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Naomi Cahn

*George Washington University Law School*

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# LOOKING AT MARRIAGE

*Naomi Cahn\**

ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE. By Milton C. Regan, Jr. New York: Oxford University Press. 1999. Pp. x, 279. \$45.

In a recent book (not the subject of this Review), highly successful and popular authors John Gottman and Nan Silver set out their seven effective principles for making a marriage last. The final suggestion is that spouses should “create shared meaning, an inner life together that is rich with symbols and family rituals and that honors the hopes of both partners.”<sup>1</sup> In a happy marriage, the couples not only provide support for each other, but also “build a sense of purpose into their lives together.”<sup>2</sup> Professor Gottman has developed these principles as a result of twenty years of research and observation of happily and unhappily married couples. Based on the interaction between couples in his Love Lab, he can predict, with over 90% accuracy, which couples will stay together and which will divorce.<sup>3</sup>

In *Alone Together: Law and the Meanings of Marriage*, Professor Milton Regan<sup>4</sup> also examines the state of contemporary American marriage, and he too argues for recognizing the importance of shared meaning between the partners (p. 5), and commitment to the marriage as an entity rather than simply to the individual lives of the spouses. He bases his prescription for the institution of marriage on an exami-

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\* Professor of Law, George Washington University Law School. — Ed. The author thanks Katharine Baker, Adam Becker, Brian Bix, June Carbone, Jane Murphy, Trisha Smith, Michelle Wu, and George Washington University Law School.

1. JOHN GOTTMAN & NAN SILVER, SEVEN PRINCIPLES FOR MAKING A MARRIAGE WORK 23 (1999). The other six principles are: 1) know the intimate details of your spouse's world; 2) foster your fondness and respect of each other; 3) look to your spouse rather than away; 4) allow your spouse to affect and influence you; 5) resolve the problems that you can; and 6) move away from gridlock to discussion. *See id.*

In her recent book based on a study of 160 men and women in intimate relationships in three countries, researcher Sally Cline found that the following issues determined the success of a married couple: “Commitment, Communication, Coping with Change, Cherishing, and Compromise . . . and Interdependence: the balance between dependence and independence.” SALLY CLINE, COUPLES: SCENES FROM THE INSIDE 15 (1999).

2. GOTTMAN & SILVER, *supra* note 1, at 23.

3. *See* Barbara Kantrowitz & Pat Wingert, *The Science of a Good Marriage*, NEWSWEEK, Apr. 19, 1999, at 54; Philip Weiss, *Is this Marriage on the Rocks*, N.Y. TIMES, May 7, 2000, at 61.

4. Professor of Law, Georgetown University Law Center.

nation of three different issues: first, the accuracy of the law and economics approach to marriage; second, the continuing validity of the spousal evidentiary privileges; and third, the division of property between spouses upon divorce. Like Gottman and Silver, Regan is concerned about contemporary marriage. Unlike Gottman and Silver, however, Regan focuses on the cultural institution and societal meanings of marriage rather than on the meaning of marriage to any particular couple.

Professor Regan is an extremely thoughtful scholar of the family and of marriage. In a previous book, he argued for a reinvigoration of status-based responsibilities in family law in order to foster greater intimacy between family members.<sup>5</sup> *Alone Together* continues the argument, placing it in the context of political conversations about the relationship between self and community.

Marriage clearly requires the individual spouses to balance their own identities with their identity as a couple,<sup>6</sup> and it thus simultaneously implicates issues of interconnection and individual fairness. *Alone Together* identifies two different stances in marriage that implicate both individual spouse and marital entity: an external stance, which is identified with the individual's benefit, and an internal stance, which is identified with the community. By clearly articulating these tensions within marriage, Regan offers an extremely useful perspective on marriage. Indeed, the strength of this book is in its persuasive descriptions of the critical nature of both care and justice within marriage, and the difficulty of balancing them.

The question that remains after reading this extremely thought-provoking book is: why marriage?<sup>7</sup> If anyone can defend the institution, then this select company includes Regan.<sup>8</sup> There have been many other defenders of marriage as an institution who argue, from a conservative slant, that it will lift women out of poverty, provide fathers for children, reweave the moral fabric of America, and, in general, save our society.<sup>9</sup> Regan, being far more measured and thoughtful,

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5. See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993) [hereinafter REGAN, *FAMILY LAW*]. For a sympathetic and perceptive review, see Margaret Brinig, *Status, Contract, and Covenant*, 79 CORNELL L. REV. 1573 (1994) (book review).

6. See Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97 (1998).

7. This question should not be confused with another, recently posed and answered by E.J. Graff. See E.J. GRAFF, *WHAT IS MARRIAGE FOR?* (1999).

8. Of course, there have been other persuasive defenders as well, including Yale Law School Professor William Eskridge. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996).

9. See, e.g., Institute for American Values, *Press Release*, Sept. 22, 1999, at 1 (visited Feb. 16, 2000) <<http://www.americanvalues.org/Unwedmothers.htm>> (reviewing MAGGIE GALLAGHER, *THE AGE OF UNWED MOTHERS: IS TEEN PREGNANCY THE PROBLEM?* (1999)) ("For Gallagher, the key to understanding the teen pregnancy crisis is marriage....").

eloquently defends marriage on behalf of married people rather than as the solution to all of society's alleged ills.

In this Review, I will first discuss Professor Regan's observations on marriage. In the second Part, I will question the utility of marriage itself: why not allow adults to choose their own means of commitment to each other and/or to others? Regardless of what is happening to the state of contemporary marriage, adults are committed to the family as a functional institution, rather than to particular rigid forms.

Next, I will question the applicability of Regan's conclusions to women, poor people, and nonwhite people. For example, in Regan's critique of the economic approach to marriage, he does not mention the special problems of poor people for whom a law and economics approach provides little explanatory power. Indeed, there are a series of special issues concerning marriage that these groups confront.

The two different stances on marriage that Regan articulates are critical to an understanding and appreciation of marriage and its role in society. Regan has made an accurate diagnosis that both stances reflect important moments in marriage, but that there may be some unavoidable tensions between them. In his analysis of the law and economics approach, spousal privilege, and divorce financial awards, he suggests that an external stance neglects important aspects that are indeed captured through the internal stance. Accordingly, perhaps our culture should focus more on the marital relationship than on the rights of each individual spouse. But I believe it is necessary to look deeper. Within each marriage, gendered expectations affect which spouse is relationally-focused and which spouse is fairness-focused, and thus the individuals within each relationship should acknowledge the insights of both stances and seek a more equitable "internal" balance.

## I. THE BOOK

Before turning to the book, I want to discuss briefly the state of contemporary American marriage. Marriage has become, indeed, has always been, a crucible for examining and solving all of society's problems. The movement toward covenant marriage in Louisiana and many other states is symbolic of a perceived decline in commitment to marriage continuity, and of attempts to preserve the besieged institution of marriage.<sup>10</sup> There is also much hand-wringing over the perceived decline in commitment to marriage itself, given the number of

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10. See LA. REV. STAT. ANN. §§ 9:272-75 (West Supp. 2000); see also ARIZ. REV. STAT. ANN. §§ 25-901 to 906 (West Supp. 1999); Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 619-20 (1999); Gary H. Nichols, Note, *Covenant Marriage: Should Tennessee Join the Nobel Experiment?*, 29 U. MEM. L. REV. 397 (1999).

cohabitating couples. Many scholars have suggested that the increase in the divorce rate over the past three decades indicates that the public views contemporary marriage as nothing more than a contract for self-fulfillment.<sup>11</sup> As a result of an increasing societal emphasis on personal psychological happiness, they believe that the focus in marriage is no longer on others, but on the individual's own self-fulfillment.<sup>12</sup> The new ideology of families celebrates, in the words of one critic, the "Love Family,"<sup>13</sup> which is based on choice and voluntary affiliation with another adult rather than on the commitment traditionally associated with marriage. Instead of living within an ethic that celebrates relationships and obligations to others, the new ethic celebrates obligations only to oneself. Vulnerability and dependence (and marriage itself) are useful, according to this critique, only when they further individual happiness. For example, while many parents used to believe it was important to stay together for the children, this is no longer true.<sup>14</sup> One recent report summarized these contemporary concerns about marriage:

The popular culture strongly reinforces th[e] sense of pessimism, even doom about the chances for marital success . . . .

Marriage is losing much of its status and authority as a social institution . . . .

For most Americans, marriage is a 'couples relationship' desired primarily to meet the sexual and emotional needs of the spouses . . . . People tend to be puzzled or put off by the idea that marriage has purposes or

11. Barbara Dafoe Whitehead, for example, blames the high divorce rate on individuals' desire for self-fulfillment at the expense of commitment and nurturing. See BARBARA WHITEHEAD, *THE DIVORCE CULTURE* 4, 6 (1997); see also Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503; see generally Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (book review).

12. See Whitehead, *supra* note 11, at 54. Professor Regan has pointed out "doubt that there is any genuine consensus about what marriage is and what its moral obligations ought to be." Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 608 [hereinafter Regan, *Market Discourse*]. There is even doubt that marriage should connote a special status. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995). Regardless of the future of marriage, it does carry with it certain privileges and images; this Article is based on the existing institution of marriage.

13. Whitehead, *supra* note 11, at 144, 152.

14. Whitehead cites a study that asked women in 1962 whether they believed that parents who did not get along with each other should stay together for the children. Fifty-one percent did not believe this was appropriate. By 1977, 80% did not think this was appropriate. See *id.* at 82. Studies of why people divorce affirm Whitehead's conclusions with respect to the changing reasons for divorce. According to several studies, failure of communication or feeling unloved are the most frequent reasons given for divorce. See CATHERINE KOHLER RIESSMAN, *DIVORCE TALK* (1990); Lynn Gigy & Joan B. Kelly, *Reason for Divorce: Perspectives of Divorcing Men and Women*, 18 J. DIVORCE & REMARRIAGE 169, 186 (1992). Historically, there has also been a shift in the reasons for divorce. See generally GRAFF, *supra* note 7.

benefits that extend beyond fulfilling individual adult needs for intimacy and satisfaction.<sup>15</sup>

Within the law, the shift toward individual fulfillment and away from state control is seen in the concern over privatization. The argument is that there has been a shift from state intervention and state-imposed norms toward more private decisionmaking.<sup>16</sup> Professor Jana Singer carefully points out the many areas in which private contracting has replaced more public ordering, ranging from premarital contracting to adoption.<sup>17</sup> In addition, she suggests that the distinction between marital status and nonmarital status is diminishing.<sup>18</sup>

Notwithstanding all of this hand-wringing about the declining importance of marriage, the marriage rate today is comparable to the marriage rate in the late nineteenth century.<sup>19</sup> While the marriage rate peaked for those born during the 1920s and 1930s, and has been declining since, the institution of marriage is not disappearing.<sup>20</sup> Even when people leave first marriages, they overwhelmingly return to the institution by remarrying. Indeed, as an example of the appeal of mar-

15. DAVID POPENOE & BARBARA DAFOE WHITEHEAD, *THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 4-6 (1999).

16. See Ann Laquer Estin, *Can Families be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 25 (1996).

17. See Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443. Others, with varying levels of approval, have also documented the increasing privatization of family law and the corresponding power of individuals to enter into contracts with respect to issues that were formerly a matter solely of domestic relations law. See, e.g., p. 5; Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982). For other perspectives, see MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); Janet Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994).

18. See Singer, *supra* note 17, at 1447-56.

19. See ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* (Rev. ed. 1992); HOWARD P. CHUDACOFF, *THE AGE OF THE BACHELOR: CREATING AN AMERICAN SUBCULTURE* (1999); Peter Brimelow, *Too Many Bachelors?*, FORBES, Nov. 15, 1999, at 143 (reporting that 31% of contemporary American men have never been married, but 44% had never married a century ago, and the percentage of contemporary married women is the same as a century ago).

20. See CHERLIN, *supra* note 19, at 10-11. Cherlin explains:

More than 90 percent of the women in every birth cohort on record (records extend back to the mid-1800s) have eventually married. The adults who came of age after World War II have the highest lifetime percentage married. . . . [R]ecent estimates suggest that the lifetime percentage married among women born during the baby boom may fall below the historical minimum of 90 percent by a *percentage point or so*.

*Id.* (footnotes omitted) (emphasis added).

The percentage of men and women over age 35 who have never married is lower today than it was in 1950. See DAPHNE SPAIN & SUZANNE M. BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* 27, tbl. 2.2 (1996). Spain and Bianchi also note that the median age at first marriage is increasing and that women who marry at an older age are less likely to divorce (although more likely to have nonmarital children). See *id.* at 26.

riage, consider the efforts of gay activists to make marriage available to same-sex partners.<sup>21</sup> Broadening access to marriage is an attempt to reinforce the importance of marriage, rather than an attempt to undermine it.<sup>22</sup>

Marriage has always served state interests, regardless of the individual economic and social interests of spouses. Underlying its language of companionship, marriage is a public status that historically has been regulated publicly to serve the purposes of the state.<sup>23</sup> It is, then, simultaneously an intensely private relationship and an extremely public status that has been manipulated to support prevailing public images of morality and social order. For example, Professor Nancy Cott shows how the federal government manipulated notions of citizenship during the nineteenth century based on a woman's marital status in order to form and reinforce appropriate gender roles.<sup>24</sup> Thus, in 1855, Congress enacted a statute providing that a woman who married a male citizen of the United States herself became a citizen, without making any provision for marriage to a female citizen; Cott argues that this "underline[s] customary male headship of the marital couple as a *civic* and *political* norm."<sup>25</sup> Judges in the nineteenth century refused to allow spouses to divorce each other except upon a finding of fault; even when judges were granted enormous discretion to allow a divorce based on incompatibility, they forced marriages to continue because of the public interest in the marital status and because of extreme antipathy to allowing parties to determine the terms of their marriage contracts.<sup>26</sup> Moreover, marriage used to control sexuality and the legitimacy of children.<sup>27</sup>

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21. There is extensive literature on this. *See generally, e.g.*, ESKRIDGE, *supra* note 8.

22. Some gay activists have argued that allowing same-sex marriage will, in fact, undermine the institution. That is not, however, the primary argument offered by most same-sex marriage advocates who seek access to marriage because they respect the existing institution and its privileges. *See id.*; *see also* Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9 (1991); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 *VA. L. REV.* 1535 (1993); Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 *YALE L.J.* 1783 (1988).

23. *See* Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 *L. & SOC. INQUIRY* 541 (1998).

24. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 *AM. HIST. REV.* 1440, 1442 (1998).

25. *Id.* at 1456 (emphasis in original).

26. *See* Naomi Cahn, *Finding Fault*, Presentation at American Society for Legal History Annual Meeting (October 1999); *see also* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 63-92 (forthcoming 2000).

27. *See* Lindsay, *supra* note 23, at 547.

Judges and legislatures have used marriage as a means to privatize dependence, to foster women's dependence on men.<sup>28</sup> By finding a marriage when evidence was doubtful as to its existence, judges have made men, not the state, responsible for women's financial needs. In cases where women sought to establish a common law marriage, a finding in their favor served simultaneously to privatize and moralize their relationships.<sup>29</sup> Thus, marriage has always involved public and private interests — and, of course, public regulation is intimately intertwined with those private interests that are protected by, and in, marriage.<sup>30</sup>

Professor Regan begins the book by examining the different private interests that are at the "heart" of marriage. The central concept of *Alone Together* is the distinction between two different approaches to marriage that exist simultaneously within any marriage: "an 'external' stance [which] represents an individual's capacity to reflect critically upon, rather than simply identify with her commitments and attachments . . . [and an] 'internal' stance [in which] marriage appears as a universe of shared meaning that serves as the taken-for-granted background for individual conduct" (p. 5). The external stance allows individuals to evaluate for themselves the costs and benefits of any particular relationship, and to assess, independently, whether their self-interest is advanced (pp. 17-18). It is characterized by concepts such as consent, justice, equality, and contract (p. 24).

By contrast, the internal stance focuses on the individual as embedded in connection with others. It is concerned with sustaining relationships; it "tends to blur the boundary between self and other" (p. 25), and it requires trust (pp. 24-25). Unlike the external stance, where obligations to the other spouse develop as a result of contract or consent, obligations to the other spouse that are based on the internal stance develop as a result of the relationship itself (p. 26). The identity of each spouse does not exist independently of the other, but is, at least partially, defined by the existence of the marriage (p. 25). While the external stance is associated with traditional liberalism and with an ethic of justice, the internal stance "has some affinities with both the communitarian critique of liberalism and with emphasis on an ethic of care."<sup>31</sup> Regan argues that both perspectives are critical to a marriage but that the stances are "irreducible to one another" (p. 29).

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28. See generally Lindsay, *supra* note 23; Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1997).

29. See generally Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 718 (1996).

30. See generally Lindsay, *supra* note 23; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174-79.

31. P. 27. The ethics of justice and care are associated with the work of Carol Gilligan. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) [hereinafter GILLIGAN, *DIFFERENT*



In a wonderful passage in the book, Regan uses a scene from Amy Tan's novel, *The Joy Luck Club*, to dramatize the awkwardness of autonomy without community in marriage.<sup>32</sup> The mother of Lena, the main character, notices the careful accounting of expenses between her daughter and son-in-law with a bottom line that her daughter will owe money to her son-in-law; Lena explains that she and her husband want to " 'eliminate false dependencies . . . be equals . . . love without obligation' " (p. 23). As Regan observes, this couple is missing the richness and interdependence of relationship that is inherent in our cultural concept of marriage. "Genuine intimacy, however, seems to demand that she also be able to take an internal stance from which the relationship is taken as a given without references to the individual costs and benefits."<sup>33</sup> Ultimately, these two different stances express tensions in our culture outside of marriage, explains Regan. His exploration of marriage serves as merely one example, albeit an important one, of tensions between the individual and the community, tensions that are central to liberal and communitarian thought (p. 30).

Having established the two distinct stances, Regan applies them in three different marriage-related contexts to show the necessity of balance rather than complete reliance on one stance or the other. First, Regan examines the economic, or market approach to marriage, looking at the rhetoric of the law and economics perspective. He returns to the economic approach to marriage in the third part of the book, when he examines property distribution upon divorce. Second, Regan examines the two different forms of privileges for spouses called to testify against each other. Although Regan observes that his articulation of the tensions between the two stances does not resolve all of the dilemmas of modern marriage (p. 205), he does indicate his preference for resolving these dilemmas: he believes that it is important for society to shift toward more of an internal stance.

In Part II, *Markets and Marriage*, and Part IV, *Money and Divorce*, Regan examines the impact of market-based discourses on the family.

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VOICE]; Carol Gilligan, *Remapping the Moral Domain: New Images of Self in Relationships in MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION 3* (Carol Gilligan et al. eds., 1988) [hereinafter Gilligan, *Remapping*]. She has suggested that the ethic of care correlates with the way that many women approach the world because it focuses on relationships between people. *See id.* at 7. An ethic of justice focuses on legal, abstract, and hierarchical rights. *See id.* at 8. *See also generally* Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992); Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1 (1991); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

32. AMY TAN, *THE JOYLUCK CLUB* 160-65 (1989).

33. P. 24. Further support of Regan's perspective occurs shortly after Lena's explanation to her mother, when Lena confronts her husband: "Why do you have to be so goddamn fair! . . . We need to think about what our marriage is really based on . . . not this balance sheet, who owes who what." TAN, *supra* note 32, at 164-65.

Although Part II focuses on the rhetoric of law and economics, and Part IV focuses on the rhetoric and reality of a property-based perspective, both parts of the book are concerned with the implications of the external stance involving the economics of marriage and the concepts of spouses as independent, contracting actors.

### A. *Money, Contracts, and Economics*

Regan begins his application of the internal and external stances to contemporary family law issues by describing the law and economics approach to the family. He explores the increasingly widespread use of this discourse to describe contemporary family life, and then critiques the approach.

The most prominent proponents of this approach — e.g., Gary Becker and Richard Posner — argue that spouses participate in a marriage market; if the overall utility of becoming married outweighs the overall utility of remaining single, then individuals will get married (p. 35). They argue, first, that labor specialization, in which one family member works primarily in the market sector, and the other in the household sector, maximizes utility.<sup>34</sup> Second, they argue that intrinsic differences between men and women dictate that women are more biologically suited to staying home and raising the children while men, of course, are better suited to market production.<sup>35</sup> Women inevitably have different preferences for market jobs.<sup>36</sup> Women specialize in building the human capital of their children and husbands, while men specialize in market capital.<sup>37</sup> Traditional gender roles, in which the woman stays home while the man is the breadwinner, provide the most efficient mechanism for family resource allocation; and this is the way of measuring marital success because “happiness or utility or welfare [are] synonyms.”<sup>38</sup> In sum, marriage is seen “as a rational joint venture that involves bargaining over and implicit exchange of resources.”<sup>39</sup>

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34. See, e.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* 14-21 (1981).

35. See *id.* at 21-22. The sociobiologists agree with this second point. Judge Posner points out two causes for women staying home: first, sex discrimination in the labor market means that women earn less than men; and second, because “women bear the children and are better adapted to child (especially infant) care, the wife’s costs of household production will be lower than the husband’s.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 157 (5th ed. 1998).

36. See Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 *GEO. L.J.* 89, 93-94 (1993) (discussing what she terms the “supply-side preference” theory).

37. See BECKER, *supra* note 34, at 23.

38. POSNER, *supra* note 35, at 157 (alteration added).

39. P. 37. As economists take pains to emphasize, of course, “rational” does not mean calculated. As Posner explains at the beginning of his textbook on law and economics:

Regan then examines how this approach is consistent with the external stance. First, like the external stance, law and economics begins with the preferences of the individual actor (p. 48). Second, law and economics emphasizes private ordering — agreements and contracts — as the appropriate means for structuring relationships (p. 51). He suggests also that the economic approach is beneficial for women because, among other things, it can provide a basis for arguing for a more equal allocation of resources between the spouses (p. 60). This is so because it clarifies the economic benefits and losses experienced by each spouse in marriage. Moreover, he argues that the economic approach to marriage, like the external stance, calls attention to the need to acknowledge the spouses' self-interest. Regan believes "[t]he economic emphasis on individual interest, consent, and fair exchange may offer a useful corrective to a language of sharing that sometimes has been used to cloak women's disadvantage" (p. 61).

Indeed, some feminist scholars have begun to reassess the utility of the economic approach to marriage. Their present goal is to ensure that caregiving and housework are "counted" as economic contributions.<sup>40</sup> Professor Katharine Silbaugh questions whether the visceral reaction against market discourse in the family is a means of undermining women's power within the home.<sup>41</sup> She argues that opposition to market discourse may deprive women of the benefits they should receive from performing labor in the household.<sup>42</sup> Silbaugh argues for the importance of increasing the status of housework in order to increase the status of women both inside and outside of the home.<sup>43</sup> She carefully documents the contemporary legal approach throughout a variety of different fields (divorce, tax, contract, etc.) toward the de-

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Economics is not a theory about consciousness. Behavior is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser . . . . And self-interest should not be confused with selfishness; the happiness . . . of other people may be part of one's satisfactions.

POSNER, *supra* note 35, at 4; *see also* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 10-11 (2d ed. 1997).

40. Shirley Burggraf argues for economic incentives to continue parental investment in their children. *See* SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF FAMILY IN THE POST-INDUSTRIAL AGE* (1996).

41. *See* Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 *YALE J.L. & FEMINISM* 81, 84 (1997) [hereinafter Silbaugh, *Commodification*].

42. *See id.* at 95; *see also* Julie A. Nelson, *Of Markets and Martyrs: Is it OK to Pay Well for Care?*, *FEMINIST ECON.*, Fall 1999, at 43, 45, 56 (arguing for a reconceptualization of markets as feminizing within a larger set of societal relationships).

43. *See* Silbaugh, *Commodification*, *supra* note 41, at 121 ("Understanding the economic aspects of women's non-market activity is an important part of the transformative vision of progressive feminism."); *see also* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *NW. U. L. REV.* 1 (1996) [hereinafter Silbaugh, *Turning Labor into Love*]. Professor Nancy Staudt believes that imposing taxes on housework could help change the gendered nature of work. *See* Nancy C. Staudt, *Taxing Housework*, 84 *GEO. L.J.* 1571, 1635 (1996).

valuation of housework as work, and toward its valuation as “merely” affectionately based, and thus not worthy of compensation.<sup>44</sup> Jana Singer suggests that privatization may be advantageous to women because it eliminates some of the “sexism and hierarchy of traditional family rules” in marriage, promotes diversity within family relationships, increases people’s control and autonomy within reproduction and other family-related activities, and may serve as a means of reaching “a more just form of public ordering.”<sup>45</sup> Within a law-and-economics model, Professor Amy Wax has argued that the traditional story is inadequate.<sup>46</sup> Instead, she posits that women’s caretaking work generates positive externalities by benefiting third parties (for example, the children themselves) as well as by creating public goods.<sup>47</sup> Consequently, a woman’s return on her labor is artificially diminished because these positive externalities are received gratuitously.<sup>48</sup> She suggests that a normative goal should be determining how to adequately compensate women for their entire contribution, including the gratuitously conferred benefits. While the language is couched in economic terms, the goal is to protect specialization in the internal stance.

Nonetheless, Regan suggests the limitations of the law and economics approach. That approach, he argues, claims to explain all behavior within marriage, even altruistic actions, but behavioral research fails to support the economic explanation (pp. 62-63). Taking an “external” approach to law and economics, that is, critiquing its underlying assumptions,<sup>49</sup> he argues that it cannot account for the interpersonal connection and social behavior associated with the internal stance. Spouses are not simply rational, utility-maximizing individuals at all times within marriage. They are, instead, concerned about each other: “an understanding of behavior as noninstrumental, undertaken solely for the sake of the other, is perhaps the essential norm that guides the behavior of persons in close relationships” (p. 74). By overlooking the behavior associated with the internal stance, and by attempting to explain such actions solely through a rational basis account, the economic approach can provide only a partial explanation

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44. See Silbaugh, *Commodification*, *supra* note 41, at 82-83; see generally Silbaugh, *Turning Labor into Love*, *supra* note 43.

45. Singer, *supra* note 17, at 1565. See also *id.* at 1533-40, 1565-67.

46. See Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495 (1999) [hereinafter Wax, *Caring Enough*]; see generally Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

47. See Wax, *Caring Enough*, *supra* note 46, at 513.

48. See *id.*

49. Professor Brian Bix usefully distinguishes between “internal” and “external” critiques of law and economics; the internal critique accepts most of the law and economics basic approach. See BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 196 (2d ed. 1999).

of marriage. Indeed, the research of social scientists on incentives for individualistic behavior indicates that "helping and cooperation can occur without the prospect of individual reward" (p. 66). Drawing extensively on the work of social psychologists and other empirical studies, Regan shows that individuals often act in ways that are inexplicable through a focus solely on personal rewards (pp. 70-73).

While the concept of "efficiency" can be viewed as descriptive rather than normative, Regan suggests that the alleged differences between positive and normative discourse may be illusory (p. 47). Regan, elsewhere, has asserted that the law and economics approach appears to be neutral but this alleged neutrality is in fact normative.<sup>50</sup>

Regan returns to the economic approach to marriage in the third section of *Alone Together* when he examines the rhetoric surrounding property division at divorce. Divorce law, he argues, historically approached spouses as partners and created post-dissolution obligations based on the past relationship. The contemporary approach, however, views spouses as "strangers," for whom the "imagery of the market" is especially useful (p. 141). When divorce was based on fault grounds alone, there was, according to Regan, a conceptual basis for awarding alimony because the faulting spouse should not be excused from his financial obligations under the marriage contract (p. 144). Regan does recognize this as a somewhat idealistic view of alimony. He notes that relatively few women received alimony even under a fault-based regime, and they did not receive a great deal of money.<sup>51</sup> Nonetheless, he observes that, pursuant to a no-fault regime, the traditional justifications are no longer valid. In response, theorists have developed various other rationales to justify continuing financial obligations between former spouses. Regan explains and then critiques theories based on human capital that attempt to provide a coherent basis for alimony, by arguing that these theories are based on an external stance toward marriage.

The two human capital theories that he explores provide justifications for alimony based on the spouses' expectation and reliance interests. Human capital theories emphasize the increase in earning potential that marriage has facilitated; typically, one spouse has maximized

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50. See Regan, *Market Discourse*, *supra* note 12, at 608-09.

51. P. 144; see also SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 23, 470 (1991) (citing BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, NO. 141, CHILD SUPPORT AND ALIMONY: 1983 (1985)). The data shows that the percentage of women who received alimony under no-fault was comparable to the percentage of women who received alimony in the 1920s. See Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999). Professor Regan also notes that the internal stance reflected by fault rhetoric circumscribed women's lives more than men's. See p. 143. He concludes, however, that "fault-based divorce featured a coherent discourse of divorce awards that expressed the importance of an internal stance toward marriage." P. 144.

his earnings while the other spouse has provided the domestic support that enables him to do so.<sup>52</sup> According to the expectation version, the supportive spouse is entitled to a reasonable return on her investment in the other spouse's human capital.<sup>53</sup> She should receive the benefit of her bargain.

The second version of human capital theory would compensate spouses for the economic loss suffered upon divorce. Because the supporting spouse contributed and sacrificed so that her spouse could increase his income, she is entitled to recover for these contributions;<sup>54</sup> she receives her reliance interest. Under each of these theories, however, Regan argues that the spouses are treated as virtual strangers who, as a result of a "contract" with each other, become entitled to share in the enhanced earnings made possible by the contract (pp. 157-58).

In response to the faults in these human capital theories stemming from the external perspective, Regan offers some different notions. His alternatives are based on an internal stance toward marriage which does not include an exact measure of compensation for each spouse's contributions to the marriage (p. 190). Instead, he advocates equalizing the spouses' standard of living for some time period after the divorce.<sup>55</sup> Such a proposal, he argues, values the domestic labor

52. P. 148; see also JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 124-25 (2000).

53. Pp. 149-53. Professor Regan cites the work of Joan Krauskopf and Cynthia Starnes. See Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980); 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 (1993). For further discussion, see Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253 (1989); Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988).

Professors June Carbone and Margaret Brinig distinguish between expectation, reliance, and restitutionary theories for post-divorce recovery, arguing that the expectation interest is what the wife would have received had the marriage continued, the reliance interest protects the opportunities lost as a result of the marriage, and the restitutionary interest is the wife's investment in the husband's human capital. See June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 958-61, 986 (1991).

54. Pp. 153-57 (relying on theories of Ira Ellman and Allen Parkman). The concept of "economic loss" has become part of the American Law Institute's draft principles for family dissolution; Professor Ellman is the Chief Reporter. Pp. 156, 259 n.126.

55. Pp. 190-92. He cites to Singer's proposal that the duration of this alimony be calculated as follows: one year of equalization for two years of marriage. See Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117-18 (1989). Professor Singer has provided further discussion of this proposal in Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454 (1999). See also Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2260-61 (1994); see generally June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 372-93 (1994) (discussing income sharing proposals).

contributions of the lower-earning spouse, and is based on the spouses' "responsibility for economic justice" which derives from their relationship (p. 190). The entitlement to alimony depends on the relationship itself, and on the wife's contributions to the marriage.<sup>56</sup> Alimony is designed to provide a cushion for the transition from the marital community to a single individual — the longer the marriage, the longer the transition period (p. 191). The husband's financial obligation to support his wife derives not just from his consent to the duties of marriage, but also from the fact of the marriage itself, from the special duties that develop from intimate relationships. It follows that marriage is more than an exchange.

The language of contract and property may in fact be richer than this account indicates. In her trenchant critique of Regan's proposal, Professor Carol Rose argues that his "supposedly relationship-based alternatives still seem to have a great deal of resonance with property."<sup>57</sup> That is, his alternatives depend on spousal sharing, but the basis for the sharing resembles a property or contractually based theory.<sup>58</sup>

In their article advocating increased marital contracting, Professors Eric Rasmusen and Jeffrey Stake argue the spouse who invests in relationships rather than market capital might want to protect herself at the beginning of the marriage by binding her partner to an agreement providing her with substantial protection in the event of a divorce.<sup>59</sup> Contract may be more promising on these accounts because it can recognize relationships. For groups who have historically been excluded from making contracts or owning property in their own names, the concepts have strong appeal.<sup>60</sup>

One of the problems with this proposal is that it may leave a 70-year-old woman with no alimony. Cf. Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2505 (1994) (noting the limited duration of income-sharing proposals); Elizabeth Scott & Robert Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1315 (1998) (noting the need for permanent alimony in some situations).

56. See Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2411-12 (1994) (reviewing Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO L.J. 2303 (1994)). Rose characterizes Regan's *Spouses and Strangers* as offering an alternative to property rhetoric in marriage that is based on relationship, but she critiques it as not being very different from property theory at all.

57. *Id.* at 2412. For a further defense of property as protective of women and their marital relationships, see Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1575-96 (1998).

58. See Rose, *supra* note 56, at 2412.

59. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 466, 473 (1998); see also Jeffrey Stake, *Paternalism in the Law of Marriage*, 74 IND. L.J. 801, 803 (1999).

60. For historical information, see Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L.J. 2213 (1994); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983); Reva B. Siegel, *Home*

Moreover, Regan critiques the traditional law and economics models, rather than the newer, sometimes even mildly feminist, approaches which have developed as a way of recognizing the complicated nature of marriage. While these feminist approaches do not resolve all of the problems associated with the increasing emphasis on the external stance, they do provide some softening of the traditional rhetoric of the law and economics approach. Regan's criticisms would still presumably apply to these newer approaches, but it is interesting to consider how they attempt to account for the internal, caring perspective on marriage.

### B. *Approaching Marital Privileges*

In addition to examining the economic discourses that are framing marriage and marital dissolution, Regan uses the external and internal stances to explore two different forms of the spousal testimonial privilege. First, the adverse testimony privilege precludes one spouse from testifying against another in criminal trials, except those involving spousal abuse or abuses of either party's child. It takes the form of either a complete bar against adverse spousal testimony, unless the defendant spouse consents, in a minority of state courts, or of permitting a witness-spouse to choose not to testify in most other state and federal courts. Under the traditional rule, the potential testimony must actually be adverse.<sup>61</sup> The rationale has been that the privilege serves to promote marital harmony. Second, the communications privilege prevents the disclosure of interspousal confidential communications that occurred during the marriage, and is generally available in both federal and state courts. Although the traditional rule allowed either spouse to claim the privilege, some jurisdictions allow only the communicating spouse to claim the privilege.<sup>62</sup> This privilege has traditionally been supported as encouraging openness between the spouses.

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as Work: *The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) [hereinafter Siegel, *Modernization*].

This is similar to the claims of some critical race theorists that "rights" are important. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 306-07 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432-33 (1987).

61. See *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1563, 1568 (1985).

62. See *id.* at 1571-72.



The spousal privileges may have no direct impact on an ongoing marriage and Regan questions whether spouses actually know of the existence of the privileges (except when there is a pending criminal prosecution). He argues that they are important as cultural symbols of the meaning of marriage. The privileges illustrate the external and internal approaches to marriage by establishing priorities between the individual spouse and the marital unit (p. 95).

He characterizes the traditional and minority forms of the adverse testimony privilege as reflecting the internal stance toward marriage, because they depend only on the existence of the marriage, not also on the consent of the spouses (p. 102). While, as an individual, the witness spouse<sup>63</sup> might be willing to testify, the fact of the marriage precludes her from testifying and overrides her own preferences. Because she is a member of the marital community, rather than an autonomous individual, she cannot testify under any circumstances; the mere status of marriage precludes her from testifying. The diminishing availability of this privilege reflects, then, some diminution in the respect accorded the internal stance.

By contrast, he characterizes the communications privilege as externally based. While it could be seen as the type of contract to which any reasonable spouse would consent (p. 98), it also depends on the state of mind of the communicating spouse: he must have intended that the communication be confidential (pp. 99-100). Consequently, not all marital communications are privileged. The privilege requires that the communicator signal an expectation of confidentiality and that the recipient give reason to believe that she will treat the communication as privileged. Only after a series of voluntary acts, then, will the privilege attach. This privilege remains strong within American evidentiary law, a reflection of the authority of the external stance (p. 102).

Given that the communications privilege attaches only to married spouses, and is not available to business partners, I am not certain that it should be characterized as an example of the external stance toward marriage. Indeed, the communications privilege could just as easily be characterized as internal. Based on the privilege, there is a presumption that communications occurring during a marriage are confidential, thereby protecting the spouses based simply on their married status.<sup>64</sup> Moreover, the communications privilege survives the dissolution of

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63. The witness-spouse is generally the wife. See Margaret J. Chriss, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 LAW & INEQ. J. 225, 231 n.37 (1993) (citing historical commentary on the paucity of cases involving male witnesses compared to those involving female witnesses); *id.* at 247 n.129 (noting that, as of 1990, there were almost ten times as many male prison inmates as female prison inmates).

64. See JACK B. WEINSTEIN & MARGARET A. BERGER, STUDENT EDITION OF WEINSTEIN'S EVIDENCE MANUAL § 18.05[3][b], at 18-55 (4th ed. 1999).

the marriage, while the adverse testimonial privilege does not.<sup>65</sup> This survival of the communications privilege, therefore, shows the continuing connection between the divorced spouses, while the lack of the adverse testimonial privilege indicates legal treatment of the spouses as strangers rather than as (at least formerly) connected individuals. Further, the adverse testimony privilege is available only in criminal cases, while the communications privilege can be invoked in civil or criminal cases.<sup>66</sup>

Regardless of whether each can be characterized as external or internal, Regan's ultimate conclusion is that the adverse testimony privilege deserves more respect because of its protection of an internal stance toward marriage (p. 133). He recognizes that the privilege has traditionally worked to women's disadvantage, because it is more likely to preclude wives, rather than husbands, from testifying.<sup>67</sup> Nonetheless, he argues that this cost may be justified by the benefits of continuing the privilege. First, the adverse testimony privilege does not apply in cases involving intraspousal abuse.<sup>68</sup> Moreover, he argues that even as it reinforces an internal stance, it does not force women to remain in a marriage.<sup>69</sup>

The adverse testimony privilege, rather than forcing people to remain married, emerges as an expression of important cultural values within marriage. Ultimately, Regan is concerned about spouses who remain as autonomous selves during marriage and who seek to mini-

65. *See id.* at 18-57.

66. An alternative perspective on the privilege suggests that it does not foster marital harmony so much as it preserves the loyalty that has been created. *See, e.g.,* Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN'S L.J. 1, 5 (1999).

67. P. 128. For feminist critiques of the privilege, see, for example, Chriss, *supra* note 63, at 251-54; *see also* Daniel Ortiz, *Making Marriage*, 81 VA. L. REV. 2157 (1995) (discussing Regan's approach and noting the numerous potential dangers of not allowing women to testify against their spouses).

68. P. 131. This is not, however, universally true. In Maryland, for example, the adverse testimonial privilege is available the first time a defendant is charged with spousal abuse. *See* MD. CODE ANN. § 9-106(a)(2) (1998).

69. P. 132. Professor Regan points out:

[I]t would be entirely rational for many women to resist th[e internal] stance, because the vulnerability that it involves would be exacerbated by the lesser amount of power and resources wives tend to possess compared to their husbands. This suggests that genuine equality between husbands and wives is necessary before women can embrace the internal stance without acute reservations. To the extent that the adverse testimony privilege reinforces gender inequality between the spouses, it therefore could have the overall effect of undermining, rather than promoting, an internal stance toward marriage. I suggest that the danger of this is less than the danger that the incrimination will undermine a norm of spousal loyalty. This conclusion, however, is admittedly tentative.

P. 33. As I discuss later, an internal stance on the testimonial privilege is particularly dangerous in domestic abuse situations. *See infra* notes 135-137.

mize or even avoid any form of vulnerability to each other; he is further concerned with marriage as an expression of our cultural values.

## II. INTERNAL AND EXTERNAL STANCES ON THE BOOK

Through this book, Professor Regan seeks to remind us that marriage is not just a vehicle for self-fulfillment, but that it is the creation of a community and of an entity that differs from the individual identities of the two spouses. Rather than focus on the rights of the two autonomous individuals who marry each other, he examines the community formed through marriage and seeks to reinforce that community. His arguments run counter to those of many family law commentators who applaud the move to contract.<sup>70</sup>

He asks, "Why Marriage?," and responds that marriage continues to have "powerful cultural power as the paradigm of intimate commitment" (pp. 6-7). He defends marriage against the claim that it has supported patriarchy by arguing that there have been significant changes in the laws that once enabled marriage to serve as a subordinating institution; it is now a more egalitarian relationship.<sup>71</sup> Finally, he explains that he is focusing on the married couple, rather than the married couple with children, because he wants to examine the institution of marriage regardless of whether there are children involved (p. 9). He points out that the decision to marry is no longer a simultaneous decision to have children, or vice versa. By separating out children from his consideration of marriage, he hopes to show the tensions — in family life and law — between choice and community. The irony of a lack of interest in marriage without children, he suggests, is that this view depends on an analysis of marriage as a privately ordered relationship, while it has historically served as a symbol of the connections inherent in family life (pp. 9-10).

Many other commentators who have looked at marriage have been concerned with a marriage plus children, or they have been concerned with divorce, the dissolution of marriage. *Alone Together* is different because it focuses on marriage per se, and on the contemporary dis-

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70. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998); see also Rasmusen & Stake, *supra* note 59; Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687 (suggesting that liberalism, and its corresponding emphasis on individual choice, may actually accord with communitarian values because liberalism can support family bonds and responsibilities); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); see generally Murphy, *supra* note 51 (discussing the move to contract and the establishment of rights within marriage).

71. Pp. 7-8. In his earlier book, he endorsed gay marriage. See REGAN, FAMILY LAW, *supra* note 5, at 120-22.

courses that define and shape the theory of marriage independent of any other factor, such as children.

Turning to each of Regan's purposes for focusing on marriage, I simply want to raise some questions. First, it is true that marriage continues to retain powerful symbolic value. Historically, it has served to determine identity. Today, ask any advocate — or any opponent — of same-sex marriage about the cultural significance of marriage and the answer will illustrate marriage's significance. Proponents of gay marriage argue that marriage is a key part of citizenship,<sup>72</sup> carries an important philosophical recognition of the relationship,<sup>73</sup> and offers substantial economic and practical advantages.<sup>74</sup> Within the gay community, there are questions as to whether the recognition of gay marriage leads to uncritical acceptance of dominant legal models and cooptation.<sup>75</sup> Opponents outside the gay community argue that marriage is historically, traditionally, and culturally defined as being a heterosexual relationship.<sup>76</sup> Philosophically, they argue that marriage must involve procreation and child-rearing.<sup>77</sup> They believe that a heterosex-

72. See John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1181 (1999) ("By expressly disallowing same-sex unions, the state devalues the lives of its gay and lesbian citizens, denying their very citizenship in a vital respect that others take for granted."); Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 165 (1996) ("There is no doubt that marriage currently represents the social and legal badge of full citizenship.").

73. See Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUTLOOK, Fall 1989, 12-13:

Marriage is much more than a relationship sanctioned by law. It is the centerpiece of our entire social structure, the core of the traditional notion of 'family.' Even in its present tarnished state, the marital relationship inspires sentiments suggesting that it is something almost suprahuman. The Supreme Court, in striking down an anti-contraception statute in 1965, called marriage 'noble' and 'intimate to the degree of being sacred' . . . Lesbians and gay men are now denied entry to this 'noble' and 'sacred' institution. The implicit message is this: two men or two women are incapable of achieving such an exalted domestic state. Gay relationships are somehow less significant, less valuable. Such relationships may, from time to time and from couple to couple, give the appearance of a marriage, but they can never be of the same quality or importance.

74. See *id.* at 10 (highlighting the ability to inherit without a will or gain health insurance from a spouse's employer).

75. See, e.g., Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 20 n.14, 21 (1999); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993) ("I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution . . .").

76. See Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 748-751 (1998).

77. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 72-73 (Haw. 1993) (Heen, J., dissenting) (quoting *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974)).

ual relationship is uniquely beneficial to society and therefore must be protected.<sup>78</sup>

Notwithstanding the cultural significance of marriage, however, the rate of marriage varies quite dramatically depending on race and class, and the increasing number of cohabitating couples does raise issues about the continuing significance of marriage. Slightly more than one-third of all black women are married, while almost 60% of white women are married;<sup>79</sup> 34.7% of people between the ages of twenty-five to thirty-four had never been married, but 53.4% of African Americans in that age group had never been married.<sup>80</sup>

Among poor people, the marriage rate is extremely low. Only about 35% of poor people live in married couple families, compared to almost 73% of the nonpoor.<sup>81</sup> As Rebecca Blank suggests, “[t]he

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78. See Wardle, *supra* note 76, at 749 (“But no other companionate relationship provides the same great potential for benefiting individuals and society as the heterosexual covenant union we call marriage, and that is why only committed heterosexual unions are given the legal status of marriage.”); see also Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 29 (“Although the Constitution does not mention the word marriage, marriage is undeniably deeply imbedded in the traditions of our nation and essential to the ordered liberty of nations. Indeed, marriage status is the ultimate example of long-established, highly preferred public status. It is official, formal, publicly endorsed, and powerfully protected.”).

79. See Popenoe & Whitehead, *supra* note 15, fig. 2. In a study of the attitudes of African-American women toward marriage (316 respondents), the comparatively less educated and lower income respondents expressed more negative attitudes toward marriage than did wealthier and more highly educated women. See Anthony E.O. King, *African American Females' Attitudes Towards Marriage: An Exploratory Study*, 29 J. BLACK STUD. 416, 431 (1999); see generally DONNA FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY* (1997).

80. See TERRY A. LUGALIA, U.S. DEPARTMENT OF COMMERCE: *CURRENT POPULATION REPORTS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE)* (1998). Professor Donna Franklin notes that the number of black men involved with the criminal justice system, together with the inadequacy of job opportunities available for black men, has decreased the number of marriageable black men. See FRANKLIN, *supra* note 79, at 219. In a study of 415 black men from Chicago, researchers found that black men who had stable jobs were twice as likely to get married as were black men who were not employed, in school, or in the military. See Mark Testa & Marilyn Krogh, *The Effect of Employment on Marriage Among Black Males in Inner-City Chicago*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS* 59, 93 (M. Belinda Tucher & Claudia Mitchell-Kernan eds., 1995).

There is a long-term difference between the white and black marriage rates. Indeed, the lower rate of “legitimate” black marriage was used by segregationists as an example of black immorality. See generally Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 406-08 (1997). See also Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999).

81. See REBECCA M. BLANK, *IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY* 17 (1997). Poor people are defined as those individuals with a family income below the poverty line. See *id.* at 15. Only 15.1% of “current” (as of 1997) welfare recipients are married compared to 28% of former recipients. See THE URBAN INSTITUTE, *ASSESSING THE NEW FEDERALISM* 3 (Nov. 1999). For further discussion of poor single mothers, see

fact that so many women choose to live extremely poor lives as single mothers suggests that marriage is unattractive to these women, for reasons we should take seriously."<sup>82</sup>

The number of cohabitating couples is dramatically increasing: approximately 35% of people born in the 1960s were expected to cohabit by the age of twenty-five, compared to fewer than 8% of those born in the 1940s.<sup>83</sup> One study found that cohabitation is more attractive than marriage for couples who do not want to feel "constrain[ed]" by marital roles in which men are breadwinners and women are homemakers.<sup>84</sup> For people in these relationships, the study suggests that the ideology and structure of marriage is thus less appealing for people choosing to cohabit.

The number of children born outside of marriage continues to increase. In 1990, almost 70% of births to teenagers were nonmarital births, while 25% of births to women between the ages of twenty to forty-four were nonmarital;<sup>85</sup> about one-third of all births occur to unmarried women.<sup>86</sup> The meaning and significance of marriage thus varies, depending on many cultural variables.

It is worth asking whether the need to balance the internal and external stances also varies depending on socioeconomic culture; indeed, the applications of the stances discussed in *Alone Together* have varying amounts of relevance. Thinking about the internal and external stances outside of a white middle-class culture provides some support for Regan's critiques of the cultural movement toward autonomous individuals within marriage. Where there is no money, a law and economics perspective is of even more doubtful utility in describing marriage than it is in a marriage of middle-class or wealthy individuals. Concepts of human capital, of allowing one spouse to specialize in household labor and the other in market labor are generally inapplicable where both spouses must work.<sup>87</sup> Similarly, the property rhetoric

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Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions From Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 708 nn.86-89 (1998).

82. BLANK, *supra* note 81, at 42. This phenomenon, she suggests, may be attributed to the increases in women's wages and the decrease in men's wages, as well as the reduction in the stigma attached to single motherhood. *See id.*

83. *See* Marin Clarkberg et al., *Attitudes, Values, and Entrance into Cohabital Versus Marital Unions*, 74 SOC. FORCES 609, 609 (1995).

84. *See id.* at 624.

85. *See* BLANK, *supra* note 81, at 33.

86. *See* Linda Waite, *The Importance of Marriage is Being Overlooked*, USA TODAY, Jan. 1999 (Magazine), at 46.

87. This is not to say that there is not a gendered allocation of household roles in such a marriage, but merely that both spouses must develop marketable skills. For a discussion of the gendered household roles regardless of employment outside of the home, *see* FRANCINE DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* (1999); *see also* Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC'Y 527 (1996); WILLIAMS, *supra* note 52.

concerning divorce has little descriptive and rhetorical power where there is no property or where low wages are insufficient to support even one person.<sup>88</sup> Turning to the spousal privilege, it may have some rhetorical power within poor marriages. Given the percentage of black men involved in the criminal justice system compared to the percentage of white men,<sup>89</sup> however, spousal privilege may have a disproportionate impact on black women.

For poor people, the law often promotes an internal stance that is damaging to the family. The financial impact of getting married can be severe. When public welfare recipients marry, the inclusion of their spouses' income may result in their being denied any further public benefits; there is a presumption of sharing.<sup>90</sup> Marriage fosters the privatization of their dependency.<sup>91</sup> For working-class poor people, the structure of the Earned Income Tax Credit creates a marriage penalty.<sup>92</sup> The credit was originally designed to help ease the work disincentives for poor households with children and it accords insufficient attention to the needs of poor two-earner marriages, punishing them instead.<sup>93</sup> Professor Dorothy Brown also points out that the marriage

88. Professor Martha Ertman has suggested that the rhetoric of money has some utility even for poor families who divorce; the spouses can divide debt, rather than income. See Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEXAS L. REV. 17, 22, 105 (1998). Even this proposal, however, has some flaws because a very poor individual can file for bankruptcy. Conversation with Professor Lucy Williams, Northwestern University School of Law (June 1999).

89. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Paul Butler, *Starr is to Clinton as Regular Prosecutors are to Blacks*, 40 B.C. L. REV. 705 (1999); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660 (1996) (reviewing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995)).

90. See, e.g., *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding provision in the Social Security Act terminating benefits for dependent child when the child marries someone ineligible for benefits).

91. See Dubler, *supra* note 28; Ariela Dubler, *Wifely Behavior*, 100 COLUM. L. REV. (forthcoming May 2000).

92. See EDWARD J. MCCAFFERY, TAXING WOMEN 194 (1997) (arguing that current tax laws serve to "penaliz[e] marriage among the poor") [hereinafter MCCAFFERY, TAXING WOMEN]; Edward J. McCaffery, *The Burdens of Benefits*, 44 VILL. L. REV. 445, 484-85 (1999) [hereinafter McCaffery, *Burdens*]; see generally Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1479-81 (1997) [hereinafter Brown, *Race, Class, and Gender Essentialism*].

The Earned Income Tax Credit (EITC) is a tax credit that "is 'refundable,' meaning that if the amount of credit that a family qualifies for exceeds the family's tax liability, the federal government will make a payment to the family of that excess amount." Mark Greenberg, *Welfare Restructuring and Working-Poor Family Policy*, in HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 24, 28 (Joel F. Handler & Lucie White eds., 1999). In 1996, "the EITC provided its maximum assistance to a family in the \$8,890 to \$11,160 range." *Id.*

93. See McCaffery, *Burdens*, *supra* note 92, at 481-91.

penalty disproportionately affects black families.<sup>94</sup> This is because the marriage penalty affects couples who are equal earners, and black families are more likely than white families to have equally contributing earners.<sup>95</sup> Getting married is, in some senses, resistance against an external stance because the spouses are focusing on the relationship, not the economic realities.

Black women are much more likely to work than are white women, and their wages are far closer to black men's than are white women's to white men's.<sup>96</sup> Within married households, black women earn approximately 40% of their household's income, while white women earn only about 29%.<sup>97</sup> Equalizing income post-divorce, then, is not as important for African-American women. Indeed, Professor Twila Perry challenges the attention given by family law scholars to the justifications for alimony:

[T]he marriage paradigm that has, to a great extent, shaped the discourse on developing a theory of alimony . . . has the potential to reinforce the subordination and marginalization of black women in two ways: first, by reinforcing privilege or an image of privilege for middle and upper-middle class white women in both marriage and divorce, and second, by reinforcing a hierarchy among women in which their value is determined by the presence or absence of legal ties to men, particularly affluent men.<sup>98</sup>

Perry argues that theories of alimony premised upon images of a breadwinner husband and a lesser-earning spouse do not apply to most black marriages.<sup>99</sup> There is something strange, then, about spending so much time and attention on something that affects relatively few divorcing black couples (and non-black couples as well). Moreover, the external stance, as represented by the law and economics discourse, may also be more complex as applied to African-American families.<sup>100</sup> From an external stance, it makes little economic sense for some black couples to marry.<sup>101</sup>

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94. See Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do With It?*, 21 U. ARK. LITTLE ROCK L.J. 759, 760 (1999) [hereinafter Brown, *Racial Equality*]; Brown, *Race, Class, and Gender Essentialism*, *supra* note 92, at 1498-99.

95. See Brown, *Racial Equality*, *supra* note 94, at 760.

96. See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 795-96 (1997).

97. See *id.* at 793.

98. Perry, *supra* note 55, at 2484.

99. See *id.* at 2493-94.

100. Professor Richard Delgado provides one of the few critical race critiques of law and economics. See Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1202 (1993) (book review) ("[L]aw and economics is . . . [a] useful way of ordering relations and transactions within a given system . . . but a poor way of understanding and dealing with broad, systemic distortions built into the very structure of that system."); see also Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998) (book review).



The negative aspects of the class and race nature of marriage suggest the importance of looking at alternatives to marriage and of creating community within those relationships. Recognizing intimacy between adults may involve changes in laws governing cohabitation. An increasing number of jurisdictions are providing protection for ongoing adult intimate relationships through domestic partnership ordinances, but the scope of these protections varies dramatically.<sup>102</sup> Laws governing the rights of cohabitants upon dissolution, especially, remain in disarray. In some states, cohabitants can sue each other on a variety of theories, while other states provide little recognition to any rights.<sup>103</sup> Imposing the obligations of marriage upon cohabitants could cause these relationships to be treated more like marriage, and might foster a sense of interdependence.<sup>104</sup>

The differential rates of marriage also suggest the importance of familial relationships other than those between intimate adults, such as those between parents and children, or between grandparents and children.<sup>105</sup> Indeed, Regan's focus on marriage occurs as other scholarly commentators are questioning the continuing validity of marriage. Professor Martha Fineman advocates the abolition of marriage as a legally privileged unit, although not the abolition of marriage itself.<sup>106</sup>

One possible interpretation, supported by an economic approach, is that some black women are likely to gain little from marriage to an unemployed black man. See David M. Heer, *Commentary*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS*, *supra* note 80, at 117, 118-19.

101. In commenting on this paper, Professor Katharine Baker asks: "Is part of what is going on that an internal stance requires an acceptance of vulnerability that many people cannot afford — they are already made too vulnerable by race, class, etc.?" Conversation with Professor Katharine Baker, Chicago-Kent College of Law (May 2000).

Available research does not show that loss of public welfare benefits upon marriage has caused a decline in marriage. See Lynn C. Burbridge, *Policy Implications of a Decline in Marriage Among African-Americans*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS*, *supra* note 80, at 323, 330.

102. See Lambda Legal Defense and Education Fund, *Lambda Legal Issue: Domestic Partnership* (visited Feb. 16, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/issues/record?record=3>>, for discussion of a range of issues involving domestic partnerships.

103. For a listing of the various types of relief available in each state, see Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them — A State Survey*, 37 *BRANDEIS L.J.* 245 (1998-99).

104. More than a decade ago, Professor Ellen Kandoian asked, "[w]hy not . . . support those parties who are in fact committed" rather than simply those who are married? Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 *GEO L.J.* 1829, 1872 (1987).

105. See *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *cert. granted sub nom. Troxel v. Granville*, 68 U.S.L.W. 3177 (Sept. 28, 1999) (No. 99-138). See also Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 *CONN. L. REV.* 1315 (1994) (arguing for "co-guardianship" contracts between parents and grandparents who act as co-parents).

106. See FINEMAN, *supra* note 12, at 228-30; Ann Shalleck, Presentation at The Association of American Law Schools Annual Meeting (January 1998).

She argues that relationships between intimate adults should be subject to the legal norms applicable to nonintimate relationships,<sup>107</sup> thereby encouraging an external approach to adult intimacy. On the other hand, she would protect the caretaker-child unit, promoting an internal stance on that relationship.<sup>108</sup> Professor June Carbone argues that the relationship between the spouses has become less important than the relationship between parent and child, and that family law should seek to encourage parents' continuing investment in their children.<sup>109</sup>

In addition, a new focus on vertical intimacy as well as horizontal intimacy<sup>110</sup> would recognize the realities of the many families formed without marriage. The exclusive focus of familial responsibilities is no longer the marital unit. Instead, as discussed earlier, the parent-child unit has also become a focus of familial obligations.<sup>111</sup> This is particularly true for poor and black families.

Second, while the laws surrounding marriage are gender-neutral, and refer to "spouses" rather than to "husband and wife,"<sup>112</sup> marriage remains a gendered institution. Women disproportionately continue to perform the second shift.<sup>113</sup> Where there are children, women do the primary work of caring for the children, as well as household work. Even with childless couples, women disproportionately perform the household labor.<sup>114</sup> Although more married women are working, women are disproportionately employed in part-time labor, and they remain more likely than men to take off time during their work lives.<sup>115</sup>

107. She suggests that the assumptions of these other laws, such as notions of an "arms-length transaction," should also be revised in order to reflect the realities of inequality. See FINEMAN, *supra* note 12, at 229-30.

108. *See id.* at 231.

109. *See* JUNE CARBONE, FROM PARTNERS TO PARENTS 323-42 (Chapter 23, "Conclusion: From Partners to Parents: The Ongoing Revolution") (forthcoming 2000).

110. *See* Baker, *supra* note 57, at 1525-26 (defining horizontal relationships as those between adults who decide to form a family through marriage, and vertical relationships as those between children and individuals with parental rights).

111. *See generally* CARBONE, *supra* note 109.

112. *See, e.g.,* Orr v. Orr, 440 U.S. 268 (1979) (striking down a statute that allowed alimony only for wives, not husbands).

113. The second shift involves work performed at home outside of the external work place. *See* ARLIE HOCHSCHILD, THE SECOND SHIFT (1989); *see also* WILLIAMS, *supra* note 52, at 13-31 (Chapter 1, "Is Domesticity Dead?"); Silbaugh, *Commodification*, *supra* note 41.

114. *See* SANJIV GUPTA, What Makes Men Change Their Housework Time? (1999) (unpublished Ph.D. dissertation, University of Michigan (Ann Arbor)) (on file with the University of Michigan Harlan Hatcher Graduate Library).

115. *See* WILLIAMS, *supra* note 52; *infra* notes 122-126 and accompanying text. Seventy percent of part time workers are women. *See* AFL-CIO, *Working Women: Equal Pay — Facts About Working Women*, (visited Feb. 16, 2000) <<http://www.aflcio.org/women/vwfacts.htm>>. Women are more likely to disrupt their work lives. *See Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm.* (statements of Leslie Kramerich);

Also, upon divorce, the standard of living for women decreases, while that for men increases; one of the most common reasons for women to become first-time welfare recipients is separation or divorce.<sup>116</sup> Regardless of the phrasing of the laws governing marriage, women remain in subordinate positions in marriage.

The rhetoric of domesticity, while no longer explicitly enforced through law, retains force through its gendered expectations of caretakers as opposed to workers.<sup>117</sup> Even though laws no longer literally reinforce patriarchy, the dominance of the husband's role is supported through "emotion"<sup>118</sup> and social constraints: women continue to view themselves as caretakers of both husbands and children, and make decisions to support that role. As Rhona Mahoney shows, women train themselves to become the primary caretaker, long before they find a partner, by the choices they make with respect to education and work.<sup>119</sup> Girls' decisions not to take math in high school are directly related to the profession that they will ultimately choose. These decisions will cause them — not the fathers — to drop out of the workplace.<sup>120</sup> Although workplace participation by women with young children has increased dramatically,<sup>121</sup> women are far more likely to work part-time.<sup>122</sup> More than two-thirds of all part-time workers are

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*Impacts of the Current Social Security System: Hearings Before the Soc. Sec. of the House Comm. on Ways and Means*, 106th Cong. 97 (1999) (statement of Joan Entmacher, Vice-President and Director, Family Econ. Sec. Nat'l Women's Law Ctr.).

116. See U.S. DEPT. OF HEALTH & HUMAN SERVICES, INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS 1998, at 11-24.

117. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

118. See WILLIAMS, *supra* note 52, at 16, 38 (discussing the enforcement of domesticity through emotion and "choice rhetoric"); Siegel, *supra* note 60, at 2168-69 (describing how courts preserved a wife's common law duties in their application of the legislature's ostensible transformation of the marriage relationship); see also DEUTSCH, *supra* note 87, at 73-81 (discussing ways in which men reinforce women's identification with the household and children by failing to take responsibility).

119. See RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* (1995). Law and economics scholars, as well as their critics, have looked at the family to examine the alleged logic of role differentiation. See, e.g., Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119 (1997).

120. See MAHONY, *supra* note 119, at 137. She recommends that parents who want their daughters to have financial independence should "insist on one simple discipline: that their daughters take at least three years of math in high school." *Id.*

121. See Kristin McCue & Manuelita Ureta, *Women in the Workplace: Recent Economic Trends*, 4 TEX. J. WOMEN & L. 125, 135-36 (1995).

122. See *Social Security and Women: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 101st Cong. (statement of Joan Entmacher, Vice-President, National Women's Law Center) (42% of mothers with children under six were employed full-time compared to 90% of fathers with children under six, and 18% of mothers with children under six, compared to 3% of such fathers, were employed part-time); Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 803-04 (1995).

women, and women constitute almost 70% of all "voluntary" part-time workers.<sup>123</sup> Women between the ages of twenty-five and forty-four are more than eight times as likely as men of the same age to work part-time, and the data suggest that this is due to childrearing responsibilities and choices.<sup>124</sup> The majority of women with children younger than five either stay at home or work part-time.<sup>125</sup> Only 2% of fathers of pre-schoolers, compared to 20% of mothers, allowed child-related concerns to affect their work schedules.<sup>126</sup> Men also retain control over most of the financial incidents of marriage.<sup>127</sup>

Thus, within marriage, women seemingly "choose," or assume, a role associated with the internal stance of connection and community and interdependency. This concept of choice, of course, fails to recognize the constructed nature of women's choices.<sup>128</sup> Indeed, the rhetoric of choice diverts attention from the constraints surrounding any particular decision, and onto the actual action of making choices.<sup>129</sup> That is, instead of looking at what is chosen, we need to examine the parameters in which choice occurs, the ideologies that structure any particular "choice." At the same time, however, there is debate over whether an acknowledgment that ideology figures in choices implies that individuals have no control over their lives.<sup>130</sup>

For purposes of discussing the internal and external stances associated with marriage, what is important is acknowledging the imbalance

123. See Bookman, *supra* note 122, at 804. Voluntary part-time workers are those who have chosen, for whatever reason, not to work full-time. See Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 776 (1995).

124. See *id.* at 775.

125. *Homing in on Motherhood: Stay-at-home Mothers*, 66 MOTHERING 32 (1993).

126. See Ellis Cose, *The Daddy Trap: After All the Talk About Equality of the Sexes, a Man is Still Expected to Be the Breadwinner*, CHI. TRIB., June 18, 1995, (Magazine), at 16 (citing 1991 Census Bureau survey).

127. While there are little good data on this, anecdotal evidence supports the few studies that do exist. See Carole B. Burgoyne, *Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power*, 38 SOC. REV. 634 (1990); Jan Pahl, *The Allocation of Money and the Structuring of Inequality Within Marriage*, 31 SOC. REV. 237 (1983).

128. See Murphy, *supra* note 81, at 724; Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); Wax, *Caring Enough*, *supra* note 46; Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991); Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369 (1992) (book review); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 217 (1987) (exploring issues of false consciousness).

129. See Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093 (1992); Williams, *supra* note 128, at 1564.

130. See WILLIAMS, *supra* note 52; Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 795 (1990); Judith G. Greenberg, *Introduction to MARY JOE FRUG, POSTMODERN LEGAL FEMINISM* ix, xix (1992).

in the relationship in which women live in an internal marriage and focus on intimacy, while men live in an external marriage and focus on rights. Professor Robin West argues that women differ from men in their valuing of intimacy.<sup>131</sup> "Women's concept of value revolves . . . around the axis of intimacy, nurturance, community, responsibility, and care," while men are more concerned with autonomy and separation.<sup>132</sup> Like Carol Gilligan, West identifies women with connection to others, and men with individualism.<sup>133</sup> Intimacy thus can be seen, at least in some senses, as a gendered value. Indeed, historical images from the nineteenth century of white, middle-class women have identified them with intimacy, and have placed women and intimacy within the domain of the family, in contrast to the male, cold-blooded marketplace.<sup>134</sup>

Moreover, women have gained some form of power through their nurturing roles, a power that has both positive and negative attributes. Acting as the relationship-centered spouse is an extremely rewarding role, even as it is simultaneously a "confining" position that may also serve to preclude men from assuming the same role.<sup>135</sup> At the same time, connection can be dangerous for women.<sup>136</sup> Indeed, for victims of domestic violence, the internal stance is particularly problematic.<sup>137</sup> Focusing on the relationship rather than on their needs may lead women to stay with an abuser rather than to leave the relationship.

The association of women with intimacy and men with justice is neither inevitable, unvarying, nor immutable. Nonetheless, marriage

131. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) [hereinafter West, *Jurisprudence*]; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

132. West, *Jurisprudence*, *supra* note 131, at 28.

133. See GILLIGAN, *DIFFERENT VOICE* *supra* note 31; Gilligan, *Remapping*, *supra* note 31.

134. See, e.g., NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Williams, *supra* note 117. For a discussion that focuses on black women, see Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEM. 51 (1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

135. For a discussion of the complexities associated with women's internal stance toward their families, see Naomi R. Cahn, *Women's Work: The Powers of Caretaking*, 12 YALE J.L. & FEM. (forthcoming Fall 2000).

136. See ROBIN WEST, *CARING FOR JUSTICE* 3-4, 10 (1997).

137. See Baker, *supra* note 57, at 1554-55; see generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (stating that women are most at danger in abusive relationships when they leave, asserting their autonomous rights to violence-free lives).

remains a gendered<sup>138</sup> institution in which women remain more likely to exhibit an internal stance toward creating and nurturing the family, and men are more likely to exhibit an external stance by focusing on work outside of the home. The man's role remains the breadwinner, while the woman's role remains the nurturer. Perhaps a better balancing of the internal and external stances could be achieved by a gendered strategy that encouraged men to focus on the marriage, and women to focus on themselves.<sup>139</sup>

Like Professor Regan, however, I believe that marriage serves important intimacy goals for women.<sup>140</sup> Thus, to the extent that marriage continues as a significant cultural institution, the goal should be to foster in men the same commitment to intimacy and to the internal stance that women have traditionally experienced. A focus on the internal stance for men might involve, on a practical level, more time spent on housework and child care and relationship-building. Focus on the external stance for women might involve less time on household-related chores and caretaking together with more leisure time; it need not necessarily involve increased workforce participation.<sup>141</sup>

To be sure, Regan does not advocate the abandonment of an external stance toward marriage and complete acquiescence to an internal stance. Instead, he argues for the importance of acknowledging the tensions between the stances. As Regan recognizes, there are particular dangers for women from the internal stance, and benefits from the external stance, that must be recognized (pp. 59-61, 128-33).

While the number of marriages without children is increasing, it remains true that an overwhelming percentage of all married couples have, or have had, children.<sup>142</sup> Children remain an incredibly important part of any marriage that can change the dynamics of the relation-

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138. I feel compelled to add in the requisite "gender" footnote. The behavior I am discussing is gendered female or male, even though not all men and not all women exhibit such behavior.

139. See Baker, *supra* note 57, at 1552-54 (discussing how women's connectedness may be a detriment in marriage). As is clear, I agree with Professor Baker on the need for women to become stronger advocates for themselves. I think, in addition, that men must focus on the relationship and develop a stronger sense of the internal stance.

140. By contrast, Professor Baker suggests that "the primary advantages that privileging the marital bond hold for men are relatively less important for women because the expressive and constituent roles that marriage serves for men are relatively less important for women, who have other relationships that serve this purpose." Baker, *supra* note 57, at 1557. That is, she believes that women will continue to want the intimacy of marriage, but that marriage-associated intimacy is less important for women than for men, because men have had fewer experiences with intimacy and personal communication.

141. See Baker, *supra* note 57, at 1575-96 for further suggestions; Joan Williams has suggested the need for restructuring the workplace so it is no longer designed around a male breadwinner relying on a stream of domestic services. See WILLIAMS, *supra* note 52, at 65.

142. The number of children born outside of marriage also indicates the independence of marriage from children.

ship. The existence of children within a marriage does provide support for Regan's call for more balance between the two different stances, which involves more attention to the internal stance of marriage. There may be less of a need to de-emphasize the external stance when it comes to children, because family members have already followed the internal stance by making a decision to care for someone else. As a culture, however, we inadequately promote the connection between parents and children by, for example, separating poor parents and their children<sup>143</sup> and by fostering a work ethic that distances parents and children.<sup>144</sup>

On the other hand, given that couples are less willing now than in the past to stay together for the sake of their children, there may still be a need to account for children within a marriage. In the first year after a baby's birth, 70% of wives feel unhappy about their marriage.<sup>145</sup> Gottman and Silver believe that the underlying reason for this unhappiness is that husbands have not shared in the transformation that parenthood brings.<sup>146</sup> Moreover, as discussed earlier, the existence of children might lead to a greater imbalance within the marriage. Women will be more likely to focus on the family and men on themselves. Regardless of the reasons for this specialization — economic, normative, constrained choices — it contributes to an unequal differentiation in approaches to marriage.

Thus, even when children are factored into marriage, the tension between individual and community remains, and may even be exacerbated. Not considering the role of children deprives an examination of marriage of some of the richness and complexities of marriage itself; the nature of marriage changes once children enter the picture. Moreover, the existence of children may also support the proposition that women need more of an external stance, while men need more of an internal stance because of the caretaking role that mothers remain more likely to assume. Thus, the balance needs to occur not just within our laws and culture, but also within each marriage.

### III. CONCLUSION: TOWARD INTERNAL AND EXTERNAL BALANCE

*Alone Together* is an extremely thoughtful book that calls for more societal and legal attention to the relationship of marriage than to the rights of each individual spouse within marriage. Regan examines different aspects of contemporary law and rhetoric that promote the in-

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143. See generally Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999); Catherine J. Ross, *Placing Out*, 60 OHIO ST. L.J. 1249 (1999).

144. See WEST, *supra* note 136, at 3; WILLIAMS, *supra* note 52, at 64-113.

145. See GOTTMAN & SILVER, *supra* note 1, at 211.

146. See *id.* at 212.

terests of individual spouses at the expense of the sharing and interrelationships that typify marriage.

Regan captures something profound about the discourses on contemporary marriage through his exploration of the external and internal stances. He suggests that his analysis applies to issues other than the rhetoric of law and economics, the division of property at divorce, or the understandings of the spousal testimonial privilege.

Indeed, the locations where the two different stances play out on a day to day basis within marriage are not through the three issues Regan discusses. Instead, the daily examples of the internal and external stances occur in negotiations over who will do the grocery shopping, who will pick up the children from school, who will take out the garbage, and whether there is enough money to pay the mortgage or rent. In these interactions, I suspect that one spouse (probably, although not necessarily the woman) focuses on the relationship, while one spouse (probably, although not necessarily the man) focuses on each individual's obligations.

In addition to the rhetoric outside of the marriage shifting to a more internal focus, thereby reinforcing concepts of relationships and self-in-context, I believe that each marriage must develop more "internal" balance as well. This will generally mean that the gendered female spouse must emphasize her rights as an individual, while the gendered male spouse locates himself as part of a relationship.

The values associated with the internal and external stances on marriage have deep resonance in a culture that has a historical commitment to recognizing individuals within communities. As Milton Regan so eloquently reminds us, we must respect both individual and community, even as we acknowledge the tensions. The tensions between self and community, he points out, transcend family law.