggested, the greater the income, the greater the quantity of marital resources available for division between the parties.<sup>134</sup> More income buys more goods,

<sup>134</sup> See *supra* Section III.B.

both public and private, which add to utility for both parties. But apart from the effects on the size of the pie, greater wealth also increases the practical potential for side-payments: Because not all assets are tied up in shared public goods, some of the surplus generated by one spouse's extra efforts can be kicked back in monetary form for that spouse's discretionary use.<sup>135</sup> Because having two earners tends to make couples financially better off, the income factor will tend to foster equality among dual-earner couples (especially the more affluent), thus offsetting somewhat the surplus-enhancing effects of role division.<sup>136</sup>

The final point to be gleaned from the bargaining paradigm is the importance of the cost of outside alternatives relative to the cost of the current marriage for the spouse with the best alternatives, which is assumed to be the husband. If remarriage is an important alternative, this suggests that the prospects for egalitarian marriage are minimized if the marriage market is dominated by women who demand few marriage-specific investments from men—as when, for example, men are generally expected to take on a small share of domestic responsibility and can devote themselves to paid work and leisure.<sup>137</sup> If most women demand little marriage-specific investment—whether from adherence to convention, poor bargaining power, or just plain personal preference—then it becomes more difficult for a few women to hold out for a lot more from men without pushing these men closer to their threat point or beyond and past their reservation price. This suggests that each woman's marital bargain can never be entirely independent of the marriage that other women are willing to make. Wives must bargain in the shadow of the market in a double sense—not just with the knowledge of the availability of potential rivals for their hus-

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<sup>135</sup> See *supra* note 42 (discussing side-payments).

<sup>136</sup> The foregoing discussion should not suggest that having both spouses work for pay could never be the more efficient arrangement overall. See Becker, *supra* note 34, at 151 (acknowledging that both spouses working for pay may be an optimal arrangement as "families [become] smaller, divorce more common, and earning opportunities for women improve[]"); see also Brinig, *supra* note 129, at 2469-73 (creating a model to demonstrate how a dual-earner arrangement could be the most efficient for some couples).

<sup>137</sup> Under the relationship described by the equation *supra* note 124, the chance for an egalitarian split decreases when  $CA(H)$  (a term that includes the husband's alternative marriage-specific input) becomes small absolutely and small relative to  $C(H)$  (which includes a component of the husband's current marriage-specific input).

bands' affections, but also of the availability of rivals willing to offer a more favorable deal.<sup>138</sup>

### *C. The Influence of the Bargaining Process*

Up to this point, the discussion has focused on whether and when egalitarian marriage is possible. We can predict that some rational, self-interested individuals will contract marriages that are unequal—those relationships will never be egalitarian (NE). But what of the remaining unions? Bargaining theory teaches that just because an egalitarian split is possible does not mean it will occur. The discussion in this Section is concerned with the likelihood that equality will be realized and with the conditions that will tend to foster or impede it.

If we take as given each party's reservation price and thus the negotiation set (that is, the possible set of bargains that are consistent with rational self-interest), what determines which bargain within that range will be struck? Game theorists have attempted to identify the factors that influence the actual allocation of shares in situations that require "splitting a pie." In predicting the outcome of real-life bargaining, idealized games can only take one so far. There is a large experimental literature suggesting that bargainers often deviate from the behaviors predicted from models based on perfect rationality and complete information. Social scientists have used empirical data to add richness to their models in an attempt to predict what real people will do.<sup>139</sup> Because there are so many psychological variables, analysis of the bargaining process has remained speculative and inexact.

The earliest models of how utilities would be divided within a feasible negotiation set were static and highly theoretical: They did not attempt to play out an actual bargaining sequence of alternat-

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<sup>138</sup> See *infra* Sections V.C-D, V.E.2 (discussing the relationship between marital bargaining and "deals" available on the marriage market).

<sup>139</sup> See, e.g., Margaret A. Neale & Max H. Bazerman, *Cognition and Rationality in Negotiation* (1991); Raiffa, *supra* note 73, at 44-65; Rasmusen, *supra* note 65, at 227-43 (summarizing attempts to model real-life, dynamic bargaining process); Martin Shubik, *Game Theory in the Social Sciences* 395-98 (1982); Colin F. Camerer, *Progress in Behavioral Game Theory*, *J. Econ. Persp.*, Fall 1997, at 166; Alvin E. Roth, *Bargaining Experiments*, in *The Handbook of Experimental Economics* 253 (John H. Kagel & Alvin E. Roth eds., 1995) (summarizing research on bargainers' behavior in various simulated bargaining games).



ing offers and counteroffers, but rather sought solutions that satisfied certain simple conditions and were stable in that no player would have a rational incentive to deviate from his choices. The most famous of these is the Nash bargaining solution. Under that scenario, two players called upon to split a pie will divide the bargaining surplus—as delimited by each bargainer's threat point or reservation price—down the middle, so that each has an equal share.<sup>140</sup>

The equal-split-of-bargaining-surplus solution, although a theoretical construct not meant as a "predictive exercise,"<sup>141</sup> has enormous intuitive and normative appeal as a "solution" to a vast range of bargaining problems. It is also useful for understanding the concept of bargaining power, and the factors that influence it. Bargaining power is reflected in one party's ability to procure a particular share of the bargained-for resources. Bargaining power is in part a function of threat advantage—which determines the feasible negotiation set—but it is also a function of a party's ability to maneuver the other into accepting a proposed position within the negotiation set. While there is no *a priori* reason to believe that real-life bargaining will result in parties' adopting the Nash solution—an equal split of the bargaining surplus—that solution can be used as the starting point for gauging the influence of factors that might give parties an advantage in real-world bargaining.<sup>142</sup> It is not implausible to assume that an equal split of the bar-

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<sup>140</sup> See *supra* note 122 (outlining a Nash solution for the IBM/S game); Baird, Gertner & Picker, *supra* note 48, at 21-23; Rasmusen, *supra* note 65, at 229 ("Nash's objective was to pick axioms that would characterize the agreement the two players would anticipate making with each other."); Shubik, *supra* note 139, at 200, 240 (defining a Nash equilibrium point for noncooperative games and comparing a Nash solution to those of two alternative models). The idealized Nash bargaining solution was originally proposed for the so-called cooperative bargaining game. A cooperative game, as already noted, see *supra* note 106, is one in which the parties can make enforceable and binding agreements as to payoffs (or in which a payoff division is imposed by fiat "from above"), as opposed to a noncooperative bargaining game in which any agreement is not binding in the sense that there is no externally imposed penalty for defecting from it. Many of the principles discussed herein, however, apply also to noncooperative bargains—those enforced solely through self-help.

<sup>141</sup> Sen, *supra* note 32, at 133 n.14.

<sup>142</sup> Alan Wertheimer describes the Nash solution as one to which rational actors would consent in a bargaining problem that is "fully described by a set of possible outcomes in terms of the agent's utilities and by a 'threat point' or no transaction alternative." Wertheimer, *supra* note 32, at 218-19 n.24. He explains that "[t]he rational bargaining view of fair transactions is *not* a pure procedural view. . . . To the

gaining surplus should result if the parties possess perfect information and if all the factors that might affect the conduct of the bargaining are in balance as between them. In this sanitized setup, the allocation of the cooperative surplus will be a straightforward reflection of the "relative strength of the parties' threat advantages."<sup>143</sup> Put another way, starting from a theoretical position of an equal division of a bargaining surplus in a typical split-the-pie game, the ability of one party to persuade the other to deviate from that position is likely to reflect some bargaining advantage other than that conferred simply by the lower limit on what each bargainer will rationally accept.

In the PE case, the egalitarian split lies within the feasible negotiation set. As the IBM/S example illustrates, an equal split of the bargaining surplus will not precisely coincide with an egalitarian division of overall payoffs if the parties' threat points differ at all. The Nash solution will favor the person with the better outside alternatives. See Figure 4.

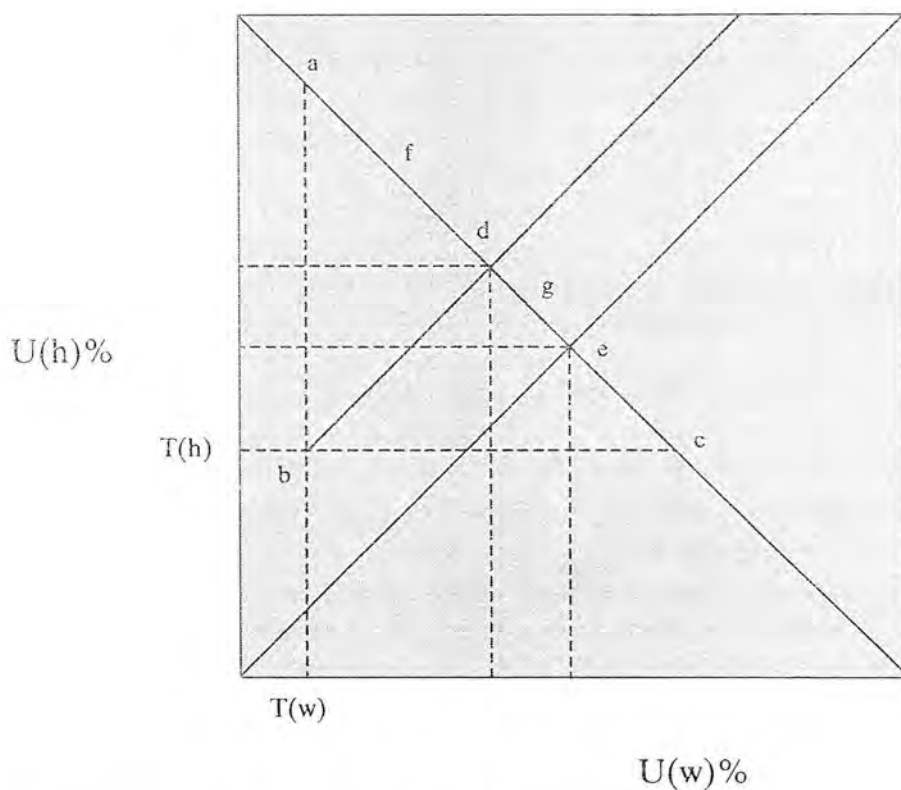
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contrary. It attempts to identify the terms on which *fully* rational parties *would* agree." Id. at 218-19 n.24. The conception, however, has a procedural analogue: It can be used to describe a bargain that would be struck if the influence of factors that might confer procedural advantages—including strategic or psychological advantages that affect the negotiating process—are either absent or are evenly matched on both sides.

The Nash bargaining solution does not represent the only attempt to provide a determinate answer to the bargaining "division problem" for rational actors. See Jules L. Coleman, *Risks and Wrongs* 37 (1992) (distinguishing the division problem from the compliance problem in constructing schemes for rational cooperation). For example, David Gauthier maintains that rational bargainers should, or would, abide by the principle of "minimax relative concession," which seeks to minimize the difference in utility as between the bargainers relative to each person's best bargain. Gauthier, *supra* note 46, at 137; see also Wertheimer, note 32, at 219 (describing Gauthier's theory). Whether this theory is predictive or normative, however, is not entirely clear. The Nash solution can be viewed as predictive only in the most ideal sense. It predicts the bargain that would result if all factors that affect bargaining behavior and bargaining strength (except threat point) are taken out of the equation or are set equal on both sides. In effect, it tells us what would happen if a person bargained with his *Doppelgänger*.

<sup>143</sup> Coleman, *supra* note 142, at 273.

Figure 4.



$T(h)$  and  $T(w)$  = threat points of husband and wife  
 $abc$  = bargaining surplus  
 $d$  = Nash solution  
 $e$  = egalitarian split  
 see text for  $f$  and  $g$

Thus, if the parties have different threat points but otherwise do not differ on traits and elements that confer actual bargaining advantage, they still will not have an egalitarian marriage. The outcome of their bargaining process will be point  $d$  (equal division of bargaining surplus utility), rather than point  $e$  (equal percentage net utility). The greater the divergence in their threat points, the

more the actual bargain struck will deviate from the egalitarian ideal.<sup>144</sup>

These observations suggest that even if men and women bargained the same way within a potentially egalitarian relationship, the benefits of marriage would on average go disproportionately to men. This effect would be due *solely* to factors that enhance men's extramarital and intramarital threat advantage: most importantly, men's higher extramarital utility, better remarriage prospects, and longer reproductive life; less importantly, their greater earning power and their somewhat different preference set for providing and enjoying domestic and child-oriented "public goods." These factors alone explain the lion's share of men's bargaining advantage.

But there is reason to believe that the realities of the negotiating process only worsen the imbalance. A number of strategic and psychological factors have the potential to affect negotiating skills or to confer bargaining advantage. It has been suggested that women and men are not equally effective negotiators because they may differ systematically in various ways that determine the ability to strike a favorable bargain within the parameters that fix the negotiation set. These include "toughness, patience, perceptiveness,"<sup>145</sup> risk averseness,<sup>146</sup> tolerance for conflict, aggressiveness, "taste for cooperation,"<sup>147</sup> the differential concerns raised by the

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<sup>144</sup> As Figure 3 illustrates (convex frontier), the less complete the tradeoff in the party's well-being (i.e., the more "caring"), the closer the Nash solution will be to the egalitarian ideal. This illustrates the principle that love tends to promote equality.

<sup>145</sup> See Wertheimer, *supra* note 32, at 64.

<sup>146</sup> There is a striking paucity of research supporting the frequently encountered assertion that men and women differ in their preferences for risk. Among the behavioral evidence that is commonly cited is male predominance in the incidence of criminal behavior, auto accidents, accidental death, and substance abuse. See, e.g., Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics*, 1996, at 380 tbl.4.8 (Kathleen Maguire & Ann L. Pastore eds., 1997) (presenting sex ratio of arrests for criminal offenses); National Highway Traffic Safety Admin., U.S. Dep't of Transp., *Traffic Safety Facts*, 1994, at 95 fig.23 (1995) (presenting data on sex ratio of involvement in motor vehicle accidents).

<sup>147</sup> Commentators have attempted to capture women's purportedly inferior negotiating ability in various ways, only some of which go more narrowly to negotiating ability as characterized herein. See, e.g., Rose, *supra* note 55; see also England, *supra* note 5, at 25 (asserting that women more often operate on a "connective model" that "takes both one's own and a connected other's utility as roughly of equal importance, regardless of who is in a stronger bargaining position," whereas men more often "see[] self-interested behavior as natural, and take[] advantage of being in a 'power-over' bargaining position when it occurs"); England & Kilbourne, *supra* note 5, at



presence of "hostages" (such as children),<sup>148</sup> the availability and willingness to use credible commitment strategies or first-mover advantages,<sup>149</sup> the sense of entitlement and notion of fairness,<sup>150</sup> and the time-dependent costs of disagreement.<sup>151</sup>

These factors are quite diverse and have disparate roles in the bargaining process. Moreover, there are a number of possible ways to conceptualize these elements and their effects on the conduct of bargaining and its outcome.<sup>152</sup> This is not the place for a comprehensive analysis of all factors that could possibly affect the conduct of bargaining. For the purposes of this Article, the best way to analyze the problem of weakness in the negotiating process is to focus on some of the general elements that might affect the psychology of bargaining over the allocation of resources within the bargaining set. The psychology of marital bargaining is critically affected by three closely related phenomena that determine how hard each partner will press his or her bargain: (1) the relative potency of defection threats, (2) the sense of entitlement, and (3) the endowment effect. In one way or another, these factors reflect how marital bargaining takes place in the shadow of the market. Each brings to bear the influence of extramarital market conditions and values upon the conduct of negotiations within the private, off-market relationship of marriage.

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171-78 (discussing men's and women's possible difference in perception and use of power); Mahony, *supra* note 16, at 34 (arguing that the widely held perception that women have a stronger desire for cooperation puts women at a bargaining disadvantage); Rose, *supra* note 55, at 423 (discussing how perceptions of women's taste for cooperation may help put them at a disadvantage in acquiring property).

<sup>148</sup> See England & Kilbourne, *supra* note 5, at 172-73; Mnookin & Kornhauser, *supra* note 89, at 966-68; Rose, *supra* note 55, at 445.

<sup>149</sup> See Mahony, *supra* note 16, at 48-51 (noting that the marital partner with the higher status or the more demanding job can more persuasively assert the difficulty of taking on domestic responsibilities); see also Baird, Gertner & Pickner, *supra* note 48, at 43 (discussing first mover advantage in dynamic models of bargaining games); Rasmusen, *supra* note 65, at 35 (same).

<sup>150</sup> See *infra* note 164 and accompanying text.

<sup>151</sup> Another important factor that can influence bargaining is access to information about payoffs and preferences. For discussion of the importance of information in the conduct of bargaining, see Colin F. Camerer & George Loewenstein, *Information, Fairness, and Efficiency in Bargaining*, in *Psychological Perspectives on Justice: Theory and Applications* 155 (Barbara A. Mellers & Jonathan Baron eds., 1993).

<sup>152</sup> For example, some may be viewed not as going precisely to bargaining "strategy," but rather as affecting the utility value of the outcome of the bargain itself. See *supra* note 147; *infra* Section IV.B.2.

The first factor—the relative potency of defection threats—depends on the parties' respective alternatives to an agreement. In addition to fixing the parties' reservation prices, the alternatives also have a distinct effect on the psychology of bargaining: The party with the best alternatives has the more credible threat of walking away if the other party fails to cooperate. That is true even if both parties stand to gain from the proposed agreement, and thus would not rationally abandon it.<sup>153</sup> The result of this strategic advantage is that the party with the less desirable outside options will often be more reluctant to drive a hard bargain or more willing to make concessions, for fear that the other party will call the deal off.<sup>154</sup> If a wife has more to lose from marital discord or

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<sup>153</sup> As long as both parties stand to gain by agreeing rather than failing to agree on a bargain, a rational actor's threat of defection or noncooperation is not strictly credible, even if that party has comparatively less to lose. See Gauthier, *supra* note 46, at 185; Sen, *supra* note 32, at 135 & n.21 (noting that "there are some very basic difficulties with any theory of threats, since it has to deal with situations *after* the bargaining has failed" when "the threatener has no obvious interest in carrying out the threat").

Nevertheless, different threat points can be expected to influence the conduct and outcome of actual bargaining because the danger of failure to reach an agreement is not illusory in real life. As Alan Wertheimer points out, "there is no reason to assume that just because both parties will gain from any division of the social surplus, they will find their way to such an agreement, just as there is no reason to assume that because both parties will gain from the cooperative solution to the prisoner's dilemma, they will both cooperate." Wertheimer, *supra* note 32, at 237. One reason a positive-sum deal may not go through is that refusal to cooperate can be part of a larger successful strategy; carrying out holdout threats helps parties enhance their credibility and discourages the other party's taking advantage in iterative bargaining situations. Thus a strategy that is a short-term loser may be a long-term winner. See Coleman, *supra* note 142, at 273; Robert H. Frank, *Passions Within Reason: The Strategic Role of the Emotions*, in 2 *Applied Behavioural Economics* 769, 774 (Shlomo Maital ed., 1988). But regardless of whether it confers tactical advantage, "breakdown" is always possible between real people, who are not always strictly rational. Thus, the "breakdown position" can be expected to influence the conduct of bargaining. See Sen, *supra* note 32, at 135 ("The breakdown position indicates the person [sic] vulnerability or strength . . . . If, in the case of a breakdown, one person is going to end up in more of a mess . . . , that is going to weaken that person's ability to secure a favorable outcome."); see also Henry Sidgwick, *The Methods of Ethics* 288 (7th ed. 1962) ("[I]n bargaining the less willing has the advantage.").

<sup>154</sup> This analysis applies where the relevant "threat point" is intramarital noncooperation as well as abandonment of the marriage. As already noted, see *supra* Sections II.D.3.b-c, men's intramarital threat point tends to be higher than women's. In cases where the husband's intramarital threat utility exceeds his extramarital threat advantage, the intramarital threat advantage will be especially high. In such cases, however, we can expect that the man's divorce threat advantage will more closely shadow his intramarital threat utility. That is, the distance between the average

upon another important sense in which bargaining takes place in the market's shadow: Parties may import market values into the bargaining process by allowing external criteria to influence the perception of appropriate bargaining concessions and demands. The market influences how parties value contributions that are of different types and thus are difficult to compare, if only because the market provides a ready measure of value. What does not come from the competitive market will appear less valuable than a contribution that is market-priced. Thus, the person whose contribution is in-kind and off-market—that is, the person whose contributions come largely in the form of direct and marriage-specific services to the family circle—will be deemed to contribute less than the person whose contribution comes largely in the form of money or other tangible assets.<sup>161</sup>

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<sup>161</sup> A number of commentators have attributed the devaluation of women's contributions to the family economy to the tendency to discount "off-market" or "unpriced" contributions and to exaggerate the worth attached to contributions in the marketplace. Barbara Bergmann has described the importation of "a market idea of fairness into family life," whereby a family member with higher earnings will "buy himself out of spending certain hours doing housework," regardless of other measures of contribution or value. Bergmann, *supra* note 7, at 271. Amartya Sen calls the strong tendency to discount the value of nonmarket internal contributions in favor of more easily measurable (and externally priced) contributions from the marketplace the "perceived contribution response." Sen, *supra* note 32, at 137. He adds that

[t]he nature of "perceived contribution" to family opulence has to be distinguished from the amount of *time* expended in working inside and outside the home. Indeed, in terms of "time allocation studies," women often seem to do astonishingly large amounts of work even when the so-called "economic" contribution is *perceived* to be relatively modest. The perception bias tends to relate to the size of the direct money earning rather than to the amount of time and effort expended . . . .

*Id.* at 139-40 (citations omitted). Sen describes how notions of "exchange entitlement," which are pegged to market value, produce the result that women are unable "to see [their] work as a value-producing work." *Id.* at 144 (quoting Maria Mies, *Lacemakers in Narsapur: Indian Housewives Produce for the World Market* 173-74 (1982)). A greater market role can boost bargaining power by giving a woman "(1) a better breakdown position, (2) possibly a clearer perception of her individuality and well-being, and (3) a higher 'perceived contribution' to the family's economic position." *Id.* Finally, Shirley Burggraf describes the market invisibility of a woman's customary contribution to the family, which comes largely in the form of opportunity cost and value added to children. That invisibility fuels a pervasive tendency to take women's domestic contributions for granted and to discount their value. See Burggraf, *supra* note 81, at 16.

Finally, marital negotiations are heavily influenced by an "endowment effect," which pegs the exchange value of bargainers' offers to a preexisting status quo.<sup>161</sup> In this respect, women are hurt by the fact that bargaining rarely takes place on a clean slate. In the generic, idealized split-the-pie game, parties come to the table without a history of preexisting allocations and without preconceptions about the shares to which they are entitled. Real-life marital bargaining deviates from this ideal by taking place in the shadow of powerful cultural expectations for men and women in marriage. The conventional role divisions in marriage—in which men invest more heavily in market labor while women take on more domestic responsibility—make the worth of each spouse's contribution depend on a baseline in which the spouses either perceive themselves as possessing a presumptive entitlement or as seeking to acquire such an entitlement. The bargaining process then proceeds through a set of exchanges in which spouses propose concessions or demands that may alter the conventional baseline. If men see themselves as entitled to certain services, and women see themselves as duty-bound to provide them, then any woman who seeks to shift responsibility for those services onto her husband must purchase that shift through larger concessions than would be necessary from a neutral baseline. Likewise, men will demand greater concessions before they will consent to take that responsibility upon themselves.<sup>162</sup> Moreover, because individuals are generally

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<sup>161</sup> See Cotter, *supra* note 10, at 2113 ("An endowment effect is said to arise when the price I would demand to sell something already in my possession is greater than the price I would be willing to pay to acquire that same thing if I did not already have it."); see also *id.* at n.188 (citing sources in the experimental social science literature concerning the psychology of endowment effects); Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 *UCLA L. Rev.* 1309, 1358-61 (1986) (noting the implications of endowment effect research for the economic analyses of law); Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 *J. Legal Stud.* 225 (1991) (suggesting applications of the endowment effect to the formulation of law and policy); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 *U. Chi. L. Rev.* 1175, 1179-81 (1997) (discussing behavioral manifestations of "loss aversion" as a form of endowment effect); Russell Korobkin, *Note, Policymaking and the Offer/Asking Price Gap*, 46 *Stan. L. Rev.* 663 (1994) (discussing the implications of the endowment effect for entitlement allocation policies).

<sup>162</sup> See Sigel, *supra* note 85, at 190 (commenting that "men expect to *receive* at home but to *give* at work . . . [whereas] the woman also gives at work, [but] she has to give at home as well"). Focus groups conducted by Sigel among 650 dual-earner families provide evidence of a significant endowment effect influencing men's perception of



observed to have different preferences for the risks of gains and losses, the endowment effect, like the quality of fallback options, can also influence the adamancy with which negotiating partners press their case. In experimental situations, "players are more willing to risk disagreement when bargaining over possible losses than when bargaining over possible gains."<sup>163</sup> Since greater sharing of a wife's traditional responsibilities represents a loss for the husband relative to the baseline, he is likely to resist concessions more firmly than his wife (who stands to gain) will insist upon them.

In practice, these three effects—"threat potency," entitlement, and endowment—all result in a wife's efforts counting for less than a husband's in any bargaining situation. The person who believes he has brought "more" into the relationship will think he deserves a better deal and will push for one. Even if contributions are objectively similar (for example, in representing an equal investment of time), the person who is viewed as bringing "less," feeling unworthy, will grant larger concessions or refrain from demanding more. Thus, a shared perception of the lesser worth of a woman's efforts—whether in the labor market or at home—will generally lead women to reduce their bargaining demands and men to increase theirs, causing women to lose out in situations that turn on hard bargaining. If "a wife's hour is not worth as much as a husband's hour, her dollar is not worth as much as his, her education and training count for less, and her attitudes carry less weight when spouses are negotiating,"<sup>164</sup> it is hardly surprising that women will

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working women's contributions to the family. In general, men focused on the costs of their wives going out to work, and saw the extra income generated by their wives' employment as a mixed blessing. *Id.* at 163-64. This perception depended on men comparing their dual-earner existence to a more traditional baseline arrangement. The endowment effect created by that baseline allowed husbands to see their wives' income as earned at considerably greater sacrifice to the family than their own and to discount the value of that income accordingly. Thus, although husbands viewed their wives' earnings "as helping provide for the comfort of the family," *id.* at 164, and admitted "enjoy[ing] the higher standard-of-living their wives' employment facilitate[d]," *id.*, they mentioned many drawbacks. Among these were decreased wifely attention, decline in quality of services, loss of the prestige and pride in the exclusive breadwinner role, and (for the more affluent) a loss of simplicity of lifestyle and an increase in consumerism from the availability of more disposable income. *Id.* at 163-65.

<sup>163</sup> Camerer, *supra* note 139, at 172; see also Sunstein, *supra* note 161, at 1179-81 (discussing behavioral evidence that an individual's displeasure from losses tends to exceed the pleasure from equivalent gains).

<sup>164</sup> Ruth Milkman & Eleanor Townsley, *Gender and the Economy*, in *The Handbook of Economic Sociology* 600, 614 (Neil J. Smelser & Richard Swedberg eds.,

come away with less of the bargaining surplus, and that the resulting bargains will deviate from the egalitarian ideal.

If women even partly share in the perception that their contributions are worth less, this carries important implications for the real-life conduct of marital relations. Bargainers' subjective perceptions of fairness can directly affect bargaining behavior. Women who think they have received a fair shake may simply cease trying to get more (even if they would be happier with a larger share).<sup>165</sup> But if willingness to press harder is a component of

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1994). The effects described might also help to explain reports that many women, including those who are objectively overworked relative to their husbands, do not perceive their situation as inequitable or unfair. In the words of one researcher, many employed mothers express "a surprisingly high level of satisfaction with an objectively unfair situation." David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor*, 42 *Fam. Rel.* 323, 328 (1993). There is a voluminous literature reporting on field studies in which husbands and wives are asked whether they believe marital responsibilities are allocated fairly. In many, although not all, more than a majority of both men and women consistently reply that the division is fair. But cf. Sigel, *supra* note 85, at 36, 96-100 (finding that more than 80% of 650 women in sample focus groups expressed dissatisfaction with household division of labor). Even though women do complain about "overload" and even though women who receive more help from husbands at home are generally happier, most wives profess to be satisfied with less than a 50/50 split in responsibility or the balance of work and leisure.

For a comprehensive review of the literature on perceptions of fairness, see Perry-Jenkins & Folk, *supra* note 16; see also Biernat & Wortman, *supra* note 11 (discussing the results of interviews with 139 married couples regarding their attitudes about home and work life); Sampson Lee Blair & Michael P. Johnson, *Wives' Perceptions of the Fairness of the Division of Household Labor: The Intersection of Housework and Ideology*, 54 *J. Marriage & Fam.* 570 (1992) (analyzing factors in wives' perceptions of the fairness of the division of household labor); Bryson et al., *supra* note 22 (studying dual-career families); Hochschild, *supra* note 23 (examining the division of household responsibilities between wives and husbands in two-job couples); Emily W. Kane & Laura Sanchez, *Family Status and Criticism of Gender Inequality at Home and at Work*, 72 *Soc. Forces* 1079, 1095-96 (1994) (discussing perceptions of gender inequality at home and at work); Lennon & Rosenfeld, *supra* note 21 (investigating the sources and consequences of employed wives' perceptions of fairness in the division of housework); Major, *Entitlement*, *supra* note 157 (attempting to explain the perception of justice despite objective imbalance as stemming from women's sex-based perceptions of lesser deservingness and entitlement as well as the intrinsic value attached to being male); Steil & Weltman, *supra* note 11 (describing the effects of resources and personal attributes on the perceived importance of careers and sharing responsibilities at home).

<sup>165</sup> Alternatively, women's resignation may represent sour grapes or an adjustment of expectations to what women think they can get. See Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* 109-40 (1983); Sen, *supra* note 32, at 126; Sunstein, *Social Norms*, *supra* note 32; see also Hochschild, *supra* note 23, at 258-62

bargaining power, it might be possible for women to increase their share simply by being more insistent. This strategy might work precisely because where bargainers come to rest within the negotiation set is largely a matter of subjective perceptions of value and worth. There is no inexorable requirement that a particular contribution within a closed bilateral monopolistic system must carry any fixed exchange value within the relationship. There is no reason why income must translate into marital power more readily than domestic work, or why "women's fertility, child rearing, emotional work, and housework are somehow less of a contribution than men's earnings."<sup>166</sup> These relative values are a matter of psychology, not economics; bargainers in an off-market relationship that generates a bargaining surplus are not price-takers. There is no competitive market, with many buyers and sellers, where aggregate supply and demand curves meet to dictate price.<sup>167</sup> Thus, "exchange" values within a bargaining relationship are not the product of microeconomic forces generating an objective metric of value that is beyond the influence of individual actors.<sup>168</sup> On the contrary, the "value" of a particular contribution is a matter of the allocation each party can force the other to accept, which in turn is determined by volatile processes of negotiation and renegotiation. Once the negotiation set and bargaining surplus are fixed (by factors that do in part reflect the external market value of the parties' holdings and contributions), there is no reason, outside the perceptions of the parties, for the party who happens to be male, or whose primary contribution is monetary, to have a strategic advantage. The advantage proceeds from the bargainers' choice to honor the metrics of a market external to the bargaining process. That choice is far from inevitable, because the values bargainers attach to any deal are not fixed by any outside force.

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(suggesting that women cease to press for change in their domestic situation principally because they realize they lack the power to obtain a better bargain).

<sup>166</sup> England & Kilbourne, *supra* note 5, at 165.

<sup>167</sup> See Rasmusen, *supra* note 65, at 227.

<sup>168</sup> The market price is generally impervious to individual choices or will. That does not mean, however, that people must adhere to the market price in day-to-day transactions involving market commodities. There is nothing to stop persons from selling or buying something for less or more than its market price if they can find a trading partner to join them in their folly. Finding someone to go along is the challenge. The market at least provides an objective measure of valuation to which those transacting business can refer.

On the other hand, just because some factors conferring bargaining advantage are "in the head" does not mean that they are easy to change. For one thing, there are two players to the marital bargaining game, and spouses' interests in adjusting the valuation of marital contributions are clearly divergent. Even if a woman successfully fights the psychology of her own devaluation and fear of loss, she must still negotiate to "get her way." But that introduces yet another factor that may impede women's bargaining success. That women at times seem to obtain objectively smaller shares can be fully explained by a combination of entitlement, endowment, and "threat potency" effects. But women's smaller share is often attributed to women's being more deferential, accommodating, or conflict-averse.<sup>169</sup> The latter can also be reconstrued as reflecting the utilities attached to the spoils of bargaining when set off against the psychic "transaction costs" of obtaining those spoils. As Jeffrey Harrison has put it, "one could say that the accommodations of others or the avoidance of conflict is something from which [a woman] derives utility."<sup>170</sup> A worse deal only looks worse because personal transaction costs have not been factored in. On this view, the problem with the "soft negotiator" is not that she does not press hard enough for what she wants. Rather, she just does not want it enough.<sup>171</sup>

The possibility of reinterpreting what can be viewed as tactical weakness as simply reflecting the "utility of the bargain" means that the status of the factors that are said to affect bargaining strategy is necessarily more ambiguous than those that determine the negotiation set. But, as already noted, the "softer" party's personality and strategies are not the only ones at stake. Men's tendency to attach little importance to women's efforts is as critical to the

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<sup>169</sup> See, e.g., Harrison, *supra* note 10, at 7-9; see also *id.* at 8 ("[A]n accommodating person dealing with a non-accommodating person will likely receive a smaller share of the gain from the exchange."); see generally Rose, *supra* note 55 (discussing the importance of women's putative conflict-averseness in bargaining over property).

<sup>170</sup> Harrison, *supra* note 10, at 7.

<sup>171</sup> That cannot be the whole story, of course. A deferential bargainer will, in the long run, find herself with fewer objective resources, and she will have less to bargain with at a future time when there is something that she dearly wants and she is willing to shed any scruples against "hard bargaining." See, e.g., Rose, *supra* note 55 (describing how women fail to accumulate tangible bargaining chips in the form of property over the course of a long-term relationship).



outcome of the process as women's tendency to denigrate their own contributions. If a woman's firmer belief in her own deservingness were reflected in greater boldness and higher expectations at the bargaining table, she still might not succeed if her husband did not share her views. *Both* parties' expectations are critical to the outcome of bargaining. Of course, one could argue that this is only appropriate: One cannot expect men to give up value for what they regard as worth less. Does this reflect a tactical advantage, or is it just a matter of men's being true to their own utility profiles? The difficulty of resolving this question makes it hard to know whether and how much the strategic considerations discussed in this section can be said to influence equity, or deviations from equity. There is always the possibility of reframing considerations that seem to reflect the psychology of bargaining as simply reflecting the value of the underlying bargain itself.

The foregoing discussion focuses on why women might make greater concessions in one-on-one bargaining than they really *need* to. But, there is some evidence of movement in the opposite direction: that women's sense of fairness or equity is increasingly working to place limits on the concessions that they are willing to make, even to the point of leading to the rejection of some bargains that otherwise appear better than no bargain at all. There is, for example, evidence from behavioral game theory that parties will sometimes "irrationally" reject positive-sum bargains if they believe they are being taken advantage of.<sup>172</sup> In noniterative situations (like marriage) where the strategic advantages of establishing a reputation as a "hard bargainer" by rejecting a favorable deal are not apparent,<sup>173</sup> the decision to divorce a spouse who insists upon lopsided bargains can be explained as reflecting an independent "taste for equity," which factors revulsion against unfairness into

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<sup>172</sup> See Rasmusen, *supra* note 65, at 229; Roth, *supra* note 139, at 266-74 (attempting to explain the rejection of profitable offers in some "ultimatum game[s]" as manifesting a preference as to "relative share[s]" or "fairness," or as advancing strategic retaliatory or credibility-enhancing goals); see also *supra* note 153.

<sup>173</sup> Marriage is still most commonly entered into only once or twice in a lifetime, and a reputation for having called a previous spouse's bluff may well make it somewhat harder to find a new "trading partner." Although discarding a spouse as a strategic move probably has few tactical advantages, driving a hard bargain within the context of a particular marriage might.

the utility function.<sup>174</sup> Regardless of whether the rebellion against bargains perceived as lopsided is seen as a tactical choice or as a shift in the perception of costs and benefits, it may help account for the observation that most divorces are initiated by women, even though marital breakup leaves most women objectively worse off (and worse off than their husbands).<sup>175</sup>

#### *D. Hard Bargaining and Dual-Earner Couples*

If we accept that some of the factors discussed in the foregoing Section may operate to cause marital deals to deviate from equity in favor of men (rather than to change the way we calculate equity), the payoffs of the actual bargains struck would diverge from the egalitarian ideal to the wife's detriment even more than those struck from bargaining equipoise.<sup>176</sup> There may be additional countervailing forces, however, that act selectively to moderate these sources of women's putative bargaining disadvantage. By some—although not necessarily all—external measures of well-being, traditional role-divided marriages are more egalitarian than dual-worker marriages: Specifically, conventional housewives' hours of

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<sup>174</sup> See Harrison, *supra* note 10, at 5-9 (discussing ways to conceptualize, or incorporate into utility calculus, the observed "irrationality" of behavior in experimental ultimatum games); *id.* at 9 (suggesting that, as a matter of simple economics, "as soon as a potential contracting party develop[s] a sense of compensatory justice that prevents the making of the bargain, the bargain is not one that would have enhanced the position of both parties in the first place"). But see Wertheimer, *supra* note 32, at 239 n.75 (questioning whether the preference for fair deals is best analyzed as a "psychic utility gain[]" from fairness).

<sup>175</sup> See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. Ill. L. Rev. 719, 731 n.44 (stating that it is often difficult to determine whether wives or husbands are instigating a divorce, but noting polls that reveal that "between the early 1970s and the late 1980s, a majority of divorced persons shifted from reporting that their divorce was the husband's idea to reporting that it was the wife's"); see also Paul DeWitt, *Breaking Up Is Hard to Do*, *Am. Demographics*, Oct. 1992, at 53, 56. Data from the first half of the century indicate that the tendency of wives to initiate most divorces is not a recent trend. From the 1920s to 1950, women sought almost three-quarters of all divorces and annulments nationwide. See J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 *Idaho L. Rev.* 1, 6 (1997) (citing Paul H. Jacobson, *American Marriage and Divorce* 121 tbl.58 (1959)). For further discussion of how the bargaining paradigm helps explain patterns of initiation of divorce, see *infra* Section IV.C.

<sup>176</sup> This divergence is represented in Figure 4 by point *f*. *Supra* p. 578.

work more closely match their husbands', whereas employed women generally work significantly longer hours than their husbands overall.<sup>177</sup> As already discussed, the traditional wife's sources of bargaining weakness (large marriage-specific investment and market opportunity cost leading to reduced outside earning potential) might be partly offset by the utility-enhancing effects of the housewife's specialized efforts and preferences.<sup>178</sup> If housewives do get more of what they want, however, the one important reason may be the strong conventions that dictate that, in carrying most of the domestic load without contributing earned income, a woman has done all that is expected of her—that is, she has done her fair share. Although breadwinner husbands may theoretically be in the position to extract more from the marriage—by demanding an even higher level of services, or effectively monopolizing all the discretionary income, or dictating all major family decisions—social taboos may prevent the more powerful person in a traditional marriage from really pressing the bargain to unseemly limits. Thus, the actual bargain in many traditional marriages may be skewed even closer to the egalitarian point than even a bargaining surplus split would allow.<sup>179</sup> That equality would not reflect real equality of bargaining power, but rather a form of grace or gift conferred in the shadow of social expectations regarding the proper balance within the family. Nonworking wives can thus achieve an actual though uneasy equality of well-being within an ongoing marriage. Nevertheless, they do not hold power equal to their husbands'. Their equality is provisional, in the sense that it depends both upon men's forbearance and upon forestalling divorce.

In dual-earner couples, in contrast, social conventions governing the division of labor will tend to accentuate rather than mitigate inequality. When a woman brings in some portion of the family income, however large, there is no perception that she has done all that is expected. Quite the contrary. In this situation, there are fewer normative checks on a husband's full use of his bargaining power to negotiate for a more favorable deal and powerful incentives for him to do so. The result will be, at the very least, a failure

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<sup>177</sup> See Pleck, *supra* note 15, at 62-63; Szinovacz, *supra* note 15, at 175; see also *supra* Section I.B (discussing the work-leisure gap among dual-worker couples).

<sup>178</sup> See discussion *supra* Section III.B.

<sup>179</sup> See point g in Figure 4, *supra* p. 578.

to mitigate the deviation from equality that would otherwise result from the host of other factors creating imbalance. The foregoing analysis helps explain why women's economic gains in the workplace have not translated into gains at home.<sup>180</sup> Although market earnings increase bargaining power, other factors supervene to undermine parity in dual earner families. This suggests that the future of egalitarian marriage is not bright and grows dimmer as married women engage in more and more paid work to generate needed income for the family.<sup>181</sup>

#### IV. INEQUALITY OF BARGAINING POWER: THEORY AND REALITY

##### *A. Equality in Practice?*

The marital bargaining paradigm and the working definition of egalitarian marriage used in this analysis beg many questions. These questions are both theoretical and practical. The theoretical objections center on issues of baselines (the starting point for measuring equality in the working definition of egalitarian marriage), metrics (the currency in which equality is measured), and the choice and treatment of variables such as preferences, norms,

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<sup>180</sup> This conclusion is buttressed by data collected by the economist Victor Fuchs which suggest that the bargains married women have struck with their husbands have generally become less favorable in recent years. Using data from a number of sources, Fuchs found that in 1960 men on average worked longer hours than women (including hours of wage and non-wage domestic work). Fuchs, *supra* note 7, at 78 tbl.5.1. By 1986, that trend had reversed, and women worked more hours. *Id.* Fuchs also calculated an index of effective income per hour of work (paid and unpaid) for all men and women, and for married men and women, using an assumption of equal sharing of marital income. He found that the ratio of married women's to men's effective income per hour of work declined steadily from 1960 to 1986, dropping more than 10% in that interval. *Id.* at 82. The 1986 ratio was still slightly greater than parity, however, which may represent the influence of the traditional couples in the mix. (Unfortunately, Fuchs lumped together dual-earner and sole breadwinner couples, thus limiting the usefulness of his data for this Article's purposes.) Fuchs attributed the decline in the sex ratio of effective income to "the increased burden of work on women who took paid jobs but still had substantial responsibilities at home." *Id.* at 82. Although the ratio is not a complete gauge of well-being by any means, it does provide one good measure of women's economic status relative to men's, which reflects women's effective access to the pool of marital income. That access may serve as one indicator of women's relative bargaining power.

<sup>181</sup> See *supra* note 7 (discussing the importance of women's earnings to maintain their families' standard of living over time).



and social conditions that are taken as exogenous in setting up the bargaining model and in defining egalitarian marriage.

Even if the basic elements of this framework are accepted, those disinclined to believe that marriage is an engine of sex-based inequality are not without argument. It is one thing to posit a theoretical framework that predicts inequality of bargaining power in marriage, and another to assert that marriage often produces real-life inequality in fact. It can be argued that a truly complete accounting of all the costs and benefits of marriage for both sexes will produce a version of marriage that is, in practice, much more balanced. Indeed, alternative stories can be told to suggest that married men are in fact operating quite near their reservation price for the relationship, while women are not.<sup>182</sup> The purpose of this Part is to examine some of these possible accounts.

### *1. The Drudge Wife and the "Efficient" Household*

Consider the example of a household that the social science data suggest is fairly common: Husband and wife engage in roughly similar hours of paid work and make significant, although not necessarily equal, contributions to family income, but the wife performs most of the domestic labor; she acts as a "drudge wife." Each hour of household work is costly to the performer.<sup>183</sup> But the work also generates positive utility, in the form of the production of services performed. Assume the couple shares in this positive utility in various degrees.<sup>184</sup> Suppose that, all else being equal, the wife has a modest absolute advantage in domestic productivity.<sup>185</sup>

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<sup>182</sup> See, e.g., S.A. Lloyd, *Family Justice and Social Justice*, 75 *Pac. Phil. Q.* 353, 367-68 (1995) (offering three hypothetical marriages in which labor is unequally divided between spouses—with the greater burden resting with the wife—and attempting to reinterpret these as creating just allocations of burdens and benefits).

<sup>183</sup> That is, it generates "intrinsic negative utility" for the person who performs it. This function takes into account the inherent pleasure or consumption value (if any) of actually performing the work minus the cost of the effort expended. The sum of these two factors is assumed to be negative.

<sup>184</sup> Differences in shares may result from different preferences for public goods (such as a clean house) or because some of the tasks are performed for the benefit of one person only (such as ironing a husband's shirts).

<sup>185</sup> This may be because she generates more utility when she performs the tasks (she does a better job) or because she dislikes performing these tasks less than her husband does (although her performance is still costly for her).

Why does the wife consent to act as a drudge wife? On the assumptions here, the lopsided division of domestic responsibility is Kaldor-Hicks efficient for the unit as a whole if we compare it to an arrangement in which some of the domestic labor is reallocated to the husband (a so-called "sharing" arrangement). The drudge-wife produces a greater quantity of gains for the spouses to share. The problem with that explanation, as we have seen, is that it does not tell us whether or how those gains are divided. Our impulse is to assert that the wife must be capturing enough of a share of the extra gains to make her effort worthwhile. That is, the arrangement must be Pareto-superior to any alternative division of responsibility within the family, despite the extra costs imposed upon the wife, or she would not consent to it. This could occur in two ways. The drudge-wife scenario could be intrinsically Pareto-superior to alternatives (such as "sharing").<sup>186</sup> Or it could be made Pareto-

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<sup>186</sup> How, despite appearances, might the wife be better off doing all the work? There are several possible stories to tell. There are two sources of positive utility for the wife: her share of the benefits of her labor, and the intrinsic consumption value from performing it (which can include vicarious pleasure in others' consumption of her services). On the negative side of the ledger are the costs of her effort (which factor in her degree of distaste for housework, which may on average be less than her husband's) and the opportunity cost of forgone leisure or other activities. Least plausible as an explanation for why wives do more is the possibility that a wife enjoys doing all the household work so much that her positive consumption value outweighs any extra negative utility or leisure opportunity costs she incurs. More credibly, the wife might have an absolute productivity advantage in domestic tasks, and her direct share of the yield from the larger pie, even without side-payments, might effectively compensate her for the extra net costs of taking on more work (which, due to differences in distaste for housework, might be somewhat less than her husband's costs under an even-split arrangement). In both of these scenarios, the wife takes on the extra tasks "voluntarily"—that is, because she herself comes out ahead by doing them. Put another way, if given the choice, she would choose these arrangements over an ostensibly more even split of responsibility.

The working wife's taking on the lion's share of domestic responsibility might also increase household productivity overall in another way: by increasing her husband's earning power. If the wife garners a great enough share of that increased earning power (which is by no means assured, see discussion *infra* Section IV.B.1.a) she may come out ahead despite her "extra" effort over the baseline of an equal split. The sources of increased earning power might include a rejuvenation effect, whereby the extra leisure men enjoy enables them to work harder and perform better on the job. If the husband earns more than the wife, the enhancement of family income from rejuvenation might be greater for the man than the woman. Similarly, the flexibility that freedom from domestic responsibility affords a man may have a significant impact on earning power by allowing him to be available to respond to unpredictable work demands and contingencies. Such flexibility may be more valuable to the fam-

superior by a redistribution of the surplus through side-payments. In exchange for the wife's greater contribution of time, the husband might cede to her enough of a share of the surplus generated by the wife's more productive efforts, in the form of other tangible or intangible benefits, to cover the wife's costs and make her better off overall than if she reduced her own effort at his expense.

Although these scenarios are no doubt apt depictions of some relationships, there are important reasons to doubt that they account for most observed instances of drudge-wife households. First, the example takes for granted that the arrangement is Kaldor-Hicks efficient because the wife has an absolute advantage in all domestic labor—an assumption that is problematic at best, and especially problematic in the case of dual-earner couples.<sup>187</sup> Even if

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ity in the hands of men either because men's earning power is greater for equivalent jobs or because male jobs tend to require more flexibility or greater commitment. Alternatively, perhaps employers reward men's extra commitment at a higher rate. Even if such sex-linked effects were eliminated, however, it is not clear that two persons, each with half as much flexibility as a traditional husband, could equal the earning power of one person who has a monopoly on the ability to respond to employer demands. On the perils of trying to combine paid work with domestic labor, see Hochschild, *supra* note 23; Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *Yale L.J.* 595 (1993); Williams, *supra* note 3.

An additional factor that makes it costlier, to both men and women, for men to substitute domestic responsibility for leisure is that disgrace attaches in our society to men who take on tasks or roles that are associated with femininity. See Case, *supra* note 159, at 3; see also *supra* Section III.C (discussing the devaluation of traditionally feminine activities). This intangible stigma is compounded by more concrete reputational or signaling costs that may adversely affect a man's occupational position or prospects, with financial ramifications for the entire family. Even leaving aside the possible financial effects, a wife may refrain from attempting to press her husband into domestic service because she prefers not to be married to an uxorious man—either because she cares about how her husband appears to others or because he will appear less attractive to her.

Finally, a comparison based solely on duration of work time—the metric of marital contribution that implicitly underlies concern over the work-leisure gap—does not take into account the intensity of work effort, work-related stress, and the subjective unpleasantness of work. It can be claimed that men on average “work harder” or are subjected to more stress on the job, and that the “extra” work women do at home barely makes up for this in the cost-benefit calculus.

<sup>187</sup> Discussions of the allocation of wage work and domestic effort between spouses are often dominated by images conjured up by Becker's efficiency model, in which women are assumed to have both a “natural” absolute advantage as well as a comparative advantage over men in domestic pursuits compared to wage work. See Becker, *Treatise*, *supra* note 36, at 22 (discussing comparative advantage); Bergmann, *supra* note 7, at 266-67 (summarizing Becker's theory of comparative advantage);

that is the case, however, a drudge-wife arrangement will not necessarily be more efficient in every case than a more even split of responsibility.<sup>188</sup> Second, it is unclear what husbands are system-

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Blau & Ferber, *supra* note 16, at 37-45 (describing the simple neoclassical model of family specialization and exchange); Hadfield, *supra* note 55, at 96 (discussing Becker's theory); Isabel V. Sawhill, *Economic Perspectives on the Family*, 106 *Daedulus* 115, 118-20 (1977) (summarizing Becker's theory of comparative advantage); Jana B. Singer, *Alimony and Efficiency*, 82 *Geo. L.J.* 2423, 2429-34 (1994) [hereinafter *Singer, Alimony and Efficiency*] (describing efficiency justification for alimony). For a critique of the comparative advantage argument, see Hadfield, *supra* note 55, at 96-98.

Becker's comparative advantage argument for household specialization is premised on a one-for-one tradeoff between the hours worked by husbands and wives in market and nonmarket sectors, in which the husband's time freed up by the wife's domestic labor is plowed into productive wage work, and vice versa. That model is consistent with both spouses' devoting equal time to work and enjoying an equal amount of leisure, and it does not directly address the efficiency or other consequences of a significant disparity in work and leisure time.

As we have seen, many dual-earner households deviate from Becker's premises. In many households, a spouse's work in one sector does not always come at the expense of work in the other. Rather, it comes at the expense of that spouse's leisure. Becker's model simply does not tell us how "optimizing" spouses should, or would, allocate the distribution of work and leisure hours in excess of the observed "matched hours" of labor, when one person is substituting consumption for work. See *supra* Section I.B.

<sup>188</sup> There are a number of factors that could tend to reduce the efficiency of a "drudge-wife" situation relative to sharing. A bedrock assumption of Gary Becker's analysis is that women are more productive in the domestic sphere. See Becker, *Treatise*, *supra* note 36, at 22-23. But Becker's "separate spheres" analysis assumes that the first and last hours of women's work are in the unpaid sector, and that men's and women's efforts are roughly matched. When women work for pay, the first hour of domestic work comes after many hours of paid work. That places her household effort on the steep part of the curve where the cost of putting in additional hours rises rapidly. Moving tasks to a flatter part of the curve can be expected to reduce costs overall. Thus, the total costs of distributing tasks more evenly between two working people may well be less than the total costs incurred by overloading one person with most of the responsibility.

Furthermore, the marginal value of leisure rises as the number of hours of work performed increases. Thus, the first hour of leisure after eight hours of work is worth less than the first hour after twelve, which means that, *ceteris paribus*, the consumption utility to the dual-earner unit will be greater when the leisure is shared than when it is monopolized. See Blau & Ferber, *supra* note 16, at 47 ("[L]eisure is likely to be more highly valued by the partner who has less of it.").

As already noted, see *supra* note 129, the gains attributable to specialization in domestic work are also greatly attenuated (and the quality of the product much reduced) when one spouse must squeeze domestic tasks into off-work hours rather than perform them as her primary activity. This attenuation argues for more sharing among working couples. Of course, it might also argue for wives' avoiding paid work altogether. But see Brinig, *supra* note 129, at 2472-73 & tbl.I (explaining why, con-



atically giving their wives—or what benefits women are systematically enjoying—to make up for the extra work the wives are doing across the board.<sup>189</sup> Third, although these accounts mitigate

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trary to Becker, dual-earner families are sometimes more efficient than traditional breadwinner families).

Finally, for some couples—for example, where both spouses can command a high enough return on the labor market—the most efficient arrangement might be to hire household help. See Bergmann, *supra* note 7, at 260 (describing the “cash-paying” alternative to housekeeping); *supra* note 129. Only about 15% of couples use any in-home paid help at all, which suggests that the “cash-paying” solution is not efficient for most couples, and thus matters little to our analysis here. See Bergmann, *supra* note 7, at 263 tbl.11-2.

<sup>189</sup> See *supra* note 186. For example, monetary side-payments will largely be confined to those affluent families in which most resources are not consumed in meeting basic needs and husbands have access to discretionary income that can be “kicked back” to the wife to make in-kind efforts worthwhile. In most families, however, money is short, so most transfers must be in-kind. The only way the husband can “compensate” his wife is by giving up his leisure or by making other concessions. (Some of those concessions might be sexual. See *infra* Section IV.A.3.)

Also, both the rejuvenation and flexibility arguments lose their force unless men’s freedom from responsibility raises total marital income (compared to the income under the sharing arrangement) enough to convince the woman, given her individual and joint shares, to agree to do most of the work. Such circumstances are most likely familiar only to upper-income bracket couples, for whom the nature of employment puts a steep premium on round-the-clock availability. See, e.g., Williams, *supra* note 3, at 2236 (describing the “dominant family ecology” of high status professional jobs, where the ideal worker can be away from home for more than twelve hours each day). Finally, the claim that men work at more stressful jobs is difficult to support empirically, as it is grounded in highly subjective preferences and requires a generalization over a range of diverse experiences. To the extent that there are durable measures of work-related stress, however, the evidence suggests that persons in low status, low control, or humdrum jobs experience more stress; it is women who are more likely to hold such jobs. See Spain & Bianchi, *supra* note 7, at 90-96 (discussing occupational trends of women); Shirley Fisher, Control and Blue Collar Work, in *Job Stress and Blue Collar Work* 19, 44 (Cary L. Cooper & Michael J. Smith eds., 1985) (concluding that “the blue collar worker should incur more distress at work”); Ben C. Fletcher, The Epidemiology of Occupational Stress, in *Causes, Coping and Consequences of Stress at Work* 3, 21-24 (Cary L. Cooper & Roy Payne eds., 1988) (citing studies that found higher levels of strain and stress among those in low occupational positions); Mahony, *supra* note 16, at 14-17 (discussing occupational sex segregation).

The main problem with the conclusion that some variation on the drudge-wife arrangement is Pareto-superior to sharing is that it fails to account for the sex bias in the data: Not only does the work-leisure gap in every study uniformly favor the husband on average, but it also does so in every family. It is exceedingly rare to find specific couples in the samples for whom the work-leisure gap is reversed. See sources cited *supra* notes 18, 21. Thus, the suggestion that money—or nonmonetary concessions—will routinely be used by one spouse to “compensate” the other for the extra effort represented by the work-leisure gap only begs the question of why wives are virtually never observed to use money or intangible concessions to compensate

the apparent inequalities of the drudge-wife situation, none provides any *guarantee* that the work-leisure imbalance will leave the wife as well off as other family members who benefit from her efforts.<sup>190</sup> On the contrary, there is a more compelling scenario: that a drudge-wife situation is Pareto-*inferior* to sharing—that is, it entails an absolute loss for the wife, with or without side-payments. The bargaining paradigm explains why this scenario is not just plausible but likely to occur in many cases: The wife consents to do more because she lacks the bargaining power to get a better deal. Thus, acting as a drudge is not, for the wife, Pareto-superior to sharing (or, for that matter, to a number of marital arrangements the couple could “rationally” adopt). Rather, it is better for the wife than the prospect of losing her husband. And although the husband who shares might also be better off doing half the work than losing his income-producing wife, his greater bargaining power allows him to avoid facing that choice.

## 2. Married Women's Labor Market Choices

The previous discussion suggests a diversity of answers to a question that has long engaged economists (and others): What determines whether and how much a married woman decides to work for pay?<sup>191</sup> The evidence suggests that married women who enter the workplace shoulder a greater burden of work than women who

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the husband for taking on more responsibility. Even if women are on average better at performing domestic tasks, it is difficult to believe that working women are so *uniformly* more domestically productive than their husbands, or that the flexibility or rejuvenation effects are so *uniformly* more valuable for men, that a reversed pattern is never more efficient for *any* family. Finally, the most powerful objection to such models is that there is simply no intramarital mechanism to *ensure* that, even if an unequal division of labor produces a surplus, enough of that surplus will find its way back to the wife to make her extra effort better *for her* than a more equal division of responsibility.

<sup>190</sup> For example, there is no guarantee that the husband's putative extra earnings due to the wife's greater domestic efforts will be distributed in the same manner. Indeed, existing evidence on the distribution and control of marital income suggests that, even when women make a significant contribution to family income, the husband still maintains greater control over discretionary spending and family finances. See *supra* note 11; *infra* note 220.

<sup>191</sup> See, e.g., Shelly Lundberg, Labor Supply of Husbands and Wives: A Simultaneous Equations Approach, 70 Rev. Econ. & Stat. 224 (1988); David Shapiro & Lois B. Shaw, Growth in the Labor Force Attachment of Married Women: Accounting for Changes in the 1970s, 50 S. Econ. J. 461 (1983); James P. Smith & Michael P. Ward, Time-Series Growth in the Female Labor Force, 3 J. Lab. Econ. 59 (Supp. 1985).

work exclusively at home. Certainly in some cases a woman may judge that the "positive utility" she enjoys from working for pay outweighs the greater burdens. The sources of such utility can include the woman's share of a larger family income; her vicarious interest in her children's greater economic well-being; her expected long-term payoff from career investment; the value of insurance against marital breakdown; the bargaining power gains from improving her extramarital prospects and contributing family income; and the psychological and social benefits of occupational endeavor and career advancement. Of the items on this list, the value of insurance against eventual marital breakup probably looms especially large in light of current divorce rates and may go a long way towards explaining many women's apparently costly labor market choices. But that factor will not necessarily explain all wives' decisions to work.<sup>192</sup>

It is tempting to assume that no wife will go out to work unless working makes her *personally* better off. (Many women are motivated by their desire to make their children better off, but such desire counts in the present model as a personal gain in the wife's welfare.) If a married woman is better off *not* working, why would she ever go to work? This question should be answered in light of evidence of ambivalence towards fathers and mothers in married-couple households both working full-time for pay. The data suggests that some working mothers would like to work fewer hours or not at all.<sup>193</sup> It is possible that women who say they would like to

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<sup>192</sup> For an article that finds a correlation between women's labor market participation and the availability of no-fault divorce, see Allan Parkman, *Why Are Women Working So Hard?*, 18 Int'l Rev. L. & Econ. (forthcoming 1998) (on file with the Virginia Law Review Association). Parkman finds that "living in a no-fault divorce state results in married women having four and a half hours less leisure and approximately the same amount of additional time devoted to work." *Id.* (manuscript at 11). He speculates that the increase in paid employment "is motivated by a desire for personal insurance against the potential costs of divorce rather than to increase [the] family's welfare." *Id.* (manuscript at 13). Nevertheless, women still "continue to provide substantial hours of domestic work" so as to "make their marriage attractive to their husband." *Id.*

<sup>193</sup> In a survey conducted by the Independent Women's Forum in 1996, only 13% of a random sample of male and female voters stated that both parents working full-time was their "ideal balance between work and family," and 36% of respondents said that one parent should stay home full-time. See Karl Zinsmeister, *Indicators: Home Life & Life Work II*, Am. Enterprise, July-Aug. 1997, at 16. Yet the majority of mothers of children under 17 work full-time. See *supra* note 19.

work less are not focusing on *net* benefits. Rather, they are focusing selectively on, and expressing regret over, the cost side of the ledger, which includes less time with their children and work overload, while selectively ignoring the compensating benefits (money, family power, relief from boredom) they receive from outside work. Perhaps what they are truly expressing is a desire for the benefits without the costs.

It is possible to imagine an entirely different explanation for this regret or ambivalence, informed by a scenario in which the woman's gains from working do not outweigh the personal costs to her: In that case, a housewife's move into the workforce will cause her to be *net* worse off within the marriage. A woman might work because her husband and family want more money—they want a bigger pie and believe her working will get them one—and she lacks the power to refuse them. But, as the bargaining model shows, a bigger pie does not necessarily translate into a bigger slice for the person who works to expand the pie. Indeed, depending on that person's bargaining position, she may find herself in a worse position.

How might this come about? Assume that a wife and husband agree that the family needs more money. They are faced with a dilemma: If the wife works, who will care for the children and run the home? These responsibilities, the couple might understandably resolve, will be adjusted after the wife begins her job. Assume, however, that they are never adjusted after all, or at least not much. The woman finds herself with more responsibility and less time. Her share of the family's larger income simply does not make up for her personal utility losses. Once she adjusts to this crunch (by delivering fewer or shoddier domestic services or delivering services less efficiently), the household may indeed be better off as a unit than before. But it may be worse off.<sup>194</sup> Regardless of whether the pie is larger or smaller (that is, whether the bargaining frontier moves out or in compared to the alternative of a single breadwinner household), the new equilibrium bargain may place the woman in a worse situation than she was in before. If there are net gains to the unit, most of those gains may go to other family members, with "assignment of the cost of increased economic

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<sup>194</sup> See *supra* Section III.B on the indeterminacy of efficiency consequences of wives working for pay.



benefits the whole family enjoys thanks to the wife's employment to her alone."<sup>195</sup> And even in the absence of net gains, the restricting of the bargain may shift the allocation of existing family resources away from the wife and towards other family members. In particular, the wife's paid labor may benefit the husband at the expense of others in the household. The husband may spend more of his income on personal pursuits, leaving his wife to pay household expenses previously paid out of his earnings alone.<sup>196</sup> And he may not mind the lower quality or increased disorder resulting from his wife's diverted energies, especially if those costs fall mainly on the children. Thus, despite a husband's rueful attention to the costs of his wife's working,<sup>197</sup> and *even if* the family unit might be worse off as a whole, a husband might actually want his wife to continue working because *his* gains outweigh *his* costs. This explains why women might work even though they really do not want to (in the sense that they would personally be better off if they did not). Their husbands want them to, and their husbands have the power to get their way.<sup>198</sup>

In the same vein, however, bargaining theory also explains why some women might not work even though they do want to. Suppose that a woman's going out to work would increase net returns to the household unit as well as make the woman, individually, better off. Assume further that the husband perceives that his wife's working for pay would make him individually worse off. He would

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<sup>195</sup> Pleck, *supra* note 29, at 284.

<sup>196</sup> See *infra* note 220 (describing how men's greater bargaining power enables them to force their wives to spend their earnings on the household while allowing men to sequester some portion of their own earnings for personal spending).

<sup>197</sup> See *supra* note 162 and accompanying text (indicating that men are aware of and express regret over the costs of wives working).

<sup>198</sup> Although he overstates his case and erroneously assumes that all married women who work are the "victims" of husbands who force them to do so, the conservative writer David Gelernter is not too far off the mark when he writes that

the typical husband would *always* have been happy to pack his wife off to work; he had no need of Betty Friedan to convince him that better income in exchange for worse child care was a deal he could live with. Society used to restrain husbands from pressuring their wives (overtly or subtly) to leave the children and get a job. No more.

David Gelernter, *Why Mothers Should Stay Home*, *Commentary*, Feb. 1990, at 25, 28; see also Maggie Gallagher, *Enemies of Eros* 45-48 (1989) (noting evidence that men increasingly are insisting that their wives work); David Gelernter, *Drawing Life* 90-98 (1997) (same).

then resist her decision to work. His greater bargaining power in the relationship, and the threat of his alienation or defection, might result in the wife's staying at home.

Finally, a housewife may recognize that working for pay could potentially carry some positive gains for her. But she might lack the bargaining power to force a reallocation of household responsibility that would make going out to work a net positive rather than a net negative move for her. If she could get other household members to change their ways, working would be worthwhile for her. But since she lacks the leverage to do so, she will find herself net worse off by going into the workforce and will choose to forgo the positive benefits of working that she might otherwise enjoy.

In sum, the wife's decisions about whether or how much to work are very much a function of her bargaining power within the marital relationship. And without an account of the reality of bargaining position, our understanding of workforce participation and other aspects of family decisionmaking must be incomplete. Side-payments and simple preferences can only be part of the story. Bargaining power is an essential part of the explanation for existing patterns. Husbands (and wives), like all "negotiators," will not compensate others for what they can take by threat. The insight that bargaining power affects distribution allows us to state what by now is obvious: Families can make adjustments towards efficiency—or, for that matter, towards inefficiency—in which one partner loses something, then loses more, and still more again. That the losing partner sticks around anyway should not surprise us. The loss of the bargain in its entirety would be even worse.

### *3. Love, Fear, and Fidelity*

Those who would object to the suggestion that spouses enjoy unequal welfare might also point to the impossibility of knowing the dominant motives that operate when one spouse's choices appear largely to vindicate the other's interests. The divorce threat model posits that the person with the worse fallback options will be influenced to some extent by the fear of the other partner's defection, with its consequences of diminished extramarital prospects and disproportionate loss of marriage-specific investments. Thus a wife will sometimes (and more often than her husband) do what is worse for her personally or what she does not want to do because

she fears the long-term consequences of getting her way in the short term. But how does one distinguish between striking a seemingly disadvantageous bargain out of a self-interested fear of defection, and engaging in the same activities out of love or an unalloyed interest in the welfare of others? A woman may be

interested in the welfare of her husband for his own sake, because she loves him, and for the sake of her children, because she loves them. She may therefore want to make a sacrifice for her husband or her children that is in the nature of a gift. . . . Or the point can be put differently. One might say that her utility is immediately increased by giving her husband or children a gift, so that the wife is getting an immediate return on her investment in the form of the gratification that comes from giving the gift.<sup>199</sup>

The gift story is undoubtedly true in many cases, and the bargaining framework does not rule out pure generosity as an important motive in family life. Furthermore, husbands as well as wives undoubtedly give gifts in many forms. Working husbands, after all, give by allowing family members to share in their earned income.<sup>200</sup> But working women choose to give in that form, too. So why do women systematically give so much more than men in the form of domestic effort or work time? If altruism without expectation of reward dominates in the marital calculus, its effects ought to balance out by sex, in the absence of a theory as to why they do not.<sup>201</sup>

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<sup>199</sup> Schneider, *supra* note 63, at 212; see also Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 Cal. L. Rev. 821, 823 (1997) (defining a gift as "a voluntary transfer that is made, or at least purports to be made, for affective reasons like love, affection, friendship, comradeship, or gratitude, or to satisfy moral duties or aspirations like benevolence or generosity, and which is not expressly conditioned on a reciprocal exchange").

<sup>200</sup> As previously suggested, see *supra* Section III.D, there is evidence that some men give gifts in the form of voluntary "forbearance" to press as hard a marital bargain as they might—although it is suggested that love does not carry the full freight here and that forbearance is confined largely to circumstances in which social conventions are on a woman's side.

<sup>201</sup> Although women may choose more often than men to express their altruism towards their families by providing direct domestic services, working women have obviously not chosen this as their primary mode of contribution. Unless women are generally more altruistic than men (as opposed to simply different in how they choose to channel altruism), it is not easy to explain observed patterns of effort and reward. See *supra* note 133.

Yet another way in which the typical snapshot of the utility/disutility balance within marriage may be deceptive is in discounting or overestimating the value of certain elements of the marital bargain for men or women. For example, there may be subjective, hidden costs to men—and, more tentatively, benefits to women—from marriage that flow from the conventional expectation of sexual fidelity. Men and women may place a different value on sexual variety—a difference that could have biological roots.<sup>202</sup> Men may experience the sexual exclusivity expected within marriage as more of a burden, while women may gain more from sexual continuity and security.

There is yet another way in which average differences in men's and women's sexuality might have implications for bargaining power within marriage. Although the "law of sexual scarcity" for men has eased somewhat in recent years—in that it has become easier for men to find sexual outlets outside of marriage<sup>203</sup>—the greater urgency of male sexuality may mean that controlling access to sex within marriage is a more potent bargaining tool in the hands of women than of men. Certainly, sexual withholding is sometimes mentioned (although rarely written about) as a unique source of women's power in marriage, and it is tempting to conclude that it serves as a counterweight to male advantage in other sources of power. But the tactical advantages of sexual withholding for women are almost certainly minimal. First, a wife who deprives her husband of sex may also deprive herself. Second, sexual withholding is a risky strategy because it may induce extreme dissatisfaction, or even anger, in men.<sup>204</sup> Like sexual infidelity, it may destroy "marital capital" wholesale, dramatically reducing the value of the marriage for the other partner in a manner that is often difficult to calibrate or control. Thus, it represents a potentially high risk strategy that is as likely to lead to divorce as to a viable

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<sup>202</sup> See David M. Buss, *Evolution and Human Mating*, 18 *Harv. J.L. & Pub. Pol'y* 537, 544 (1995) (discussing evidence of male desire for sexual variety); Robert Wright, *The Moral Animal: The New Science of Evolutionary Psychology* 33-92 (1994) (same).

<sup>203</sup> See *supra* Section II.D.3.a; *infra* note 338.

<sup>204</sup> See, e.g., David M. Buss, *Conflict between the Sexes: Strategic Interference and the Evocation of Anger and Upset*, 56 *J. Personality & Soc. Psychol.* 735 (1989) (reporting, based on responses to theoretical questionnaires, that sexual withholding by wives elicits most extreme expressions of anger and dissatisfaction from husbands).



bargaining advantage. Finally, because relatively little is known about the conduct of marital sexual relations (apparently one of the last taboos), it is unclear whether, in actual fact, male sexual deprivation within marriage is a greater problem—and female withholding a more common tactic—than female sexual deprivation and male lack of interest. Also, many women may be neither willing nor able to engage effectively in this ploy.<sup>205</sup>

The expectations of marital exclusivity and fidelity, goes the argument, can more plausibly be seen as adding more to the cost or minus side of the marital ledger for men, thus decreasing the sum total of their intramarital well-being. This cost to men must be subtracted from the other resources and benefits they enjoy in the net utility calculus. When the psychic disutility of sexual fidelity is added to what men otherwise get from marriage (and the psychic utility of sexual security perhaps taken into account for women), there is less inequality in men's and women's share of marital utility than meets the eye. By this analysis, the fidelity differential does not exacerbate inequality, but reduces it.

But there is an alternative way of viewing the effect of the fidelity factor. Negative utility attached to fidelity within marriage can alternatively be viewed as positive utility attached to the opportunities for sexual adventure outside it.<sup>206</sup> By raising men's premarital or extramarital threat point or reservation price relative to women's, enhancing these opportunities narrows the possibility for equality in the distribution of the other resources of marriage, and potentially *exacerbates* the problem of inequality of shares. Men would demand an even greater share of the net pool within marriage to bring them above their reservation price for entering into marriage in the first place. Because men's compensating share must come

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<sup>205</sup> Douglas Allen and Margaret Brinig argue that whether the willingness to accommodate the other partner sexually, or the threat not to, can serve as a bargaining chip for one spouse depends on the spouses' relative level of interest in and demand for sex within the relationship. They speculate that the relative level of interest changes during the course of the relationship as a function of each spouse's age, with men's demand for sex generally exceeding women's during the earlier and later periods of marriage, but women's exceeding men's during the middle period. According to their analysis, a lower demand for sex creates a "property right" that can be traded away for other concessions or to forestall divorce. See Douglas W. Allen & Margaret Brinig, *Sex, Property Rights, and Divorce*, 5 *Eur. J.L. & Econ.* 211 (1998).

<sup>206</sup> See discussion *infra* Section V.F on changes in social conventions regarding premarital and extramarital sex.

out of other elements of the bargain that are up for grabs, the fidelity differential will drive inequality in other spheres.<sup>207</sup>

What is the best way to understand the fidelity factor? The analysis that treats men's relative preference for sexual variety as tending to produce inequality rather than equality in marriage relies upon a framework similar to that evident in the egalitarian convention: It views persons' prospects outside the relationship as external to, rather than as built into, the concept of an egalitarian marriage. This view is critically dependent on accepting a particular baseline for measuring equality of welfare. In addition to incorporating assumptions as to baseline, the framework put forward here also depends on adopting a utility metric and accepting a role for certain tastes or preferences as contributing to, or detracting from, equality.<sup>208</sup> Is this approach justified, or are there better ways to assess the balance of marital relations?

### *B. Equality in Theory?*

#### *1. The Lessons of Bargaining Theory: Egalitarian Marriage as Heuristic*

To understand marriage as a bilateral bargaining relationship is to position it within a category of interactions taking place in widely varying social contexts. The puzzles posed by these relationships have much in common.<sup>209</sup> There are no universally

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<sup>207</sup> The British antifeminist author Geoff Dench sees the exchange value of male fidelity as central to the explanation of observed patterns of effort and reward in male-female relationships. According to Dench, "on the issue of sexual possession most men feel no less and probably much more, trapped than women do. Men would say that it is they who are 'giving' most in a relationship which requests mutual fidelity." Geoff Dench, *Transforming Men* 228 (1996). Elsewhere he states that "[i]t may well be that most women are still prepared to carry a double load of domestic work, in return for male fidelity." *Id.* at 229.

<sup>208</sup> See discussion *infra* Section IV.B.2.

<sup>209</sup> For a general discussion of these issues in the context of bargaining generally and off-market monopolistic bargaining in particular, see Coleman, *supra* note 142; Wertheimer, *supra* note 32; Young, *supra* note 46; Gauthier, *supra* note 46; Harrison, *supra* note 10; see also Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 *J. Legal Stud.* 203 (1997) (examining settings in which nonmodifiable contracts might enhance contractors' welfare); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 *U. Pa. L. Rev.* 1913 (1996) (examining the coexistence of self-enforcing systems of norms and state-enforced contracts); J. Hoult Verkerke, *An*

agreed-upon principles for fair transactions and no unproblematic criteria for equality of bargaining power within exclusive long-term relationships,<sup>210</sup> just as there is no uncontested theory of a just or equitable society as a whole.

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Empirical Perspective on Indefinite Term Employment Contracts, 1995 Wis. L. Rev. 837 (offering an empirical investigation of bargaining for just cause protection).

<sup>210</sup> A complete treatment of the question of whether marriage is exploitative is far beyond the scope of this Article. Nonetheless, the characteristics of marriage explored herein would suggest at least the possibility of an affirmative answer for some who have attempted to define exploitative relationships. For example, Alan Wertheimer and Joel Feinberg have argued that mutual gains from a relationship are not inconsistent with a claim of exploitation, and coercion and duress are not necessary concomitants. Wertheimer, note 32, at 251 (citing Joel Feinberg, *Harmless Wrongdoing* 176 (1988)).

The philosopher David Miller suggests that there are two criteria for an exploitative transaction:

First, the transaction must typically be more advantageous to the exploiting party and less advantageous to the exploited party than some benchmark transaction which we use (tacitly or explicitly) as a point of reference. Second, the actual transaction must have come about through some special advantage which the exploiter enjoys, upon which he capitalizes to induce the exploited to engage in this relatively less beneficial exchange.

David Miller, *Exploitation in the Market*, in *Modern Theories of Exploitation* 149, 156 (Andrew Reeve ed., 1987). If equal shares of welfare is the benchmark, and if better extramarital prospects constitute a "special advantage," then marriage could be exploitative. Both criteria, however, stand in need of further justification.

From the point of view of marriage as a form of relational contract, resolving the question of whether marriage is exploitative requires deciding whether changes in the marital status quo that are induced or motivated by the possibility of the other spouse's defection are to be regarded as valid or legitimate modifications. The answer to that question may partly turn on whether the ongoing agreement not to abandon the marriage is to be regarded as fresh consideration for the other party's otherwise unremunerated concessions. How that question is resolved may, in turn, depend on whether there is some basis for deciding that the promise not to abandon the marriage is a constitutive part of the agreement to marry in the first place. It is on the last point that claims that marriage is inherently exploitative potentially founder. Under the domestic law in operation in most states, which permits partners to call the contract off without incurring the types of penalties that would ordinarily be appropriate for a breach of contract for continued performance, there is little basis for inferring that either partner has made a formal *legal* promise to remain in the marriage indefinitely. For this reason, one partner's agreement to stay on would appear sufficient to support any sacrifice on the part of the other spouse. Thus, any claim that concessions motivated by the fear of defection, or concessions extracted by the threat of defection, are exploitative must find support in the realms of convention, morality, or social understanding. See, e.g., Eric Rasmusen & Jeffrey Evan Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *Ind. L.J.* 453 (1998); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 *Va. L. Rev.* (forthcoming Nov. 1998).

The idealized criteria for an egalitarian relationship suggested in this Article include a utility metric and a benchmark of equal maximum percentage utility. Equality of division is measured from a baseline marital pool that employs a "worldly goods" assumption. The partners bargain over everything they have, with nothing held back. For the most part, their preferences and tastes are taken as exogenous—although not all preferences have the same status within the egalitarian model.<sup>211</sup>

As suggested in the previous Section, the framework advanced here—especially in its use of the working definition of an egalitarian relationship—is concededly vulnerable to challenge in a number of respects. Before engaging in further discussion of the problematic aspects of the analysis, however, it is best to review the strengths of the bargaining model in general and of combining that model with a notion of egalitarian marriage in particular. This analytical framework powerfully illuminates certain fundamental principles of allocation between family members that would otherwise be unexplored or poorly understood. What have we learned from the discussion so far?

#### *a. The Fallacy of Compensatory Exchange*

First, the bargaining analysis adopted here decisively scotches the notion that a viable marriage is one in which each partner must be as well off, or gain as much from marital transactions, as the other. One spouse can start out better off outside the marriage and once married continue to be better off.<sup>212</sup> Indeed, it is precisely be-

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<sup>211</sup> See *infra* discussion Section IV.B.2.

<sup>212</sup> This point requires recognition of the difference between baseline utility or well-being, and gains therein. Attempts can be made to compare baselines or, alternatively, utility gains as between persons. Here, the argument is that men's higher extramarital baseline confers the ability to bargain for larger increments in utility over baseline. Put another way, because women have a greater desire to be married, they get less of what marriage has to offer. An analogy can be drawn to the relationship between an unemployed subsistence factory worker and a business owner. The unemployed worker's baseline well-being is extremely low. Precisely because of his dire straits (which make him desperate to raise his baseline well-being, even if only slightly), his bargaining position is weak. He is willing to accept quite a low wage (which represents his portion of the productive surplus generated by his work for the owner). The owner, who starts out from a higher baseline, is in a far better position to do without the worker than the worker is to do without him. This gives him the leverage to garner the lion's share of the productive surplus. It is tempting to conclude that for



cause the better-off spouse (in general, the husband) starts out ahead that he can garner the lion's share of what the relationship has to offer. The more favorable baseline confers bargaining strength, which translates into ownership of a greater portion of the gains. The coupling of a higher baseline with greater gains for men helps explain the seeming paradox of the folk wisdom that women often appear relatively eager, and men relatively reluctant, to marry despite evidence that marriage boosts men's well-being more than women's.<sup>213</sup>

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someone who starts out with a lower baseline well-being, the marginal utility of a single quantum of sought-after benefit or resource will be greater for that person. Indeed, Alan Wertheimer seems to accept this assumption. See Wertheimer, *supra* note 32, at 64-70. Although this may be true for *money* (which has diminishing utility as the level of *wealth* rises), it is not necessarily true of other types of resources. The marginal utility of a particular asset or benefit transferred to a person bears no necessary relation to the baseline utility from which that person starts out. See, e.g., John C. Harsanyi, *Interpersonal Utility Comparisons*, in *The New Palgrave: Utility and Probability* 128 (John Eatwell, Murray Milgate & Peter Newman eds., 1990); see also Steven Croley & Jon Hanson, *The Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 Harv. L. Rev. 1785, 1814-16 & n.103 (distinguishing between baseline utility and increments in utility and explaining that it is possible for persons with lower levels of well-being to experience smaller marginal utility gains from receiving certain quantities and types of resources). In any event, the ways in which the amount of utility gained from a fixed allocation of resources might relate to baseline starting points has little to do with the posited disparities in marital well-being, which are based on differences in utility that assume no particular distribution of resources. Rather, those disparities are simply a function of the initially better-off spouse's ability to bargain for a greater share of utility from the pool.

<sup>213</sup> See Linda J. Waite & Glenna D. Spitze, *Young Women's Transition to Marriage*, 18 *Demography* 681 (1981); see also Waite, *supra* note 40. Married men are notably better off than single men on measures of physical and mental health, life expectancy, occupational success, and earning power. The difference between married and single women on these parameters is far less pronounced. This pattern may reflect men's ability to garner the lion's share of the marital surplus when marriage does occur.

Men's large gain in well-being from marriage makes their supposed reluctance to marry seem puzzling, but that reluctance may be explained by men's higher "baseline," which in turn is attributable to men's far longer reproductive life and the availability of extramarital substitutes for much of what men seek from marriage. See *supra* Section II.D.3.a. The lack of urgency that men seem to feel about marrying, despite its benefits for them, may also reflect the nature of many of marriage's benefits for men. Married men are healthier and earn more, but those gains are long-term and cumulative. Because it is hard for the individual on the threshold of marriage to appreciate and assess these effects, men may tend to overestimate the benefits of remaining single, while underestimating the benefits of getting married.

Bargaining theory also helps explain why men might fear divorce less than women though marriage is a better deal for them. Bargaining theory predicts that men would value *being married*, whereas women would value *staying married*. Even if men gained disproportionately from any "positive-sum" relationship, they would still typically place a lower value than their wives on the particular marriage they happen

Bargaining analysis also cautions against indulgence in what might be termed the fallacy of compensatory exchange. As the discussion of the drudge-wife scenario demonstrates,<sup>214</sup> it is tempting to assume that any marriage that is a viable going concern will consist of a series of Pareto-superior intramarital deals or exchanges in which no partner loses ground over time, and all compromise takes place from a starting point in which both spouses share equally in surplus-producing decisions. Without this condition, what reason would the partners have to consent to any specific marital sub-deal?<sup>215</sup> But this is obviously all wrong. In the evolution of any marriage, one spouse's contribution need not be matched by the other's, and one spouse can lose ground absolutely compared to where that partner, or the other, started out within the relationship. All that is required for the marriage to remain feasible as between rational actors is that the deal struck be better for both partners than calling the deal off. This is perfectly consistent not only with one partner being chronically locked into a worse position than the other, but with her position relentlessly deteriorating over the course of the marriage.<sup>216</sup>

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to be in presently because they have a better chance of finding a replacement mate. Women would place a higher value on any existing marriage, because their chance of finding a replacement is smaller (and grows ever smaller with time).

<sup>214</sup> See *supra* Section IV.A.1.

<sup>215</sup> This type of logic appears to inform Ira Ellman's landmark article on alimony, in which he takes the position that alimony should not take into account the balance of costs and benefits incurred during the life of the marriage. Ellman, *supra* note 63. Ellman writes that "a spouse who finds the intact marriage unsatisfactory, because the 'current exchange' seems unfair or for any other reason, has the option of leaving the marriage." *Id.* at 280. He goes on to assert (somewhat contradictorily) that when "financial expropriation" continues within an ongoing marriage, it must be the case that "the apparent victim is receiving some compensating financial or nonfinancial benefits from the marriage." *Id.* Nevertheless, "[t]he availability of exit" means "we need not worry about imbalances in the exchange during the marriage." *Id.* at 280-81. But it is precisely because of the availability of exit that we *do* need to worry about imbalances of intramarital exchange.

<sup>216</sup> See *infra* Section IV.C (discussing the "bargaining squeeze"). This point about the application of the bargaining paradigm to marriage is consistent with the lessons of game theory generally, which show that "repeated play can sustain equilibria in which people do very bad things to each other." Andrew Rutten, *Anarchy, Order, and the Law: A Post-Hobbesian View*, 82 *Cornell L. Rev.* 1150, 1158 (1997). Indeed, the correct statement of the major result in the theory of repeated games is that repeated play allows virtually any payoff to be an equilibrium outcome. In other words, anything can happen in a repeated game. The reason is simple: when people work together, they generate a surplus over what they could

*b. The Shadow of the Market and the Measure of Value*

On a more specific level, the bargaining framework set forth here has the additional virtue of laying bare the hidden importation of market values into the marital bargain. Consider an objection that could be leveled against one aspect of the analysis: the marital pooling condition, which assumes bargaining over all individual assets, net of utility costs. Implicit in this condition is the assumption that unequal sharing or access to monetary income potentially represents a deviation from the egalitarian condition.<sup>217</sup> But men on average earn more than women, and most husbands earn more than their working wives.<sup>218</sup> At the very least, it could be argued, it is fair for wives to work longer hours to obtain access to an equal share of their husbands' greater income.<sup>219</sup> Put another way, perhaps the better method of achieving equality would be for couples to commingle equal amounts of earned income, withholding any excess for their own exclusive use. One spouse would share his or her excess only upon the condition that the other make additional contributions.<sup>220</sup> But to posit a swap of extra earned income for ex-

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achieve on their own. This surplus is the point of working together. However, there is no natural way to divide the surplus; as long as each player gets more than she would get by working alone, she is better off working with others.

*Id.* (citations omitted).

<sup>217</sup> Of course, the presumption will often be rebutted, since the metric of equality in the model is utility gain, not control over income. Not every instance of deviation from strict equality in income-sharing is inequalitarian. Nor is every deviation from strict equality in time devoted to work activities. Individual couples may have different utility functions for money, just as they have different preferences for work and leisure. But a population-wide pattern of wives' chronic inequality of access to husbands' income (despite wives' equal or greater work hours), like a pattern of wives' chronic inequality of work time, raises suspicions of structural inequality of access to these resources, for there is no reason to expect gender bias *on average* in preferences for control over money and leisure. In "equal power" relationships, the distribution of these resources between the sexes, although subject to variation across relationships, would be expected to balance out in the aggregate.

<sup>218</sup> See *supra* note 20.

<sup>219</sup> The marital pooling assumption seems especially strained in extreme cases in which husbands hold vast fortunes. If Bill Gates fails to share all his holdings with his wife, does he then fail at egalitarian marriage? Even if he does, can he hope to have an egalitarian marriage on our description? As noted, however, see *supra* note 54 and accompanying text, this Article concerns itself primarily with marriages that do not represent such extremes.

<sup>220</sup> The evidence that wives do not always have effectively equal control or access to family income, see *supra* note 11, can be interpreted as reflecting the outcome of bar-

tra hours of domestic service is in effect to abandon a measure of marital balance in terms of individual net utility, and to adopt a market measure of the worth or value of contributions in marriage. A spouse's insistence upon being excused from domestic responsibility because of greater earning power represents the ultimate intrusion of the metric and ethos of the market into the precincts of private marital relations, which are supposed to be sheltered from the market's crass demands. But, as we have seen, the adoption of such a market measure, at least to the extent it influences allocation of the *bargaining* surplus, is a choice, not an economic necessity. To suggest that a man would be justified in refusing to contract, or in calling off, a marriage in which his extra earnings were not matched by his wife's extra domestic effort is to say nothing more than that he will use his superior bargaining power to extract an exchange based on signals from a market that stands outside that relationship. He elects to ground his marital relations in market-based values.

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gaining over total family income, or it can be viewed as the result of men's violation of the pooling condition by holding back a portion of earnings for their own exclusive use. See *supra* Section II.D.1 (discussing pooling conditions and "holding back").

There is evidence that working for pay increases women's control and access to marital income although it rarely equalizes it. See, e.g., Alstott, *supra* note 6, at 2027-28; Marjorie E. Kornhauser, Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax, 45 *Hastings L.J.* 63, 90 (1993); Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 154-55 (describing evidence for the "kids-do-better" hypothesis, in which women's monetary earnings are correlated with higher family expenditures on women and children). Although this increased access could be viewed as part of a marital exchange in which increased access functions as a side-payment or extra reward to compensate for work overload, see *supra* Section III.B, the better explanation is that working for pay increases women's bargaining power. But although earning power may provide working women with more potential control over spending than housewives, women's market efforts will not necessarily equal control because, as noted, men have other sources of bargaining power. Indeed, in some cases, a husband's greater bargaining power may translate into a woman's loss of control over her earnings. See Marjorie Kornhauser, *Theory vs. Reality: The Partnership Model of Marriage in Family and Tax Law Versus Intra-Household Allocations*, 69 *Temp. L. Rev.* 1413, 1430-31 (1996) (describing a family in which all child related expenses, including "the au pair, baby clothes, baby toys, uncovered medical bills, etc.," were paid out of the wife's smaller income, with money for any additional expenditures to be "requested" from the husband). Moreover, if greater control over income functioned as a "reward" for role overload, one would expect to see women with the greatest role overload exercising more control than women in "sharing" families. Whether this pattern obtains requires empirical investigation.



*c. What Does a Woman Want? or From Choices to Preferences Revisited*

The insights of bargaining theory, when combined with the working definition of egalitarian marriage adopted here, also reveal a broad set of misconceptions about what lies behind couples' ordering of their affairs and, more importantly, about the relationship between preferences and choices in and outside of marriage.

First, by highlighting the potential influence of external threat advantage on the bargain that is actually struck, the bargaining paradigm shows that observed patterns of marital behavior may have as much to do with women's desire to remain married and to hang onto their husbands as it does with the actual intrinsic tastes and preferences for, and costs and benefits of, the elements of the marital bargain itself. Marriage is widely valued because it is potentially a positive-sum game. There are reasons why women may value playing this game even more than men and why they may be loathe to lose the relationships in which they find themselves. This all-important "threat" factor is often pointedly left out of the highly idealized accounts of divisions of marital responsibility. Those accounts often attempt to explain women's choices as grounded exclusively and straightforwardly in their intrinsic skills and tastes for domestic activities. But that explanation is radically incomplete. That women do not mind shouldering the domestic responsibility as much as men do, or that they do it better, does not explain why they do so much of it, for they would still rather not. Fear of the consequences of doing less completes the account.

The bargaining paradigm helps clarify the true relationship between choices and tastes. The disparity in bargaining power is based in some part on mean differences in men's and women's preferences or tastes. But there is a careless way of discussing those differences, uninformed by bargaining constraints, that provides a highly misleading and radically incomplete account of why women and men do what they do. To tell the truth about men and women, one needs to tell the truth about the way in which marriage forces men and women to engage in bilaterally monopolistic bargaining that differentially circumscribes the option set from which they choose. Simple-minded attempts to link preferences with observed choices do little to explain why responsibilities and privileges are distributed as they are, and they ignore the problems of free riders.

holdups, and defection threats that distort the payoffs within a bargaining game.

Recall the Parable of Neat and Slob.<sup>221</sup> Neat likes a clean apartment more than Slob does. Because they are forced to live together, Neat bears all the costs of a clean apartment, while both enjoy the benefits. An outside observer is tempted to reason back from behavior to preferences. He infers that Neat "prefers" to clean and "prefers" a clean room, and that Slob "prefers" to study and "prefers" a messy room. But neither of these statements is true. Slob prefers a clean room to a messy one, just as Neat does. And for his part, Neat would rather Slob clean the apartment. Moreover, Neat's performance of all of the housework cannot be explained as a joint effort to maximize efficiency. That Neat gets more positive utility than Slob from a clean apartment does not necessarily mean that it is more efficient for Neat to do the cleaning. That depends on what Slob does instead; he might be, for example, watching television. Even if the reason Neat cleans *first* is that he gets less disutility from cleaning than Slob (so that having Neat rather than Slob clean increases overall net utility), that does not explain why Neat cleans. He does not clean *because* it is more efficient for him to do so. Rather, he would be quite happy to foist the job on Slob even if that would result in less gain to the unit overall.

So far, the simple story of what Neat and Slob want does not take into account the influence of exit threats. Now suppose that Neat threatens to leave the apartment, sticking Slob with the entire cost of the rent, unless Slob takes on full responsibility for cleaning the apartment. Further suppose both roommates know that it would be impossible for Slob to find another roommate for the balance of the semester. One would not be surprised to learn that, in such circumstances, Neat no longer cleans the apartment. Rather, Slob would do all the work, and Neat would study in a clean apartment. One might say that Neat "prefers" to study, while Slob "prefers" to clean, but that conclusion would be as nonsensical as its converse. To say that one party "prefers" cleaning confuses a desire to gain the benefits of having an activity performed with a desire to perform it. Under the threat and non-threat scenarios, both parties have in common that they benefit

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<sup>221</sup> See *supra* Section II.D.3.c.

from the results of cleaning. Both understand that cleaning imposes costs. Both would prefer enjoying the benefits alone to enjoying the benefits while incurring the costs. Who will get his way?

As the Parable of Neat and Slob illustrates, the confusion inherent in the usual way of speaking of men's and women's choices in marriage is compounded by the fact that intrinsic preferences and the allocations forced by the bargaining dynamic (including the extrinsic differential threat of exit) often point in the same direction. Women might value the fruits of domestic labor more and might mind doing it less (although they still mind). They might have more exacting standards for the duration and quality of parental care (although they may be largely indifferent as to which parent provides it). But it does not follow that women would not choose a different bargain—one in which the allocation of costs, benefits, and responsibilities was more favorable to them—if they could only get it. The fact that they often cannot is related to their preferences, but only indirectly. It is related to the manner in which their preferences interact with the structural features of marriage as a bilateral and exclusive monopoly and the rules for exit from, and intervention in, marriage as ordained by law.

Where there are cost-benefit tradeoffs between bargaining partners, there is always another, better bargain that each partner could conceivably procure.<sup>222</sup> Each partner could always get a larger slice of the pie. It follows that there is always another more

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<sup>222</sup> This situation follows from the most basic structural feature of a bilateral bargain to split a fixed pie. If the bargainers differ in their preferences or utility functions, one party's gains will entail losses for the other. Whether more or less depends on how much those utility functions differ or overlap—which is determined in turn by the degree of mutuality, commonality, and love within the relationship. But none of those can completely abolish the need for tradeoffs or a role for power. See *infra* Section IV.B.1.d. As Alan Wertheimer explains it:

[T]here is an important sense in which any marginal gain to one party within the zone of agreement is indeed at the other party's expense: while the parties may prefer any outcome within the zone of agreement to the nonagreement solution, they are not indifferent to the distribution of the social surplus within the zone of agreement. Each would prefer a price that is furthest from his or her reservation price. And any movement away from one's own reservation price is, in that sense, at the other party's expense.

Wertheimer, *supra* note 32, at 21 (footnote omitted). A more piquant observation on the situation is offered by Rebecca West, who stated that "the great enemy of feminism is that men don't like housework and women don't like housework." Leslie Garis, *Suburban Classic*, Ms., July-Aug. 1987, at 142, 142 (putatively quoting Rebecca West).

favorable bargain that each would like to have, but might lack the leverage to obtain. In the words of Susan Okin, a division more favorable to the other side will be resisted by those who "do not want [it], and are able, to a very large extent, to enforce their wills."<sup>223</sup> Thus, doing what one wants to do in a bargaining situation is always a comparative concept. If the act of providing a benefit imposes costs on one partner, that partner will want to provide less of it. If the result of a benefit being provided favors one partner, she will want more of it to be provided, but preferably by another. As between two partners, the relative magnitude of costs and benefits does not matter as long as the net calculus points in the same direction: Each would rather free ride. That calculus will be reflected in each partner's preferred ordering of bargained-for deals.

The effects of bargaining constraints on bargaining partners' choices are parallel to the effects of tax policy on married women's labor force participation, which have been described by Edward McCaffery.<sup>224</sup> McCaffery accepts that men and women have different exogenous preferences for employment, as revealed by a "greater [work] elasticity among married women" and a greater interest in part-time work.<sup>225</sup> But the choices men and women make, given those preferences, depend critically on a system of taxation that taxes second-earner incomes at a much higher rate than primary breadwinner's earnings. By attaching consequences to work that "push[] men to work more and many women to work less," the tax system "perpetuates social stereotypes" about what men and women really want.<sup>226</sup> Yet, under a different tax system, men and women might make very different choices that provide far less support for those stereotypes.<sup>227</sup> The same can be said about men's

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<sup>223</sup> Okin, *supra* note 32, at 153.

<sup>224</sup> See McCaffery, *supra* note 186; Edward J. McCaffery, *Equality of the Right Sort*, 6 *UCLA Women's L.J.* 289, 306-17 (1996).

<sup>225</sup> McCaffery, *supra* note 224, at 316.

<sup>226</sup> *Id.* at 317. McCaffery makes a similar although less straightforward point about how women's choices are influenced by the paucity of "quality" part-time work options in the labor market, which he describes as a form of market failure. McCaffery, *supra* note 186, at 619-22.

<sup>227</sup> McCaffery faults Richard Epstein and others for "repeatedly point[ing] to free 'choices' as being responsible for whatever observed inequalities we see. How can we make men and women change if they don't seem to want to?" McCaffery, *supra* note 224, at 316. Epstein has commented that "[i]f individuals do have different natural endowments, then the system of voluntary arrangement should reflect those



and women's choices in marriage. Within a very different institution—or outside of the institution altogether—men and women might behave quite differently than they do, and we might speak about “what they want” in very different terms. But the situations in which men and women find themselves militates decisively against different choices.

*d. The Ineluctable Role of Power*

Feminists are sometimes accused of distorting the “true” nature of marriage by viewing power as a key determinant of relations between the sexes.<sup>228</sup> This recasting of an age-old institution whose guiding principles are supposed to be cooperation and affection is criticized as sinister and destructive. Although no one denies that some actual relationships fall short of the mark, the attainable ideal of a “good marriage” is thought to be one in which the assertion of power has no place and no explanatory role. Power simply falls out of the picture as a meaningful component of a “good marriage” as it is commonly understood.

The modeling of marriage as a bargain teaches that this ideal is hopelessly unrealistic. Feminists who assert that power is an ineluctable feature of marriage may be guilty of subversive demystification, but they are not wrong. When the interests of two individuals fail precisely to coincide, there is potential for conflict. Even the very best marriage is marked by some degree of con-

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differences,” thus implying that tastes and dislikes are the exclusive source of family divisions of labor, and that bargaining leverage has nothing to do with it. Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 Harv. J.L. & Pub. Pol’y 331, 340 (1995). But Epstein candidly admits elsewhere in the same article that there is a “risk of exploitation . . . present in marital arrangements” because a typical husband is in the position to “extract most of the gains from the marriage, even if the wife is better off than she would have been if the marriage had never taken place.” *Id.* at 344. This concession evinces an understanding of the central insights of bargaining theory. Unfortunately, Epstein does not identify the forces and structures that determine how gains within the family will in fact be allocated. Nor does he expand on the point that those with a better fallback position within and outside of marriage have more power to get their way within their relationships.

<sup>228</sup> Ruth Wisse, a Harvard literature professor critical of feminism, has recently stated: “By defining relations between men and women in terms of power and competition instead of reciprocity and cooperation, the [women’s] movement tore apart the most basic and fragile contract in human society, the unit from which all other social institutions draw their strength.” Ruth R. Wisse, *On the Future of Conservatism*, *Commentary*, Feb. 1997, at 41, 42.

flict—not in the overt sense of acrimonious disagreement, but in the sense that both partners cannot simultaneously maximize the satisfaction of *all* their preferences and desires. When both partners cannot win, what determines who gets his or her way and who gives way? In a bargaining relationship, the answer is bargaining power.

Certainly the participants in a good marriage have many goals, desires, and tastes in common. There are large areas of endeavor in which conflict is absent because the couple is of one mind: Priorities overlap, and agreement is complete and absolute. And then there is love, which can transform the fulfillment of another person's wishes and desires into one's own. But although conflict may be uncommon in some relationships, it is never absent. At some point, individual interests assert themselves. As long as the spouses are *in any way* distinct persons with distinct goals, there will be conflict in marriage.

The bargaining paradigm predicts that conflict will be resolved against women more often than against men. To be sure, women are not wholly powerless within marriage. That they will get their way less often than men does not mean that they never will, nor does it mean that men will never have to relinquish their objectives or do things they do not want to do. Moreover, an individual woman may be very powerful, both absolutely and relative to her husband. The point is that women as a group have fewer of the traits and assets that confer power within private consensual relationships. Their power is idiosyncratic, not structural. Indeed, many individual attributes that confer power within relationships could be expected to balance out between men and women: For every woman who is physically beautiful, gracious, tenacious, or intimidated by displays of emotion, there is a man with similar traits (although those people may not be married to each other).<sup>229</sup> But

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<sup>229</sup> In measuring marriage against an egalitarian ideal, one can imagine three possible situations: (1) equality case by case for each marriage; (2) a range of more or less lopsided marriages, arrayed on a bell curve that measures imbalance in favor of one or the other sex, but with no clear sex-based skew overall; or (3) a distribution of imbalance in relationships, but with more relationships favoring members of one sex and favoring them to a greater degree (which this Article asserts is the prevailing pattern, in favor of men).

The great diversity among individuals who enter into marriage and the heterogeneity of coupling suggest that the realization of the egalitarian ideal for each individual

when potential sources of power are considered over the population as a whole, a structural advantage emerges over and above the individual variation, and that advantage favors men. Women are, on average, *relatively* powerless, which means that, on the occasions when compromise is called for, it is women who will end up compromising more often.

This conclusion holds regardless of whether women tend to be more deferential than men. Indeed, the point stands even if we indulge every hoary stereotype about "difference" and accept for the sake of argument that the average woman is more deferential, altruistic, and averse to conflict than the average man.<sup>230</sup> Even if we assume that women defer to their partners more often than men because they want or "prefer" to (in the sense that they "get positive utility out of it"),<sup>231</sup> that does not exclude the distinct possibility that women also defer more often than men *even when they do not*

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couple—represented by the first possibility—is an unrealistic aspiration. The differences between people who marry each other are bound to give rise at the individual level to disparities in the factors that confer power within relationships. Although the elimination of the extremes of such individual disparities is in itself desirable, this Article is centrally concerned with inequalities of bargaining power within relationships that correlate systematically with sex.

A consideration of homosexual unions clarifies the importance of distinguishing sex-based imbalances of power within the population as a whole from any variance in power balance within relationships—either in the aggregate or individually—that is unrelated to sex. For example, lesbian couples may on average be more "equitable" than male homosexual relationships—that is, they may cluster more closely around the center of the bell curve for power disparities between the partners. Yet, by definition, homosexual relationships do not give rise to asymmetries in power within relationships that correlate with sex. See England & Kilbourne, *supra* note 5, at 172.

<sup>230</sup> This insight about power's ineluctable role in marriage also does not depend on how rich or "loaded" our concept of psychic utility in marriage is. Even if each spouse's utility function is replete with vicarious preferences and second-order desires, all that matters is that, in each marriage, each spouse's elevation of the other's satisfaction over his or her own will at some point run out. The time will come when each spouse will want something on his or her own account. In other words, all that matters is that pure (or even partial) selfishness comes into play once in a while.

The important point is that the conclusions about the role of bargaining power hold even on a fairly straightforward rational choice model. This shows that the model is sometimes quite useful in demonstrating the validity of feminist insights and that the feminist critique of the rational actor model as subversive of feminist goals is not always well-taken. See, e.g., *Beyond Economic Man: Feminist Theory and Economics*, *supra* note 36; England, *supra* note 5; Elizabeth Anderson, *Should Feminists Reject Rational Choice Theory?*, Address to the APA Eastern Division Meetings (Dec. 30, 1996) (transcript on file with the Virginia Law Review Association).

<sup>231</sup> See discussion *supra* Section III.C.

want to. The first type of (directly preference-driven) deference, though perhaps the product of undesirable or "oppressive" social conditioning,<sup>232</sup> might still be said to add to the welfare of the actor herself.<sup>233</sup> The second type of (non-preference-driven) deference, in contrast, is a matter of power only. It forces the actor to take steps that do not add to her immediate well-being. Rather, she acts to forestall imminent or future consequences that will work an even greater deprivation. That is, she acts out of fear of consequential harm, not out of an anticipation of immediate personal benefit. The layering of the effects of power upon any preexisting tendencies will make women seem even more deferential than they really are.

The conflict inherent in marriage also sheds light on forms that female sexuality can take both within and outside that relationship. A satisfying treatment of marital sexuality cannot proceed without a fully nuanced anatomy of desire and, perhaps, a normative hierarchy of the consistency of varieties of sexual experience with the dignity and integrity of the person. Even without these tools, however, it is possible to recognize a continuum of sexual encounters: from those accompanied by elemental sexual arousal or sexual desire, to those devoid of sexual feeling but undertaken for distinctly instrumental purposes. On the latter end of the spectrum, a person might decide to have sex without arousal or desire because of the expected negative consequences of refusing or to make it easier to obtain a desirable nonsexual objective. The most extreme example of "instrumental" sex is submission motivated by a fear of physical violence. But that is not the main concern here. Rather, the more interesting category for our purposes is that of women who find themselves having sex, not because they welcome the encounter for its own sake or even simply from a loving desire to give pleasure or to make a partner happy, but because of concerns about conse-

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<sup>232</sup> See *supra* note 32.

<sup>233</sup> There are, of course, many who would question a utility model that viewed the satisfaction of all preferences, however formed, as enhancing the welfare of the person holding those preferences. See *supra* note 32, and sources cited therein; see also Sen, *supra* note 8 (arguing that an individual's preferences are influenced by exogenous pressures); Sumner, *supra* note 32, at 66, 160-62 ("[P]ersonal values are also notoriously subject to influence by accustomed social conditions."); Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986) (noting that private preferences are not uninfluenced by legal rules).



quences within and for the relationship. A woman may decide against refusing her husband for a range of reasons: she may anticipate his displeasure or dread his moods or worry that he will renege on a promise. She may recognize that a well-timed sexual encounter will help her to "get her way" in a conflict that lies on the horizon or will simply aid her in procuring day-to-day cooperation. Or she may simply wish to solidify or preserve a valued relationship by minimizing the incremental tensions that can lead to eventual disaffection or abandonment. To be sure, men might occasionally find themselves having sex "without really wanting to" for similar reasons.<sup>234</sup> And there is certainly room for disagreement as to whether all "instrumental" reasons for having sex, as so described, are to be considered suspect or undesirable, especially within an ongoing long-term relationship. Because motives are often mixed, the line between sex provided from anticipation of loss or gain and sex provided out of love can sometimes be very fine indeed. Nonetheless, it must at least be acknowledged that marriage provides a potential setting for sex that has little to do with ardor or affection as such, and much to do with fear of being deprived of the forms of material and social well-being that a partner can provide. Women's weaker bargaining position suggests that the experience of having sex that is "unwanted"—in the sense that it is not undertaken out of an immediate *physical* desire for the other person or from the wish to give or receive *sexual* pleasure, but rather out of a concern for a deprivation the other person might inflict—is a more common one for women than for men. The fundamental insight is that women's experience of sex must be decisively colored by the power men (including husbands) exercise in ordinary marital relationships.

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<sup>234</sup> Biology ensures, however, that a man—unlike a woman—cannot have heterosexual intercourse in the absence of sexual arousal. If sexual desire is a richer and more complicated psychological state than mere arousal, a man could find himself in a situation in which he would prefer to forgo a sexual encounter despite a level of arousal that makes the encounter possible. In that case, he might go ahead despite his lack of desire for the same reasons a woman might do so: to further some instrumental purpose. Cf. Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA Women's L.J. (forthcoming 1998) (on file with the Virginia Law Review Association) (recognizing a category of sexual experiences that "one would rather forgo than endure were there no negative consequences").

## 2. *Egalitarian Marriage and Premarital Endowments*

Formidable forces are arrayed against the realization of the egalitarian ideal for marriage. Before further exploring the pragmatic implications of this insight, it is necessary to discuss some problematic limitations of the egalitarian paradigm. Every concept of equality must not only answer the question "equality of what?" but also "equality as compared to what?" The latter inquiry requires establishing a baseline against which to measure equality—a baseline that is as free from arbitrary assumptions and "undeserved" credit as possible. How well does the concept of egalitarian marriage employed here satisfy those conditions?

The utility measure and the marital pooling condition seek to minimize "the importation of a market idea of fairness into family life."<sup>235</sup> The measure of entitlement is not an individual's market resources, but the more neutral metric of equality of satisfaction or well-being. That measure strives to be "for internal use only"<sup>236</sup> in two senses. First, it does not rely directly on market price and value in fixing the terms of exchange within marriage. Second, it excludes certain conditions external to the marriage—partners' differential prospects on the remarriage and labor markets, for example—in determining the measure of well-being.

These conditions raise the question of whether, even if spouses are equally likely to get their way within a marital union, they are really equally well off if one spouse, but not the other, could do almost as well within another marriage or outside of marriage altogether. Should the measure of relative position take account of opportunity cost—that is, how well each spouse is doing compared to his or her prospects elsewhere? This question shows that rejecting extramarital opportunities as the basis for assessing equality requires some justification.

The decision to view extramarital prospects as external to the bargain is a decision to reject extramarital well-being as a baseline for gauging marital equality, and equal gain in utility over that baseline as the benchmark for equality. If the latter measure were adopted, the basis for equal division would be the divorce-threat bargaining surplus, and an equal division of that surplus would

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<sup>235</sup> Bergmann, *supra* note 7, at 271; *supra* note 160.

<sup>236</sup> Bergmann, *supra* note 7, at 272.

spell marital equality. Such an approach would obviously yield a quite different assessment of the degree to which real life bargains deviate from the egalitarian norm, because the potential effects of unequal extramarital prospects between men and women would be rendered invisible by folding these factors into the starting point for equality. Nevertheless, our framework suggests that actual relationships might *still* deviate from this measure of equality, though perhaps not as sharply as under our working model: The free rider effects of different intramarital threats or the sex imbalance in negotiating skills and strength might still operate to allow men to garner a greater share of gains over the extramarital baseline.

The main problem with adopting an extramarital baseline and shares of utility gain over that baseline as the measure of equality is that it "may well prescribe exactly the sorts of distributions that motivated the concern with inequality of bargaining potential in the first place."<sup>237</sup> This does not mean that it is the wrong principle. But it is a less heuristically valuable one. The chosen framework permits clear identification of *more* of the key factors that put women at a real-life disadvantage.

It is nonetheless important to acknowledge that the egalitarian calculus adopted here does not create a division rule that is entirely untainted by fixed traits, market values, or other extrinsic social forces that influence the parties' baseline endowments. Indeed, it would be difficult to come up with a calculus free from these influences that did not wholly flout our intuitive sense of marital benefits and burdens. Partners' endowments (in the form of beliefs, talents, energy, tastes, and skills) help determine how much utility each spouse can and will contribute to the marital pool. Those endowments also determine how much value each spouse draws from the pool (including how much benefit is derived directly from the other spouse's contributions). A paradigm that allows these endowments to affect gains and entitlements—as does ours—can be faulted as arbitrary or unjust<sup>238</sup> in its treatment of the

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<sup>237</sup> Wertheimer, *supra* note 32, at 68.

<sup>238</sup> On the supply side, earning power and accumulated wealth inevitably affect the utility calculus because earnings expand the pool of marital assets to be disbursed and generate utility for family members. But earning power and wealth, like other assets and endowments spouses bring into the marriage, can be traced in part to arbitrary advantages that differ by sex, such as better educational, training, or job opportuni-

range of background conditions that may create a debt for one party in favor of the other.<sup>239</sup>

ties for men. Alternatively, sex-correlated preferences for certain kinds of work might produce supply-side dislocations that depress or enhance the pay for some sex-stereotyped jobs. Also, men might have a greater "taste" for wealth accumulation. See Spain & Bianchi, *supra* note 7, at 90-96, 129-31; Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. Chi. L. Rev. 891 (1986); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311 (1989). Alternatively, though, great wealth and earning power may also be the product of great premarital effort or hard work, which is generally costly to the spouse expending that effort. It could be argued that a spouse should somehow get credit within the marriage for "negative utility" expended in creating assets that are imported into the marriage, at least to the degree that those premarital costs exceed the other partner's. Yet our model does not generally permit such credit, since it nets out from the marital pool only those costs individually incurred during the life of the marriage.

Furthermore, a husband may be able to add value to the marriage through minimal effort because he is handsome, empathic, or charming. These attributes generate marital capital, which redounds directly to the benefit of his wife. The wife's gain is a function of the husband's fixed, passive, and "unearned" characteristics, and not of his effort or active input. Yet the husband will "get credit" for these contributions in the marital calculus, if only because they add directly to his wife's satisfaction. The amount of satisfaction his wife gains from the husband's possession of those attributes is in turn based on her preferences and tastes, which are equally arbitrary and undeserved. More pertinently for present purposes, it is suggested that men and women may differ in their degree of distaste for domestic tasks. If a husband hates doing laundry twice as much as his wife does, is he to be rewarded for this preference by having to do half as much or getting twice as much marital compensation for doing it all? The latter case presents the problem posed by a relationship in which one spouse's preferences threaten to turn him into a type of "utility monster"—that is, a person who obtains "enormously greater gains in utility from any sacrifice of others than these others lose." Robert Nozick, *Anarchy, State, and Utopia* 41 (1968). These possibilities raise difficult issues that this model does not resolve. But see Wertheimer, *supra* note 32, at 216-30 (discussing how the judgment of the fairness of a bargain is influenced by the sense of justice or the moral significance of the background conditions contributing to the bargainer's endowments and outside opportunities). See generally Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. Rev. 815 (1980) (assessing the costs and benefits of merit-based distributive systems); John Rawls, *A Theory of Justice* (1971) (describing the arbitrariness of talents); George Sher, *Desert* 22-36 (1987) (assessing Rawls's critique of concepts of desert).

<sup>239</sup> There are additional problems with the model's treatment of preferences. For example, in discussing the influence of the endowment effect in the negotiating process, men's tendency to discount the worth of working wives' monetary income (because those inputs are seen as coming at the expense of other valuable wifely services) is viewed as contributing to deviation from an egalitarian relationship because it "distorts" the negotiating process. There is, however, an alternative way to think about this phenomenon. If men view their wives' paid work effort as imposing grievous costs as well as benefits, then perhaps it makes sense for women to work harder at home just to balance out those perceived costs and even up the ledger of



These problematic features cannot be completely avoided if one sticks with subjective, psychic utility as the measure of well-being.<sup>240</sup> Although this exercise by no means requires a larger commitment to the view that preferences are exogenous, the model adopted here by and large takes people as it finds them. We need only be mindful that the working egalitarian calculus has the potential to hide problematic sources of advantage in the marital bargaining game. Nevertheless, the concept of egalitarian marriage, for all its flaws, provides a useful heuristic for identifying and examining a host of forces that push intramarital arrangements in directions that favor men over women and for understanding the consequences of bargaining imbalance.

### *C. The Bargaining Squeeze*

The bargaining approach helps identify the forces that cause the average wife to agree to take on a greater burden of domestic work and responsibility than her husband. If the wife also participates significantly in the paid labor market, she will find herself working harder overall. Moreover, as discussed,<sup>241</sup> power distribution af-

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effort and reward. In other words, if we take men's perceptions of the worth of women's efforts as given in the utility calculus, then perhaps women's greater domestic effort should be perceived as making the relationship *more* equal, not less.

Moreover, in choosing one baseline among others, the model treats certain elements (like personal tastes or preferences, or labor market prospects) as sometimes internal to the model and at other times external to it. Like earning power, a spouse's professional status, mechanical skill, social graces, and love of children are all incorporated into the measure of an egalitarian relationship, in that each affects the contents of the pool from which the other spouse draws satisfaction within the marriage. In contrast, a man's desire to marry a younger woman is a preference that is viewed as external to the relationship and to the definition of equality. Thus, some differences in preferences and endowments define equality while others are identified as sources of deviation from it. Also, some of the same elements appear on both sides of the equation, as when market earning power figures both in the creation of the marital pool (which fixes the criterion for the ideal egalitarian division) and in the magnitude of the marital threat values (which determines the negotiation set and thus the likely deviation from equality).

<sup>240</sup> For example, in proposing a "sharing ethic," in which each spouse's contribution would be valued "as proportional to the total time the person devoted to the family's economic well-being" and "[e]ach hour would be valued inversely to the pleasure the activity gave," Barbara Bergmann sidesteps the difficult problem of assessing the equitable value of spouses' positive contributions by adopting the metric of hours of work. Bergmann, *supra* note 7, at 272. She thus obviates the need to consider any subjective measure of the utility spouses generate for themselves or others.

<sup>241</sup> See *supra* Section IV.A.2.

fects the choices that wives make about whether and how much to participate in the labor market. A wife might work for pay even if she would be better off staying home, or she might stay home even if she would be better off working. A more detailed and dynamic examination of the elements of marital bargaining adds richness to these insights by showing how initial disparities in bargaining power, and other factors that compound those disparities, create a form of "feedback transmission,"<sup>242</sup> or feedback loop, that amplifies behavioral differences between the sexes and, ultimately, gender inequality. The result is a progressive bargaining squeeze that has potentially detrimental consequences for women, for children, and for the marital unit as a whole.

How does feedback transmission work? This Article has suggested that men and women do not start out with equal bargaining power in marriage because marriage is on average more valuable to women than men, and because men and women have different utility functions for the supply of public goods.<sup>243</sup> That initial disparity leads the average woman to agree to take on a greater burden of domestic responsibility than her husband, even if she also works long hours for pay. Initially, she may find herself making a more intensive "active" investment in idiosyncratic marriage-specific capital than her husband. Even if that greater investment does not at first result in greater labor market opportunity costs (i.e., cutbacks at work), she still functions as a first performer of the implicit marital contract: Her greater sunk costs (which necessarily increase her relative costs of exit) will lead to further erosion in her bargaining power. She will also begin to experience a decline in her remarriage options, which will add to the weakness of her position.<sup>244</sup> As her bargaining position slips, her husband is tempted to press for a greater share of marital gains because he has the power to get his way. As a result, she may experience steadily increasing pressure to take on more responsibility. The greater pressure has two possible results. The wife may resist the pressure by shirking and cutting corners at home in order to bring down her total costs

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<sup>242</sup> The phrase is Amartya Sen's. Sen, *supra* note 8, at 138 n.25 (noting the tendency to "ignor[e] the role of 'feedback transmission' in sustaining gender asymmetry").

<sup>243</sup> See *supra* Section II.D.3.c.

<sup>244</sup> This corresponds to the passive first performer component, described above. See *supra* note 14 and accompanying text.

in the marriage and increase her net share. At the same time, she may increase her investment in paid work, in order to buy "insurance" against the spouse's further renegeing or decision to dissolve the relationship altogether. Alternatively, she may withdraw from paid work and specialize more in unpaid work in order to relieve the pressure and costs of greater responsibility. But the latter choice only worsens her bargaining position by introducing significant market opportunity costs as well as deepening her sunk costs (in the form of marriage-specific investment) relative to her "portable" employment market investment. This process can continue indefinitely until the woman withdraws from market work to a significant degree or drops out of the labor force altogether.

This scenario reflects the fact that the inability to enter an enforceable long-term contract to govern a relationship where one party is the first performer is equivalent to inviting inefficient opportunistic renegotiation.<sup>245</sup> Because couples cannot make a premarital contract that is enforceable intramaritally, they must constantly negotiate and renegotiate the marital bargain as the marriage progresses. The position from which women renegotiate the bargain is generally one of progressively declining bargaining strength, in which they stand to relinquish the gains, or "quasi-rents" that they might have captured if an enforceable, long-term agreement had been negotiated before entering into the relationship.<sup>246</sup> The response to the threat of opportunistic appropriation is some form of suboptimal investment, in which the more powerful party reneges or threatens to renege, and the vulnerable party scrambles to minimize her potential losses by decreasing her total investment as bargaining strength permits (by cutting back at work,

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<sup>245</sup> See Cohen, *supra* note 4; *supra* Section I.B (discussing the first performer problem); see also Brinig & Crafton, *supra* note 55 (discussing opportunism in marriage under no-fault rules). The first performer problem is a variant of the larger dilemma posed by "sunk costs," or specialized investment in the context of relational contracts in which the parties find it necessary (because of unanticipated contingencies) to renegotiate the terms of the contract midstream. In that case, the parties "have incentives to use strategic or opportunistic behavior in order to secure a larger slice of the enhanced contractual 'pie.'" Goetz & Scott, *supra* note 107, at 1101. For a discussion of relational contracts, see *infra* notes 250, 297 and accompanying text.

<sup>246</sup> See Cohen, *supra* note 4, at 287-89.

at home, or both) or by rechanneling her efforts into "portable" assets (such as labor market human capital).<sup>247</sup>

Consider the hypothetical bargain that a particular couple would strike on the eve of marriage if they possessed perfect information and were guaranteed perfect enforcement of their deal. Even if the couple did not start out from positions of equal outside options and equal extramarital welfare, and thus would be unlikely to negotiate a perfectly egalitarian deal,<sup>248</sup> the ability to negotiate a binding antenuptial agreement would still have salutary effects, because it would arrest the bargaining squeeze and eliminate the potential for opportunism that it presents. If we assume that the couple first settles on some significant level of mutual participation in the paid labor market,<sup>249</sup> then they would likely agree initially to an allocation of unpaid labor that was efficient (Pareto or Kaldor-Hicks), and then would agree on side-payments that reflected their relative bargaining position. This might result in some degree of role division. But because, by hypothesis, their agreement would be both specific and specifically enforceable for the life of the relationship, any role division (which might require one party to make a greater domestic investment) would not contribute to the more domestic spouse's deteriorating bargaining position. There would be no op-

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<sup>247</sup> Although it may "cost" a woman to combine domestic work with market work during the life of the marriage (as compared to dropping market work altogether), investing in market work is a wise strategy in a climate of uncertainty regarding the contours of the marital deal or the very continuation of the marriage itself. One explanation for why women persist in working for pay despite the relative overload of dual responsibility is that they are purchasing insurance against divorce. See *supra* Section IV.A.2.

<sup>248</sup> The average premarital positions of men and women—the positions from which they would write a private contract to govern intramarital relations—are probably not the same and thus would not be expected to produce an egalitarian deal for most women on the market. An egalitarian deal might be possible if the woman settled for a much less desirable partner than she could ordinarily obtain on a marriage market in which both matches and marital terms would be determined competitively. For a discussion on the interaction of the marital bargain and the marriage market, see *supra* Section II.D.3; *infra* Sections V.C, D.1.

<sup>249</sup> In reality, not all couples would decide on this level of mutual employment, and the decision about just how much paid labor each person would perform would not be made independently of all other decisions about work, leisure, and distribution. Moreover, the couple's commitment to paid employment could not really be independent of bargaining power. But, for simplicity, this discussion takes as its starting point a situation in which both members of a couple engage in significant amounts of paid work.



portunistic renegotiation because the more vulnerable party could refuse to renegotiate the contract or demand compensation for doing so. The deal would be stable and permanent, and an optimal and efficient level of domestic services would be supplied.<sup>250</sup>

But consider what happens when any initial arrangement is not enforceable. Once the marriage is underway, the woman will come under pressure to do an even greater share of unpaid work; her greater sunk costs improve her husband's bargaining position, allowing him to engage in opportunistic shirking of the performance of his initially agreed-upon amount or to renege on promised side-payments. The husband's shirking will in turn induce the wife to shirk: It may not be worthwhile for her to continue to maintain the *total* level of domestic services contemplated in the original agreement by taking over the husband's share in addition to doing her greater agreed-upon share. Rather, she will adopt some level of output of domestic services (probably a level between her own initially bargained-for level and the amount needed to maintain the total—his plus hers—bargained-for output) that is optimal *for her*, given the balance of costs and benefits. Because of the ceiling effects of women's time and effort overload and the steep increase in the negative marginal utility of work near the top of the ceiling, it may be in her interest to reduce her effort significantly. In other words, she will engage in a process of self-help to soften the effect of her husband's refusal to honor the bargain, thus capturing some portion of the benefits of the bargain at his expense. The result may well be an overall undersupply of domestic investment to the unit (by both husband and wife) relative to the optimal amount.

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<sup>250</sup> See, e.g., Benjamin Klein, Robert G. Crawford & Armen A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & Econ. 297, 301 (1978) (describing the efficiency costs of opportunistic behavior). Of course, a comprehensive anticipatory contract is a virtual impossibility because the parties cannot possibly predict all future eventualities that bear on the relationship between the parties. To posit a fully specifiable contract is, in effect, to read marriage out of the category of relational contracts as they have been described and analyzed. See, e.g., Goetz & Scott, *supra* note 66; Robert E. Scott, Conflict and Cooperation in Long-Term Contracts, 75 Cal. L. Rev. 2005 (1987). It is nevertheless analytically useful to set out the ramifications of assuming that an anticipatory binding contract could be devised. See *infra* Section V.D.1.

The unit as a whole would be worse off, and both spouses, as individuals, would be too.<sup>251</sup>

There is another possible consequence of men's shirking from an ideal bargain if that behavior is coupled with direct pressure on wives to take up the full degree of slack: Men's greater bargaining power might result in some husbands' overplaying their hand and pushing women beyond their "reservation price" for the relationship, thus inducing women to initiate divorce. This scenario helps explain how evolving bargaining inequality due to diverging threat alternatives can destabilize marriage. It also helps explain how the data suggesting that women initiate divorce more frequently than men<sup>252</sup> is fully consistent with the bargaining paradigm and with women doing worse by marriage than men. Because of her weaker bargaining position and her smaller surplus share, the typical wife may be squeezed closer to her reservation price than her husband, and the margin for further pressure is smaller. In the give and take of marital negotiation, the person in the weaker position (the wife) is more likely to be pushed past her reservation price to a zero, or negative, share of marital surplus.<sup>253</sup> The husband, in contrast, has a much larger cushion of surplus going into any negotiation, and thus is less likely to be pushed "over the edge" by the other partner's hard bargaining. This explanation for observed patterns of divorce initiation holds good even though what awaits the woman after divorce is less attractive than what awaits her husband. The willingness to divorce is not a function of this interpersonal comparison. Rather, what matters is the *intrapersonal* difference in how well each spouse can do inside versus outside the marriage. If the woman's bargaining position is so weak that she cannot gain even a minimal share of marital surplus, she will initiate divorce. Wives are more likely to be in that position than husbands.<sup>254</sup>

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<sup>251</sup> That is because, by hypothesis, the size of the pie would be smaller under the renegotiation scenario than if an enforceable deal could be made between the same spouses up front. This scenario assumes that there is no marriage market effect from being able to write an enforceable prenuptial agreement. See *infra* Section V.D.1.

<sup>252</sup> See *supra* note 175.

<sup>253</sup> This effect can be exacerbated by a woman's sense of the unfairness of being pushed too hard. On the role of the "taste for equity" in fueling marital breakdown, see *supra* note 174.

<sup>254</sup> But see *infra* note 268 (suggesting factors going to variations in timing of divorce initiation by men and women).

The real victims of the spousal race to the bottom, however, may be third parties who typically benefit most from investments in domesticity: children. As working couples engage in their rounds of self-protective shirking, children may receive less than an optimal amount of attention and suffer accordingly. Indeed, the scenario shows how women's lesser bargaining power within marriage can hurt children. Women may have strong preferences for children's receiving parental attention and care. If working women could somehow attain greater bargaining power in marriage, they might use it to induce men to relinquish some of their leisure time in order to care for children. If women had the bargaining strength to effect more spousal sharing of domestic responsibility, each unit of women's attention to children would come at lower cost than under conditions of severe maternal work overload. The result might be a greater degree of combined parental time for children overall.<sup>255</sup>

The social science data provide evidence of a dramatic reduction in total household time devoted to both housework and childcare over the past thirty years.<sup>256</sup> To be sure, much of the decline follows women's substitution of paid work for unpaid work, which increases monetary income that can be spent on children. Whether the reduction in parental time represented by the substitution of paid work for domestic work represents a harmful net loss for children in a family is a function of a complex calculus: It depends on whether increased earnings make up for the loss of maternal attention, whether one or both parents have adjusted the quantity or quality of attention paid to children in off-work hours,<sup>257</sup> and

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<sup>255</sup> This conclusion is of a piece with the "kids-do-better" hypothesis, see *supra* note 220, which asserts that "children benefit when their mothers control a larger fraction of family resources." Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 155. That control can take the form of initial maternal command over resources brought into the marriage (such as the mother's earnings or child allowances assigned specifically to the mother, see Lundberg & Pollak, *Noncooperative Bargaining Models*, *supra* note 56, at 135) or through any measures that give women more bargaining power within the family.

<sup>256</sup> See Blau & Ferber, *supra* note 16, at 126 tbl.5.3; Robinson & Godbey, *supra* note 18. For an interesting sociological perspective on the "flight from domesticity," see Arlie Hochschild, *The Time Bind: When Work Becomes Home and Home Becomes Work* (1997).

<sup>257</sup> As to the issue of "quality time," Steve Nock and Paul Kingston, in their 1981 study of working couples with children, found that children in single breadwinner, two-parent families spend substantially more time with their parents (mostly mothers) than children in dual-earner families, but that the difference with dual-earner

whether there is an important and independent value in a parent's just being present for most of a child's waking hours. It is possible that, in some families, couples work too hard and long to give children the attention they need, even if all of both parents' nonwork hours are devoted to children. Below that level, and at any given level of total commitment to paid work, reductions in parental attention during off-work hours may at some point start to detract significantly from children's well-being. Evidence indicates, as already discussed, that the void at home produced by women's entry into the job market has not been completely filled by men. On the contrary, men seem to have taken full advantage of their bargaining power to minimize the extent to which women's market efforts impinge on their freedom and leisure. This analysis suggests that, by imposing costs on women and pressuring them to engage in self-help, this strategy may have come at children's expense as well.<sup>258</sup>

The foregoing explains how the marital bargaining squeeze might produce suboptimal total investment in domesticity and children. In other cases, however, it might have the effect of exerting downward pressure on a woman's investment in paid work below the level that a woman might select if she bargained from a position of greater strength. Some wives might choose to recapture a greater share of the bargaining surplus not by cutting back on domestic

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families is "largely accounted for by the lesser time of employed mothers in activities that involve children only peripherally, not in directly child-oriented activities." Steven L. Nock & Paul William Kingston, *Time with Children: The Impact of Couples' Work-Time Commitments*, 67 *Soc. Forces* 59, 59 (1988).

<sup>258</sup> This conclusion comports with the observations in one study of working spouses' childcare arrangements, which found that "variation in husband's [sic] hours of work has no statistically significant effect" on men's childcare responsibilities or time with children. Richard R. Peterson & Kathleen Gerson, *Determinants of Responsibility for Child Care Arrangements among Dual-Earner Couples*, 54 *J. Marriage & Fam.* 527, 532 (1992). The authors conclude that "[h]usbands' involvement in paid work and relatively low participation in household work appear to be the path of least resistance." *Id.*

Nock and Kingston found that fathers in dual-earner couples do not generally make up for even a portion of parental time lost to children by mothers' going out to work. Rather, they spend on average *less* time with their children than otherwise comparable men in single-earner couples. See Nock & Kingston, *supra* note 257, at 74. Much of this effect is the result of couples' practice of engaging in staggered shift work in order to minimize the cost of paid childcare. Moreover, the data suggest that couples tend to arrange shiftwork so that fathers are at work and mothers are at home when children are present and awake (e.g., afterschool and early evening). See *id.* at 73-76, 81 & tbl.3. These arrangements mean that men can spend more time at home at leisure rather than engaging in childcare.



labor but by reducing the effort expended on paid labor.<sup>259</sup> The pressure to withdraw from paid work is independent of efficiency considerations, since it results from the weaker party's desire to recapture a greater share of the marital surplus by reducing her effort. But the woman who chooses this avenue of cost-reduction further weakens her bargaining position because she effectively specializes in nonmarket work. She thus increases marriage-specific investment and market opportunity costs, which widens the divergence between her expected extramarital utility and her husband's. This strategy creates a vicious cycle in which withdrawal from market work generates fresh pressure to withdraw even more. These pressures operate independently of the famed returns to specialization touted by Gary Becker, which tend to increase role division by enhancing marital surplus.<sup>260</sup> Rather, the increased role division here is a matter of power loss within a bargaining relationship due to the divergence of threat points and has no necessary connection to efficiency gains.

The downward pressure on paid work has far-reaching consequences for women's well-being and social status as a group. First, the prospect of encountering such pressures affects women's long-term incentives to prepare for market work, since women who anticipate that they will be forced to take on a greater share of unpaid work and to withdraw from paid work will underinvest in labor market capital.<sup>261</sup> Since high earning power only alleviates, but

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<sup>259</sup> This choice between cutting back on domestic work and scaling back paid work might reflect variation in women's tastes for paid work and domestic work. It might also reflect intrasex differences in utilities attached to certain types of risk, since women's market work probably plays an important role as insurance against marital breakdown. See *supra* notes 191-193 and accompanying text. That there is some range of taste in these matters is suggested by data showing that married women fall into distinct camps based on their labor supply elasticities, and that they differ in the magnitude and direction of income and substitution effects. Some studies indicate that married women with high labor market participation have elasticities close to those of married men, whereas women who work less are generally highly responsive to factors that make work more or less lucrative. See Alstott, *supra* note 6, at 2018-20 & n.75. In light of these differences, one would expect that some hypothetical "egalitarian" couples might choose to strike quite "equalitarian" deals characterized by similarity in marital roles, see *supra* Section II.C.1, while others would negotiate for more role division.

<sup>260</sup> For a discussion of Becker's comparative advantage argument, see *supra* note 187.

<sup>261</sup> See Okin, note 32, at 144; see also Mahony, *supra* note 16, at 69-71 (describing how a traditional woman "burns bridges" to alternatives to being a homemaker);

does not eliminate, the disparity in bargaining power, this effect will operate apart from any other incentives to engage in labor market capital investment. Second, the logic of disparities in bargaining power dictates that small initial inequalities of responsibility for household work inexorably tend to snowball. Although sex differences in preferences, tastes, earning power, or comparative advantage help to create initial bargaining disparities, those disparities unleash a set of forces that take on a life of their own. The effects of bargaining inequality are then added to the other social, personal, and labor market factors that militate against women's full participation in the workforce, or in any other worldly endeavors—such as politics—that require large commitments outside the home.<sup>262</sup> This contributes to the creation of a caste-like system in which women as a group enjoy less economic and political power and fewer of the benefits that economic and political power bring.<sup>263</sup>

#### V. IS THERE A CURE FOR BARGAINING IMBALANCE?

Suppose equal bargaining power is defined as the condition that would allow the partners, regardless of sex, to negotiate an egalitarian marriage. What, if anything, could be done to attain that ideal? How might we go about correcting the *sexual* imbalance in bargaining power that marks the institution of marriage as it currently exists?

The sources of women's bargaining disadvantage are threefold: differences in the premarital and evolving divorce threat advantage, differences in the intramarital threat advantage, and differences in factors leading to weakness in the negotiating process. Each of these sources of bargaining imbalance stems from the peculiar interplay of differences between men's and women's prefer-

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Williams, *supra* note 3, at 2241 (discussing the rhetoric of choice: "women are really equal, goes the argument, they just make different choices").

<sup>262</sup> See, e.g., Nancy Burns, Kay Lehman & Stanley Verba, *The Public Consequences of Private Inequality: Family Life and Citizen Participation*, 91 *Am. Pol. Sci. Rev.* 373, 382-83 (1997) (exploring possible links between spouses' control over family money and free time and involvement in political activities); see also McCaffery, *supra* note 186, at 623 (noting that women planning to marry may have fewer incentives to pursue education); Okin, *supra* note 32, at 138-39 (suggesting that women may make themselves more vulnerable by anticipating the division of labor within marriage).

<sup>263</sup> See Cass R. Sunstein, *The Anticaste Principle*, 92 *Mich. L. Rev.* 2410, 2411 (1994) (describing castes as resulting from "social and legal practices [that] translat[e] highly visible and morally irrelevant differences into systemic social disadvantage").

ences or social position with key features of the marital regime. The most important features are fundamental to marriage itself: Both legally and conventionally, marriage is understood to be an exclusive, bilaterally monopolistic contract within which spouses are committed to satisfying a host of mutual needs. Two other key features are the legal convention of marital privacy—which gives rise to a strong formal rule against intramarital enforceability of explicit contracts between spouses—and marriage's practical character as a complex relational contract—which makes the creation and enforcement of explicit terms for the conduct of marriage as a going concern highly infeasible. The final feature of the marital regime is the law of exit (or divorce). Divorce is made easy and is accompanied by limited redistribution of resources. The rules of divorce are also sex-blind, in that they take no systematic notice of the structural differences between men's and women's fate following divorce. Consequently, men and women are forced to bargain in the shadow of the markets for employment and for mates, where those markets offer different prospects for men and women.

Any corrective for bargaining imbalance must deal adequately both with men's exit threat advantage and their intramarital advantage. (It would also ideally come to grips with women's potential weakness in the process of negotiation itself—a tall order.) Unfortunately, a measure that may correct or mitigate some sources of imbalance will not necessarily address others, may exacerbate them, or will produce other perverse effects. For this and other reasons, a comprehensive solution to bargaining imbalance is hard to come by.

### *A. Rules of Marriage and Divorce*

The deep structure of marriage and the conditions of exit from marriage appear most critical to the development of the bargaining imbalance. The most obvious corrective is to abolish either marriage or divorce. Although the former has recently been proposed,<sup>264</sup> and the latter actually implemented in the past,<sup>265</sup> neither is a feasible solution. Because a suitable marriage is a positive-sum

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<sup>264</sup> See Fineman, *supra* note 3, at 228-30 (proposing that the *legal* institution of marriage be abolished).

<sup>265</sup> See Lawrence Stone, *The Road to Divorce: England 1530-1987*, at 1-8 (1990).

game, it is safe to predict that people will find a way to play it. Thus, even if legal marriage were abolished, people would continue to couple up, to make relationship-specific investments, and to lose those investments through sex-skewed opportunistic defections under conditions that favor the strong at the expense of the weak, just as they do today.<sup>266</sup> The abolition of legal marriage would at most effect a deregulation of a social practice that would continue without benefit even of the inadequate post-marital safeguards (such as child support and property division laws) that are currently in place.

As for abolishing divorce, the problems of an absolute ban are inherent in any change that makes divorce harder to obtain: Women (and men) who would like to stay married would be favored at the expense of women (and men) who would not. In any event, some spouses would still abandon one another (and withdraw their marital contributions), since no divorce rule can force people to live together. Many more would stay together, but at the cost of the worst type of marital inefficiency: Both partners would be better off divorced.<sup>267</sup> Although the differential value of staying married for men and women might mean that female winners from a ban would outnumber the losers, there would still be a considerable number of women for whom marriage to a particular man would no longer be worthwhile under any feasible bargaining scenario.<sup>268</sup>

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<sup>266</sup> See Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 Mich. J. Race & L. 491 (1996) (discussing Martha Fineman's proposal to abolish marriage, and predicting the emergence of "virtual" traditional marriages even without legal recognition for marriage).

<sup>267</sup> Cf. Estin, *supra* note 4, at 534 ("[A]n 'inefficient divorce' is one that occurs even though husband and wife together enjoy a greater gain from marriage than they would from divorce.").

<sup>268</sup> See *supra* text accompanying notes 174, 252-254 (discussing reasons why women might frequently initiate divorce despite appearing to have more to lose from marital breakup, including dissatisfaction with inequity as such, men's "hard bargaining" pushing women past their reservation price, and the reduction or destruction of a woman's share of "marital capital" by irreconcilable conflict or by the husband's misfeasance, such as abuse, noncooperation, or sexual infidelity). While foreclosing divorce weakens men's bargaining position by precluding exit, it also weakens women's position by depriving them of the strategic advantage of threatening to leave. Even when continuing a particular marriage remains a positive-sum game, a woman may better her bargaining position if her husband believes that she might "call his bluff" by acting on her own threats or forcing him to act on his. On the role of making credible threats in positive-sum games, see *supra* note 153.



Short of a ban on divorce, rule changes have been proposed that attempt to make exit more difficult. Currently, all fifty states have some variation of no-fault divorce, and the great majority have unilateral no-fault.<sup>269</sup> Although reintroducing fault or universalizing bilateral consent rules would allow women to block or impede male-initiated divorce, it would not equalize intramarital bargaining power. Exit threat is only one component of the imbalance. As the following discussion illustrates, by trapping women within noncooperative or disharmonious marriages, sex-neutral impediments to exit would exacerbate the inequalities that stem from intramarital differences in access to resources.

A rule of bilateral consent would alleviate the bargaining imbalance created by the threat of a husband's defection: Women who wish to remain married despite their husband's desire to divorce would be given an effective property right to the marriage. If the husband gained more from divorce than the wife gained from marriage, the husband could try to induce the wife's consent by effecting a transfer that would make her indifferent between divorce and continuing the marriage.<sup>270</sup> But the buyout tactic is only open if the initiating spouse's gains from divorce exceed losses to the other. If

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Although there is some data to suggest that women initiate most divorces, see *supra* note 175, there is a paucity of information about the timing of divorce initiations by men and women. The bargaining model would predict that most early divorces would be initiated by women, since women's bargaining power and remarriage prospects decline during the early years while men's are on the rise. It is especially to a woman's advantage, if things are not going well, to end a marriage before the birth of children. Men, on the other hand, have much to gain from staying with a woman until both have reached middle age (since his position is on the rise relative to hers). Thus, male-initiated divorces might begin to increase and perhaps even dominate as middle age approaches, even though that is when women's bargaining position is weakest. Cf. *supra* text accompanying note 253 (discussing why women might tend to initiate more divorces as their bargaining position deteriorates).

<sup>269</sup> See *supra* notes 99-103 and accompanying text.

<sup>270</sup> Ideally, the marriage would then only dissolve if divorce was Kaldor-Hicks efficient (producing enough gains to one or both spouses to allow a Pareto-superior redistribution). See, e.g., Estin, *supra* note 4, at 541 (discussing Allen Parkman's argument that "mutual consent . . . permits a wife opposed to a divorce to demand compensation for all the nonfinancial losses that result from divorce"); see also Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. Legal Stud. 503 (1993) (explaining that, by compelling a redistribution that leaves both parties better off upon divorce and discouraging divorce unless there are enough gains to improve both parties' positions relative to remaining married, the bilateral consent rule promotes "efficient marriage"). For a discussion of "efficient" alimony rules, see *infra* text accompanying notes 316-317.

that condition does not obtain—or even if it does—the spouse seeking a divorce might try to induce the other to abandon the marriage by destroying through his or her own conduct much of the unique marital capital that makes the marriage valuable in the first place. There would no longer be a marriage worth saving, or at least the marriage would not be worth nearly as much as before, and it would thus be easier for the disgruntled spouse to persuade the other to grant consent.<sup>271</sup>

This point illustrates why reform of consent or fault rules cannot provide the complete remedy to bargaining imbalance. Rules that regulate exit address only the component of bargaining weakness that is attributable to differential exit threat advantage. They leave untouched other possible sources of bargaining weakness—specifically, the husband's superior intramarital threat position under the "burnt toast" scenario. If, as hypothesized, husbands on average have a greater ability to make their wives miserable within marriage than wives do their husbands, equalizing exit threat advantage alone will not solve the problem.

In any event, a bilateral consent rule will have consequences that could hurt some women. By granting a property right in the marriage to the husband that is symmetrical to the wife's, the rule adds as much to men's bargaining strength as to women's. A woman who wanted to divorce might in turn be blocked by a husband who might be able to extract concessions (such as the relinquishment of property or custody rights) as the price for exit, thus making the woman even worse off.<sup>272</sup> Although combining a bilateral consent rule with a fault regime would discourage some forms of deliberate marital misbehavior, women would still be stuck with undesirable partners who fell short of the fault standard, and would lose protection if they were "at fault" themselves.<sup>273</sup>

In sum, reviving fault or consent rules can only be a partial solution to bargaining imbalance. Indeed, it helps some women at the expense of others. For women whose marriage has lost its value or

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<sup>271</sup> See, e.g., Cohen, *supra* note 4, at 300 ("Because the law can do little to enforce the most meaningful and possibly onerous obligations of a marriage, it is possible for a party to breach the contract while remaining nominally married.").

<sup>272</sup> See Mnookin & Kornhauser, *supra* note 89, at 963-64.

<sup>273</sup> For a review of the general critique of fault rules in divorce, see Estin, *supra* note 4, at 559-64; see also Ellman, *supra* note 99 (general review of fault rule).

worse, remaining married is nightmarish. For women who dearly wish to hold onto their husbands and recoup their investment in married life, abandonment is their greatest fear. Fault rules favor the second group over the first, but both need help.

The limitations of fault and consent rules stem partly from trying to find sex-blind and symmetrical solutions to a sex-specific problem. The conservative commentator Irving Kristol has suggested that unilateral no-fault divorce be made available only to women; men would be required to prove wives' misfeasance to obtain a dissolution.<sup>274</sup> Although this regime would give wives considerable leverage, the solution would not be costless. Most notably, it would hurt men whose wives' reprehensible behavior falls short of legal fault. The main drawback, however, is that the rule might not survive a constitutional challenge, since it makes an overt legal distinction between men and women.<sup>275</sup>

### *B. Child Custody*

One area in which the law long tolerated a sex-specific preference (in favor of mothers) is child custody. But the law surrounding divorce shifted from formalistic and rigid rules (such as "maternal preference" or "maternal presumption") to more fluid or egalitarian standards (the "best interests of the child" or "joint custody").<sup>276</sup> The process of shaping the details of custody arrangements, as with other aspects of the law governing family relations, has become increasingly "privatized."<sup>277</sup> Child custody is now determined primarily by interspousal bargaining.

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<sup>274</sup> Irving Kristol, *Sex Trumps Gender*, Wall St. J., Mar. 6, 1996, at A20; see also Burggraf, *supra* note 81, at 136 (discussing Kristol's proposal and responses).

<sup>275</sup> See *United States v. Virginia*, 518 U.S. 515 (1996); *Califano v. Goldberg*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); see also Alstott, *supra* note 6, at 2042 n.171 ("Constitutional precedent suggests that the gender-neutral formulation would be necessary in the United States.").

<sup>276</sup> See Maccoby & Mnookin, *supra* note 18, at 6-7.

<sup>277</sup> See, e.g., *id.* at 8-10 ("[C]ontemporary divorce law has increasingly recognized the legitimacy of 'private ordering.'"); Mnookin & Kornhauser, *supra* note 89, at 952-56 (discussing the shift to "private ordering"); *id.* at 963-77 (discussing the role of parental negotiation in resolving child custody issues); *id.* at 977-84 (discussing different child custody regimes); see also Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443.

Mnookin and Kornhauser have explored the effect of negotiated child custody arrangements on the welfare and position of participants following divorce.<sup>278</sup> But, as with all conditions that bear on the spouses' "exit options," the prospect of having to bargain over custody at divorce also influences what goes on within "successful" marriages. The move from a maternal preference rule to negotiable child custody arrangements and joint custody can best be described as having a detrimental effect on women's intramarital bargaining position. By awarding the mother something she is likely to find quite valuable (if only because of her limited reproductive potential and her larger investment in existing offspring), the old-fashioned maternal presumption or preference improved the mother's extramarital position and thus her exit advantage relative to her husband's. To the extent some (if not many) fathers value more than sporadic contact with their children, the maternal preference reduced those men's exit advantage by increasing the price (loss of contact and control over children) attached to divorce.

An understanding of men's and women's respective bargaining positions within marriage points the way to significant (and backward-looking) reform in the law of child custody. Where bargaining power is unequal, as it often is for husbands and wives within marriage and after divorce, private ordering will inevitably cause the weaker party to lose out unless bargaining takes place against a baseline that corrects for this imbalance.<sup>279</sup> Child custody should be at least partly "deprivatized" by reviving a strong presumption for maternal custody. Of course, a mother can always relinquish custody by private agreement, but she would do so against a baseline entitlement that could only rarely be taken away. Moreover, the rule should not take the form of a primary caretaker rule, which looks to which parent provided the most "hands-on" care. Although such a rule would favor women in most instances, it would undermine the bargaining position of working women who are the most likely to share childcare responsibilities with their husbands and paid caregivers but who, as we have seen, still suffer from unequal bargaining power within marriage for other reasons. The purpose of a return to maternal preference would only partly be to compen-

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<sup>278</sup> Mnookin & Kornhauser, *supra* note 89, at 951.

<sup>279</sup> For a discussion of "private ordering" solutions to bargaining imbalance, see *infra* Section V.D.



sate for the loss in bargaining power that results when women take on a disproportionate share of childcare within marriage. The rule would also provide a crucial counterweight for the structural advantage men possess by virtue of their longer reproductive life (which makes their investment in each child, however large, less important to them) and the marriage-market advantages that flow from this biological fact. Moreover, any legally enforceable paternal visitation rights should be conditioned on payment of child support. This condition would strengthen the wife's hand within marriage by taking away a possible bargaining chip from the father in the event of divorce.<sup>280</sup>

As with so much else in divorce law, post-divorce child custody rules are rarely discussed in light of their effects on the conduct of marriages in which divorce is not (yet) an issue. Yet couples conduct their daily married life not just in the shadow of the market but also in the shadow of everything that awaits them after marriage dissolves. The lack of realism about the relationship between married life and divorce, and an ill-advised quest for neutrality, flexibility, and autonomy in divorce law, has resulted in rules that hand men potent bargaining tools and deprive women of what little power they have. Recent "reforms" in child custody rules have increased sex-based disparities in bargaining power within marriage.

### *C. Informal Social Norms and Self-Help*

Traditionally, strong norms regulated many aspects of behavior surrounding marriage and reproduction, ranging from the division of sexual responsibility within marriage to the social consequences of premarital sexual conduct, adultery, spouse abandonment, and divorce. Many of those norms have changed dramatically in recent years.<sup>281</sup> Is it possible to imagine any informal norm changes, under

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<sup>280</sup> This quid pro quo rule would make it harder for fathers who care little about visitation to use their rights strategically by offering to reduce contact with the children if the mother would accept less money. But cf. Mnookin & Kornhauser, *supra* note 89, at 980-85 (criticizing a proposed legal rule to deny noncustodial parents visitation rights).

<sup>281</sup> See, e.g., Burggraf, *supra* note 81, at 112 ("Prior to the late 1960s, nonmarital sex was a strong taboo in American culture . . . [and] the social sanctions weren't trivial."); George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. Econ. 277, 278 (1996) (noting the erosion of the custom of shotgun marriage in the 1970s); Amy L. Wax, *Against*

current marriage and divorce regimes, that would help to equalize bargaining power between men and women? In considering this question, it is important to be mindful of the distinction between normative conventions that are enforced by conspicuous external sanctions and mechanisms, which are perhaps resisted by persons expected to follow the norm, and internalized norms, which are not resisted but adopted as values and preferences. In the arena of marital behavior, many conventions may have significant components both of external sanction and internalized taste that are difficult to disentangle. Moreover, some conventions may have an important biological source; if so, they might not be easy to change.<sup>282</sup>

Certainly, some of the problem of sexually skewed bargaining power would go away if women and men shared the same average preferences, tastes, drives, outlook, and utilities respecting all functions internal and external to the family economy. We have so far treated observed preferences as exogenous, fixed, and largely uninfluenced by the very pressures that create bargaining disparities and account for their feedback effects.<sup>283</sup> Although the notion that men's and women's preferences are exogenous and impervious to social expectations and choice-constraining pressures has repeatedly been challenged,<sup>284</sup> and there is evidence that the challenge may in some respects be justified,<sup>285</sup> there is no obvious known method for moving men's and women's preferences—if indeed they are disparate—towards parity.

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Nature—On Robert Wright's *The Moral Animal*, 63 U. Chi. L. Rev. 307, 347-48 & n.68 (1996) (book review) (noting erosion of social norms that imposed sanctions for divorce).

<sup>282</sup> See Wax, *supra* note 281, at 307-08.

<sup>283</sup> See *supra* notes 32, 233.

<sup>284</sup> See *supra* notes 32, 233.

<sup>285</sup> A small study of "egalitarian" (role-sharing) married couples is provocative on this score. In describing the experience of her sample, the author wrote:

The change to a more even sharing of domestic chores was not easy. Not only did the wives have to contend with the husband's disinclination to do chores, they also had to cope with guilt feelings about abandoning their traditional role and with the mixed feelings they had seeing their husbands do nontraditional tasks. As their strong interest in a profession consumed more and more of their mental and physical energy over the years, however, housework seemed increasingly tedious rather than challenging. In addition, the women's movement led them to believe that doing double work is unfair and made them feel better about sharing domestic chores with their husbands.

Haas, *supra* note 43, at 294.

There is another set of preferences that are external to the marital economy but critically important to family bargaining power: the preferences for partners, which operate on the marriage and remarriage markets. As already discussed, men prefer younger women and are indifferent to parity or mild inferiority of social status. Women marry slightly older men and seem to prefer higher status husbands.<sup>286</sup> These patterns give men more currency on the remarriage market and exacerbate disparities in earning power as between couples.

Two tactics have been proposed to deal with the conditions that create men's superior remarriageability. Concerned with neutralizing the effects of remarriage patterns on women's bargaining weakness within marriage,<sup>287</sup> Rhona Mahony recommends that women adopt a strategy of hypogamy—marrying down in status and earnings.<sup>288</sup> Lloyd Cohen, on the other hand, recommends that women marry much older men, on the theory that those men's value on the marriage market will decrease with age.<sup>289</sup> Both Cohen's and Mahony's recommendations appear to be directed at women only. The assumption seems to be that self-help is superior to politics: People are more likely to change their own conduct to advance their own interests than to get other people to change their behavior to their detriment.

Mahony's proposal necessarily entails women marrying down in age. She suggests that men married to higher-earning women will choose to specialize in marriage-specific capital as readily as women married to higher-earning men, and thus will relinquish the exit threat advantage conferred by better labor market prospects and fewer marriage-specific investments. Mahony's suggestion is unlikely to work very well, for several reasons. First, a sudden shift to a world in which women prefer younger and lesser-status men will do little good so long as men's preferences do not change. It takes

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<sup>286</sup> Status disparities have been moderated in recent decades by the rise in assortative mating, which tends to match people of similar educational attainment and initial occupational potential. See, e.g., Robert D. Mare, *Five Decades of Educational Assortative Mating*, 56 *Am. Soc. Rev.* 15 (1991) (documenting the dramatic rise in educational syngamy, or the tendency to marry another with similar years of schooling, especially among the college-educated).

<sup>287</sup> See Mahony, *supra* note 16.

<sup>288</sup> See *id.* at 215-38.

<sup>289</sup> See Cohen, *supra* note 4, at 293.

two to make a marriage, and the match a woman can make is not simply a function of her own tastes. Rather, it is determined by a process of "pairwise-bargained allocation"<sup>290</sup> in which various supply and demand curves, reflecting men's and women's priorities, meet. If men do not give priority to higher status wives, but continue to seek the traits they have traditionally found desirable (youth, beauty, and conventional femininity), there will be a serious mismatch on the market, and fewer women may be able to find mates at all.

Second, Mahony's suggestion requires a coordinated and uniform change in women's preferences and practices. Even if a particular woman could find a man of lesser status to marry her, there will be a steadily increasing pool of other women willing to marry up to him as he gets older and earns more, and his wife will still face a declining pool of men willing to marry her. Thus, female hypogamy as an individual solution can only delay, but cannot wholly solve, the problem of women's declining currency on the marriage market.

The task of persuading all women to shun hypergamy (marrying up) and embrace hypogamy (marrying down) presents all the formidable collective action problems entailed in trying to change an existing norm, and in maintaining uniformity in the face of incentives to defect from the norm.<sup>291</sup> But even if women could overcome their emotional attraction to men of higher status—which may be just as deeply ingrained and difficult to alter as men's penchant for younger women—they may not gain much by marrying down, for they will give up valuable tangible benefits by choosing lower status men. A smaller piece of a larger pie (in the form of an unfavorable marital bargain with a higher status man) may be worth as much—or possibly more—than a larger piece of a smaller one, in the form of an egalitarian marriage to a lower status man.<sup>292</sup> Whether women as a whole would be better off as more equal

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<sup>290</sup> See Rochford, *supra* note 56.

<sup>291</sup> See Sunstein, *Social Norms*, *supra* note 32 (discussing the difficulty of a minority faction changing existing norms).

<sup>292</sup> See *infra* Section V.D.1. Departures from rationality due to information deficits, cognitive distortions, and the tendency to discount the future—which have received little discussion in this Article—probably play an important role in real-life decision-making in this area: The future losses from weak bargaining power are speculative and painful to confront, but the current inadequacies of a marital candidate are vivid and immediately apparent.



partners to lower status men is a complex question that depends on the state of the marriage market, and on whether the far-reaching secondary costs to women of the bargaining squeeze—costs that would not be incurred in an egalitarian relationship—are fully taken into account by women in their selection of mates on the currently unregulated market.<sup>293</sup> The fact that, in the absence of enforceable bargains, the resources a man commands and his wife's leverage over these resources in bargaining would probably continue to bear an inverse relationship suggests that women may not gain much by marrying down.

Cohen's suggestion avoids one flaw in Mahony's plan: Because older men would probably be more than happy to marry much younger women, women's collective decision to choose much older men would not result in severe market mismatch of supply and demand. But, as with the decision to marry younger men, marrying much older ones would entail some loss in utility unless women could overcome their market preferences for only slightly older men (which may be no easier than adopting a desire for younger mates). Even though a husband's death (as opposed to divorce) leaves the surviving wife with an undivided claim on his assets, it is still not clear that the increased bargaining power a woman enjoys because of the reduced risk her husband will divorce her outweighs her projected losses due to the risk of his dying earlier in the marriage. Finally, because intramarital bargains equilibrate with conditions on the marriage market—and, in the absence of enforceable bargains, do so, at least in theory, with no gain in efficiency or increase in the size of the pie<sup>294</sup>—Cohen's ploy may only introduce different tradeoffs rather than create absolute gains. Cohen tries to argue that women's tendency to choose somewhat older husbands already shows that "women realize that they have more reason to be concerned with divorce than widowhood."<sup>295</sup> It appears, however, that women have already balanced the risks of those unfortunate states in favor of husbands only somewhat older than themselves.

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<sup>293</sup> See Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 152-54 (describing equilibration of marriage market conditions and intramarital bargaining possibilities when binding agreements are not feasible).

<sup>294</sup> See *infra* Section V.D.1.

<sup>295</sup> See Cohen, *supra* note 4, at 294.

Mahony's and Cohen's suggestions have this in common: They implicitly recognize that, absent a change in the external rules defining the marital regime, a more balanced marital bargain can be reliably secured only by choosing a man of the type that now has lesser currency on the marriage market. What lies behind the lesser currency, however, is that these men offer fewer benefits to their mates. Even if age and status ceased to be attractive to women as a psychological matter, the sociological fact remains that those traits correlate in men with the ability to bring tangible benefits to a marriage, and women continue to value those tangible benefits. For these proposals to work, women would have to decide they do not care about their husband's material wealth and earning power after all.

The prior discussion suggests that, in the absence of a massive transformation of taste, it is futile to attempt to change the intra-marital balance of power without recourse to an independent, external mechanism for fixing the costs and benefits of marriage—a mechanism that does not depend on self-help by the person in the weaker bargaining position. That self-help is futile under current circumstances can be illustrated by considering another imaginary scenario that relies on changing the social norms surrounding the choice of mate. Suppose all women got together and decided to demand an egalitarian division as a condition of getting married in the first place or continuing in their current marriage. Suppose such an initial coordination were possible. (Clearly, such an ultimatum would have little effect if not issued—and followed—by most women, since men would simply search for women who did not demand such a condition.) This cartel would initially lower men's exit advantage by reducing the leeway for finding a better marital bargain in the division of marital contributions. But the removal from the market calculus of the availability of lopsided marital bargains would still not completely eliminate men's threat advantage: A husband would still be able to look for a younger and more attractive—albeit equally demanding—mate (and find one), whereas a wife could not.

Women's awareness of men's greater ability to procure a rematch would doom the cartel. The temptation to defect would be overwhelming, as individual women viewed bargaining concessions as a way to hold on to what they have (on the view that this is the

best they could ever get). That the ultimatum could be issued as a condition of agreeing to get married in the first place would not matter: Women could not take effective advantage of their relative bargaining strength during their youthful period on the primary marriage market because any bargain they struck initially would be subject to endless renegotiation throughout an intramarital period of rapidly eroding leverage. The lack of any external mechanism for enforcing the collective norm of issuing an equality ultimatum is a pivotal defect. Once married, every woman would be on her own, and the temptation to abandon the norm would prove irresistible.

*D. Private Ordering: Contracting for Marital Terms  
and Costs of Exit*

*I. Antenuptial Agreements*

Comprehensive antenuptial contracts to regulate the conduct of the marriage face two formidable obstacles, one legal and one practical. First, as noted, the law will not enforce them during the life of the marriage.<sup>296</sup> Second, the very nature of marriage as a relational contract means that such a fixed document cannot in reality ever be produced; "unknown contingencies or the intricacy of the required responses may prevent the specification of precise performance standards."<sup>297</sup> Thus, the complete, anticipatory regulation of marital relations, without provision for revision or renegotiation, is a chimera.

Nevertheless, the subject of antenuptial contracting is provocative, at least from a theoretical point of view. Suppose we could reverse a key structural feature of the current marital regime: the refusal to enforce contracts between spouses during the life of the marriage. Could privately negotiated antenuptial agreements cor-

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<sup>296</sup> See *supra* note 66 and accompanying text.

<sup>297</sup> Goetz & Scott, *supra* note 66, at 1092; see *supra* note 250; Scott & Scott, *supra* note 210 (describing marriage as a paradigmatic relational contract); see also Cohen, *supra* note 4, at 298 (noting that an enforceable marital contract would have to take into account "the stage in the marriage when the breach occurs, the circumstances of the parties at the time of marriage, and the circumstances at the time of breach"); Oliver E. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations, 2 J.L. & Econ. 233, 238 (1979) (observing the replacement of neoclassical processes by "adjustment processes of a more thoroughly transaction-specific, ongoing-administrative kind").

rect the problems posed by inequality of bargaining power within marriage? The short answer is no. Private bargaining cannot rectify inequality of bargaining power. Rather, the bargains struck will simply reflect that inequality. The long answer is somewhat more complex. Although private antenuptial contracting cannot cure initial disparities in bargaining power due to men's and women's somewhat different average demand for marriage, it could counter the progressive slide of women's bargaining position by cutting off the possibility for renegotiation during the course of the marriage. This should have the effect of reducing shirking, self-insurance, and underinvestment in domesticity. To remedy the principal sources of bargaining power disparity, the contract would ideally specify disposition of value following marital dissolution (to modify exit threats). But it must also regulate *intramarital* behavior and be enforceable during the marriage to keep husbands from capitalizing on their intramarital threat advantage.<sup>298</sup>

The first objection to the use of antenuptial contracts is that they present coordination and collective action problems: One bride's demand for an antenuptial promise is unlikely to be met with assent when the default rule is no deal at all, and most women ask for nothing more. In the absence of a universal norm of premarital contracting, some men will simply search for women who will not demand contractual protection against deteriorating bargaining power.<sup>299</sup>

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<sup>298</sup> An antenuptial contract might propose the incorporation of post-marital monetary compensation for any imbalances in costs and benefits that resulted during the course of the marriage from one partner's bargaining weakness. Even apart from posing practical difficulties of valuation, such a rule would only compensate for imbalances in the event of divorce. It would not eliminate inequalities in the conduct of an ongoing marriage. Only a rule of redistribution or specific performance that operated intramaritally could be expected to accomplish that goal.

<sup>299</sup> Although courts will generally not enforce contracts intramaritally, antenuptial contracts that specify some intramarital and post-marital conditions will be enforced in many states upon dissolution. See Silbaugh, *supra* note 17, at 34; see also Laura P. Graham, Comment, The Uniform Premarital Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage, 28 Wake Forest L. Rev. 1037 (1993) (detailing implications of approval of the Uniform Premarital Agreement Act). The infrequency with which such contracts are drafted might reflect adverse selection problems. In the absence of a coordinated or uniform custom of prenuptial contracting, women who demand such contracts might be seen as untrustworthy or otherwise undesirable. This problem, and the reluctance of women to relinquish an advantage in competing for desirable spousal traits, which



Even if that objection could be overcome, any attempt to arrest the progressive decline in women's initial bargaining position by private contract will have side-effects on the marriage market. As noted, the marriage market is a complex process of "pairwise-bargained allocation"<sup>300</sup> that matches men and women depending on both the attributes they possess and the ones they are looking for. The marriage market is not perfectly competitive, because people are not perfect substitutes for one another. Two other important factors influence men's and women's currency and their choice of mates on the marriage market: how well men and women do outside of marriage (determining how eager they are to marry), and how satisfactory a deal they can strike within marriage (a function of their bargaining position as the marriage progresses).

As discussed above, men and women may not regard marriage as equally valuable, perhaps because men can obtain more of what they want outside of marriage (and can wait longer for what they want within marriage). This relative value of marriage is reflected in the marriage market price of each person, which in turn determines how desirable a mate he or she can obtain under prevailing baseline conditions—that is, where there are no intramaritally enforceable prenuptial deals. Under these conditions, each person searches for the best mate he or she can get, and each can command a mate with certain qualities. The legal and practical obstacles to binding antenuptial deals effectively allocate to women most of the risk of exploitation through opportunistic renegotiation during marriage and of potential expropriation of quasi-rents through divorce. This allocation of risk is probably "priced into" the market in the form of extra compensation to women for bearing that risk (and a lower "price" for men imposing it). In effect, a woman will demand more compensation up front (in the form of a higher quality husband) because the risk of loss of her marital investment is so high. The man may be willing to pay more up front for the privilege of reserving the potential to exploit. Thus, a particular woman may be able to find a more desirable man, and a

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might have to be traded off against the security, certainty, and more favorable terms of the marital bargain, combine to impede the development of a society-wide norm in favor of premarital contracting. Newlyweds' refusal to contemplate divorce and women's dim awareness of the structural sources of their bargaining power disadvantage may also lead women to underestimate any benefits of such contracts.

<sup>300</sup> See Rochford, *supra* note 56.

man may be forced to settle (and will be willing to settle) for a somewhat less desirable woman, in partial compensation for the gender-based allocation of risks imposed by the current marital regime.<sup>301</sup>

Nevertheless, reducing or eliminating those risks contractually by forcing parties to negotiate for binding terms on the semicompetitive primary marriage market should make for more efficient marital agreements. This might allow some women to come out ahead. Eliminating the possibility of opportunistic renegotiation or defection should reduce expensive, inefficient self-protective behavior and underinvestment, which ought to increase the overall size of the marital "pie."<sup>302</sup> Precisely how that extra surplus would be distributed, however, is unclear, because it depends on how a marriage market that has equilibrated in the absence of binding and enforceable contracts would adjust to their widespread adoption. If women could capture some of the increased surplus (and they should be able to), much of the extra payoff would probably come in the form of reduced risk: Although the average woman might have a somewhat less desirable husband, she might be compensated not only by her greater bargaining power but also by enjoying a marriage of greater predictability, stability, and permanence.

Although antenuptial agreements face formidable practical and legal obstacles and might shift the marriage market, this discussion

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<sup>301</sup> The interaction of the marriage market with the balance of power within marriage suggests that a woman should seek to maximize her marital payoff, in the absence of a binding premarital contract, by finding a man of such high quality (e.g., rich enough, attractive enough) that she obtains sufficient up-front benefits to compensate for the possibility of early defection and the threat of first performer losses. But the fact that a woman wants to find a man whose very desirability insures her against the actuarial risk of early desertion does not mean that she can find one: Her currency on the market is determined by microeconomic forces that fix the "price" of what she is offering, largely determined by her attributes and attractiveness, as well as the market demand for those traits. On the marriage market, you cannot always get what you want. Thus, many women will in fact be underinsured against the bargaining squeeze and undercompensated for the risk of divorce. On the interaction of marriage markets and marital bargaining generally, see Becker, *supra* note 37; Gary S. Becker, *A Theory of Marriage* (pt. 2), 82 J. Pol. Econ. S11 (1974); Bergstrom, *supra* note 56, at 1929-30; Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 152-54.

<sup>302</sup> See, e.g., Klein, Crawford & Alchian, *supra* note 250, at 301 (describing the costs of opportunistic behavior); see also Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 Vand. L. Rev. 397 (1992) (discussing premarital agreements as a hedge against marital opportunism).

suggests why they might still be a good idea. It is true that some women might have to lower their sights, but that adjustment might bring greater efficiency to marriage markets, with benefits to be shared by women. It is the current marriage market that is distorted by its invitation to opportunism generally, and by the greater potential for opportunism by men. It could be argued that women now marry higher quality men than they rightly "deserve" precisely because they pay on the back end rather than the front. Under the current marital regime, women assume a greater risk of a larger loss than they would if obligations could be fixed ahead of time. As a result, the variance in payoffs is greater. In effect, the current marriage market is a high stakes game for women with big winners (those who manage to hold onto high quality husbands) and big losers (those left relatively destitute when their husbands abscond). To the extent that the remote risk of divorce is notoriously discounted by most people,<sup>303</sup> the current regime seems like a good deal, but it may not be.

## 2. Dowry and Bride Price

Another variation on the theme of private contracts is the custom of dowry or bride price.<sup>304</sup> Dowry is money or property paid by the husband or his family to the family of the bride to be held in trust for her in the event of the husband's breach of the marriage contract. So long (but only as long) as the marriage endures, the money becomes part of the couple's estate. Dowry therefore functions as a performance bond on the husband. It moves bargaining power towards parity by operating as a kind of tax on the husband's defection, which lowers his effective exit threat advantage.

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<sup>303</sup> See Baker & Emery, *supra* note 14, at 443 (noting that while marriage license applicants who were surveyed estimated correctly that half of U.S. marriages would end in divorce, their median response was 0% when asked to assess the likelihood that their own marriages would suffer this fate).

<sup>304</sup> See generally Cohen, *supra* note 4, at 292-93 (discussing the role of bride price "to alleviate some of the problems of appropriable quasi rents" in marriage); Ivy Papps, *The Role and Determinants of Bride-Price: The Case of a Palestinian Village*, 24 *Current Anthropology* 203 (1983) (applying economic theory to the payment of bride price); Melford E. Spiro, *Marriage Payments: A Paradigm from the Burmese Perspective*, 31 *J. Anthropological Res.* 89 (1975) (giving an overview of the customs and economic role of dowry and bride price in southeast Asian communities).

Apart from its inherent imprecision in estimating relative exit threats, dowry has limited usefulness under current social conditions. First, earning power, not property, is the most important source of marital wealth for most couples, and most people do not have enough up-front resources to post an effective bond. (The alternative—permitting the husband to borrow the money against future earnings—is in effect an alimony rule, which is discussed below.<sup>305</sup>) Second, as with all devices that regulate exit threats, the stability of the practice of dowry would depend on its adoption across the board. But its adoption cannot be imposed by fiat. As Lloyd Cohen states, dowry is “a cultural phenomenon that evolves over a period of centuries.”<sup>306</sup> Third, the custom would have to incorporate an understanding that even women who do not assume a traditional role and are not overtly financially dependent—and who thus appear to have little labor market opportunity cost of marriage—deserve a bond against the passive depreciation of their marital capital. This would require a revolution in thinking about marital relations.<sup>307</sup>

Finally, dowry shares the limitation of any mechanism that does not rely on intramarital enforcement: The marriage must end before the remedy for unequal bargaining power is triggered. Intramarital free rider strategies that push women to a point short of divorce would continue unabated. If conditions grew poor enough to induce the wife to initiate exit, she could not claim the bond under traditional dowry principles. Moreover, a fault component would be needed to deal with the moral hazard of opportunistic exit by the wife.<sup>308</sup> But traditional concepts of fault are too broad-gauged to protect a wife from all possible efforts by the husband to destroy or appropriate marital capital.

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<sup>305</sup> See *infra* Section V.E.2.

<sup>306</sup> Cohen, *supra* note 4, at 292.

<sup>307</sup> For a comparable discussion of new alimony rules, see *infra* notes 317-324 and accompanying text.

<sup>308</sup> See Cohen, *supra* note 4, at 292 (suggesting that dowry cannot work within a no-fault system).



*E. Bargaining in the Shadow of the Law: Mandated Payment or Transfer Rules*

The foregoing sections suggest that, if the world is to be made safe for egalitarian marriage, the way lies not in self-help but in politics. Women cannot get a better deal by choosing a worse husband, and they cannot rely on other women's voluntarily standing firm with them to insist on a better bargain. Likewise, private ordering cannot be a complete answer to inequality of bargaining power, because an egalitarian deal cannot be expected to result when men and women negotiate from different premarital starting points and when the negotiated deal equilibrates with an unregulated marriage market.

Would external regulation work? There are a number of possible measures that could be adopted.<sup>309</sup> Perhaps the law should alter or control the marriage contract by regulating intramarital relations or by fixing the terms of post-marital distribution. This Section will consider both possibilities.

*1. Intramarital Payments or Transfers*

Detailed regulation to equalize the precise terms of marital relations would be impracticable for the same reasons that relational contracts for that purpose are infeasible. Nevertheless, the government can selectively intervene to redistribute some forms of marital assets during the life of the marriage. Two proposals are the assignment of a family allowance to the mother or primary caretaker of a child<sup>310</sup> and mandated income sharing within marriage.<sup>311</sup>

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<sup>309</sup> Various mixed public-private schemes are not discussed here. One example of such a scheme would be taxing single men to try to equalize their premarital bargaining position with unmarried women, and then allowing the parties to negotiate an enforceable prenuptial deal privately. I owe the suggestion to tax single men to George Triantis. Interestingly, proposals for a "bachelor tax," or tax surcharge on single marriageable men, were a staple of Swedish politics at the turn of the century. Their avowed purpose, however, was to stem the precipitous fall in the national birthrate by encouraging men to marry earlier, not to provide women greater marital leverage. See Allan Carlson, *The Swedish Experiment in Family Politics* 16 (1990).

<sup>310</sup> For an extensive discussion of family allowances, see Alstott, *supra* note 6, at 2042-55.

<sup>311</sup> See Okin, *supra* note 32, at 180-83 (proposing income sharing within marriage).

*a. Child Allowances*

Many European countries now pay a universal family or child allowance to families, prorated according to the number of children. Most countries pay the allowance either to the mother or to a primary caretaker who is defined as the person providing most care for the child within the family.<sup>312</sup> How might a woman's control over this subsidy affect intramarital bargaining power? Under the divorce threat model, the fact that the subsidy was assigned to a mother within an intact marriage would not make any difference because it would not in itself improve the terms of her exit. Moreover, some husbands might continue to have the leverage to bargain away the benefits of a wife's control of extra income by taking control of other valuable resources. Only if single or divorced mothers also received the subsidy—that is, only if the subsidy continued outside of marriage—would a woman's exit threat be enhanced and her bargaining position improved.<sup>313</sup> But the intramarital threat model does predict that intramarital assignment of the allowance to mothers would improve women's bargaining power, because wives' and children's fallback position within a conflict-ridden marriage would improve.<sup>314</sup> The child allowance would be like income to the mother, which could be withheld from her spouse without directly hurting the recipient or her children.

*b. Intramarital Income Sharing*

It is not clear that legally enforced income sharing during marriage would help to improve many women's position. Like a child allowance, income sharing would at best provide only a partial solution to bargaining power inequality and could not be expected to

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<sup>312</sup> See Alstott, *supra* note 6, at 2042. As Anne Alstott notes, a family allowance expressly earmarked for mothers might present constitutional difficulties within the United States. See *id.* at 2042 n.171.

<sup>313</sup> As Anne Alstott suggests, the exit threat enhancement effect would result from "a system of family allowances paid *only* to single mothers," regardless of whether married women were also paid. *Id.* at 2052. Note, however, that a system of exclusively intramarital payments would have some effect on the husband's exit threat, because he would lose the ability to share in the allowance if he leaves the family. See *id.* at 2052 n.213.

<sup>314</sup> See Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 56, at 149 (noting that a separate spheres intramarital bargaining paradigm predicts enhancement of women's bargaining power from a child allowance assigned to mothers).

tract and the duties spouses owe to one another.<sup>318</sup> Any rule that would govern alimony for the purpose of correcting an imbalance in bargaining power must take into account remarriage prospects. That would require a very different rule from one ever seriously proposed. For example, it would mandate some readjustment in favor of the woman—based on the actuarial chance of remarriage—regardless of whether she seemed to assume greater responsibility at home or managed to maintain earnings or career parity with her husband.<sup>319</sup> Under current alimony practice, in contrast, it would be rare for a woman with significant earning power and an uninterrupted work record to receive alimony on her own account.<sup>320</sup> But any rule designed to equalize bargaining power would need to focus as much on the role of passive depreciation in the marital balancing act as on active and measurable opportunity costs.

Such a post-divorce transfer rule has its limitations in addition to difficulties in implementation.<sup>321</sup> A stringent alimony rule, like private prenuptial contracts, leaves the marriage market unregulated. The rule would have the predicted effects of any measure that takes power away from men and reduces the risk of exploitation for women. Some men's unwillingness to marry on those terms

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<sup>318</sup> See, e.g., Ellman, *supra* note 63; Elisabeth M. Landes, *Economics of Alimony*, 7 J. Legal Stud. 35 (1978); Parkman, *supra* note 40; Symposium on Divorce and Feminist Legal Theory, *supra* note 4; Symposium on Family Law, 1991 BYU L. Rev. 1; Trebilcock & Keshvani, *supra* note 4. For a comprehensive review of the subject, see Estin, *supra* note 4, and Estin, *supra* note 36. Alimony's possible purposes include holding couples to their long-term promises, promoting efficient investment, compensating for loss of a reliance interest, or deterrence. The measure of alimony consistent with each purpose will have different effects on bargaining power as well as other incidents of marriage, including stability.

<sup>319</sup> The rule could be based on actuarial projections of remarriage prospects (broken down by parameters such as age, sex, income, and education). Alternatively, income and assets could be divided with an upward adjustment upon the remarriage of one spouse to compensate the unmarried spouse for the value of the married spouse's new partner. Such a rule would greatly discourage remarriage and new family formation by *both* men and women.

<sup>320</sup> See Weitzman, *supra* note 12, at 147-50 (describing the circumstances under which alimony is awarded under the current no-fault system).

<sup>321</sup> Recognizing long-term post-marital claims by one spouse on the other's income, which would be required to make the rule work, would discourage labor market participation and hard work through a substitution effect, or would drive workers into the underground economy. See, e.g., Burggraf, *supra* note 81, at 133. The most pronounced effects would be felt on the low end of the income scale, where labor market participation is tenuous.

would tend to produce a decline in marriage rates from current levels and a delay in the age of marriage.<sup>322</sup> Some women might have to settle for lower quality men. On the other hand, as with antenuptial contracts,<sup>323</sup> a rule creating a more enforceable long-term contract should lead to a deeper and more efficient level of intramarital investment and more stable and predictable marital relationships. The diminution in the payoff from opportunistic defection should create a larger "marital pie," shares of which compensate the average woman for other marriage market effects. For persons of both sexes seeking stability and a reliable return on investment, this effect would increase the incentive to get married.<sup>324</sup> Finally, an alimony rule that seeks to compensate for intangible losses through monetary transfers would function in a fashion that discriminated against the poor. Because people at the lower end of the income scale would be pushed below the subsistence level by any interspousal transfer of income, they will rarely initiate divorce under a rule that really takes into account all forms of prospective loss.

Contrast the complete-internalization rule with a regime that has been proposed by some commentators: post-marital equal sharing of income.<sup>325</sup> Income splitting has the virtue of simplicity. It does not require case by case evaluation and adjustment for the tangible or intangible components of relative contribution, sacrifice, benefit, or opportunity cost during the marriage. But in its very simplicity lies its weakness as an instrument for equalizing bargaining power. A pure division of partners' income is a very blunt instrument for bringing about equalization of bargaining positions within

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<sup>322</sup> For a discussion of marriage market effects of private contracts, see *supra* Section V.D.

<sup>323</sup> For a discussion of the efficiency of antenuptial contracts, see *supra* Section V.D.1.

<sup>324</sup> Jana Singer has suggested that a simple post-divorce income-sharing requirement might have the effect of "encourag[ing] husbands to increase their investment in family care, 'since the financial consequences of such an investment strategy would not be so devastating in the event of a divorce, and the benefits of investing solely in one's own career would not be so complete.'" Singer, *Alimony and Efficiency*, *supra* note 187, at 2455 (quoting Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. Rev. 1103, 1121 (1989) [hereinafter *Singer, Divorce Reform*]).

<sup>325</sup> See, e.g., Burggraf, *supra* note 81, at 131-33, 254; Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 Wis. L. Rev. 789; Okin, *supra* note 32, at 180-83; Singer, *Alimony and Efficiency*, *supra* note 187, at 2454-60; Singer, *Divorce Reform*, *supra* note 324, at 1114-21.



marriage. It fails to take into account the individualized, intangible benefits and costs of a marriage and its alternatives—including average differences by sex. Although this lack of flexibility would help some women by raising their exit advantage to near parity or beyond, it would hurt others (by undercompensating them), and it would also unfairly hurt some men (by overtaxing them).

Moreover, if a background of no-fault divorce is assumed, a rigid income-sharing rule would apply regardless of who initiated divorce and would dictate the same allocation regardless of how much better or worse off each partner would be following divorce. As such, it would often fail to take into account “what, in many cases, may be the most significant loss associated with divorce: the loss of the marital status itself.”<sup>326</sup> Such loss is somewhat greater for women and grows with age. The person who can remarry—more often the man—will gain a share of a new marital surplus and perhaps a second income. The income-splitting rule provides no special compensation for this differential in threat advantage, and thus may often (as when earnings are similar) undercompensate the wife. In addition, because the income-splitting rule looks only to earnings disparity and not to the remarriage chances of divorced spouses, such a rule could severely penalize some higher-earning women, imposing even greater pressure on them to make marital concessions to forestall the loss of their husbands.

Finally, adoption of a post-divorce redistribution rule that assigns one partner an enduring share in a former partner's future income regardless of any notion of breach or fault creates an opportunity for strategic behavior on the part of a nonearning or lower-earning spouse. If, for reasons unrelated to her husband's misfeasance or hard bargaining, a lower-earning wife feels she would be better off outside the marriage—perhaps because she has found a better prospective husband—then she gains a windfall by initiating divorce. (This would, at the very least, create a disincentive for men to marry women without independent income or to consent to a wife's withdrawal from paid employment.) Alternatively, if the marriage remains marginally valuable to her absent income redistribution, but is worth leaving if she can gain an equal share of her husband's post-divorce income, the income-sharing rule will induce

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<sup>326</sup> Singer, *Alimony and Efficiency*, *supra* note 187, at 2448.

her to leave even if it would make her husband worse off. Put another way, a rigid income-sharing rule creates a moral hazard by encouraging divorce in cases in which divorce is not Pareto superior to staying married and thus ends up imposing deadweight losses on one spouse.<sup>327</sup> That problem bears directly on bargaining power: The spouse in danger of bearing the costs of divorce will be at a bargaining disadvantage within the marriage.<sup>328</sup>

The ideal complete-internalization rule suggested above, in contrast, does not present this particular danger. A spouse would not seek a divorce unless that partner would be so much better off outside the marriage that he or she could afford to transfer enough assets to make the other partner better off as well. There would be no deadweight loss and no opportunism. Many couples would stay married rather than divorce when one partner wanted out, because the mandated transfer would make that partner worse off than he or she would be by remaining married.

The complete-internalization rule has its own difficulties, however, which are characteristic of all alimony rules that are triggered

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<sup>327</sup> As Michael Trebilcock and Rosemin Keshvani write:

In constructing the hypothetical contract at the time of marriage, would the two parties agree that the wife should share in the husband's economic returns both where there is no marriage dissolution and where there is? . . . [N]o insurer would write such a policy because the wife may well be rendered largely indifferent to sustaining or terminating the marriage, given the assumption that her entitlements on divorce are not contingent on proof of absence of fault on her part for the marriage dissolution.

Trebilcock & Keshvani, *supra* note 4, at 557; see also H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 *Am. Econ. Rev.* 437, 443-44 (1986) (discussing moral hazard in the context of marital relationships).

<sup>328</sup> Jana Singer argues that the moral hazard endemic in post-divorce income splitting is overstated because "income sharing after divorce is not likely to improve a lower wage earner's financial position." Singer, *Alimony and Efficiency*, *supra* note 187, at 2457. She explains that "given the added expense of maintaining two households, divorce is likely to result in a net decrease in both spouses' financial well-being," *id.*, and that "a lower wage earning spouse is likely to have invested disproportionately in marriage-specific human capital, . . . [thus] reduc[ing] a spouse's incentive to engage in opportunistic behavior during marriage." *Id.* at 2458.

Although Singer's observations are valid, her analysis suffers from a failure to consider the full range of scenarios that could obtain if income sharing were available. A "predatory wife" might marry with an eye towards gaining a partial claim on a future husband's income. Or a fragile but "efficient" marriage might become worth more dead than alive to a lower earning spouse. By giving one spouse the chance to improve her position at the expense of the other, the sharing rule might result in a decrease in total well-being overall.

by the desire to exit rather than by breach of a well-defined promise or fault.<sup>329</sup> The very scenario that creates the greatest difficulty for an inflexible income-sharing rule—that of the lower-earning spouse who nevertheless would like to leave the marriage—also exposes the practical flaws inherent in the less rigid rule. Once again, the bedrock presumption of the internalization rule is that the party who seeks the divorce has judged that he or she will be better off outside the marriage, taking into account both tangible and intangible benefits, and regardless of any apparent decline in financial well-being. Thus, if a lower-earning wife seeks a divorce and her husband resists, the presumption would apply, and the transfer rule will mandate that, if anything, assets will flow from her to her husband to compensate him for his losses. In practice, the application of the presumption gives rise to the objection already discussed, which stems from the monetization of marital value inherent in any rule of compensation: It favors the party with money or the ability to generate it. A lower-earning wife who has invested primarily in marital capital and who has little labor market value may be so miserable that she feels she is better off without her husband, but she may lack the means to pay for the privilege of exit.<sup>330</sup> This would mean that, as a practical matter, higher-earning spouses (mostly men) would be able to buy their way out of loveless or irksome marriages more often than traditional wives.

The complete-internalization rule is also not free of the potential to elicit strategic behavior. Although it neutralizes the predatory wife problem posed by the income-sharing rule (by barring transfers to the one initiating divorce), it fails to deal adequately with a disturbing alternative scenario: the miserable wife married to the bad or exploitative husband. If the husband makes the marriage undesirable or worthless to the wife through infidelity, misfeasance, or noncooperation—if he uses his superior intramarital threat advantage to destroy or appropriate a large share of marital assets, even to the point of pushing the wife below a reservation price already made quite low by poor extramarital prospects, large marriage-specific investments, and the burden of children—then the husband could effectively sidestep the obligation to pay ali-

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<sup>329</sup> See, e.g., Ellman, *supra* note 4, at 6-9, 49-53, 74-81.

<sup>330</sup> See Zelder, *supra* note 270, at 506 (pointing out that many of the assets of marriage are tied up in children, who are neither liquid nor divisible).

mony through his own misdeeds.<sup>331</sup> In effect, he could use his other sources of bargaining power advantage to torment his wife so much that divorce would entail a net utility gain for her, thus relieving him of the obligation to provide her with any compensation upon exit. A rule that ignores the husband's capacity to engage in this loss-making strategy cannot hope to accomplish a *comprehensive* equalization of marital bargaining power. This is just another way of saying that the alimony rule functions poorly if it allows payment to a spouse despite "fault." A fault conception, however, would only work well if it was sufficiently sensitive to take into account the full range of strategies, from annoying to egregious, for inducing the other spouse to initiate divorce.

The prime strategy for driving the other to initiate divorce is to take advantage of intramarital threat potential. Thus, adjusting exit threats through monetary allocations would not suffice: The rule would have to be combined with some form of direct intramarital intervention or redistribution to neutralize shortfalls from differences in intramarital threat potential and chronic negotiating weakness.<sup>332</sup> But, as we have seen, direct intramarital regulation—whether by contract or by rule—would be infeasible and transform the nature of the institution beyond recognition.

One way to mitigate—if not entirely negate—the perversities of the wealth effect and the potential for strategic appropriation of marital capital would be to supplement an alimony rule based on complete internalization with a requirement like the one proposed

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<sup>331</sup> See the discussion of parallel problems with the rule requiring bilateral consent for divorce, *supra* Section V.A. The most extreme example would be physical abuse or the threat of abuse, which is not uncommon. See, e.g., Demie Kurz, *For Richer, For Poorer: Mothers Confront Divorce* 52-56, 64-75 (1995) (describing the role of physical violence for a sample of divorcing couples). The rule could be written to make an exception for this type of behavior, but that would leave untouched the considerable portion of men's intramarital threat advantage that does not stem from or require resort to physical violence.

<sup>332</sup> An alimony rule, like an antenuptial bargaining term, could be designed to include post-marital monetary compensation for any imbalances in costs and benefits that resulted from intramarital bargaining weakness. As with the antenuptial term, such a rule would only compensate for imbalance in the event of divorce, but would have little effect on the conduct of an ongoing marriage. See *supra* note 298; cf. Ellman, *supra* note 4 (rejecting on feasibility grounds any alimony rule that attempts to adjust for inequities during the life of the marriage); Ellman, *supra* note 63, at 280 (arguing against adopting an alimony rule that provides "a remedy for unfair exchanges during the marriage").



by Ira Ellman, which seeks to compensate the spouse who has invested disproportionately in marriage-specific capital. Ellman proposes that alimony reflect such a spouse's opportunity cost in the form of forgone investment in market human capital or other tangible or clearly quantifiable sources of potential financial gain.<sup>333</sup> In the event an unhappy low-earning wife initiates a divorce that is not mutually agreeable, that supplemental principle would usually have the effect of converting her indeterminate debit into a credit, at least insofar as she could demonstrate that her greater investment in domestic pursuits entailed a personal financial sacrifice. Even a wife with considerable earning power might be able to argue for forgone opportunity and escape having to pay for the privilege of divorce if she could demonstrate a greater in-kind contribution to the maintenance of the household.

### 3. *Welfare payments*

An alternative way to increase women's well-being outside of marriage, and thus reduce men's marital threat advantage within marriage, is for the government to make payments to ex-wives or custodial mothers directly. Until recently the United States had AFDC, a means-tested federal family-allowance program.<sup>334</sup> Before the repeal of the program, AFDC paid benefits not just to ex-wives but also to never-married single mothers. Persons qualifying for AFDC often received supplemental benefits such as Medicaid or Food Stamps. These benefits might have had the effect of making some women with low earnings capacity virtually indifferent as between marriage and non-marriage. Because the package of aid was sometimes as or more valuable than full-time wages at the bottom of the income scale,<sup>335</sup> federal poverty programs set women up as the equivalent of non-working wives to phantom husbands. To be sure, some real-life husbands supply extras in the

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<sup>333</sup> See Ellman, *supra* note 4, at 49-53.

<sup>334</sup> 42 U.S.C. §§ 601-687 (1994). The program was repealed in 1996 and replaced with a block grant program known as Temporary Assistance to Needy Families ("TANF"). Pub. L. No. 104-193, 110 Stat. 2105, 2112 (1996). Under TANF, however, some states have continued benefits programs similar to those in place under AFDC.

<sup>335</sup> See, e.g., Michael Tanner, Stephen Moore & David Hartman, Cato Institute, *The Work vs. Welfare Trade-Off: An Analysis of the Total Level of Welfare Benefits by State*, Sept. 19, 1995; Michael Tanner & Naomi Lopez, Cato Institute, *The Value of Welfare*, June 12, 1996.

form of emotional support and partial sharing of household responsibilities, but other husbands may impose net costs that partially offset the income they provide. AFDC may be more attractive than these husbands by supplying the income without the costs.

These poverty programs would tend to put poor women in a powerful bargaining position with respect to low-earning husbands. But such programs would also probably destabilize existing marriages among eligible populations or deter marriage altogether. Marital instability and low rates of marriage among the most poorly educated and least employable groups are consistent with these predicted effects, although they clearly have other causes as well.<sup>336</sup>

#### *F. Informal Social Norms Revisited*

As the previous discussion suggests, there are two important parameters that must be considered when trying to correct bargaining imbalance between husbands and wives: intramarital threats and divorce exit threats. There are in turn two important elements to be considered in any attempt to adjust men's and women's divorce exit threats: each spouse's relative value of leaving the marriage compared to the other's and the absolute value of the exit threat for each spouse. The latter affects the incentive to marry and stay married. If exit threat is to be set equal as between the sexes, there are three possible permutations: raise one spouse's threat point so both are high, lower the other's so both are low, or establish some point between the extremes. Federal poverty programs may have had the effect of raising some women's well-being outside of marriage to a level virtually equivalent to, or perhaps greater than, their well-being within most marriages they potentially could make. Because women could have children out of wedlock without losing welfare benefits, the expected costs to a welfare-eligible woman of remaining or becoming single was brought within the range of the costs to a man, with costs being rather low for both. In effect, the threat advantage for both potential partners was rendered quite high, with a predictable destabilizing effect. A complete-internalization

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<sup>336</sup> See, e.g., Daniel T. Lichter, *The Retreat from Marriage and the Rise in Nonmarital Fertility*, in Dep't of Health & Human Servs., *Report to Congress on Out-of-Wedlock Childbearing* 137, 138 (1995) (discussing evidence that recent declines in marriage have been greatest among least-educated women).

alimony rule would, in contrast, adjust one spouse's exit threat upward (the payee) and the other's downward (the payor). The hope is that the adjustment would, at worst, have a negligible effect on marital stability, and at best would decrease instability by forcing the would-be defector to internalize some of the losses imposed on the spouse who would be abandoned.

Perhaps the most pro-marriage rule of all, however, is one that insures that both spouses' exit prospects are similarly unattractive. Before about 1960, divorce carried a stigma in American society that had real reputational and economic consequences. Those included difficulties in remarrying, ineligibility for higher political office, and possible derailment of promising professional or business careers—all consequences with potentially greater impact on men. The informality of the stigma allowed for gradations in response depending on circumstance and perceived fault.<sup>337</sup> To be sure, *all* divorced persons were suspect, and women who abandoned their families or were otherwise thought to have contributed to their own difficulties were judged harshly. But because it was understood that dependent wives had more to lose from divorce than men, a man's defection invited special opprobrium.

The insights of bargaining theory reveal that remarkable wisdom informed the informal customs that made the post-divorce state unpleasant for all concerned. Other defunct social norms that made the unmarried state unattractive for men, such as the taboo against casual premarital sex and the expectation of marriage following out-of-wedlock pregnancy ("shotgun marriage"), also helped even the playing field between men and women within marriage.<sup>338</sup> But those norms, although supplemented by religious

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<sup>337</sup> See, e.g., Joseph Adelson, *Splitting Up*, Commentary, Sept. 1996, at 63; Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 *Future of Children*, Spring 1994, at 29; Richard Epstein, *Enforcing Norms: When the Law Gets in the Way*, Responsive Community, Fall 1997, at 1, 7 ("When divorce was regarded as socially unacceptable, divorcees found it difficult to get jobs, join clubs, or run for public office."). See generally Jonathan Rauch, *Live and Let Lie*, New Republic, Sept. 22, 1997, at 24 (describing bygone informal social controls surrounding marriage, adultery, and divorce).

<sup>338</sup> See, e.g., Burggraf, *supra* note 81, at 112; David Popenoe, *Modern Marriage: Revising the Cultural Script*, in *Promises to Keep: Decline and Renewal of Marriage in America* 261 (David Popenoe, Jean Bethke Elshtain & David Blankenhorn eds., 1996) ("Under the old system . . . if a man wanted regular sex (other than with prostitutes) he had to marry."); see also Akerlof, Yellen & Katz, *supra* note 281, at 284

scruples, have ultimately proved highly unstable. Greater mobility, women's increasing financial independence, and changing attitudes about the role of sex, relationships, and marriage have contributed

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tbl.II (noting decline in shotgun weddings from 1965 to 1984). Bargaining theory predicts that the stigma attached to premarital sex would strengthen women's hand within marriage by making sex harder to obtain. The shotgun marriage practice would also tend to have this effect, since it imposed severe penalties on men who abandoned or refused to marry a pregnant girlfriend.

According to Akerlof and his co-authors, shotgun marriages occurred because women customarily elicited a promise of marriage in the event of pregnancy in exchange for agreeing to engage in premarital sex, and men routinely made good on that promise to avoid the social and reputational costs of reneging. *Id.* at 297-304. With the advent of the birth control pill and legalized abortion, the market was flooded with women who were willing to take contraceptives or abort, and thus these women had less of an incentive to extract a promise of marriage as the price of engaging in premarital sex. This development destabilized the "promise" norm by putting women who insisted on a provisional promise of commitment at a competitive disadvantage in attracting young men. *Id.* at 307-10.

According to the authors, the increased availability of sex without a promise of marriage led to an increase in the out-of-wedlock birth rate. *Id.* Some women (mostly those in the lower socioeconomic classes) who found themselves pregnant—and who previously would have been good candidates for shotgun brides—decided to go ahead with their pregnancies even if the fathers refused to marry them. If one of the important reasons men marry is to have their own children, then the reported increased willingness of some women to bear children out-of-wedlock would be predicted to increase their prospective mates' well-being outside of marriage as well. This would not only decrease these men's willingness to marry, but might also increase men's leverage within those marriages that are contracted.

The dramatic recent increase in the age of first marriage for both men and women, see *supra* note 1, is consistent with the contemporaneous increase in the availability of premarital sex in all social classes. The ease of obtaining sex outside of marriage decreases the costs of delayed marriage for both sexes, but especially for men, who are always faced with greater scarcity of sexual opportunities. See Akerlof, Yellen & Katz, *supra* note 281, at 309 (noting the erosion over the past three decades of the taboo against premarital sex except as a prelude to marriage). But the lifetime marriage rates among higher socioeconomic classes has not dropped nearly as much as among the less educated. See Lichter, *supra* note 336, at 138-39. This pattern may be due partly to the practical unavailability to higher status men of having their own children outside marriage. In contrast, out-of-wedlock birthrates have exploded among the relatively poor and less well-educated: More men in those groups can now obtain both sex and children outside the marital union. See Wax, *supra* note 266, at 493 n.6 (citing statistics on rates of extramarital childbearing, which indicate that rates decline steeply among white women as education and income rise). Interestingly, single motherhood through artificial insemination or adoption does not have the effect of giving identifiable men their own children. To the extent that well-off white women favor those methods, out-of-wedlock childbearing (which occurs infrequently in this group anyway) will make little contribution to men's extramarital welfare or their disincentive to marry.



to the erosion of the informal social sanctions.<sup>339</sup> The steep rise in the divorce rate to a near-majority phenomenon has made it more difficult to treat divorced persons as deviant and socially marginal or to impose meaningful reputational costs.<sup>340</sup> As a result, the social stigma that once attached to divorce has all but disappeared in most quarters. Finally, informal sanctions against divorce carried a social price. By imposing additional and onerous transaction costs on divorce, the fear of social disapproval held some people in otherwise negative-sum unions. In addition, spouses were locked into inefficient relationships in which one spouse had more to gain from divorce than the other had to lose—a problem better solved with post-divorce redistribution. On the other hand, the social stigma of divorce was particularly effective in protecting the well-being of third parties—most notably, children—whose interests in the continuation of an unhappy marriage did not precisely coincide with their parents’.

## VI. CONCLUSION

While not solving the puzzle entirely, this account of marital bargaining provides an important missing piece in the search for explanations of why women occupy a lower social status and perform the lion’s share of less valued work. More specifically, it helps to explain why married women—still the majority of women—appear on average to work harder and longer and for fewer rewards than their husbands. The standard account says that women are doing what they want to do: They like it this way, and would not change it if they could. Alternatively, women just *appear* to do worse. There are hidden compensations and consolations that make them just as well off as men. When different preferences and utilities are factored in, equality reigns.

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<sup>339</sup> See, e.g., Barbara Dafoe Whitehead, *The Divorce Culture* (1997) (documenting the recent destigmatization of divorce); see also Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1916 (1991) (discussing forces of modernity, mobility, and anonymity that contribute to the erosion of social norms).

<sup>340</sup> See Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 Am. Scholar 17 (1993) (discussing general difficulty of maintaining social stigma against behaviors as they become more common); Sunstein, *Social Norms*, *supra* note 32, at 929-30 (discussing the costs of policing social norms); Wax, *supra* note 266, at 508-25, 533-37 (discussing erosion of norms stigmatizing illegitimacy).

Although bargaining theory cannot definitively refute this account, it shows why there is no reason to credit these stories and good reason not to. Women probably *do not* like it that way and *would* change it if they could. But they cannot, because they lack the leverage to do so. The reasons behind this dilemma lie deep within the structure of marriage itself. The bilateral and monopolistic institutional framework—in which each woman is forced to bargain with one man with little outside help or intervention—is an effective mechanism for turning women's differences to women's disadvantage. To be sure, the scope for "private" bargaining within the marital relationship is affected by baseline rules of domestic law (supplemented by custom), which in turn determine the rights and obligations that spouses have towards each other. These factors can strengthen or weaken women's hand. But domestic law has been increasingly deregulated and privatized.<sup>341</sup> By imposing fewer and fewer specific obligations on spouses and leaving more matters to be worked out between the parties, recent changes have forced women to rely on the not-so-tender mercies of a bargaining game undertaken from a baseline of unequal starting points and bargaining strength. The key structural features of our current marital regime—exclusivity, minimal and sex-blind barriers to exit, no intramarital enforcement of promises or contracts, and little post-marital redistribution of resources—insure that the institution operates very much in men's favor. But even though some of these features represent fairly recent innovations and reforms that could be abandoned, there are limits to what law or custom can do to strengthen women's bargaining position, given marriage's fundamental nature. Conflict and power cannot be wished out of marriage. Nor can the disparity between men's and women's positions. That disparity is not just a contingency of the institution, a superficial cultural gloss that can be discarded in some times and at some places. Rather, it is of the essence: a consequence that springs from the deep and defining nature of marriage as a *monopolistic* institution marked by the expectation of exclusivity, fidelity, and cooperation for living. Marriage has always been a two-person bargain at its core, insofar as many key matters between husband and wife, including divisions of labor and reward, have always been

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<sup>341</sup> See, e.g., Mnookin & Kornhauser, *supra* note 89, at 952-58; Singer, *supra* note 277.

regarded as "something to be sorted out privately rather than made a subject of public intervention."<sup>342</sup> To the extent the spouses must work out the most important terms of their life together and then rely largely on self-help to make those terms stick, marriage must continue to be an institution in which "the balance between freedom of action and security . . . [remains] dependent on shrewdness, negotiating skill, and the preexisting distribution of wealth, power, and legal entitlements."<sup>343</sup>

To be sure, the structure of the marital relationship is not the only culprit responsible for women's disadvantage. Such diverse factors as the rigidities of the labor market,<sup>344</sup> the pro-breadwinner bias in the tax code,<sup>345</sup> the cultural equation of manliness with occupational success,<sup>346</sup> the eroticization of men's dominance over women,<sup>347</sup> the stigma of male domesticity,<sup>348</sup> the "iron law of childcare,"<sup>349</sup> and the residue of job discrimination and sexual harassment all are important. Women's own outlook and aspirations also play a role. Such putative traits as women's greater concern for children, for compromise over conflict, and for caring rather than ruling would put them at a competitive disadvantage in the wider world even if marriage could somehow be radically transformed or even extinguished as a social norm. Women's preferences still might lead to systematic specialization even within a marital institution structured to achieve a more egalitarian balance; in turn, women might hold fewer positions of worldly power, and women's interests might be slighted. There is no simple solution to this problem, and the abolition of all traces of sexual caste would

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<sup>342</sup> Richard A. Posner, *Conservative Feminism*, U. Chi. Legal F. 1989, at 191, 200.

<sup>343</sup> Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 Mich. L. Rev. 1266, 1302 (1997); see also Tracy E. Higgins, *Democracy and Feminism*, 110 Harv. L. Rev. 1657, 1674 (1997) (discussing the idea that women's relative lack of power in private relationships—as opposed to the public sphere—is a significant source of women's inequality).

<sup>344</sup> See McCaffery, *supra* note 186; Williams, *supra* note 3.

<sup>345</sup> See Edward J. McCaffery, *Taxing Women* (1997).

<sup>346</sup> See Williams, *supra* note 3, at 2238-39.

<sup>347</sup> See, e.g., Catherine A. MacKinnon, *Feminism Unmodified* 127-214 (1987).

<sup>348</sup> See Williams, *supra* note 3, at 2243; Case, *supra* note 159.

<sup>349</sup> See Fuchs, *supra* note 7, at 137 (noting that the labor intensiveness of childcare entails either that most women cannot afford trustworthy care, or that childcare workers will be poorly paid).

clearly require radical and far-reaching changes (which in turn would entail some very real costs).

Nonetheless, marriage as currently structured remains a critical and important component of women's inequality. There is a disparity between the promise of equal partnership that marriage represents and the means to enforce that promise. Neither legalistic measures nor private contracts provide the complete solution to the problem of bargaining imbalance within marriage. Nevertheless, marriage generally performs its social functions best when enduring as a long-term contract in which participants honor their reciprocal obligations. Unfortunately, few marital obligations are effectively enforced either formally or informally. A deliberate decision has been made to give divorcing couples a clean break. Thus, the final accounting ordained by current law and custom does little to make good on the types of long-term promises that are the source of most of the institution's unique social benefits. The failure to enforce the promises implicit in the marital relationship, although certainly not the exclusive source of men's and women's inequality within marriage, contributes to it by opening the way for rampant opportunism that disproportionately harms women and children. Proposals that attempt to make marital promises stick—such as the revival of alimony, fault, and consent requirements—have some potential to strengthen women's hand within marriage. But the sex-neutral form that these proposals most often take undermines that potential by strengthening men's position as well.

There is no panacea for women's age-old dilemma in marriage. It is difficult to redistribute power in relationships that depend, in important part, on voluntary choices and voluntary contributions between unequals, and it is difficult to transform a vital social institution that, in its transformation, would be destroyed. The relative powerlessness of women within marriage that is described in this Article—and the sense of being *overpowered* in a relationship central to human existence and happiness—marks out an important but poorly understood locus of dejection at the heart of feminine experience. The resignation that characterizes women's outlook on relationships with men and the persistence of the "woman question" in general can be traced in large part to the basic intransigence of the problem of marriage as a relationship that aspires to be between equals, but is not. Indeed, it could be argued that the



gulf between aspiration and reality (or between aspiration and structure) is a source of frustration for both sexes, since men must also learn to live within an institution rigged to their own advantage but not of their own making.

Finally, the built-in structural inequalities of marriage, which may once have been thought to be a source of strength for the institution, may now have come to represent a fatal weakness. The evidence would suggest that women are increasingly dissatisfied with marriage as it currently exists. More and more women are turning their backs on their marriage, often seemingly at great cost to themselves and their children. One possible explanation for this otherwise puzzling behavior is that women, as weak bargainers, are losing out in the marital give and take to the point where they perceive themselves as better off outside marriage than within it. Or perhaps they are repelled by the imbalance in their "positive-sum" bargain and have come to see that imbalance as fundamentally unfair. Can women's sense of injustice and the desire for a fair deal be suppressed forever, even for their own and their children's sake? Must the chronic imbalance in such a key relationship—one so central to social life and to the fate of individuals—inevitably generate rebellion?<sup>350</sup> Women's growing distaste for marital inequality—coupled with men's unsurprising desire to maintain it—may represent the most potent and ominous threat to the institution of marriage so far.

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<sup>350</sup> See, e.g., Joshua Cohen, *The Arc of the Moral Universe*, 26 *Phil. & Pub. Aff.* 91 (1997) (suggesting that human moral and emotional makeup is such that a group's chronic experience of relative powerlessness within a basic social institution—such as slavery—must inevitably lead to a recognition of injustice and a rebellion against injustice).