Family Law Exceptionalism Revisited

by
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Critiques of modern family law often start by questioning its distinctiveness. These critiques highlight how the history of family law as a separate subject area is steeped in status-based patriarchal doctrines like the law of master and servant, coverture, and the right of chastisement. The history arguably justifies skepticism about the propriety of treating family relationships as different, needing their own body of law. This article pushes back against that skepticism. It argues that family law exceptionalism, as operationalized today, does a better job of protecting many women who enter legal families than would a body of law that did not treat family relationships as unique. If the law were more willing to commodify women's unpaid contributions, less willing to demand marital sharing, and more willing to see spouses as fully autonomous actors, many women who conform, even in minor ways, to traditional gender roles, would be considerably worse off. And women who do not conform to traditional gender roles likely would not be better off.

Part I of this essay summarizes the family law exceptionalism critique, in particular the work of scholars who argue that the continued treatment of marriage as a status and the resulting refusal to enforce contracts for domestic services, hurts women. Part II briefly tells the story of the last fifty years of that status/contract controversy, a story that reveals family law's rejection of, but then re-embrace of status. The re-embrace of status stemmed from a recognition that a more contract-based regime hurt too many married women. Part III acknowledges that some women continue to be endangered by family law's status regime, but many of those women, particularly lower income women, have learned not to marry.[1] They understand that marriage can trap them, not

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1 *See infra* notes 116 - 118.

because it prevents them from contracting with a spouse, but because marriage would force them to share with a spouse. Part IV touches on the benefits of exceptionalism more broadly. Scholars assume that family law exceptionalism hurts women because the history of legal marriage is full of patriarchal doctrines, but in two family law areas not necessarily related to marriage, domestic violence and the law of children, most everyone acknowledges that an exceptionalism approach is better for women and children. This recognition supports the idea that it is not the endurance of male supremacy, but the intimacy, unique labor, and vulnerability characteristics of most families that should give rise to rights and responsibilities that are best understood as distinct.

I. The Family Law Exceptionalism Critique

In an ambitious project published in 2011, Professor Janet Halley traced the origins of contemporary family law to the economic and industrial shifts in the nineteenth century which transformed how the law treated labor.[2] Prior to those shifts, the household was where most goods were produced. In that household, wife, child, and servant were all "similarly subordinate."[3] Parent and child and husband and wife were "equally proximate to the law of guardian and ward and . . . the law of master and servant."[4] When production of goods shifted from the home to commercial and industrial jobs in urban areas, servants left that explicitly hierarchal, status-defined household, but wives and children did not.

In leaving the household to work elsewhere, servants became laborers who sold their labor by contracting with those who wanted to buy it. Thus, work for laborers became something that they did because they had willingly contracted to do it, not something they did because their status as servants demanded it. The law of contracts governed servants' relationship to their labor.

Women who continued to work in the home did not become laborers as that term was understood. Home-based work was

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2 *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 Yale J. L. & Human. 1 (2011) (hereinafter, "Halley I"); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 Yale J. L. & Human. 189 (2011) (hereinafter "Halley II").

3 Halley I, *supra* note 2, at 2.

4 *Id.*

perceived as different, outside the market and therefore not subject to contract. The market/household dichotomy was born.

The stark divide between market and household, contract and status, allowed different norms and expectations to develop in the different domains. Contract law extolled free will and autonomy, whereas family law disavowed the importance of individual choice and emphasized the importance of morality and selflessness. Professor Halley, citing Duncan Kennedy's work on contract, notes that "paternalism, community and informality" became the values of family law not contract law.[5] As the nineteenth century progressed, the law of contract assumed ever greater importance as the arbiter of the market, but the family remained outside of it, such that "exchanges into, out of, and especially within the ongoing family"[6] were not subject to contract. In 1899, the U.S. Supreme Court explained that:

> [w]hen the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligation of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations.[7]

Marriage was a social institution, serving the communal interest in altruism and stability. Individual interests within the family could be discounted in the interest of stabilizing the family community. Power might manifest itself within families, but the law would assume it was a kind of benign power because families were, by definition, altruistic. What happened within families was not exchange or bargaining as those behaviors were understood in the market in general and contract law in particular. They were instead the fulfillment of obligations prescribed by the status of marriage. As Halley describes it, family law imposed "ascriptive statuses saturated with duty."[8] "Domestic Relations/Family Law are what they are by virtue of their categorical distinction from the law of contract and, more broadly, the law of the market."[9]

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5 *Id.* at 86.

6 Halley II, *supra* note 2, at 289 (emphasis in original).

7 Maynard v. Hill, 125 U.S. 190, 211 (1888) (citing Adams v. Palmer, 51 Me. 481, 483 (1863)).

8 Halley II, *supra* note 2, at 190.

9 Halley I, *supra* note 2, at 1.

Professor Reva Siegel's work on wives' claims to the value of their household labor tells a somewhat different story with a comparable conclusion.[10] Siegel argues that in the late nineteenth and early twentieth centuries, the law adopted new doctrines to more subtly maintain a husband's right to his wife's labor, a right that had been explicit with coverture. When wives claimed, under recently passed earnings statutes, that they were owed compensation from their husbands for work performed in the home, courts rejected their claims by creating personal services exceptions to the earnings statutes. Siegel argues that the refusal to enforce marital contracts for domestic services amounted to a kind of "preservation [of coverture] through transformation."[11] Judges interpreted earning statutes to allow women to earn wages for work done outside the home, but not for work done within it.[12] Again, domestic labor was considered distinct, unlike other labor that was performed in the market.

Courts insulated women's domestic labor from any kind of commodification by adopting both contractarian and anti-contractarian arguments. As Siegel explains, the contractarian position involves courts accepting the potential legitimacy of an interspousal contract for domestic services, but finding that the contracts at issue lacked consideration because, as spouses, wives were already obliged to provide their husbands with the services associated with "raising, clothing, feeding, educating, and nurturing her family."[13] In contrast, the anti-contractarian position "deems the interspousal agreement unenforceable because

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10 Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 Yale L. J. 1073 (1994) (hereinafter "Siegel, *Home as Work*"); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 Georgetown L. J. 2127 (1994) (hereinafter "Siegel, *Modernization*").

11 Siegel, *Modernization*, *supra* note 10, at 2178–87. Siegel had previously argued that the law adopted a doctrine of privacy to implicitly shield domestic abuse from state scrutiny to maintain what had been a husband's explicit prerogative to beat his wife. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117, 2119 (1996) (hereinafter "Siegel, *Rule of Love*") (illustrating the "preservation through transformation" of status regimes by analyzing the changes that occurred in domestic assault law).

12 Siegel, *Modernization*, *supra* note 10, at 2131 (judges called upon to apply the earnings statues were determined to insulate a 'wife's work' from market exchange).

13 *Id.* at 2130.

paying a wife for her labor will degrade her into a mere servant."[14] The anti-contractarian position "insists *a wife's' labor is not property that husband and wife can barter over like a fungible market commodity.*"[15] Siegel, like Halley, concludes, that "[e]xchange in the market is thus paradigmatically 'interested,' while exchange in the household is paradigmatically 'altruistic.'"[16]

Siegel notes that courts often invoke both contractarian and anti-contractarian positions in the same case. She discusses the relatively modern California case of *Borelli v. Brusseau*,[17] in which a court refused to enforce an oral contract for nursing services between an infirm husband and his wife both because the California Civil Code codified a duty of spouses to care for each other (suggesting the absence of consideration)[18] and because sickbed negotiations were "antithetical to the institution of marriage" (suggesting that marital contracts could not be enforced even if there was consideration).[19] Siegel argues that "courts can invoke both types of justifications without sense of contradiction because the justifications are historically related: two expressions of one body of marital status law [i.e., coverture] as it developed over several centuries."[20] Thus, Siegel concludes that "notwithstanding the putative abolition of coverture, women in the industrial era found themselves economically disempowered in marriage and impoverished at divorce—and still find themselves so today."[21]

Professor Joan Williams also highlights courts' refusal to commodify domestic labor as central to the replication of "traditional gendered allocations and [maintenance of] the [traditional] dichotomy between market and the family."[22] She concedes that "commodification anxiety serves several different purposes and does not

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14 *Id.* at 2204.

15 *Id.* at 2200 (emphasis supplied).

16 *Id.* at 2202.

17 16 Cal. Rptr. 2d 16 (Cal. App. 1993).

18 *Id.* at 20 (California Civil Code §5132 stated that "a married person shall support the person's spouse while they are living together." Code § 242 declared that "every individual shall support his or her spouse.").

19 *Id.* at 13 (sickbed bargaining . . . [is] . . . "antithetical to the institution of marriage as the Legislature has defined it.").

20 Siegel, *Modernization*, *supra* note 10, at 2205.

21 *Id.* at 2131.

22 Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 83 Geo L. J. 2227, 2282 (1994).

always signal the policing of gender boundaries. But it often does."[23] Also citing *Borelli v. Brusseau*, she argues that commodification anxiety becomes particularly pronounced "when family-based entitlements redistribute husbands' wealth to wives."[24]

Professor Jill Hasday argues that these critiques by others are still powerful notwithstanding significant changes to family law in the late twentieth and early twenty-first century. These changes, including no-fault divorce, increased acceptance of prenuptial and postnuptial agreements and decreased reliance on alimony or maintenance, seem to signal a greater acceptance of contract doctrine in family law. Still, Hasday suggests that modern family law as understood "by legal scholars and especially by legal authorities, like legislators and judges"[25] ignores how family law's ongoing reliance on status "continue[s] to sustain . . . the social inequality of women."[26] The modern "family law canon"[27] wrongly assumes that modern family law embodies a status-to-contract story, even though the transition to contract from status is entirely incomplete. Hasday argues that the persistence of status "den[ies] individuals choice about the structure of their relationships,[28] and fails to protect individuals within marriage.[29] She cites not just *Borelli,* but a series of other cases involving unsuccessful claims to payment for marital services between spouses, for proof that modern family law does not "uphold women's equality."[30]

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23 Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It 118 (1999).

24 *Id.* In later work on commodification, Williams suggests that one can ask whether domestic labor has value that should be recognized in law without assuming that it is the market that should put a value on that labor. *See* Joan C. Williams & Viviana A. Zelizer, *To Commodify or not to Commodify: That Is not the Question, in* Rethinking Commodification 362 (Martha M. Ertman & Joan C. Williams eds. 2005). This latter understanding of commodification, one that separates the question of whether something has value from whether the market should value it, is consistent with how the law of marital dissolution has come to value domestic labor. *See infra* Part II.

25 Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 825 (2004).

26 *Id.* at 830.

27 *Id.* at 825.

28 *Id.* at 836.

29 *Id.* at 837–38.

30 *Id.* at 830.

The next Section evaluates and concedes many of these arguments. Family law is still permeated with status; it resists enforcing contracts for domestic services and it refuses to commodify most household labor. Family law is still exceptional. But family law's failure to commodify domestic labor and enforce marital service contracts does not inure to most married women's detriment. In fact, quite the opposite is true. Modern family law's embrace of status, anti-contractarianism, and anti-commodification protects most married women who disproportionately engage in domestic work for any significant time. It forces a redistribution of wealth from those who work in the market to those who work more (or extensively) outside the market. And it forces that redistribution by treating domestic labor as distinct and by rejecting market measures of its value. There are women who can be hurt by family law's forced redistribution of wealth, but for the most part, these women, especially lower income women—who earn just as much if not more than any potential spouse and still disproportionately invest in domestic work—no longer marry.[31] They escape the potential harms of status by not entering into status relationships.

II. Status vs. Contract

All the scholars discussed above would likely acknowledge, as Hasday does, that many of the twentieth century changes to family law did involve some casting off of status.[32] The no fault

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31 *See infra* notes 116 - 118.

32 In an important article, Professor Kaipo Matsumura argues that "[a] pervasive narrative in legal scholarship [] that family relationships are treated differently from market relationship" overgeneralizes by failing to see all the different contexts in which contract law is infused with status. Kaipo Matsumura, *Unifying Status and Contract*, 56 U.C. Davis L. Rev. 1571, 1591 (2023). Matsumura suggests that there is much more relationship-specific exceptionalism within contract law than the traditional status/contract dichotomy admits. In other words, family law exceptionalism is but one of many forms of exceptionalism. I agree with Matsumura to the extent he suggests that other areas of contract law are infused with status. I disagree to the extent he argues that family law is no more exceptional than the other areas he discusses. He elides the conundrum posed by unique labor that family members provide, *see infra* text accompanying notes 43-47, and the fact that the plaintiffs in many of the cases he cites were not asking courts to apply contractual notions of breach nor contract remedies, but the very different understandings of liability and remedies that family law exceptionalism provides. See *infra* note 48 and Katharine K. Baker, *The Polyamorous Threat to*

revolution that swept through almost all fifty states in the 1970s and early 80s effectively allowed either spouse to leave a marriage at will. Marital duties became less ascriptive because one could avoid them by leaving a marriage. When one spouse did leave, the law grew increasingly wary of imposing long-term obligations on either spouse because divorce was meant to mark a new beginning for each spouse as an autonomous individual. The 1973 Uniform Marriage and Divorce Act embraced a "clean break" theory of divorce, encouraging courts to distribute marital property in ways that allowed each spouse to go their own way without any future entanglement through mechanisms like alimony.[33] This period also saw growing acceptance of both pre- and post-marital contracts, which allow soon-to-be spouses and people who are already spouses to contract with regard to property division in case of divorce. These contracts, which had been viewed through an anti-contractarian lens because they were seen as antithetical to marriage, became legitimate enough to generate their own Uniform Act.[34]

Critical to family law's willingness to dispense with some vestiges of status was the growing recognition that women were, or at least could be, "laborers" in Professor Haley's nomenclature. Women could enter into contracts in markets and earn wages just as men could. The women's equality movement in the latter half of the twentieth century helps explain family law's willingness to dispense with some of family law's paternalism.

It did not take long for people to realize that this rejection of paternalism left many divorced women significantly worse off after divorce. Women who had disproportionately invested in domestic work found themselves cast into the market, free to sell their

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Nonmarriage, 61 Fam. Ct. Rev 81, 88 (2023) (discussing how cohabitants' contract claims are rarely asking for the market value of their services and usually ask courts to assume that family norms, not commercial norms, should apply).

33 *See* Leslie Joan Harris, June Carbone & Rachel Rebouche, Family Law 272–73 (7th ed. 2023) (discussing the Uniform Marriage and Divorce Act's ideal of the parties going their separate ways after divorce, with minimal financial entanglement). Traditionally, alimony had often been tied to fault, and by dispensing with the relevance of fault, the new understanding of divorce also dispensed with a primary justification for alimony. *Id.*

34 The Uniform Premarital Agreement Act was adopted by approximately half the states by the late 1990s. *See* Harris, Carbone & Rebouche, *supra* note 33, at 500.

labor, but ill-equipped to do so because they had disproportionately invested in non-market work. By the late 1980s, numerous commentators reported that divorce was an economic calamity for many women.[35] Divorce always involves some collective decline in the standard of living for the divorced parties because of the lost economies of scale when one home becomes two, but the unmooring of divorce from a fault-based regime also unmoored property distribution and alimony from their theoretical foundations. If judicial re-adjustments of financial incidents at divorce were not supposed to remedy the harm caused by the destruction of what was supposed to be a permanent institution, who should end up with what? The answers to that question varied widely not just by state but within states. Community property states continued to divide community property evenly at divorce, but the equitable distribution states, which far outnumbered community property states, rendered wildly divergent results. As Professor Mary Ann Glendon commented at the time, the equitable distribution system left divorcing litigants "[in] a lottery whose outcome greatly depend[ed] on the luck of the judicial draw."[36]

The commentary discussed in Part I implicitly suggests that women could have protected themselves from these vagaries through contract. Part II.B will question that conclusion, but regardless of whether women in the nascent no-fault era would have been better off if they had been able to sell their labor to their husbands while married, family law did not embrace contract as the solution. Instead, by the early twenty-first century, it re-embraced status. Contemporary family law is again a domain suspicious of contract doctrine's reification of autonomy and choice and instead willing to embrace assumptions about selflessness and altruism.

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35 James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce Law for Women and Children*, 21 Fam. L.Q. 351 (1987) (discussing economic consequences); Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 Fam. L.Q. 79, 97 (1986) (reporting a study in Vermont showing men's per capita income rising by 120% after divorce while women's decreased by 33%); *See generally* Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985) (discussing many of the ways women are economically damaged by divorce).

36 Mary Ann Glendon, *Family Law Reform in the* 1980*'s*, 44 La. L. Rev. 1553, 1556 (1984).

These assumptions provide the foundation for the contemporary formulaic approach to property distribution and maintenance. Borrowing from what the law of parenthood had adopted in the 1980s, the law of marriage in the twenty-first century adopted formulas and guidelines that determine rights and responsibilities based on status. Just as what a parent owes or is entitled to in child support is based not on any agreement, but on one's status as a parent, so what one owes or is entitled to at divorce is based not on any agreement (absent an ante or postnuptial agreement) but on one's status as a spouse.

A. *The Role of Status in Property Division and Maintenance*

1. Property Division

Consider property division. Even as more people have come to accept the inevitably of diverse family forms,[37] the law of property distribution at divorce has become less respectful of individual difference, less contextual, and more status-based. In most states, marital property is split equally at divorce, or at least courts start from that assumption.[38] Comments in the American Law Institute's ("ALI") Principles, published in 2001, suggest "marital property and marital debts [should be] divided at dissolution so that the spouses receive net shares equal in value."[39] The word "equitable" in "equitable distribution" states gives judges some room around the edges, but judges usually need to articulate a solid reason for deviating from the 50/50 presumption.[40] Context and diverse individual preferences, unless memorialized in a written, signed, procedurally sound ante or postnuptial agreement, rarely dislodge the 50/50 presumption.[41]

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37 Justice O'Connor wrote in 2000 that "demographic changes of the past century make it difficult to speak of an average American family." Troxel v. Granville, 530 U.S. 57, 63 (2000).

38 *See* Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. Ill. L. Rev. 319, 334, n.112 (listing states with a statute and states with a judicial presumption of a 50/50 split).

39 Principles of the Law of Family Dissolution Analysis and Recommendations § 4.09 (2002) (hereinafter "ALI Principles").

40 24 Am. Jur. 2d *Divorce and Separation* § 531 (2010).

41 *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608 625–30 (1998) (default rules establish a status quo bias

In justifying this presumption, the ALI specifically acknowledges the problems with trying to commodify domestic labor. The ALI's commodification anxiety stems not from fear of degrading women by treating them as servants, but from fear of undercompensating them by relying on market measures. Traditional domestic labor, performed disproportionately by women,[42] involves both labor that commands little value on the market (cleaning, child care, etc.) and labor that has no market measure because it is unique. Family labor is often distinctly valuable because of the person performing the labor. One can hire someone else to attend a child's soccer game, but that replacement person simply is not filling the same role as a parent. One can hire a nurse to take care of an ailing spouse, but that nurse is not filling the same role as a spouse. The comments to the ALI Principles acknowledge that "the incommensurability of the spouses' nonfinancial contributions frustrates any effort to attach monetary value to them."[43] Given "this measurement difficulty," the ALI concludes, "it may be sensible for the law to presume irrebuttably that the spouses contributed equally to their entire relationship."[44] In other words, contemporary property distribution law compensates not by valuing women's labor as contract law would, but by valuing domestic

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that makes contracting around them cumbersome). Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. Chi. Legal F. 265, 270 ("legal rules surrounding issues of marital property tend to stick—that is, whether or not spouses would actually choose these rules in a situation of perfect choice, they end up with them"). Although comprehensive empirical studies are rare, those that have been done suggest that most prenuptial agreements do not stray very far from the 50/50 rule for most accumulated property. *See* Elizabeth Carter, *Are Premarital Agreements Really Unfair? An Empirical Study*, 48 Hofstra L. Rev. 487 (2019) (providing a survey of the content of one Louisiana parish's antenuptial agreements and finding that most divided property equally).

42 *See* Katie Newkirk, Maureen Perry-Jenkins, & Aline G. Sayer, *Division of Household and Childcare Labor and Relationship Conflict Among Low-Income New Parents*, 76 Sex Roles 319 (2017) (mothers spend almost twice as much time on unpaid work as fathers); *Raising Kids and Running a Household: How Working Parents Share the Load*, Pew Rsch. Ctr. (Nov 4, 2015), https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/ (in dual-career families, mothers do more childcare work).

43 ALI Principles, *supra* note 39, § 4.09, cmt. c.

44 *Id.* I have previously referred to this explanation of the equal division of property as "a definition of marriage masquerading as a property distribution theory." Baker, *Homogeneous Rules*, *supra* note 38, at 352.

labor usually at a much higher rate than contract law would. It does so to effectuate a significant redistribution of wealth from market workers to those who labor outside the market.

Borelli v. Brusseau, a case that plays a prominent role in Professors Siegel, Williams and Hasday's arguments, highlights this commodification problem. Mr. Borelli was on his fourth hospitalization in five years and had little hope of ever living without nursing care again when he allegedly entered into an oral contract with Mrs. Borelli. He did not want to rely on market labor for his nursing care. So, Mrs. Borelli alleged, he entered into a contract with her for that care. Presumably, Mr. Borelli thought that his comfort level would be qualitatively different if care was being provided by his wife.

Imagine how the law of contract might have responded if Mrs. Borelli had performed inadequately or, contrary to their agreement, contracted out some portion of Mr. Borelli's care before he died. What remedies would be available to Mr. Borelli if he sued? A court might try to order specific performance, but that is highly unlikely because courts are especially wary of specific performance in the context of personal services contracts.[45] A reluctant Mrs. Borelli, nursing Mr. Borelli only because the court was forcing her to do so, would not likely be an adequate substitute for what Mr. Borelli thought he had contracted for, i.e., a loving spouse taking care of him.[46] A court might require Mrs. Borelli to pay Mr. Borelli the market value of her services. This would be an expectation remedy, an attempt to put Mr. Borelli in the position he would have been in had the contract been performed. But it would be an obviously inadequate remedy; he contracted with her in order to avoid market services. Lastly, a court could allow Mr. Borelli to withhold payment. This would be a reliance remedy, trying to put Mr. Borelli in the position he would have been in if he had never entered the contract. But reliance remedies do not really enforce a contract; they minimize the damage caused by breach, returning the breached against party to their ex ante position.

Mr. Borelli simply could not get what he wanted through contract law if Mrs. Borelli breached. Absent some kind of stipulated

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45 Robert Scott & Jody Krause, Contract Law and Theory 122 (6th ed. 2023) (courts are generally reluctant to specifically enforce a contract to perform personal services).

46 *Borelli*, 16 Cal. Rptr. 2d. 16.

damages, contract law cannot provide an adequate remedy for a breached promise for unique services because there is no substitute for unique services. Unique services cannot be objectively valued. Thus, the commodification problem is endemic to contract law as much as it is endemic to family law. Family law has tried to address the commodification problem by incorporating a status-based remedy. Contract law has not.

Family law's rejection of contract and re-embrace of status also prevents courts from having to assess whether a spouse actually performed their marital or contractual obligation. What one is entitled to is a function of being a spouse, not a function of what one has earned as an individual. A spouse's entitlement to 50% of the marital property is not altered even if she outsources the "clothing, feeding and educating" of her family to others and pays for that outsourcing with income earned by the other spouse.[47] It does not matter how good one is at organizing family time, nursing sick family members, taking care of in-laws, or providing emotional support. Entitlement stems from status, not performance.[48]

Comparably, it does not matter whether one earned a great deal of money in the market or comparatively little. One must share half of what one made. Forced sharing, a concept that is antithetical to the autonomy-respecting, market-driven law of contracts is a (mostly) non-negotiable, ubiquity in family law.[49] The law forces one to share – to be selfless – because that is what the status of marriage requires.

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47 Siegel found that courts refused to allow married women to contract with their spouses for this kind of labor. *See* Siegel, *Modernization*, *supra* note 10, at 2130.

48 This is not true in the other contract areas that Professor Matsumura cites as being infused with status, like the law of General and Subcontractor. *See* Matsumura, *supra* note 32, at 1610–16. Failure to perform in the contracting context is breach and excuses reciprocal performance. The transition to no-fault rendered the notion of breach inapposite in marriage.

49 A duty to act in good faith, common in contract law, is not the same as a duty to share. There is no one definition of good faith, *see* U.C.C. § 1-304 (Am. L. Inst. & Unif. L. Comm'n 2022): Restatement (Second) of Contracts § 205 (Am. L. Inst. 1981), but in general the duty forbids dishonesty and or half-hearted performance. *Id.* at § 205. One conforms to a good faith standard by being very clear that one does not want to share. See the discussion of *Carney v. Hansell*, *infra* text at notes 71–72.

2. Maintenance

The modern approach to maintenance (traditionally called "alimony") also increasingly reflects a status-based approach to post-divorce income stream, though maintenance is still considerably more contextual than property division. In general, there are three types of maintenance: reimbursement support, rehabilitative support, and general support.[50] Reimbursement support is particularly common in shorter term marriages in which one spouse financed another's human capital investment (in education or a business, perhaps), but did not stay married long enough to reap the economic advantages of that investment. The spouse who invested in the other is reimbursed for their disproportionate contribution. Rehabilitative support, if granted after a short-term marriage, can serve a comparable function in that it tries to provide a spouse who has forsaken their own career or wage-earning ability with the transitional support needed to make the investments they previously forsook for the marriage.

There are shades of contract law in both restitutionary and rehabilitative awards. Reimbursement maintenance works something like restitution, or unjust enrichment, in contract law. The party who enriched the other (by, for instance, investing in his education) should be entitled to their investment back.[51] Rehabilitative maintenance is akin to reliance damages in contract law. The law tries to put the spouse who disproportionately invested in the family in the position she would have been had the "contract" (i.e., the

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50 J. Thomas Oldham, *The Surprising Continuing Lack of Consensus Under U.S. Law for the Award of Spousal Support After Divorce 1*, *in* International Survey of Family Law 2022, at 1(Intersentia 2022), https://ssrn.com/abstract=4180899). Some states have another category, transitional alimony, meant to help an ex-spouse "adjust[] to the economic consequences of establishing and maintaining a household without the benefit of the other spouse's income." In *re* Marriage of Pazhoor, 971 N.W.2d 530, 541 (Iowa 2022). "The term 'transitional' has been used interchangeably with 'rehabilitative,'" *id.* at 539, and it is somewhat unclear whether courts use transitional alimony as a means of compensating, like restitutionary alimony, or rehabilitating, like rehabilitative alimony, or simply as an equitable means of making the tradition out of marriage less abrupt for the lesser earning spouse.

51 For the paradigmatic explanation of restitution as a contract remedy, see Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 56 (1936).

marriage) never been entered into.[52] Both of these contract-like remedies may work well enough for short term marriages. But for long-term marriages they strike many as unfair or unrealistic. A spouse who has lived for fifteen years with a spouse whose law school education she helped finance before she left the paid labor force to raise the couple's children is arguably entitled to more than the present value of her previous contribution. Her reliance and foregone opportunities are much more substantial than would be reflected in the present value of the money she invested in his education.[53] And, the longer the marriage, the harder and more nonsensical the rehabilitative inquiry tends to become because the longer the marriage and the greater the number of opportunities she has foregone, the harder it is to answer the question "what should a spouse be rehabilitated to?"[54]

These concerns gave rise to a second wave of alimony reform because the clean break theory of divorce left those who had disproportionately invested in domestic work in long term marriages so little.[55] That re-thinking has led to general maintenance that, like property division, is becoming increasingly status-based and

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52 *Id.* at 54.

53 Consider how much more difficult it can be to re-enter the labor force after being out of it for ten versus two years.

54 Consider the spouse in *Pazhoor*, 971 N.W.2d 530. She was a registered doctor in India and completing her internship when she married. Both she and her husband attempted to pass the medical boards when they moved to the United States. He passed. She did not. She coauthored several medical articles after that, but once her husband secured a position as a hospitalist and their first child was born, she stopped engaging in market work. Her husband filed for divorce 16 years after she had last practiced medicine. At that point, she agreed it made more sense for her to pursue a master's degree than a medical license and the court awarded her maintenance that it thought would allow her to achieve that goal. But what if she had insisted that she wanted to pursue a medical license? Why is she not entitled to be rehabilitated to that standard if that is the standard she was at when she got married? Because her investment in non-market work was too long and too substantial for her to be able to rehabilitate as a doctor? That suggests one's remedy decreases in proportion to the length of one's family investment. That seems backwards.

55 Mary Kay Kisthardt discusses this "second wave" in Mary Kay Kisthardt, *Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61 (2008). For more on how women who engaged in domestic work were hurt by the initial abandonment of alimony, see Cynthia Lee Starnes, *Mothers as Suckers, Pity, Partnership and Divorce Discourse*, 90 Iowa L. Rev. 1513, 1539 (2005).

formulaic. There is still variation in how courts determine whether maintenance is appropriate at all, but there is also consistent movement away from contextual evaluation.

Much of the variation in how states determine the amount of support is due to different categorical rules dictated by statute. Some state statutes place limits on how high an award can be[56] or how long it can last.[57] These categorical rules enforce their own kind of status. Courts are prohibited from ordering alimony even if the labor engaged in, or the roles spouses assumed, or their implied agreement, might indicate it is appropriate. More tellingly, an increasing number of states rely on some kind of formula to set a general maintenance amount.[58] The 2001 ALI Principles endorse this formulaic approach, as does the American Association of Matrimonial Lawyers.[59] For the most part, these formulae incorporate two variables, income differential at the end of the marriage and the length of the marriage. As long as the marriage lasted long enough and the income differential is great enough, the less economically empowered spouse is entitled to maintenance due to the fact – the status – of the marriage. It does not matter how much she contributed or what opportunities she forewent or whether she was a good spouse. And, critically, it does not matter what the parties' intent was with regard to who should do what in the marriage and how each party should be compensated. One is entitled to maintenance, if one is entitled to maintenance, not based on a meeting of the minds with regard to marital obligations or the performance of those obligations, but based on the simple fact of marriage.

Together, contemporary property distribution and maintenance rules force family members to share, not as form of payment for services, nor because the person with whom they are forced to share is particularly deserving, but just because one is a spouse. Professor Halley is completely right: Marriage is "saturated" with its "ascriptive" contents."[60] In other words, marriage is a bundle

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56 Tex. Fam. Code § 8.055 (stating that the award must be the lesser of $5,000/month or 20% of the obligor's income).

57 Ind. Code Ann. § 31-15-7-2.

58 Vermont, Colorado, Illinois, Massachusetts, New York, Delaware and Maine all rely on maintenance formulae for general maintenance determinations. *See* Oldham, *supra* note 50, at 11–12.

59 *See* ALI Principles, *supra* note 39, § 504; Kisthardt, *supra* note 55.

60 *See* Halley I, *supra* note 1, at 42.

of rights and duties imposed by law." Those duties include sharing labor and property. The law is not particularly good at forcing people to work, but modern family law consistently forces spouses to share their property and their income at divorce.

Importantly, this status only benefits those in marriages that have the combined human capital to generate a surplus. As Eleanor Brown, Naomi Cahn, and June Carbone point out, "[i]n the bottom 40% of couples, there is no reliable surplus."[61] Status forces a higher earning spouse to share the excess. If there is no surplus, there is nothing to share. As Part III explains, this system leaves spouses who earn as much or close to as much as their spouse, and still invest disproportionately in domestic work, without any kind of compensation for their domestic investment. It also leaves spouses who disproportionately invest in domestic work only to find their marriage collapse quickly vulnerable. Part III discusses these two classes of cases, but before doing so, it is worth taking a closer look at the contract alternative.

B. *The Contract Alternative*

The academic criticism of courts' refusal to enforce contracts for domestic services, whether those alleged contracts were entered into between married couples or cohabitants, routinely assumes that women would have been better off if courts had been more willing to view domestic services as valid consideration in a contract. This Section unpacks that claim, first by questioning whether the cases provided as evidence that women would be better served by contract involve promises that would be enforced as contract, then by highlighting the bargaining power dynamics that undermine the claim that most married women could use contract to their advantage.

1. *Oral and Implied Contracts*

The list of cases usually cited for the idea that women are hurt by the law's failure to enforce marital contracts for domestic services, a list on which *Borelli v. Brousseau* always assumes a

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61 Eleanor Brown, Naomi Cahn & June Carbone, *The Price of Exit*, 99 Wash. U. L. Rev. 1897, 1902 (2022) (citing data from the Federal Reserve Board on household well-being).

prominent place,[62] almost all involve oral or implied contracts.[63] The oral and/or implied nature of these alleged contracts is important because in the vast majority of cases alleging a contract for domestic services, the plaintiff never actually proved the existence of the contract.[64] Some commentators argue that the failure to enforce a contract for domestic services in the *nonmarital* context is also a modern manifestation of coverture, just as Professor Siegel argued that failure to enforce a domestic services contract in marriage was a manifestation of coverture.[65] But criticisms of

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62 All of the authors cited in Part II cite to *Borelli*.

63 Two of the cases cited by Professor Hasday involve a slightly different issue, statutory interpretation. In *Minnesota v. Bachman*, 521 N.W.2d 886 (Minn. Ct. App. 1994), a wife attempting to leave prison for a work release program argued that the domestic services she could provide her family constituted work for purposes of the program. Relying on how other social welfare programs, like workers' compensation, treated domestic services, the court found that the legislature did not intend domestic services provided to one's own family to count as work for purposes of the program. This is not the court refusing to enforce a contract; it is a court interpreting legislative intent. Comparably, in *Department of Human Resources v. Williams*, 202 S.E.2d 504 (Ga. Ct. App. 1973), a disability benefits recipient wanted to be able to collect for the cost of his wife's domestic services. If he had hired someone to come into his home to help him, he could have deducted that cost up to $100. The court held that the statute would allow him to contract for services that his wife provided if they were "above" a wife's normal duty (and remanded to determine whether the duties of the wife met that threshold). Again, this is not a court finding that domestic services can never be contracted for between spouses; it is a court interpreting what a legislature intended as criteria for government programs.

64 *Borelli*, 16 Cal. Rptr. 2d 16 (alleging an oral promise to leave her with more than the antenuptial agreement provided); Dade v. Anderson, 439 S.E.2d 353 (Va. 1994) (finding that an implied contract based on her rendering of domestic services, though this claim would perhaps better be labeled one for unjust enrichment); Estate of Lord, 602 P.2d 1030 (N.M. 1979) (alleging an oral antenuptial agreement between a wealthier older woman and a considerably younger man to leave him more property when she died); Mays v. Wadel, 236 N.E.2d 180 (Ind. 1968) (making a claim for an implied contract for the contributions the wife made to the husband's property and for her care of him while he was ill; the husband's will explicitly provided that she was entitled to $8/day for every day of care she provided while he was ill, but the wife renounced her rights under the will and argued instead under an implied contract claim for considerably more than the $8/day that the will would have given her).

65 Siegel, *Modernization, supra* note 10, at 2198. Albertina Antognini argues that courts' refusal to enforce contract in these contracts is a modern

courts' unwillingness to enforce contracts for domestic services, in both the cohabitation and marital context, fail to acknowledge the weakness of the contract claims in these cases.

a. *Cohabitation Contracts*

The most famous example of contract failure in the cohabitation context is *Marvin v. Marvin*,[66] in which the trial court found no express or implied contract between Michelle Triola and movie star Lee Marvin.[67] Triola could not prove that Marvin, with whom she had lived for several years, intended to share anything with her after they broke up. The court also found that Triola could not receive anything in unjust enrichment because it was Michelle, not Lee, who had been more enriched by the cohabitation.[68]

In *Barron v. Meridith*, decided more than forty years later, another California court ruled comparably. The cohabitant had "received benefits from the relationship, including payment of living expenses and other goods and services,"[69] so as a matter of unjust enrichment she was not entitled to more, and she could not establish that the defendant ever promised her more than what she had already received.[70] Consider also *Carney v. Hansell*, in which a New Jersey court awarded the plaintiff cohabitant an unjust enrichment remedy of minimum wage for the work she had performed at her cohabitant's business.[71] Relying on claims of both implied partnership and implied contract, Ms. Carney alleged that she was entitled to considerably more than the minimum wage. But the court found that the defendant had made it abundantly

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manifestation of coverture, but in making that claim, she assumes that the contracts could be enforced as contracts. Albertina Antognini, *Nonmarital Coverture*, 99 B. U. L. Rev. 2139 (2019).

66 Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), *aff'd and modified*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

67 Marvin v. Marvin, 176 Cal. Rptr. 555, 558–59 (Cal. Ct. App. 1981).

68 *Id.*

69 Barron v. Meridith, No. CGC 13-535537, 2017 WL 772444 at *4 (Cal. Ct. App. Feb. 28, 2017).

70 *Id.* at *3.

71 Carney v. Hansell, 831 A.2d 128 (N.J. Super. Ct. Ch. Div. 2003).

clear that he had no intent to marry or share his business, his property, or his future income with his cohabitant.[72]

Mr. Hansell's testimony, while very effective at defeating the contract and partnership claims because it demonstrated his intent *not* to divide his property, revealed that he had behaved in the ways that family law exceptionalism eschews. He was unwilling to commit, unwilling to share, and entirely un-altruistic. If the parties had married, Ms. Carney would likely have been entitled to 50% of the wealth acquired in the business Hansell had started and appreciation of the homes they lived in together. Family law would have required him to share, regardless of his intent. Contract law does not.[73]

Courts do sometimes award cohabitants marital-like remedies using contract law, but usually only after being convinced that both parties really did intend to share their property. If a court finds that

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[72] The court wrote:

> defendant went to great lengths to be certain that plaintiff was not his legal business partner. All trucks and business accounts were solely in his name. On several occasions she asked him to include her as a named party in the business and he always refused. She says he point blank told her that nothing would ever be in her name. On one occasion defendant told plaintiff that he would burn the business down before she would ever get anything. It was clear he considered it as his sweat and equity alone, which was responsible for the success of the business.

Id. at 132.

[73] Professor Matsumura discusses *Carney* and suggests that the court should have been willing to enforce Ms. Carney's contract because the law allows non-intimates to contract for the kinds of services Ms. Carney provided, like "babysit[ing], houseclean[ing], driv[ing], personal shopp[ing] . . . [and] night nurs[ing]." Matsumura, *supra* note 32, at 1607. Ms. Carney was asking for much more than that. She claimed she was entitled to a share of the property Mr. Hansell acquired during the relationship, which family law would have provided, but that is not the remedy that courts would provide in a contract for babysitting, housecleaning or night nursing services, unless the parties both clearly agreed to such an exchange. As I have detailed elsewhere, cohabitants alleging contracts for their services almost always ask for more than what the babysitters, housecleaners, drivers and night nurses earn in a market. *See* Baker, *Polyamorous Threat*, *supra* note 30. Perhaps Ms. Carney should have gotten more for her babysitting and housecleaning in their home, not just her work at Mr. Hansell's business, but she offered absolutely no proof that the parties agreed that she should be paid a family law remedy.

a couple "intended to . . . live together as a family"[74] or had "an intent to share equally"[75] then they are willing to award a cohabitant half of the acquired property. But many cohabiting plaintiffs cannot prove that their partner intended to share. Without that proof, there is no contract. Often, it is the desire not to commit to sharing post-dissolution that leads cohabitants not to marry.[76] Asking courts to imply a contract in these situations asks a court to find an intent to share notwithstanding a perfectly reasonable assumption that at least one of the parties did not marry because they did not want to share. That assumption that is often validated by the testimony of one of the cohabitants.[77]

b. *Marriage Contracts*

Married plaintiffs claiming they contracted with their spouses for domestic services have to prove a different kind of intent. The equal sharing rules already apply to them because they are married. Thus, married contract claimants must prove both spouses agreed to more than that. Their contract claims rest on proving a mutual intent to enter into a legally binding agreement to commodify their domestic service labor. It is not at all clear they can do so.

As suggested, the evidence of the required intent to contract in these cases is shaky at best. None of the cases cited by the commentators above involve written signed contracts for domestic services and several involve claims against a dead spouse who had no opportunity to deny the existence of the contract.[78] In two of the cases cited by Professor Hasday, not only was the alleged oral promisor dead, the alleged promise was for considerably more than what both spouses had agreed to in a written, signed

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74 Dutton v. Laine, No. 93934, 2006 WL 851389, at *4–5 (Kan. Ct. App. Mar. 31, 2006).

75 Wilbur v. DeLapp, 850 P.2d 1151, 1152–53 (Or. Ct. App. 1993).

76 Katharine K. Baker, *What Is Nonmarriage*, 73 SMU L. Rev. 201, 216 (2020) (discussing common reasons cohabitants give why they cohabit, which include not wanting to commit and not wanting the freedom to leave a relationship or a place with ease).

77 *See supra* text at note 72.

78 *Dade v. Anderson*, *Estate of Lord*, *Mays v. Wadel*, and *Borelli v. Brusseau*, *see supra* discussion in text at note 63, all involved claims against a deceased's estate.

prenuptial agreement.[79] Skepticism surrounding such claims seems well justified.

One might argue that we should not expect spouses to enter into written contracts because such a requirement would undermine the trust that the law wants to foster between spouses. But if the parties had previously entered into a written, signed prenuptial agreement, it is arguably appropriate for the law to require a writing before allowing one party to claim they abandoned their previous formal, signed agreement.

One case, *Mathews v. Mathews*, involved a written promise addressed "to whom it may concern" in which the husband promised "everything I have or will have will be [his wife's] to have and hold for the benefit of our children and herself [if he ever left her.]"[80] The writing was nearly fifteen years old and there was no recitation of consideration from the wife to the husband. The wife maintained that her consideration was her domestic services and/or her not leaving him first.

Implying consideration or reliance (as would be necessary for a promissory estoppel claim) in this case is problematic because it is easy to see why the wife would have stayed and performed domestic services even without the promise. The husband was providing something for her and her children before he left. Her claim depended on her proving that she stayed and performed domestic work in return for or in reliance on her being provided for in the long run not just the short run.[81] It is perfectly possible that, as in the cohabitation cases, a court would find that she stayed because she was considerably better off by staying in the short term, not because she was relying on his promise to give her everything if he left.

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79 *Wadel*, 236 N.E.2d 180, and *Borelli,*16 Cal. Rptr. 2d 16, both involved claims for considerably more than the antenuptial agreement the parties had signed.

80 Matthews v. Matthews, 102 S.E.2d 697, 698 (N.C. 1968).

81 A traditional contract requires consideration from both parties, *see* Restatement (Second) of Contracts § 17 (Am. L. Inst. 1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.") Promissory Estoppel requires a promise, reliance on that promise, and avoidance of injustice. *See id.* § 90 ("A promise which the promisor should reasonably expect to induce action or forbearance . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

Most lawyers with a passing familiarity of contract law should also realize that the alleged contracts in these cases present Statute of Frauds problems. Statutes of Frauds require contracts of more than a year to be written and signed.[82] Though some of these contracts were completed within a year (because the promisor spouse died), presumably they were meant to last more than a year. The writing requirement in Statutes of Frauds is thought to serve both evidentiary and cautionary functions because the writing forces parties to be clear in their promises, and the formality impresses upon parties the legal significance of what they are doing.[83] Both of those concerns, the precise nature of the promise and an intent to be legally bound by it are paramount in these cases.[84] So before assuming that family law's embrace of status defeats valid claims of contract in ways that work to the detriment of women, it is worth recognizing that contract law itself may not honor these claims.

2. *Bargaining Power*

In addition to relying almost exclusively on oral or implied contracts, the cases in which contract claims arise often involve unequal distributions of bargaining power. The frequency of dead obligors stems from the fact that these promises were often allegedly made by elderly, ill people eager for care or companionship from a younger spouse.[85] As mentioned above, Mr. Borelli was on his fourth hospitalization in five years; he had just had a massive stroke that left him in need of "round-the-clock care" and

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82 Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800–03 (1941).

83 *Id.*

84 The marital context in these cases also renders the "partial performance" exception to the Statute of Frauds doctrine problematic. Many courts enforce contracts that would otherwise violate the statute if there has been partial performance. For a discussion, see Schwedes v. Romain, 587 P.2d 388, 391 (Mont. 1978) (discussing the partial performance exception). All of the cases relied on in the critique of family law exceptionalism involved allegations of partial performance, but that performance involved providing services that are routinely provided by spouses even if there is no contract. It will be difficult to prove that the partial performance was rendered pursuant to the contract if it is routinely performed in the absence of contract.

85 *See supra* cases discussed in note 63.

he very much wanted to die at home.[86] Mrs. Borelli was likely the only person in the world who could provide him with what he wanted. It is hard to imagine a weaker bargaining position than Mr. Borelli's. Indeed, if the court had found that a contract had existed, one could argue that Mrs. Borelli took advantage of her extraordinarily greater bargaining power to extract an exceedingly generous compensation package for four months of nursing care. When both parties were of more sound mind and body, Mrs. Borelli had agreed to much less in an antenuptial agreement.[87]

In theory, antenuptial agreements allow parties to enter into an agreement for a potential future division of assets before the parties' assumptions of different roles during the marriage has weakened either party's bargaining position. If, once married, the parties begin to assume different roles, or make complementary investments in market and non-market work, the bargaining power of the spouse who has invested in non-market work is usually compromised. Women are still much more likely than men to disproportionately engage in non-market work, especially if the parties have children or elderly dependents.[88] As Martha Fineman explained, dependency begets dependency and by withdrawing, even if only somewhat, from market work to take care of dependents, caretakers become dependent on others.[89] When the law is more willing to enforce contracts between spouses, the party who has invested more in market work can more easily exploit that dependency.[90]

Both the Uniform Premarital Agreement Act ("UPAA") and the Uniform Premarital and Marital Agreement Act ("UPMMA") address bargaining power concerns by imposing disclosure and representation requirements. Substantively the UPMMA requires an analysis of both whether the agreement was "unconscionable

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86 *See Borelli*, 16 Cal. Rptr. 2d 16.

87 *Id.*

88 Institute for Women's Policy Research, *Providing Unpaid Household and Care Work in the United States: Uncovering Inequality* 6 (Jan. 2020), https://iwpr.org/wp-content/uploads/2020/01/IWPR-Providing-Unpaid-Household-and-Care-Work-in-the-United-States-Uncovering-Inequality.pdf.

89 Martha Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 163 (1995) (building a theory for how taking care of dependents renders caretakers dependent).

90 *See* Rhona Mahoney, Kidding Ourselves: Breadwinning, Babies and Bargaining Power 44–45 (1995).

at the time of signing" and whether it creates a "substantial hardship" at enforcement.[91] The UPAA only includes an analysis of unconscionability at the time of signing, but enforcing the contracts discussed in Part I would mean that courts should not take either Act's procedural requirements—which attempt to address bargaining power asymmetries—seriously.[92] None of the alleged contracts in the cases discussed above were entered into with the procedural protections required by the APAA or UPMAA.

In a provocative and optimistic law review article, Professor Mary Anne Case suggests that courts would not enforce marital contracts if it was clear that a dependent spouse had too little bargaining power,[93] but that courts may be ready to enforce contracts between spouses if they are entered into by financially secure, professional women (Michelle Obama is her example) interested in securing promises from their husbands with regard to household labor.[94] Professor Case credits economist Robert Pollack's work,

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91 Unif. Premarital and Marital Agreements Act § 9(f)(1)&(2) (Unif. L. Comm'n 2012).

92 It is true that wives more often file for divorce than husbands. *See* Michael J. Rosenfeld, *Who Wants the Breakup? Gender and Breakup in Heterosexual Couple*, *in* Social Networks and the Life Courts 221 (Duane F. Alwin, Diane H. Felmlee & Derek A. Kreager, eds. 2018) (finding that wives wanted or initiated break-ups 70% of the time). Many women pursue divorce because they are willing to take an economic hit in order to start another life and, in the short term, post-divorce, husbands report lower levels of post-divorce well-being than wives. Thomas Leopold, *Gender Differences in the Consequences of Divorce*, 55 Demography 769, 771 (2018) (reporting that while men's reported dissatisfaction with divorce was higher than women's immediately after divorce, the negative economic effect of divorce for women in the longer term eventually eliminates any gender gap in dissatisfaction with divorce.). But if husbands are so hurt by divorce, one would expect to see more marital contracts in which the wife tried to monetize to her advantage his desire for stability. One does see some contracts like this, *see*, *e.g.*, *In re* Marriage of Labuz, 54 N.E.3d 886, 898 (Ill. App. Ct. 2016) (the husband claimed duress because the wife threatened to leave with their child unless he signed a postnuptial agreement), but the most common kind of marital contract remains the antenuptial agreement in which the "economic inequality between the spouses" remains "substantial," with the man having a great deal more economic and human capital than the wife.

93 Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 Wash. U. J. L. & Pol'y 225, 246–48 (2011) (describing a court refusing to enforce a marital agreement in which the wife agreed to "submit herself completely to her husband Myles and to grant him sole custody and property rights in the event of breach.").

94 *Id.* at 255–60.

which suggests that the law's refusal to interfere in marital relationships hurts those who deviate from traditional sex roles because in the absence of enforcement of non-traditional bargains, couples retreat to a "noncooperative equilibrium within marriage" that reflects traditional gender norms.[95] Case suggests that "exceptional" women who have bargaining power, especially early in a marriage, can use contract law to destabilize the gendered workloads that continue to characterize most marriages and are re-enforced by the law's refusal to enforce contracts for marital services.

I am less optimistic about this proposal for two reasons. First, I am simply less confident that if marital contracts become more accepted, courts will refuse to enforce those entered into by people with less bargaining power. Contract law in general and courts in particular are notoriously bad at policing bargaining power. As indicated above, the UPAA used an unconscionable-when-signed standard to try to police bargaining power in the prenuptial agreement context, but when left to the courts, that standard was watered down or ineffective enough that reformers felt the need to create an additional substantive review at enforcement, not just execution, in order to protect those hurt by pre or post marital agreements.[96] This is typical. In other contractual contexts, those with less bargaining power often resort to legislative fixes, not a sympathetic judiciary, to police the exploitation of bargaining power.[97]

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95 *Id.* at 250.

96 Thus, the UPMAA added the "substantial hardship for a party because of a material change in circumstances arising after the agreement was signed" exception to enforceability, thus requiring judicial review of the substance of the agreement both at signing and at execution. *See* Unif. Premarital and Marital Agreement Act § 9(f)(2).

97 The recent legislative movement around non-compete contracts is an example. Over the past five to ten years, various state legislatures felt the need to adopt bans on non-compete contracts for those with the least bargaining power. *See, e.g.*, 820 Ill. Comp. Stat. Ann. § 90/10 (prohibiting non-compete clauses for those earning less than $75,000 a year). The FTC has proposed rules that would prohibit certain non-compete agreements at all income levels. *See FTC Announces Rule Banning Noncompetes*, Fed. Trade Comm'n (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-non-competes. Non-judicial bodies are stepping in to render certain bargains unenforceable because judges won't rule them unconscionable. Even the agreements at issue in the case that is so often used to introduce students to the concept of unconscionability, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C.

Second, the willingness of someone like Michelle Obama to force their spouse to live up to their contractual commitments depends on their alternatives. The presence of children completely disrupts many professional women's BATNA ("Best Alternative to a Negotiated Alternative").[98] Children both increase the amount of non-market work needed in the home and increase the likelihood that women will perform it.[99] But children also greatly increase the cost of leaving, not only for the professional woman but also for the children. Perhaps there are more women than I realize who are willing to endure significant family strife in order to make sure their husband calls the dentist and organizes the carpool to get the kids to soccer practice and makes sure that summer camps are lined up, but the far more likely result is that the financially secure professional parent will outsource the work that her husband promised to do.[100] This will decrease the family's overall wealth, but many parents would rather do that than put the marriage at risk by trying to enforce the contract legally.[101]

Significant investment in children tends to lead to a conflation of one's own interests with the child's.[102] If the spouse

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Cir. 1965) (discussing cross-collateralization clauses) are now usually prohibited by statute, not individual determinations of unconscionability. *See, e.g.*, Fla. Stat. § 516.31(4).

98 For a discussion of professional women's BATNAs in the context of negotiating caretaking duties, see generally Rhona Mahony, Kidding Ourselves: Breadwinning, Babies and Bargaining Power 36, 51-56 (1995).

99 Newkirk et al., *supra* note 42, at 3 (mothers spend almost twice as much time on unpaid work as fathers); *Raising Kids and Running a Household, supra* note 42 (in dual-career families, mothers do more childcare work).

100 Newkirk, et al., *supra* note 42, at 10 (discussing the use of outsourcing as a means of dealing with the added demands of family labor).

101 And even if a court did enforce the contract, the likely remedy would be the monetary equivalent of the cost of outsourcing. Unless the parties divorced, this award would be meaningless because a court would only take it into account when determining what was separate and what was marital property for division at divorce. More important, as discussed above, the remedy would likely not reflect what the wife was contracting for, which was for the husband to provide his unique labor so that he could model the gender-norm-transgressing behavior which would teach the children that domestic services did not have to be performed by women.

102 Amartya Sen argued that policies must be concerned with women's individual interests even if they may conflict with a child's interest, Amartya Sen, *Gender and Cooperative Conflicts* 7 (World Inst. For Econ. Rsch. Working Paper, No. 18, 1987), but he documented just how prevalent it was for women

seeking to enforce an agreement thinks the enforcement would hurt the child, enforcement no longer seems to be in her interest. Children do not fare well when their parents engage in antagonistic legal proceedings.[103]

Given the difficulty in proving the existence of a contract in a domain in which explicit bargaining is rare and altruistic behavior is prized, the difficulty in commodifying unique domestic work, the ways in which living out gender roles affects bargaining power, and the economic and non-economic costs of legal enforcement, it is not at all clear that contract law can serve the interests of those who invest disproportionately in domestic work, whether in a cohabiting relationship or a marriage. That is why status and family law exceptionalism persist.

The Role of Contract in Marriage

Contract law, especially the notion of mutual intent, is still relevant in family law. One must consent to be married.[104] One must

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to conflate their interests with their children's. Feminists have noted this for years. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 584–85 (1986) ("the feminine perspective views individuals primarily as interconnected members of a community . . . . [w]omen thus tend to see others as extensions of themselves rather than as outsiders or competitors.").

103 *See* Janet R. Johnston, *High-Conflict Divorce*, *in* 4 The Future of the Child 165, 174 (1994) (high conflict after separation significantly impedes children's adjustment); Marsha Kline Pruett & Herbie DiFonzo, *Closing the Gap: Research Policy, Practice and Shard Parenting*, 52 Fam Ct. Rev. 152, 153–54 (2014) (explaining that shared parenting is not always appropriate).

Professor Case acknowledges that, given the financial and emotional cost of contract enforcement, impartial low-cost tribunals might be the best adjudicative bodies for these contracts. She draws on historical accounts of courts in continental Europe (where wives retained at least nominal ownership of marital property) and religious practices in both Judaism and Islam that involve mediators who are supposed to interfere with ongoing marriages, often to women's advantage. *See* Case, *supra* note 93, at 239–43 (discussing alternative forums). These kinds of intermediate courts to enforce marital agreements might make a huge difference in wives' willingness to ask a third party to enforce marital agreements, but note they are a blatant example of family law exceptionalism. Contracts for marital services are not be treated as contracts for other services, but are adjudicated through a forum that is likely to incorporate the family law values of sharing and altruism, not the contract values of autonomy and free will.

104 *See, e.g.*, Iowa Code Ann. § 595.1A (requiring the consent of parties to marry).

intend to, as the Supreme Court wrote, enter into a relation "the rights, duties, and obligation of which rest not upon their agreement"[105] but upon what the law says marriage is. Marriage is forced sharing. If one does not intend to share, as the cohabitating men in the cases discussed above clearly did not, one should not get married or one should very carefully, very openly, and very formally contract around it.

The law's willingness to enforce pre and post nuptial agreements suggests some willingness to let parties define the economic consequences of marriage for themselves, but only some. Courts still resist using contract law to enforce promises for marital services because since the mid-twentieth century, most courts have refused to conduct a serious assessment of whether a party breached their marital vows. The no-fault revolution relieved courts of the obligation to assess marital behavior, but the no-fault revolution just codified what had already been manifest in courts that adjudicated divorce: judges' resistance to evaluating whether someone was supportive enough, or faithful enough, or nice and generous enough to have adequately performed their marital promises.[106]

Trying to reformulate traditional marital vows into promises enforceable in contract does not avoid the problem of judicial resistance to evaluating fault or breach in the context of intimate relationships. And it is not at all clear that any of the potential parties, much less the judges, would actually want courts to return to a time when they engaged in that evaluation. Recall that most of the cases discussed above involve implied promises. There are a multitude of implied promises in most intimate relationships and if some are meant to be legally enforceable then both parties are free to argue that all of those implied promises should be legally enforceable. What if the party accused of failure to share as promised counters with an accusation of inadequate sexual performance or excessive sexual demand[107] by the other party and therefore mutual breach? What if the party accused of failure to

105 Maynard v. Hill, 125 U.S. 190.

106 *See* Katharine K. Baker, *Equality and Family Autonomy*, 24 U. Penn. J. Const. L. 412, 426 (2022) (discussing judges' resistance to taking a fault evaluation seriously).

107 *See* Favrot v. Barnes, 332 So. 2d 873 (La. Ct. App. 1976), *rev'd on other grounds*, 330 So. 2d 843 (La. 1976) (husband alleged that his wife breached an agreement "to limit sexual intercourse to about once a week," claiming that she "sought coitus thrice daily.") *Id.* at 875.

share as promised counters with an accusation of annoying, nagging behavior that is inconsistent with love? The accusations can get ugly and demeaning and all-but-impossible to evaluate very quickly. There are no witnesses or other objective evidence of most of this behavior. That is the nature of intimacy.

Thus, even if parties can prove the existence of a contract, courts will resist rigorous contract enforcement not as a vestige of coverture and not because courts are crippled by commodification anxiety but because intimate relationships almost always involve too many context and couple-dependent implied promises and conditions, especially in relationships of any significant length. Contract law is not equipped to evaluate all of those implied promises and conditions. Neither is family law, so it instead relies on status.

III. Those Hurt by Status

Most of the cases discussed above involve enough marital assets to justify the costs of litigation. For couples who have few to no assets, either because they will never earn enough or they have yet to do so, family law's embrace of status can be dangerous. The former group, low-income women, have already figured this out and, as the discussion below explains, they avoid the danger by not marrying. The latter group, those who divorce early in a marriage, might well benefit from contract, but they could protect themselves adequately with a prenuptial agreement, one that could expire, or not, once either or both of the parties had acquired sufficient marital property.

Lower Income Marriage

The forced sharing that marital status imposes on spouses makes some spouses particularly vulnerable. For those who would be forced to share even though they do not have that much to share, or those who would rather prioritize spending on children or housing as opposed to a partner, or those who might find themselves enmeshed with someone who has accumulated or continues to accumulate significant debt, marriage is a huge risk. Professors Brown, Cahn, and Carbone explore these risks,[108] and suggest that for lower income women, who are overwhelmingly

108 Brown, Cahn & Carbone, *supra* note 61.

likely to be involved with lower income men, "commitment to a partner may be a source of vulnerability rather than strength."[109] Notwithstanding some economies of scale from living together, entwining one's finances with someone who may be a net drain on resources is dangerous. If the prospects of significant advantage from pooling resources are low and the potential for loss is high, then a simple cost benefit analysis suggests that marriage may not be worth the potential cost for lower income women.[110]

Lower income women are more likely to make as much if not more than a male partner. In the bottom economic quintile of marriages, women usually earn more than their spouses.[111] The gender wage gap for Black and Hispanic women is considerably less than it is for Asian and White women.[112] As Brown, Cahn, and Carbone summarize, "Black women are by far the most likely women to be the primary economic support for their families both because a higher percentage are single mothers, and because even when they marry, they are more likely to earn as much as or more than their husbands."[113] These statistics likely reflect the precarious position in which many working class and poor men find themselves. Low wages, sporadic work opportunities, and systemic inequalities render many low-income men particularly vulnerable, and just as dependence breeds dependence, vulnerability breeds vulnerability within an institution in which everything is shared.

Adding to the danger for low income women is the stubborn persistence of a gender gap in the provision of unpaid, domestic work. For those with family income under $30,000 annually, women spend 38% more time on unpaid work than do men.[114] For families in the $30,000–$60,000 range, women spend 41% more time on unpaid work than do men.[115] This means that lower income

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109 *Id.* at 1921.

110 "[I]nterdependence . . . increases the cost of exit as untangling joint undertakings can be complex and contentious." *Id.* at 1919.

111 *Id.*

112 Women's Bureau, U.S. Dept of Labor, Women's Earnings and the Wage Gap, https://www.govinfo.gov/content/pkg/GOVPUB-L36-PURL-gpo117415/pdf/GOVPUB-L36-PURL-gpo117415.pdf (last visited Nov. 4, 2024).

113 Brown, Cahn & Carbone, *supra* note 61, at 1903.

114 Institute for Women's Policy Research, *supra* note 88, at 6.

115 *Id.* Wealthier households are likely the ones most likely to outsource domestic work. In households earning over $100,000 a year, women do 33% more of the unpaid household work. *Id.*

women are likely earning as much if not more than a partner *and* doing more of the unpaid work.

The benefits of status are lost on these women. They will be made worse off if they are forced to share any accumulated wealth. They will not be compensated for their domestic work because the partner who benefits from it does not have the money to compensate them, either because he never had it or because the household has already consumed it. But contract law would not help them much either. Their partners have precious little with which to bargain. And, enforcing promises costs money. If the chances of recovery are small, it is simply not worth it.

Lower income people have figured this out. Starting in the 1960s and 1970s, just as the law of marital dissolution was changing to reflect a less moralistic and more egalitarian approach to marriage, a class-based marriage gap began to emerge. As W. Bradford Wilcox and Wendy Wong report, the drop off in marriage rates began first for those in the lowest 20th percentile of earnings, and then spread to the working class (20th–50th percentile in earnings).[116] Today, for adults between the ages of 18–55, only 26% of the poor and only 39% of the working class are married.[117] In the middle and upper class, 56% of people are married.[118]

Notably, lower income unmarried women are more, not less likely to have children,[119] but the presence of children does little to incentivize low-income women to marry. Children do not ameliorate the dangers of economic interdependence; if a partner cannot provide, he cannot provide, regardless of whether a child is there. And the presence of children significantly increases the costs of exit. For many low-income women, their primary family relationship is with their child or children, not with a partner. They decide to become legal parents even as they decide not to marry.[120] They take primary financial and emotional responsibility for their

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116 W. Bradford Wilcox & Wendy Wong, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today* (2017), https://www.aei.org/wp-content/uploads/2017/09/The-Marriage-Divide.pdf.

117 *Id.* at 3.

118 *Id.*

119 The average number of children for poor women is 2.4; the average number for working, middle, and upper class women is between 1.7 and 1.8. *Id.* at 4.

120 *See id*. at 6 (showing 61% of poor millennials plan to have a baby first rather than a marriage first, compared to 44% and 19% of working class and middle/upper class millennials respectively).

children and they have more confidence that their relationships with their children will last.[121] This means they may well not want to have to share what they are able to provide, whether modest savings or government benefits, with a spouse.[122] They would rather it go to their children.[123]

Family law exceptionalism fails to meet the needs of low-income women. Accordingly, they do not avail themselves of it. American society could certainly do much more to alleviate the hardships on lower income women and men, but neither family law nor contract law seems able to provide the help that low-income women need. Neither family law nor contract law can generate money when it does not exist and neither area of law is equipped to force people to perform domestic services that they refuse to perform.

Short Term Marriages with Disproportionate Sacrifices

The other group of people who are at risk given family law's continued reliance on status is spouses in short term marriages who sacrifice either to support a spouse or to disproportionately engage in unpaid domestic work or both. The spouses (usually women) most aggrieved are those who make that sacrifice and soon divorce when their ex-spouse may then be positioned to earn much more than he ever did during the marriage. Because not enough marital wealth was generated during the marriage, these

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121 June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 119–21 (2014) Kathryn Edin & Maria Kefalas, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage 203–04 (2005); (both books discussing how low income parents assume financial responsibility for their children, in part to ensure that they can leave unreliable partners). It is low income men, who contribute less on average to a household than do low income women and who do significantly less unpaid work than do women, who would have the most to gain from marital status.

122 Baker, *supra* note 76, at 226–29 (describing how marriage would allow a spouse to share dependent benefits through social security disability or workers compensation with children even though the insured might rather the children get all of it).

123 In other words, "sharing principles that govern committed relationship make no sense where there is no surplus and where sharing among the adults comes out of the resources on which children depend." Brown, Cahn & Carbone, *supra* note 61, at 1904.

spouses get little marital property at divorce, and in states that prohibit or discourage maintenance after short-term marriages, they may not be entitled to any of their ex-spouse's future income stream.

Rehabilitation and reimbursement maintenance are designed to provide compensation for these spouses but not all states accept these as legitimate forms of post-marital spousal support. In these instances, contract law, in particular a prenuptial agreement, entered into when bargaining power is at its most equal, can help furnish the support that rehabilitative and reimbursement maintenance would otherwise provide. Usually, spousal sacrifices made so that the other spouse can increase their human capital happen relatively early in a marriage. The parties want to get the investment in human capital over with. A spouse who is contemplating such a sacrifice should protect themselves with a prenuptial agreement, negotiating for something like reimbursement or rehabilitative payment in the event of divorce. There is no reason to think that such a prenuptial agreement would be unenforceable, especially if what the parties' bargain for is what the law would impose in those states that award reimbursement or rehabilitative maintenance.[124]

A. *A World Without Family Law?*

This analysis of who family law protects and how it protects them raises legitimate questions about whether it is appropriate for family law to reward the people it rewards. In the last fifty years, wages for those at the top of the economic scale have increased more than they have for any other group.[125] Often, earning at this

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124 A state that refuses to award maintenance in relatively short-term marriages is not necessarily taking the position that an agreement for a comparable kind of award is unconscionable or against public policy, only that it should not be imposed by courts.

125 The gender wage gap for college graduates has been increasing since the 1980s, Elise Gould, *State of Working America Wages 2019*, Econ. Pol'y Inst. (Fed 20, 2020), https://www.epi.org/publication/swa-wages-2019/. Even though it has narrowed considerably among those with less education. Shelly Lundberg, Robert Pollack & Jenna Stearns, *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childrearing*, 30 J. Econ. Persps. 79, 98 (2016) (maintaining that the decline in the real earnings of less educated men explains much of the narrowing of the gender wage gap among less educated workers as a whole). Wages for the wealthiest earners have grown four times as much as median wages

level requires working very long hours.[126] It is disproportionately men who work these longer hours.[127] They get paid handsomely for doing so, but longer hours in paid work effectively foreclose these men's ability to do unpaid work in the household. So, their wives do it. Collectively this makes sense as long as the surplus gained by the long work hours is shared. Family law ensures that the surplus is shared even if the parties divorce. In practice, this consistently results in a transfer of wealth from men to women. Thus, contemporary marital dissolution law protects women from higher income households by subsidizing a gendered division of labor. In doing so it arguably increases the gender wage gap and reinforces gender roles in a demographic that is most likely to espouse a belief in gender egalitarianism.[128] Contemporary marital dissolution law also does nothing to protect lower income women who disproportionately invest in family care.

Whether this is an appropriate way for the law to intervene may depend on what one thinks would happen in the absence of this forced sharing. Clearly, as structured now, forced sharing does not help lower income women. This is why *intent to enter* into a legal family should matter. Those who want to avoid forced sharing should be able to do so; otherwise, family law will just exacerbate the vulnerability that lower income woman already experience.

With regard to those at the other end of the economic spectrum, the answer to the question of whether the law should continue to subsidize a gendered division of labor may depend on what one thinks would happen in the absence of forced sharing in this demographic. How confident are we that spouses would make different choices if they did not know that the law was going to force them to share in the event of divorce? If marital roles are

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in the economy. Elise Gould, *Decades of Rising Economic Inequality in the U.S.*, Econ. Pol'y Inst. (Mar. 27, 2019), https://www.epi.org/publication/decades-of-rising-economic-inequality-in-the-u-s-testimony-before-the-u-s-house-of-representatives-ways-and-means-committee/.

126 Youngjoo Cha & Kim A Weeden, *Overwork and the Slow Convergence in the Gender Gap in Wages*, 79 Am. Soc. Rev. 457, 459 (2014).

127 *Id.*

128 *See* Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis,* 38 Sex Roles 239, 240 (1998) (indicating that education level and participation in the labor force correlate with belief in gender equity for both men and women).

going to persist, even if they grow less gendered, and if enough people are willing to take the risk of disinvesting in the market in return for the chance at long-term wealth with their spouse, then ceasing to treat marriage as a status will simply leave market-earners with more money at divorce. Those who invest disproportionately in the family, regardless of their gender, will have less.[129]

One might also conclude that because the law of marriage is relevant mostly only for those with excess wealth, society should not bother to invest the resources it does in administering the law of marriage – though family law is hardly the only area of law that disproportionately serves the wealthy. Again, whether one thinks this family law intervention is appropriate may depend on what one thinks would take its place. Perhaps the laws with regard to forced sharing, even if they only end up being applied to the wealthy, serve an important expressive function. Perhaps family law dissuades enough people from behaving in the non-altruistic ways that Mr. Hansell, the selfish cohabitant, did. Perhaps Americans would rather have an area of law that assumes, as contract law does not, that people have duties to take care of each other not just themselves. Perhaps if, as Professor Halley observed, "paternalism, community and informality" are values not found elsewhere in law, it is better that they have at least some doctrinal home.[130]

IV. Exceptionalism Defended

There are other reasons to believe that treating the family as distinct, and crafting law that is particular to family relationships, reflects sound policy. The personal dynamics that usually define love and intimacy generate different behavior than does the commercial, market-driven world of contract. That love and intimacy tends to complicate the liberal order's reification of autonomy. Two examples, from the laws pertaining to domestic violence and

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129 Or perhaps higher educated women would have children out of wedlock as lower income women do because if the law is not going to force spouses to share income, then it has less reason to force spouses to share custody. More educated women could decide, like lower income women already have, that if they are not going to be able to benefit financially from marital status, they are better off without it so that their claim to custody is stronger. For a historical discussion of the property/custody tradeoff, see Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 Va. L. Rev. 79 (2016).

130 *See* Halley II, *supra* note 2, at 215.

the laws pertaining to children, suggest that the law is re-embracing a willingness to treat the behavior around love and intimacy as distinct.

A. *Domestic Violence*

In her article on the history of this country's approach to domestic violence, Professor Siegel questioned another form of family law exceptionalism: the marital (or family) privacy doctrine.[131] What the doctrine of family privacy preserved, she argued, was the same kind of immunity from punishment for domestic violence that husbands had been granted when the law gave them the right to physically chastise their wives. An explicit right to chastisement died out in the nineteenth century,[132] but domestic violence still went unpunished as judges refused to interfere in ongoing marriages, in the name of marital privacy. This refusal to intervene helped "preserv[e] relations of altruism."[133] Again, family law was dangerously exceptional because it allowed judges to insist that a "domestic violence situation [is] different from other forms of criminal behavior."[134]

Siegel makes clear that judges were far more concerned with protecting the privacy of propertied white men than poor Black men, so not all men escaped punishment for domestic violence, but privacy played a crucial role in maintaining the power that many husbands could exert over wives. And Siegel was not alone in examining how various notions of privacy have obscured women's injuries and erased women's domestic labor. The critique of privacy doctrine was a staple of second wave feminist theory.[135]

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131 Siegel, *Rule of Love*, *supra* note 11, at 2180.

132 *Id.* at 2129 (by the 1870s, "no judge or treatise writer in the United States [] recognized a husband's prerogative to chastise his wife.").

133 *Id.* at 2169.

134 *Id.* at 2194, citing Siddle v. City of Cambridge, 761 F. Supp. 503, 512 (S.D. Ohio 1991).

135 *See* Elizabeth Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present 7–8 (1987) (suggesting that "[t]he single most consistent barrier to reform against domestic violence has been the Family Ideal" and going on to say that "[o]ne crucial element of the Family Ideal was belief in domestic privacy"). *See also* Catharine A. MacKinnon, Toward a Feminist Theory of the State 193–94 (1989) (critiquing privacy); Elizabeth Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973 (1991) (further exploring how privacy doctrine shields abusers from punishment);

In response to this critique and to growing awareness of the dangers posed by intrafamily violence, reformers in the late twentieth century sought to break down official practices that had treated a "domestic dispute" as something other than the violence that it was.[136] But the initial efforts to take domestic violence more seriously floundered. Victims often declined to press charges. Some victims returned to their abusers or let their abusers return to them because the victims still loved their abusers and the abusers promised to stop.[137] Some abused women still wanted a father for their children.[138] Some women just did not trust the police.[139] Frustrated by how difficult it was for the criminal process to punish abuse, scholars argued that the public had an interest in combatting domestic violence and punishing abusers even if a victim did not want to proceed with arrest and prosecution.[140] Numerous communities adopted mandatory arrest policies to ensure that abusers interfaced with the criminal justice system.[141]

Frances E Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835, 856–57 (1985); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* Public and Private in Social Life 281, 295–97 (S.I. Benn & G. F. Gaus eds., 1983).

136 *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 NYU Rev. L. & Soc. Change 191, 212 (2008) (quoting police manuals that encourage officers to allow a perpetrator to cool off in order to facilitate reconciliation).

137 *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 16–22 (1991) (detailing conversations in battered women's discussion group). *See also* Katharine K. Baker, *Dialects and Domestic Abuse*, 110 Yale L. J. 1459, 1474–75 (exploring women's resistance to giving up on their relationship).

138 Mahoney, *supra* note 137, at 21.

139 Lynora Williams, *Violence Against Women*, Black Scholar, Jan–Feb 1981, at 18, 22 (noting that Black women know that Black men will be dealt with more severely than white men would be).

140 *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 Yale J. L. & Feminism 3 (1999) (suggesting ways in which the process could go forward without victim cooperation); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849 (1996) (discussing mandated victim participation).

141 *See* Kimberly D. Bailey, *The Aftermath of* Crawford *and* Davis*: Deconstructing the Sound of Silence*, 2009 BYU L. Rev. 1, 9–10 (discussing mandatory arrest policies).

These policies met with decidedly mixed results. The deterrent effect of arrest worked much more successfully on men with economic and race privilege than on those without such privilege.[142] The Supreme Court made it difficult for prosecutors to proceed without victim participation.[143] And a growing chorus of feminist scholars of color articulated a counter-critique to the (white) feminist critique of privacy. Kimberle Crenshaw,[144] Dorothy Roberts,[145] Anita Allen,[146] Kimberly Bailey,[147] bell hooks[148] and Peggy Cooper Davis,[149] all Black women, argue that marginalized communities need more, not less, privacy. Traditionally, as Siegel noted, privacy did a much better job of protecting white male abusers than men of color who abused, but many Black women suggested that the answer was not to dispense with privacy. Instead, the law should expand it. Black families deserve family privacy too, even if that means they have to rely on community norms to get the violence to stop.

In the last fifteen years, the complicated dynamics between victims and abusers in the context of domestic violence have led most experts to realize that effective policies require state actors

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142 *See id.* (citing studies highlighting raced results in mandatory arrest studies).

143 *Id*. at 14 (discussing Supreme Court evidence rulings requiring victim participation).

144 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1257 (1991) ("[t]he home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society.").

145 Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1470–71 (1991) (family life for women of color is a "site of solace and resistance against racial oppression").

146 Anita Allen, *Coercing Privacy*, 40 Wm. & Mary L. Rev. 723, 746 (1999) ("The solution to domestic violence is not to end families and seclusion but to make better use of evidence of chronic violence.").

147 Kimberly Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 Am. Crim. L. Rev. 1777, 1813 (2012) (discussing hesitance of domestic violence victims of color to relinquish their privacy to state authorities).

148 bell hooks, Feminist Theory: From Margin to Center 37 (1984) (family life allows Black women to "experience dignity, self-worth, and a humanization that is not experienced in the outside world").

149 Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1371 (1994) (families provide an "oppositional enclave" that stands apart from a potentially racist state).

to treat domestic violence as its own issue, that is, exceptional. All states now have instituted civil protective order statutes allowing victims to receive, ex parte, an order restricting an alleged abuser from conduct that may endanger the victim.[150] These orders immediately restrict an alleged abuser from entering his own home, even if he owns the property, and even though the victims often later choose not to go forward with the prosecution.[151] This is an extraordinary amount of state power, exercised with far less notice and process provided to a defendant than is the norm in non-intimate violence cases, but it has become common in the domestic violence context. This recent history suggests that reformers have concluded that treating domestic violence differently does a better job of curtailing it than does treating it like other forms of criminal behavior.

Reflecting similar concerns, some counties now have a special place for victims to report violence to experts trained in this particular kind of violence.[152] Some jurisdictions have successfully instituted programs that facilitate reconciliation between abuser and victim.[153] Several studies indicate that couples can emerge from the protective order process with their relationship intact and the violence stopped, if the parties understand reconciliation and not retribution as their goal.[154]

All of these innovations incorporate the recognition that domestic violence victims often value their relationships and their privacy in ways that make standard criminal law enforcement very unattractive to them. What most victims want is for the relationship to continue and for the violence to stop.[155] In practice, both

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150 American Bar Association Commission on Domestic & Sexual Violence, *Statutory Summary Charts*, American Bar Association (last visited Sep. 21, 2024), https://www.americanbar.org/groups/domsteic_violence/Initiatve/statutory_summary-charts/.

151 *Id.*

152 *See, e.g.*, Cook County Domestic Violence Courthouse, https://www.illinoiscourts.gov/courts-directory/77/Cook-County-Domestic-Violence-Court/court/ (last visited Sep. 21, 2024).

153 *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship*, 29 Cardozo L. Rev. 1487 (2008) (discussing the use of orders forbidding abuse rather than requiring separation in some counties).

154 *Id.* at 1536 (citing studies).

155 *See* Baker, *supra* note 137, at 1474-75.

victims and abusers experience domestic violence as "different from other [] criminal behavior."[156] It is not the doctrine of marital privacy that creates the distinction between what we call domestic violence and other forms of violence; it is the nature of love and relationship.

The women's movement of the latter twentieth century drew attention to just how dangerous domestic violence can be for women. The doctrine of family privacy was identified as an initial culprit for the law's failure to address domestic violence because privacy was the tool used by courts to justify treating domestic violence differently than other violence. But the more the issues surrounding domestic violence came to light, the more it became clear that both the problems and the solutions with regard to domestic violence required treating violence between intimates differently than violence between strangers. Intimate behavior exceptionalism has come to be identified as part of the solution not the problem.

B. *Children*

Finally, and more obviously, children are exceptional also—and not just in the "all children are precious" sense. The state has a *parens patriae* responsibility to ensure children's well-being.[157] Ensuring that well-being usually involves treating them, and the context in which they are raised, as exceptional. If one concedes that children should not just be treated as somewhat littler legal subjects, and one acknowledges that, ideally, children are raised within families, then it follows that families must be treated exceptionally because children are.

Not all families include children, of course, but for those that do, the law must treat the adults involved differently than it would treat them if children were not present. Contract law is of limited utility when it comes to children. Not only are children permitted to void any contract they enter into as minors, adults who are otherwise entitled to contract cannot barter away or acquire through

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156 *See* Siegel, *Rule of Love, supra* note 11, at 2194 (citing Siddle v. City of Cambridge).

157 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (discussing the state's *parens patriae* authority).

contract the legal rights and responsibilities of parenthood once the child is conceived.[158]

Parenthood is a legal status, just as marriage is. One's rights and obligations as a parent flow from that status. Some scholars have argued that intent and mutual agreement should be more relevant in determining who has status as a parent,[159] just as intent and mutual agreement are relevant in determining who has marital status, but only a few people argue that parents should be left to their own bargains when it comes to custody and child support.[160] There is too much potential for one party to exploit greater emotional attachment to the child and/or lesser economic stability, often to the detriment of the child.[161]

The child support guidelines, which have been in place longer than either the equal sharing principle for marital property or any maintenance formulas, help minimize that bargaining power problem. The guidelines determine parental obligation based completely on status (and earnings), not at all on contract principles like intent or autonomy or mutual agreement. Plenty of people criticize what goes into the guidelines,[162] but, to my knowledge, no one suggests the law should treat child support obligations like contractual obligations.

In practice, parents may rely on private agreements with regard to support and custody, but courts do not enforce those

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158 Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. Rev. 2037, 2050–51 (2016) (discussing difference in enforceability of contracts for parental status depending on how a child was conceived).

159 *Id.* at 2085–88 (suggesting that notions of mutual intent, coupled with formal registration, should determine parental status). Adopting contract paradigms to determine who has family status, whether marital or parental, is very different than relying on contract doctrine to regulate behavior between spouses or parents. Family law exceptionalism suggests that those who have status as family should be governed by a different set of rules, one in which the ability to contract is restricted, but that does not mean that notions of mutual intent should not be used to determine who should have family status.

160 *But see* Sarah Abramowicz, *Contractualizing Custody*, 83 Fordham L. Rev. 67 (2014) (arguing that parents' custody agreements should be enforced as contracts.).

161 For a discussion of how these bargaining power disparities may hurt the child, see *Garska v. McCoy*, 278 S.E.2d 357, 360–62 (W. Va. 1981).

162 *See* Baker, *Homogenous Rules*, *supra* note 38, at 340–42.

agreements as such.[163] A court reviews those agreements in light of the child support guidelines and a best interest of the child standard. Just as the equal sharing provisions create a status quo bias that strongly influence how parties bargain in pre and post nuptial agreements, so the child support guidelines and custody standards create a strong status quo bias that sets parameters on what parties bargain over for child support and custody. But courts do not treat parental bargains over support and custody as contracts the way they treat pre and post nuptial agreements as contracts. No amount of procedural protection, disclosure, and representation would lead a court to adopt an agreement that it did not believe was in the best interest of the child. Courts bless such agreements because they have come to learn that letting parents reach and implement their own bargains leads to better outcomes for children,[164] not because those bargains best reflect the mutual interest of the bargaining parties that contract law honors.

The ALI has recently undertaken a Restatement of the Law with regard to children.[165] It was a controversial project at first because people questioned whether there were coherent legal principles that applied to the law's treatment of children.[166] The ALI concluded that there were. Professor Elizabeth S. Scott explains that "it is a regime in which the goal of advancing child well-being melds the interests of the state, parent, and child."[167] The framework makes clear that honoring parental rights is a way of protecting children.[168] Professor Scott also notes that "protection of strong parental rights is compatible with the traditional constitutional rationale grounded in family privacy."[169]

Adults who invest substantially in the unpaid work of raising children are likely to, first, have the child-specific knowledge

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163 *See* Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443 (discussing how much courts rely on private agreements between divorcing parties even if they do not enforce them as such).

164 *See* Baker, *supra* note 106, at 434 discussing reasons why judges defer to parenting plans).

165 Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. Chi. L. Rev. 279 (2024).

166 *Id.*

167 *Id.* at 282–83.

168 *Id.* at 299.

169 *Id.* at 303.

that is necessary to make sound decisions on behalf the child[170] and, second, adopt their children's interests as their own.[171] Thus, protecting the parent-child relationship is a way of protecting children's interests. As long as the law continues to treat children as something other than little adults, the law will need to treat those adults who care for them as something other than typical autonomous subjects in the context of their family rights. In other words, the law of parenthood must be exceptional because the law of children is exceptional and this means that family law will inevitably be exceptional.

V. Conclusion

The critique of family law exceptionalism rightly identifies how the history of family law is steeped in beliefs that are entirely inconsistent with modern notions of gender equality, sexuality, and children's well-being. During the latter part of the twentieth and early part of the twenty-first century, family law experimented with a variety of ways of incorporating more enlightened understandings of gender, intimacy, and personhood into the doctrine. Reform has not always progressed in a linear fashion, but it has progressed. That progression grapples with the status/contract tension in Family Law, recognizing that neither a wholesale embrace of contract, nor a wholesale embrace of status best serves the interests of those whom traditional Family Law left subordinate. Contemporary Family Law tries to compensate for contract law's frequent inability to address the problems posed by unique family labor, disproportionate (and gendered) divisions of unpaid labor, and the altruistic norms that permeate families by relying on status. Often, treating family as a status, not a network of contracts, does a better job of protecting those left subordinates by tradition than would contract law.

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170 Emily Buss, *"Parental" Rights*, 88 Va. L. Rev. 633 (2002) ("Parents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances.").

171 *See* Sen, *supra* note 102 (observing conflation of caretakers' interests with those of the children for whom they caretake).