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Enforcing Bargains in an Ongoing Marriage

Mary Anne Case*

It may at first seem odd to include enforceable bargains between parties to an ongoing marriage among traditionally forbidden areas of exchange. After all, the notion of a marriage market is familiar to readers of texts ranging from nineteenth century English novels to twenty-first century personals ads. Parties to a marriage are frequently urged to show one another the money. Exchange between them, far from being forbidden, is strongly encouraged. But, even as the laws governing marriage in the United States have moved farther along the spectrum from status to contract, marriage in the United States by and large remains subject to what Saul Levmore has dubbed the rule of “love it or leave it.”¹ Courts in this country have generally been closed to those who seek judicial enforcement of bargains or judicial resolution of disputes in an ongoing marriage; married couples are instead usually “limited to self-help, private negotiation, or the extreme step of dissolution.”²

Applying this rule to marriage is increasingly anomalous. Other areas of law once dominated by a love-it-or-leave-it norm, like the

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1. Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221, 226 (1995).

2. *Id.* at 226.

law of business partnership,³ and the law governing supply contracts,⁴ have evolved over time toward “expansion of remedies and, in particular, the possibility of legal intervention in a continuing contractual relationship.”⁵ At the same time, parties in forms of long-term sexual relationship other than marriage, forms which U.S. law once put squarely within the category of forbidden exchange by denominating them meretricious (i.e., tantamount to illegal prostitution), found courts increasingly receptive to claims for enforcement of their bargains. In the leading case of *Marvin v. Marvin*, for example, the California Supreme Court held that

courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. . . . In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.⁶

At least in theory, married couples, too, are freer to make enforceable contracts with one another than once they were under U.S. law. Section 3(a)(8) of the Uniform Premarital Agreement Act allows a couple to contract about “any . . . matter, including their personal rights and obligations, not in violation of public policy.”⁷ Still, a decade after Elizabeth and Robert Scott observed that “[e]ven under the Uniform Premarital Agreement Act, which seems to permit

3. Business partnerships are the central focus of Levmore’s analysis. *Id.* at 221 (“The traditional rule in partnership law is that a claim for ‘final accounting’ is a partner’s exclusive remedy. Under this rule, withdrawal from a partnership must precede or accompany legal actions against one’s partners.”).

4. *Id.* at 249 (“There was a time when to bring a claim against one’s supplier, for example, was to terminate the supply contract.”).

5. *Id.*

6. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976). Although the passage of so-called mini-DOMAs, or Defense of Marriage Acts, has complicated the analysis in several states, virtually all states now allow for some judicially enforceable contractual claims by one nonmarital cohabitant against another. See generally William A. Reppy, Jr., *Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273 (2002).

7. UNIF. PREMARITAL AGREEMENT ACT § 3, 9C U.L.A. 373 (1983).

contracting over intramarital issues, there is little evidence that courts are prepared to resolve any resulting disputes.⁸ I, Like the Scotts, remain “unaware of any appellate opinions applying this section during marriage.”⁹ Moreover, even though the comment to section 3 states that “an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on,”¹⁰ it remains true, as the Scotts observed, that “[s]tates that have adopted the Uniform Act . . . do not seem to enforce such contracts, and some have seemingly inconsistent statutory provisions.”¹¹

The remainder of this Essay will use a variety of arguments to question what remains the presumption against availability of judicial enforcement for bargains between spouses in an ongoing marriage, first by explaining how *McGuire v. McGuire*,¹² the leading case most often and reflexively cited to support this presumption, in fact offers no such support; then by weighing the relevant policy considerations; and by drawing analogies to the remedies available for other forms of relational contracts under U.S. law and to the remedies available to parties in an ongoing marriage in other legal systems.

8. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1303 (1998).

9. *Id.* at 1303 n.177.

10. UNIF. PREMARITAL AGREEMENT ACT § 3 cmt.

11. Scott & Scott, *supra* note 8, at 1303 n.177; *see also id.* (quoting CAL. FAM. CODE § 1620 (West 1994)) (“Except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property.”).

12. *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953). Those who approach the enforcement of bargains in an ongoing marriage by way of contract rather than family law may be more likely to begin with the British case of *Balfour v. Balfour*, [1919] 2 K.B. 571 (holding unenforceable the commitment of a husband stationed in Ceylon to send £30 each month to his wife in England). Among the many reasons this Essay focuses on *McGuire* rather than *Balfour* are that Mrs. Balfour, unlike Mrs. McGuire, only sought judicial enforcement after her husband had proposed a permanent separation and that a Victorian marriage such as that of the Balfours was governed by legal rules and social norms even farther from those applicable in the United States today than was a mid-twentieth century middle American marriage such as that of the McGuires.

MCGUIRE IS A CASE ABOUT STATUS, NOT CONTRACT¹³

Although cited in fewer than half a dozen other cases since it was decided in 1953, *McGuire v. McGuire* is discussed in well over one hundred law review articles and featured prominently in the overwhelming majority of family law casebooks published for the U.S. market. Among the propositions for which it is generally thought to stand is that a wife “could not enforce any claims against her spouse during the course of the ongoing marriage.”¹⁴

The Nebraska Supreme Court’s detailed recounting of the facts likely contributed to making the case a classic. According to the court, Lydia and Charles McGuire had been married for more than thirty years before she brought him to court.¹⁵ At the time of their marriage, he had been a bachelor farmer in his late forties with “a reputation for more than ordinary frugality,” and she had been a widow in her thirties with two daughters.¹⁶ Until a few years before the litigation, Lydia, in addition to doing chores on her husband’s farm and performing household duties, had earned her own money from raising chickens.¹⁷ She used the money “to buy clothing, things she wanted, and for groceries,”¹⁸ but a deterioration in her health had forced her to give up her poultry and egg business,¹⁹ leaving her with a small bank account of approximately \$1,500 in her own name as well as some rent money from her late husband’s farm, her interest in which she had transferred to her daughters.²⁰ Her husband, by contrast, had in his name bank deposits and government bonds totaling more than \$100,000, as well as nearly four hundred acres of land.²¹ Lydia described herself as “a dutiful and obedient wife” and her husband as “the boss of the house . . . [whose] word was law . . .

13. My analysis here is inspired by the chapter on *McGuire* in HENDRIK HARTOG, *MAN & WIFE IN AMERICA: A HISTORY* 6–39 (2000).

14. Ellen Wright Clayton & Jay Clayton, *Afterword: Voices and Violence—A Dialogue*, 43 VAND. L. REV. 1807, 1815 (1990).

15. *McGuire*, 59 N.W.2d at 342.

16. *Id.* at 337.

17. *Id.*

18. *Id.*

19. *Id.* at 338.

20. *Id.* at 337–38.

21. *Id.* at 338.

[who] would not tolerate any charge accounts and would not inform her as to his finances or business; . . . a poor companion.”²² She acknowledged that he had paid for groceries, kitchen flooring, a combination stove, and her three abdominal operations.²³ But she complained that their house had no indoor plumbing, their 1929 Ford had a bad heater, and her husband provided her with very little cash; no new clothes, furniture, or silverware; not even tickets to a motion picture show, membership fees for charitable institutions, or the ability freely to make long distance telephone calls.²⁴ The trial court had ordered him to remedy these deficiencies, making his credit available to her and obligating him to pay for several thousand dollars worth of household improvements, a new car, his wife’s annual travel expenses to visit her daughters, and a monthly \$50 personal allowance for his wife.²⁵ The Nebraska Supreme Court reversed, noting that “the marital relation has continued for more than 33 years, and the wife has been supported in the same manner during this time without complaint.”²⁶ It held that “to maintain an action such as the one at bar, the parties must be separated or living apart from each other.”²⁷ According to the Nebraska Supreme Court:

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband’s attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf.²⁸

It does appear that the court is telling Lydia McGuire she must love her marriage or leave it: only if she is willing at least to separate from her husband, if not also to divorce him, will the court allow her to enforce her legal rights against him.²⁹

22. *Id.* at 337.

23. *Id.* at 337–38.

24. *Id.*

25. *Id.* at 343.

26. *Id.* at 342.

27. *Id.*

28. *Id.*

29. In point of fact, she never did separate from him, perhaps because, while the appeal of the case was pending, her husband had indeed made the improvements ordered by the lower court. Charles McDermott, attorney for Mr. McGuire, reports that, in his view, the McGuires:

Those who continue to cite *McGuire* for the proposition that a court will not enforce a bargain between spouses in an ongoing marriage should look much more closely at the holding in both its specific factual context and its general legal context, however. There was no suggestion in the case that the McGuires ever had any kind of bargain or contract between them, other than the contract for their entry into the status of marriage as it was then defined by the law of Nebraska. Therefore, when the court insists that “[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine,”³⁰ it is repudiating enforcement of a thick vision of status and has not necessarily said anything at all repudiating the enforceability of any explicit, or even implied, agreement between spouses.

On the facts as presented, such evidence as a court might use to find an implied agreement does not favor Lydia McGuire’s claim. As the court noted, she had acquiesced for three decades “without complaint”³¹ in the household’s prior level of expenditures and her longstanding pattern and practice had been to use her own money (of which admittedly there was less in recent years due to the cessation of her poultry business) to purchase items she now claimed her husband should be ordered to furnish her.³² Precisely in the absence of an express contractual understanding between the McGuires as to their standard of living or level of expenditure and in the face of their longstanding contrary pattern and practice, for the court to choose Lydia’s over Charles’s view as to household living standards would

were very much alike, both being very cautious when it came to money. . . . They never did separate, but continued to live together as husband and wife until Mr. McGuire’s death. . . . They would come together in their old Model A car during the winter with no heater to the Courthouse. . . . After the hearings they would immediately get in their car and go home.

Incidentally, while the case was pending in the Supreme Court, Mr. McGuire did comply with the District Court’s orders and bought a used car with a heater and made some payments to her and . . . modernized the farm home, all of which he resented doing.

Letter from Charles McDermott, Attorney for Mr. McGuire (Apr. 18, 1977), *reprinted in* Judith Areen & Milton C. Regan, Jr., *Family Law: Cases and Materials* 150–51 (5th ed. 2006).

30. *Id.*

31. *Id.* at 342.

32. *Id.* at 338–42.

be indeed for a court to dictate to them, rather than leaving it to the McGuires themselves to determine.

One way to make this clearer is by comparing *McGuire* to other cases in which couples ended up in court because of a dispute about their family's living standards. Underlying many of these cases is the doctrine of necessities, which at common law made a husband liable for items such as food, clothing, household items and essential services furnished to his wife, who while under coverture had limited ability to contract in her own name. Consider first, by way of contrast to *McGuire*, the 1980 Wisconsin case of *Sharpe Furniture, Inc. v. Buckstaff*.³³ Mrs. Buckstaff, a housewife married to a husband with a "substantial income"³⁴ and whose "family is one of social and economic prominence in the Oshkosh area,"³⁵ placed a special order with the plaintiff for a sofa, which was delivered to and remained at the time of litigation in the Buckstaff family home.³⁶ Mr. Buckstaff, however, declined to pay for the sofa, claiming not only a lack of the traditionally required evidence that he had failed or refused to provide a sofa for his wife but also "that the necessities doctrine conflicts with contemporary trends toward equality of the sexes and a sex neutral society."³⁷ The majority opinion not only reaffirmed that "in the absence of an express contract to the contrary, . . . a husband incurs the primary obligation, implied as a matter of law, to assume liability for the necessities which have been procured for the sustenance of his family"³⁸ but also declared that the "Buckstaffs are a prominent family and their socio-economic standing justifies a finding that the sofa at issue here was a suitable and proper item for their household."³⁹

Mrs. Buckstaff was prepared to do what Mrs. McGuire apparently was not—to order merchandise on credit without her husband's or the court's prior approval.⁴⁰ She was less at risk than Mrs. McGuire in so

33. *Sharpe Furniture, Inc. v. Buckstaff*, 299 N.W.2d 219 (Wis. 1980).

34. *Id.* at 221.

35. *Id.*

36. *Id.* at 220–21.

37. *Id.* at 222–23.

38. *Id.* at 222.

39. *Id.* at 224.

40. Indeed, in the Buckstaff case, the husband had already advised the local credit bureau

doing because, unlike Mrs. McGuire, she apparently had no income or assets of her own from which her creditors could demand payment. But the Wisconsin Supreme Court was also prepared to do what the Nebraska Supreme Court was not: to determine the appropriate “living standards of a family”⁴¹ based on its wealth and social position, perhaps because the court’s task was limited to approving, not the remodeling and refurbishing of an entire house, but a single discrete purchase not expressly rejected—indeed apparently already used—by the husband asked to pay for it.

In other cases which like *McGuire* involve broad areas of disagreement, courts regularly declined to intervene, in large part because of an aversion to micromanagement of a couple’s spending decisions. The disagreements between Paul and Kathryn George, for which she sought judicial resolution, included, for example, whether to shop on an installment plan or pay bills promptly, whether to shop at Kroger’s or another store, and whether he or she “should control the expenditure of funds.”⁴² Describing this as a case involving, not husbandly neglect (given that Mrs. George herself testified, “[w]e live very nice”),⁴³ but “conflicting concepts of family financial management,”⁴⁴ the Pennsylvania Supreme Court, like that of Nebraska in *McGuire*, declined to intervene, saying that the criminal neglect statute under which Mrs. George had prosecuted her case “was never intended to constitute a court a sounding board for domestic financial disagreements, nor a board of arbitration to determine the extent to which a husband is required to recognize the budget suggested by the wife or her demands for control over the purse strings.”⁴⁵

Put this way, the American court system’s repudiation of intervention in the budgeting decisions of a couple in an ongoing marriage bears some resemblance to its repudiation of comparable worth in the enforcement of employment discrimination laws. In both

service (but apparently not Sharpe Furniture) “that he would not be responsible for any credit extended to his wife.” *Id.* at 220.

41. *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

42. *Commonwealth v. George*, 56 A.2d 228, 229 (Pa. 1948).

43. *Id.*

44. *Id.* at 230.

45. *Id.* at 231.

instances, a concern over micromanaging influences the decision not to intervene. Just as the laws governing marital support were, according to the Pennsylvania Supreme Court, “never intended to constitute a court a sounding board for domestic financial disagreements, nor a board of arbitration” over household budgeting decisions,⁴⁶ so, for example, the Seventh Circuit has insisted that the Equal Pay Act

does not authorize federal courts to set their own standards of “acceptable” business practices . . . [or] to serve as personnel managers for America’s employers. As we say frequently when dealing with equivalent questions under other federal statutes, such as Title VII of the Civil Rights Act of 1964: “A district judge does not sit in a court of industrial relations. No matter how medieval a firm’s practices, no matter how high-handed its decisional process, no matter how mistaken the firm’s managers, Title VII and § 1981 do not interfere.”⁴⁷

Courts in the United States tell women dissatisfied with the prevailing wages in pink collar jobs approximately what they tell wives dissatisfied with their husbands’ level of expenditure on the household—love it or leave it.⁴⁸ If your pink collar job, or your marital household, as currently structured and compensated, doesn’t suit you, find another sort of job or another household. This is especially easy for the court to say at a time when there are no

46. *Id.*

47. *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) (citations omitted). I am not suggesting that comparable worth litigation is in all respects analogous to litigation about an ongoing marriage, however. As Frank Easterbrook was quite right to remind me, in the comparable worth context, unlike the marital bargain context, courts are perfectly willing to enforce the contract between the parties; indeed, they insist on enforcing it rather than rewriting it.

48. Other judicial systems are more willing to intervene to adjudicate both claims of comparable worth and disputes in an ongoing marriage. As will be discussed *infra*, even in the Middle Ages courts in continental Europe adjudicated claims in an ongoing marriage. And for the last several decades, the European Union has interpreted its equal pay guarantee to encompass adjudication of whether work is of comparable worth. *See, e.g.*, Case 61/81, *Comm’n v. U.K.*, 1982 E.C.R. 2601 (holding that because EU law guarantees men and women the “right to equal pay for work of equal value,” member states must provide a forum in which a worker can have adjudicated a claim that his or her “work has the same value as other work”).

remaining formal legal hurdles either to divorce or to women's entry into blue and white collar jobs previously reserved to men.

The general effect of combining this absence of remaining legal obstacles to exit with an absence of strong judicial intervention in the relationship is all too often to leave the gendered power imbalance untouched but obscured. In the world of employment, without the intervention of enforcement of comparable worth, jobs in which women predominate (including those jobs to which women were once limited) tend to remain underpaid and undervalued in comparison to jobs predominantly held by men. And, especially when they take those larger earnings home, many husbands will still, like Charles McGuire, hold the whip hand over the living standards of their family by virtue of their superior economic power, if no longer by legal prerogative of sex.

It is important, however, to remember that the legally enforced regime of married women's subordination under coverture helped create and justify the Anglo-American rule that courts would decline to intervene in an ongoing marriage even to enforce an explicit bargain between husband and wife. As Blackstone famously described it in the late eighteenth century:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: . . . and her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. . . . For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.⁴⁹

49. 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

Not only could a married woman not make a contract with her husband, but also her ability to bargain with the outside world was severely restricted by coverture, in which rights over her property and the wages she had earned vested in her husband.⁵⁰ In addition to precluding husband and wife from making enforceable contracts with one another about such matters as the level of household expenditures, the status law of marriage under coverture also had a simple way of resolving any disputes: he wins. By law, the husband had the right to determine where and how the couple would live. Even as changes in the law during the period from the mid-nineteenth century to *McGuire* gave married women increasing rights over property, it was not until 1981 that the U.S. Supreme Court finally struck down as an unconstitutional violation of equal protection on grounds of sex a “statute that gave a husband, as ‘head and master’ of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse’s consent.”⁵¹

Arguments similar to those used today to object to any enforcement of bargains in an ongoing marriage were in the past used to argue against amending the law to increase the liberty and equality of wives in marriage. Thus, noted nineteenth century treatise writer Joel Prentiss Bishop, as part of an argument against law reform proposals that would have “the law of partnership . . . extended to husband and wife, thus making the two equal, and burying the supposed superior rights of the husband”⁵² or would have allowed “husband and wife to pass through their married lives absolutely independent of each other in respect of property”⁵³ raised the following “insurmountable” difficulties with the latter proposal:

If the wife spends an afternoon in visiting her mother instead of making jellies, shall the husband bring her into court to determine the abatement to be made from the sum he had

50. See, e.g., CAROLINE NORTON, ENGLISH LAWS FOR WOMEN IN THE NINETEENTH CENTURY (Hyperion Press, 1981) (1854) (1854 polemic influential in reforming the laws of Britain written by wife whose husband had seized her earnings and her children after unsuccessful divorce action).

51. *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981).

52. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS 398 (Marion C. Early ed., 2d ed. 1907) (1887).

53. *Id.* at 399.

promised her for work in keeping his boarding-house? Shall there be a lawsuit to settle the allowance for tending the baby which is partly his and partly hers? If her washing is sent to a laundress, and her clothes had been soiled in part in doing his work and in part in doing her own, and in part in tending the baby of both, shall the judge of a court be employed in instructing the jury how to adjust the account between them?⁵⁴

The transformation of the argument for non-interference in the financial arrangements of couples in an ongoing marriage can be seen as an example of what Reva Siegel has called “preservation through transformation.”⁵⁵ She first illustrated this “modernization dynamic” by demonstrating how the justification for courts’ reluctance to intervene in cases of wife beating transformed over time “in rule structure and rationale from a law of marital prerogative to a law of marital privacy.”⁵⁶

Marital privacy has also over time been used as a justification, not only for courts’ reluctance to intervene in an intact marriage without a prior explicit agreement between the spouses that can guide resolution of the disagreement (apparently the situation in *McGuire*), but even for a court’s refusal to enforce a fully negotiated agreement between divorcing spouses.⁵⁷

OTHER RELATIONAL CONTRACTS CAN BE ENFORCED DURING AN ONGOING RELATIONSHIP

With respect to enforceable bargains between parties to a sexual relationship, including marriage and meretricious relationships in

54. *Id.*

55. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996).

56. *Id.*

57. *See, e.g.,* *Mentry v. Mentry*, 142 Cal. App. 3d 260, 268 (1983) (declining to enforce agreement concerning children’s exposure to non-custodial parent’s religion reached by divorcing spouses under supervision of family conciliation court because “considerations of family privacy and parental autonomy should continue to constrain the exercise of judicial authority despite the fact that the family is no longer intact; indeed, such considerations more often than not gain force because the family is no longer intact”).

both the old-fashioned and the newfangled (Washington state law)⁵⁸ sense, subsidiary questions follow from the general question: Why no enforcement in an ongoing relationship? If employers and employees, athletes and their teams, and stars and their studios can go to arbitration over terms without having the relationship necessarily end through what Saul Levmore called “love it or leave it,” why not spouses? The argument that courts will be cluttered with claims about who does the dishes has never stopped agreements between mere roommates from being enforceable in principle before one of them moves out. Why, as Fran Olsen asked years ago, can sex itself not be one of the things couples bargain over?⁵⁹ And why is contracting by married couples so often seen as necessarily a weakening of bonds, rather than an opening up of the possibility of strengthening them by, for example, allowing the conventional wedding promises (for better, for worse . . .) to be enforceable with expectation damages?

Additionally, what the amount in controversy is, even in an apparently trivial dispute, really depends on the parties involved. It may not seem like a big deal that Charlize Theron wore one brand name watch rather than another to an awards show, but in light of her \$3 million contract with one design firm, it was, so they sued.⁶⁰ If her agreement had been with her husband, for example, that she would not wear jewelry he had not given her, what result? What if her husband were a jewelry designer?

Among merchants in ongoing contractual relationships, as Lisa Bernstein has documented, the ability to submit disputes such as those about the quality of a particular shipment of goods “to a neutral tribunal at a low cost and to obtain a quick ruling on the subject

58. Although the term “meretricious relationship,” derived from “meretrix,” the Latin for prostitute, was long used to refer to something in the nature of prostitution, the courts of Washington state began in the late twentieth century to use it in a way not intended to be pejorative to describe non-marital “committed intimate relationships” to which they were prepared to give some legal recognition under state law. *See* Peffley-Warner v. Bowen, 778 P.2d 1022 (Wa. 1989) (acknowledging the pejorative history of the term “meretricious” but failing to find an adequate substitute); *Olver v. Fowler*, 168 P.3d 348, 350 (2007) (substituting the term “law of committed intimate relationships” for what had previously been known as Washington’s “meretricious relationship doctrine”).

59. *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

60. *Weil v. Theron*, 585 F. Supp. 2d 473 (S.D.N.Y. 2008).

without filing a claim for breach can play an important role in preventing contractual relationships from unraveling.”⁶¹ Might not those in a marital relationship similarly benefit from an opportunity to hive off a discrete disputed question for definitive resolution without being limited to the alternatives of festering unresolved disagreement or divorce?⁶²

As contracts scholar Banks McDowell argued nearly a half century ago, parties to a marital bargain

ought not to and may not regard the court as an intermeddler in their private fight, but rather as an impartial referee whose decision must be accepted as the fair and equitable resolution of their controversy. Enforcement of the agreement may well remove a bone of contention among the parties, whereas refusal merely lets the dissatisfaction fester.⁶³

McDowell’s “conclusion from the above analysis is not that the courts ought to automatically start enforcing such agreements, but it is ground for taking a new look at the problems.”⁶⁴ He went on to analyze three kinds of agreements between spouses in an ongoing marriage and the circumstances under which they should be judicially enforceable: “reconciliation agreements,” which he said had “been effectively used to improve troubled marriages by the Conciliation Court in Los Angeles”,⁶⁵ “adjustment of obligations agreements,” in which “parties to a marriage . . . not in serious trouble . . . merely want to make more definite some general obligation or to vary some duty imposed by law on the marital relationship,” which he argued should be enforced so long as they did not “represent an attempt to avoid marital duties” or “destroy the flexibility necessary for adjustment as the position of the spouses changes”;⁶⁶ and agreements

61. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1774 (2001).

62. There is at least some possibility that this is what happened with the McGuires, given that according to his attorney, she obtained much of what she had sued for while the appeal was pending, he obtained vindication on appeal, and the two remained together until his death. See Letter from Charles McDermott, *supra* note 29.

63. Banks McDowell, *Contracts in the Family*, 45 B.U. L. REV. 43, 52 (1965).

64. *Id.*

65. *Id.*

66. *Id.* at 53.

for performance of marital obligations “above and beyond the call of duty,” which were bargains intended “to induce performance of [a marital] duty” such as caring for a sick spouse “in an exceptional” rather than “perfunctory manner,” to arrange compensation for “an extraordinary service which is a great and largely unanticipated burden on the promisee.”⁶⁷

Corporations, including closely held corporations, also habitually

[a]llow[] a participant (shareholder) to bring suits, based on fault or contractual agreement, against fiduciaries or the ongoing enterprise. Because courts rarely go so far as to dissolve corporations, one might think of there being an exclusivity rule of the opposite kind in this arena: “Litigate but do not leave it.”⁶⁸

Given the strong analytical and historical points of similarity between the development of the Anglo-American laws governing marriage and those governing business corporations (which I have explored at length in other work),⁶⁹ the law of marriage’s strong divergence from corporate law is particularly noteworthy.

OTHER LEGAL SYSTEMS HAVE LONG ALLOWED FOR ENFORCEMENT IN AN ONGOING MARRIAGE

The inability to obtain enforcement in an ongoing marriage is far from a universal feature of the law of marriage in all legal systems at all times. For example, Montesquieu declared at the beginning of the eighteenth century that, in France, “husbands have only a vestige of authority over wives,” because “the law intervenes in every dispute between them.”⁷⁰ Indeed, historians of late medieval and early

67. *Id.* at 53–54. *But see* *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993) (declining to enforce due to lack of consideration an agreement that wife would, in exchange for an interest in certain of her husband’s property she had previously renounced in a prenuptial agreement, personally nurse her sick husband at home rather than arrange for professional care).

68. Levmore, *supra* note 2, at 229.

69. *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1777–84 (2005).

70. Sarah Hanley, *Social Sites of Political Practice in France: Lawsuits, Civil Rights, and the Separation of Powers in Domestic and State Government, 1500-1800*, 102 AM. HIST. REV. 27, 40 (1997) (quoting CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, PERSIAN

modern France and Italy provide evidence of a pattern of judicial enforcement of women's rights within an ongoing marriage that seems to resemble the U.S. corporate law norm:

For women, property separations emerged as a more viable option than separations of person and property. The relative ease with which property separations were granted provided married women with the leverage to counter, whether by threat or by actual petition, the legal privileges their husbands had over marital property and to check other kinds of behavior than the narrow management of property.

. . . [In litigated cases, h]usbands' competence was questioned rather than assumed; indeed, some women in these cases . . . were able to use separation petitions to reshape the political economies of their households to protect their own interests if their husbands came up short. . . .

. . . .

. . . For the state as represented by its judges, for the local community, and for kin anxious to protect their lineage property, separations were a means of disciplining and regulating households. But all three parties sought to limit the disruption by trying to reconcile husbands and wives and by favoring property separations as checks on the internal problems of households over the disintegration of households that separations of person and property entailed.⁷¹

Perhaps one reason why continental judges were more willing than their English contemporaries to follow what became the modern rule for corporations is that continental marriages, particularly among the urban bourgeoisie, resembled closely held corporations more than did those of the English landed gentry. Women in intact marriages in early modern France, for example, had their own capital in the form of lineage property, and the level of detailed judicial decision making

LETTERS (Christopher J. Betts ed. & trans., Penguin Books 1973) (1721)).

71. Julie Hardwick, *Seeking Separations: Gender, Marriages, and Household Economies in Early Modern France*, 21 *FRENCH HIST. STUD.* 157, 179–80 (1998).

required to vest control of such property in a wife was far less than the micromanagement inevitably involved in determining, for example, the appropriate living standards of the *McGuire* household. “In England, by contrast, where there was no lineage property, there was also no common-law right to separate property and no separate property agreement until the nineteenth century, and separate domicile was easier for women to obtain than separate property.”⁷²

The historians’ evidence suggests that bargaining in the shadow of possible judicial enforcement—as the modern law and economics literature would predict—strengthened the hand of women in continental Europe negotiating with recalcitrant husbands, not only over property issues such as household expenditures and investments,⁷³ but also when it came to matters such as domestic violence. For example, in her study of separated couples in fourteenth-century Venice, historian Linda Guzzetti describes cases settled before judicial proceedings were brought, in which:

it was a question of the husband undertaking, for the future, neither to beat his wife, nor to abuse her, but to treat her well. The promises were made with the aim that the wives accept living again with the husbands from whom they had fled. These reconciliation agreements contained formulas similar to those in all other notarial contracts: for non-fulfilment of promise a financial penalty was envisaged, and each party could take the other to court.⁷⁴

72. *Id.* at 175. A French woman’s remedies were not necessarily limited to asserting control only over the property she brought to the marriage, however. Judges could also order her to receive “a yearly maintenance sum from her husband.” *Id.* at 161. “A late-seventeenth-century commentator noted that ‘the husband must only be deemed the Master of the Community [property] when he makes good use of it’ and that in Burgundy, as in other customary-law regimes, failure to manage property well opened the door to a petition for separate property.” *Id.* at 160 (alteration in original).

73. The threat of litigation could work both ways. While granting a wife her separate property could protect household assets from creditors, the publicity accorded her petition could also signal to creditors the financial precariousness of the household. More than one French husband whose wife sued for a separation “on the grounds of his poor husbandry and mistreatment of her . . . called her claims slanderous and not only opposed the petition but asked that she pay him compensatory damages.” *Id.* at 172.

74. Linda Guzzetti, *Separations and Separated Couples in Fourteenth-century Venice*, in *MARRIAGE IN ITALY, 1300-1650*, at 249, 257 (Trevor Dean & K.J.P. Lowe eds., 1998)

Whereas differences in marital property regimes between England and the continent may help account for the comparative willingness of courts in early modern continental Europe to enforce bargains in an ongoing marriage, the fact that their approach to marriage is more thoroughly contractual and juridical may help explain why Jewish and Islamic legal systems have also long been more willing to enforce bargains in an ongoing marriage than the Anglo-American legal system, whose approach to civil marriage evolved from Christian canonical notions of marriage as a sacrament of union.

According to Elimelech Westreich, the *McGuire* case would have been decided very differently under Jewish law: “The living standards are definitely a matter for the courts to determine. [This] is accepted without reservations by the Misnah, Talmud, Mishneh Torah, Sefer Ha-Turim, Shulchan Aruch, and in other Jewish law sources including the verdicts of the rabbinical courts of Israel.”⁷⁵

In the Mishneh Torah, Maimonides spells out at length what sort of food, dwelling, household objects, clothing, even ornaments and laundry money a husband must provide for his wife, specifying that a rich man must provide far more and of better quality than a poor one and mandating divorce only if a husband lacks the means to provide his wife even what a poor man’s wife is entitled to.⁷⁶ More generally, the Mishneh Torah not only sets forth the obligations of husbands and wives, but describes which of them can be altered or abrogated by agreement between the parties and exactly how they can be judicially adjudicated and enforced in an ongoing marriage.⁷⁷

(footnote omitted).

75. E-mail from Elimelech Westreich, Professor of Jewish Family Law, Tel Aviv Univ., to Mary Anne Case, Arnold I. Shure Professor of Law, Univ. of Chicago Law Sch. (Jan. 2, 2009) (on file with author).

76. See MAIMONIDES, THE CODE OF MAIMONIDES (MISHNEH TORAH), BOOK OF JUDGES, LAWS OF THE SANHEDRIN, ch. 21, at 10–22 (Yale Univ. Press, Julian Obermann et al. eds., Abraham M. Hershman trans., 1977).

77. See, e.g., *id.* at 10 (“Whenever a woman refrains from performing any of the tasks that she is obligated to perform, she may be compelled to do so, even with a rod. When a husband complains that [his wife] does not perform [her required tasks], and [the wife] claims that she does, [the dispute should be clarified by having] a [neutral] woman dwell with them or [by asking] the neighbors. The judges should clarify the matter in the best way they see fit.”).

Consider the following report of a dispute in an ongoing marriage adjudicated under Jewish law more than seventeen hundred years ago:

A man may marry a woman on the condition that he not be responsible for her sustenance and financial support. Moreover, he may mandate that she be responsible for his sustenance and financial support and Torah study. An exemplary tale [ma'aseh]: Yehoshua the son of R. Akiba married a woman and agreed with her that she be responsible to support him and his Torah study. There were years of drought, and they began to dispute. She began to complain about him to the sages, but when he came to the courthouse he said to them, "[S]he is more trustworthy in my eyes than anyone." She said to them, "Indeed, he did posit that condition." The sages said to her: "There can be no changes after the ratification."⁷⁸

ENFORCING DOMESTIC VIOLENCE PROTECTION ORDERS IN AN ONGOING RELATIONSHIP

Unfortunately, the laws of early modern Venice may have been more conducive to obtaining protection against domestic violence in an ongoing relationship than those of many U.S. jurisdictions today. Scholars with practical experience as well as theoretical insight into the rules governing domestic violence protective orders, such as Sally Goldfarb, have criticized the fact that "remedies for domestic violence too often protect a woman's right to safety only if she is willing to leave her partner, thereby sacrificing her right of autonomy as expressed through her decision to stay in an intimate relationship."⁷⁹ They note that the overwhelming majority of protective orders issued are

78. Azzan Yadin, *Rabbi Akiva's Youth*, 100 JEWISH Q. REV. 573, 583 (2010) (quoting Tosefta Ketubot 4.7).

79. 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, 1489 (2008).

“stay-away” orders, which are designed to protect the victim by ending her relationship with the abuser. . . . However, there is another type of civil protection order for domestic violence, one that is currently prohibited in some jurisdictions, underutilized in others, and largely ignored in discussions of domestic violence law. Unlike a stay-away order, these orders prohibit future abuse but permit ongoing contact between the parties. Protection orders permitting ongoing contact are a valuable option for many women who are unwilling to leave their relationships and therefore would not seek a stay-away order. By customizing each order to express the victim’s preferences for how much and what kinds of contact should be allowed, these orders can put the force of law behind the individual woman’s choices.⁸⁰

I know from personal experience that the relationship-ending legal character of a criminal order of protection, in an instance of what Janet Halley has dubbed family law exceptionalism,⁸¹ does not extend to relationships that are not domestic or sexual. In the spring of 2000, I received a criminal order of protection against a tenant in my Manhattan building who had credibly threatened to kill me and to burn down the building. Although the tenant had already carried out threats to damage my property, I was nevertheless advised by landlord-tenant counsel that not only could I not terminate this tenant’s lease but I might also even be compelled to offer him a renewal lease under the Rent Stabilization laws. Had my legal relationship with this threatening individual been that of husband and wife, not landlord and tenant, I could have had him thrown out of my house.⁸²

Intimate domestic violence has taken on a love-it-or-leave-it character, which Jeannie Suk has dubbed “‘state-imposed de facto divorce,’ wherein prosecutors use the routine enforcement of

80. *Id.* at 1489–90 (footnotes omitted).

81. See, e.g., Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

82. He did leave the building several months later, as a condition of a plea bargain negotiated by the Manhattan District Attorney’s Office.

misdemeanor [domestic violence] to seek to end (in all but name) intimate domestic relationships.”⁸³

THE POSSIBILITY OF JUDICIAL ENFORCEMENT OF MARITAL
BARGAINS CAN ACT AS A BRAKE RATHER THAN A SPUR TO
BARGAINS THAT ARE GROSSLY UNEQUAL OR OTHERWISE
CONTRARY TO PUBLIC POLICY

Just because bargains between a married couple cannot be enforced in court does not mean they will not be made. As Lawrence Stone documents, married couples in seventeenth and eighteenth century England who could not or did not seek judicial separation nevertheless formulated with the aid of lawyers highly detailed written contracts of separation. These contracts often contained clauses detailing not only their financial arrangements but also a more or less explicit assurance that the husband would not charge his wife with adultery even if she co-habited with another man after separation, despite the courts’ repeated denial of the validity of such clauses and some difference of opinion about the enforceability of private separation agreements more generally.⁸⁴ More recently, the *New York Times* reported increasingly frequent requests of matrimonial lawyers that “no-child provisions” be included in pre-nuptial agreements entered into between older wealthy men and their younger second wives, making it a condition of marriage that the couple have no children.⁸⁵

That such agreements would be deemed void as against public policy does not, as a practical matter, affect those who without judicial coercion fully perform them. At the most extreme, even the Thirteenth Amendment injunction that “[n]either slavery nor involuntary servitude . . . shall exist within the United States,”⁸⁶ one of the very rare U.S. constitutional prohibitions without a state action limitation, does not prevent couples in the United States from living

83. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 8 (2006).

84. LAWRENCE STONE, *THE ROAD TO DIVORCE: A HISTORY OF THE MAKING AND BREAKING OF MARRIAGE IN ENGLAND 1530–1937*, at 163 (1990).

85. Jill Brooke, *A Promise to Love, Honor and Bear No Children*, N.Y. TIMES, Oct. 13, 2002, § 9, at 1.

86. U.S. CONST. amend XIII, § 1.

in what the BDSM community calls 24/7 Master/Slave relationships, in which the slave contracts to do the master's will without limit, reservation, or question.⁸⁷

On the rare occasions when similar bargains are brought into court, they are not well received. For example, while an appellate court majority opinion was content simply to affirm the trial court's refusal to enforce the provisions of marital and separation agreements in which Yvonne Spires made a commitment to submit herself completely to her husband Myles and to grant him sole custody and property rights in the event of breach, concurring Judge Frank Schwelb felt the need to append the full text of the agreement to provide readers of the opinion "a striking example of the lengths to which some men would go to formalize the absurd and to exalt to contractual status their petty domestic tyranny."⁸⁸ As Judge Schwelb explained:

Although, unfortunately, some men abuse, oppress and humiliate their wives, it is surely rare for a husband not only to reduce to writing an instrument requiring total subordination by the wife to the husband's caprice, but also to require his unfortunate spouse to sign it. I find it even more remarkable that a husband who has contrived to secure his wife's formal written assent to the husband's assertion of supremacy would then have the temerity to ask a court to enforce such an oppressive document according to its terms.

In my opinion, a "contract" such as the one between these parties, which formalizes and seeks to legitimize absolute male domination and female subordination within the marital relationship, is against the public policy of this jurisdiction. It may not be enforced in our courts, nor can it be permitted to

87. See, e.g., PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* 241 (2d ed. 2000) ("Of course, some S/M couples (or triads or other polygons) do try to maintain their erotic roles one hundred percent of the time, and they usually sign a written contract. It works best when some time is spent discussing the content of the document and when it is individually tailored to a particular relationship."); F.R.R. Mallory, *24/7, HOUSE OF DESADE*, <http://www.houseofdesade.com/articles/247.htm> (last visited Nov. 8, 2010); F.R.R. Mallory, *Submissive vs. Slave*, *HOUSE OF DESADE*, <http://www.houseofdesade.com/articles/subvsslave.htm> (last visited Nov. 8, 2010).

88. *Spires v. Spires*, 743 A.2d 186, 192 (D.C. Cir. 1999) (Schweib, J., concurring).

affect adversely the rights of the oppressed wife or her children. . . .

. . . It reflects a view of the relationship between the sexes that should have been consigned long ago to well-deserved oblivion. Under the law, the parties' now-defunct marriage made Mrs. Spires her former husband's partner, not his slave.⁸⁹

The *Spires* case was drawn to my attention by scholars of family law who urged me, in effect, to be careful what I wished for when I spoke in favor of judicially enforceable bargains in an ongoing marriage. Although it may seem like a paradox, I think the case actually helps demonstrate why courts are indeed an appropriate forum, far better than many alternatives, to deal with bargains such as the Spires' "Marital Agreement." This is because, if the ordinary courts are closed to couples in an ongoing marriage, they will have an increased need to look elsewhere if they wish an arbiter for their ongoing disputes rather than a separation or divorce. As Saul Levmore observed:

[I]t is precisely in the area of domestic relations, where the love-it-or-leave-it rule is most robust, that a substantial industry of counseling and mediation has arisen. Private parties can be said to react to the mandatory love-it-or-leave-it rule by "litigating" in the shadow of the courthouse and turning to pastors, psychologists, and other counselors. The demand for these nonjudicial services might be regarded as a clamor for a liability remedy where none is offered by law.⁹⁰

Eric Rasmusen and Jeffrey Evans Stake have even argued that "[t]he turn to restrictive religions can be seen as a plea for the enforceability of commitment [in marriage]; an attempt to fill the gaps in public law with private institutions."⁹¹ As Rasmusen and Stake see it, now that "those desiring traditional relationships cannot count on the law to support their expectations," the need for aid in enforcing their marital

89. *Id.*

90. See Levmore, *supra* note 2, at 244.

91. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464 (1998).

bargains may have “driven otherwise irreligious individuals to organized religions that constrain individual freedom . . . to signal a level of commitment that the law refuses to enforce” because “[a] church can be seen as a private organization that enforces restrictive rules that the law refuses to enforce.”⁹²

Judge Schwelb is right that a summary or excerpts do not convey the full restrictive flavor of the Spires’ Marital Agreement, but it is worth noting in this context that its approximately nine hundred words include not only a dozen different specific ways in which the wife is to submit to the husband but also a general provision in Paragraph 6 that the wife shall “conduct herself in accordance with all scriptures in the Holy Bible applicable to marital relationships germane to wives and in accordance with husband’s specific requests.”⁹³ Consistent with its general tendency to put full control in the hands of Mr. Spires, Paragraph 6 commands: “Wife shall consult husband as to the applicability of scriptures.”⁹⁴

An only slightly less controlling husband than Mr. Spires might have instead provided for an outside authority, such as a clergyman or religious body, whom the couple could consult in case of any doubt about what scripture required or more broadly about any dispute over any perceived breach of the agreement between them. Such an arbiter, unlike a civil court, would not be limited by constitutional prohibitions on slavery or guarantees of equal protection and due process. A religious arbiter might well have no difficulty enjoining on Mrs. Spires the full submission called for by the contract.⁹⁵ Many religious bodies and individual clergy, mainstream and otherwise, have views about the appropriate behavior

92. *Id.* at 463.

93. *Spires*, 743 A.2d at 193–94.

94. *Id.* at 193.

95. The Southern Baptists, for example, have officially declared it to be a wife’s duty to “submit herself graciously to the servant leadership of her husband.” *Comparison of 1925, 1963 and 2000 Baptist Faith and Message*, S. BAPTIST CONVENTION, <http://www.sbc.net/bfm/bfmcomparison.asp> (last visited Feb. 6, 2011). As I have discussed in other work, the timing of the Southern Baptists’ inclusion of wifely submission among their official tenets is noteworthy: although hardly a new doctrine, it became official only after the U.S. Supreme Court had declared the enforcement of any such submission in state or federal law unconstitutional. *See, e.g.*, Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriage*, in *AFTER SECULAR LAW* (Winnifred Fallers Sullivan ed., forthcoming 2011).

of husbands and wives that would be impermissible for a state or federal court to impose on spouses.⁹⁶ Although not all couples would prefer civil court to dispute resolution by pastors, psychologists, and other counselors, it seems to me better that couples who would prefer a civil court be given that option without being required to seek a divorce, because the constraints that apply to civil courts do not apply to these other potential arbiters.

The controversy in Ontario, Canada, arising out of a 2004 attempt by the Islamic Institute of Civil Justice to provide Canadian Muslims sharia-based binding arbitration enforceable in civil court is worth examining in this connection.⁹⁷ Many participants in the controversy framed it as simply a problem with faith-based arbitration or even more narrowly with Islamic arbitration applying sharia law. For example, in September 2005, Ontario Premier Dalton McGuinty insisted that “there will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”⁹⁸ But the problem presented and the ultimate legislative solution adopted encompassed any binding arbitration of family law matters enforceable in the ordinary courts, not just religious arbitration. Since 1991, the Arbitration Act, under which not only secular but also Jewish, Christian, and Muslim groups formed and operated arbitral boards, apparently had allowed for legally binding arbitration of family and business matters without any “institutional oversight mechanism to ensure that decisions were in compliance with Canadian law.”⁹⁹ As a result of the controversy, the law was amended February 14, 2006, to provide that “enforceable decisions must be consistent with the provincial family law regime,” including

96. See, e.g., *In re Marriage of Wang*, 896 P.2d 450, 454 (Mont. 1995) (Leaphart, J., dissenting) (discussing church practice of subjecting a wife to exorcism “to rid herself of the ‘evil unsubmissive spirits’—the spirits which caused her to speak up for herself and to exercise authority rather than completely submit to her husband”). For further discussion, see Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381.

97. For a brief summary of the major events and issues in this controversy, see Anne Korteweg, *The Sharia Debate in Ontario*, 18 ISIM REV. 50 (2006). For a longer exploration of the issues and constituencies involved, see, for example, Beverley Baines, *Must Feminists Identify as Secular Citizens? Lessons From Ontario*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 83 (Linda C. McClain & Joanna L. Grossman eds., 2009).

98. Baines, *supra* note 97, at 85.

99. Korteweg, *supra* note 97, at 50.

applicable constitutional guarantees such as the equality of the sexes.¹⁰⁰ Some of those who opposed this change insisted that Muslim women would still “turn (or be turned) to informal sharia based-arbitration without any protection by the state.”¹⁰¹ From what I know of it, however, the 2007 amendment is an improvement over a regime in which there was not only no protection from the state but also a risk that the state itself would enforce against such women arbitral decisions that systematically and grossly devalued women’s rights.

AN OPPORTUNITY TO ADJUDICATE DISPUTES IN AN ONGOING
MARRIAGE MAY BE PARTICULARLY BENEFICIAL TO COUPLES
WHOSE MARITAL BARGAINS DEPART FROM TRADITIONAL GENDER
ROLE EXPECTATIONS

In his Comment on this Essay, economist Robert Pollak argues that while “[e]conomic models of bargaining in marriage” lead to the conclusion that judicial willingness to enforce at least some bargains between spouses in ongoing marriages would “be superior to the . . . ‘love-it-or-leave-it’ rule,” these models also “suggest that the magnitude of the improvement would be relatively small.”¹⁰² In conversation, Pollak acknowledged that he premised his claim about the small magnitude of predicted improvement on an assumption that overall only a small minority of couples would likely take advantage of the opportunities offered by judicial enforcement. For couples in that small minority, however, he readily admitted that the magnitude of the improvement could be quite large.

As Pollak notes, I share his intuition that because of “three factors ignored in the simple [two-stage bargaining] model: the costs of legal enforcement, the nature of relational contracts, and the reluctance of family members to make explicit bargains with one another,”¹⁰³ few couples in ongoing marriages “would resort to the courts.”¹⁰⁴ The

100. Baines, *supra* note 97, at 96.

101. Korteweg, *supra* note 97, at 50.

102. Robert A. Pollak, *Comment on Mary Anne Case’s Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL’Y 261, 261 (2011).

103. *Id.* at 272.

104. *Id.* at 270.

small number of likely litigated cases does not seem to me to cut in favor of closing the courts to such couples, however. Indeed, given that the danger of overburdening courts with numerous trivial or burdensome spousal claims is frequently raised as an objection to entertaining the possibility of any judicial enforcement of bargains in an ongoing marriage, the small number may cut in the proposal's favor. Moreover, only a very small percentage of parties to most ongoing transactions (indeed, even to transactions no longer ongoing) resort to the courts. This does not make the possibility of judicial enforcement unhelpful or irrelevant to all but the small percentage who seek it, however. As documented in an extensive literature on "bargaining in the shadow of the law"—a concept not coincidentally first given its name in an article on the resolution of disputes between divorcing spouses—"the particular allocation a court will impose if the parties fail to reach agreement" creates bargaining endowments that are a major factor in shaping the contours of the agreements reached and abided by even by parties who never seek judicial resolution of disputed questions.¹⁰⁵

As discussed above, in the past, the absence of any possibility of judicial enforcement of bargains in an ongoing marriage created bargaining endowments that tended to benefit the patriarchal husband.¹⁰⁶ At present, as Pollak's own innovative prior work modeling bargains in marriage suggests and as I will explore in further detail below, increasing the possibility of judicial enforcement for bargains in an ongoing marriage may be more likely to create bargaining endowments that tend to benefit those in couples who have reached and seek enforcement of a bargain that departs from traditional gender roles.

If I am right that the couples who could most benefit from a retreat from a love-it-or-leave-it regime for marriage are likely to be thus doubly exceptional—exceptional not only in their willingness to make explicit bargains but also in the extent to which those bargains

105. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966 (1979).

106. See *supra* note 48 and accompanying text; Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV. 240, 242–43 (1988) (analyzing Gary Becker's model of decision making in the family as an ultimatum game in which the "husband-father-dictator-patriarch" can make a take-it-or-leave-it offer to other family members).

embody a departure from traditional sex role differentiation in marriage—then my support for making a space for them in the law is strengthened by my longstanding commitments as a feminist theorist. Much of my prior work in feminist theory has focused on the need to make space for the exceptional man or woman.¹⁰⁷ And, although my analysis here is not constitutional, I am inspired to emphasize the potential beneficial effects of law reform on outliers by the centrality of exceptional husbands and wives to so much of the U.S. constitutional law of sex and gender.¹⁰⁸

What support is there for the claim that excluding the possibility of judicial enforcement of bargains in an ongoing marriage is disproportionately likely to disadvantage those whose bargains depart from traditional sex roles? Consider what Pollak himself concluded in earlier pioneering work on marital bargaining. With Shelly Lundberg, Pollak developed a cooperative Nash bargaining model for marriage dubbed “separate spheres,” in which the default outcome is

107. See, e.g., Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 105 (1995) (“In arguing that the treatment of the exceptional effeminate man teaches us much, . . . I hope to have shown how, once again, the margins can illuminate the center; and to have taken steps to make the world safe for us all, norms and exceptions, men and women, masculine and feminine, and every shade in between.”).

108. Ruth Bader Ginsburg famously litigated many precedent-setting constitutional sex discrimination cases on behalf of husbands and wives who were exceptions to traditional sex roles. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (female military personnel); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (male primary caregiver for infant); Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 *CORNELL L. REV.* 1447, 1448–49 (2000) (analyzing the role of exceptions to stereotypes in constitutional sex discrimination law). And in the abortion case of *Planned Parenthood v. Casey*, the majority, urged to let stand a requirement of spousal notification because “it imposes almost no burden at all for the vast majority of women seeking abortion,” responded:

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate’s reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Planned Parenthood v. Casey, 505 U.S. 833, 894 (1992) (citation omitted).

“not divorce, but a noncooperative equilibrium within marriage” that reflects gender norms.¹⁰⁹ According to Pollak and Lundberg:

The separate spheres model differs from the divorce threat model in two ways. First, the threat point is not divorce but a noncooperative equilibrium defined in terms of traditional gender roles and gender role expectations. Second, the noncooperative equilibrium, although it is not Pareto optimal, may be the final equilibrium because of the presence of transaction costs.¹¹⁰

They explained:

[I]n realistic social contexts, conventional modes of behavior may suggest a “focal-point equilibrium,” thus reducing or eliminating the need for pre-play negotiations or providing a way of predicting their outcome. In the case of marriage, social conventions regarding the responsibilities of husbands and wives may indeed suggest to the spouses a particular equilibrium.

....

. . . The separate-spheres bargaining model provides an obvious example: if some household public goods are regarded as within the wife’s sphere and others as within the husband’s sphere, then a reasonable focal-point equilibrium may consist of complete gender specialization in the provision of household public goods corresponding to this conventional gender assignment of responsibilities.¹¹¹

What Pollak’s analysis predicts is exactly what I am afraid of—not only do husband and wife begin with social conventions that suggest a focal point equilibrium in line with conventional gender roles, if they fail to agree or fail to abide by an agreement to diverge from conventional gender roles and there is no possibility of obtaining

109. Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988, 990 (1993).

110. *Id.*

111. Shelly Lundberg & Robert A. Pollak, *Noncooperative Bargaining Models of Marriage*, AM. ECON. REV., May 1994, at 132, 134–36 (1994).

judicial enforcement of an agreement to diverge from such roles, the likely outcome, short of divorce, is “a noncooperative equilibrium defined in terms of traditional gender roles and gender role expectations.”¹¹²

Pollak’s Comment stresses that an economist’s “simple two-stage model” of bargaining in marriage will exaggerate the efficiency advantages of the possibility of judicial enforcement of bargains in an ongoing marriage to the extent such a model ignores “three mechanisms [apart from judicial enforcement] that, in some cases, would enable spouses to make binding agreements: internalized norms, self-help, and non-legal third-party enforcement.”¹¹³ Pollak correctly notes: “‘Norms’ are an elastic notion, often encompassing both obligations enforced by the prospect of internal sanctions (e.g., you will feel guilty) and external sanctions (e.g., if you mistreat your wife, you will be beaten by her brothers and ostracized by the community).”¹¹⁴

What Pollak fails to note in his Comment, however, is the disproportionate way both internal and external *gender* norms are likely to operate on an untraditional bargain between spouses. Because spouses who bargain for an unconventional division of roles are overwhelmingly likely to have been exposed to socialization in conventional gender roles, any internalized guilt a husband may feel at failing to live up fully to his unconventional bargain may be counteracted by his sense that he is already doing more than his father and other husbands around him have done. Unless their community is as unconventional as the spouses’ unconventional bargain, the community may be more likely to ostracize his wife for demanding so much more of him than is customary than it is to support her in her demand that he live up to his bargain. The community may ostracize him more for agreeing to such a bargain in the first place than for failing to live up to it. It is also touchingly optimistic of Pollak to assume that “if you mistreat your wife, you will be beaten by her brothers.”¹¹⁵ The brothers may instead have a

112. Lundberg & Pollak, *supra* note 109, at 990.

113. Pollak, *supra* note 102, at 271.

114. *Id.* at 268 n.51.

115. *Id.*

direct personal stake in supporting a husband who fails to live up to an unconventional bargain over the wife who could use their help in enforcing it against him extrajudicially: the brothers may not want to give their own wives any ideas about renegotiating their own household bargains along less conventional lines less advantageous to the brothers. (Note that while my examples presume that the party more likely to need help enforcing a bargain that departs from conventional gender role expectations is the wife, similar arguments would apply, for example, to the case of a husband seeking to hold his wife to a bargain that she support his exit from the labor force to be the primary caregiver of their children.)¹¹⁶

As for other forms of non-legal third party enforcement beyond family and community pressure, as discussed above, there is every reason to think that the most likely sources of such enforcement—notably religious organizations, clergy and other counselors—are also likely to favor traditional gender roles over the untraditional. Judges, too, are socialized in and may be sympathetic to conventional gender roles, but they are also socialized into interpreting and enforcing agreements and are legally bound as well as socialized into complying in their enforcement decisions with constitutional norms of sex equality and due process. For these reasons I would predict that, just as repressively traditional bargains such as the Spires marital agreement will do worse with judges than with those most likely to offer non-legal third party enforcement, untraditional bargains may well do better.

BARGAINING AND THE ENFORCEMENT OF BARGAINS IN THE ONGOING MARRIAGE OF BARACK AND MICHELLE OBAMA

As a supplement to the hypothetical and abstract marital bargains Pollak and other economists have modeled, let me end with a brief

116. It is an interesting question whether bargains such as those whose enforcement under Jewish law was discussed earlier, *supra* note 74 and accompanying text, in which a wife will support her husband as he studies Torah rather than have him support her as Jewish law would otherwise require, should be seen as bargains departing from traditional sex roles, given that both a husband's dedication to study and a wife's corresponding participation in market activities are solidly established traditions in Judaism. See, e.g., *Proverbs* 31:10-31 (describing the market and household activities of a "woman of valor").

discussion of the relatively well-documented marital bargaining of one real-life couple, Barack and Michelle Obama. The repeated renegotiation of bargains in the Obamas' ongoing marriage is documented in a number of first person reports by each of them over a number of years, corroborated by third party reporting, all of which tells a consistent story on which the Obamas themselves agree.¹¹⁷ Of course, the Obamas never did and likely never would seek judicial assistance in enforcing their bargains for many reasons, the least of which is the effect such litigation would have on his political career. Because internalized and community norms and self-help assisted in facilitating the enforcement of their bargains, Pollak may see their case as supporting the proposition that there are effective ways short of offering a judicial forum to reduce the likelihood of inefficiency in marital bargaining. But the extraordinary advantages the Obamas brought to the table and the difficulties and inefficiencies they both concede they still suffered in their ongoing renegotiations also point up the limitations unconventional couples face in operating without a judicial backstop. Tellingly, although Pollak's and other economic models of bargaining in marriage focus on "income or earnings" as the resources each spouse controls and divides in a bargaining game, for the Obamas time and energy seem to have been the scarce resources whose contribution to the household public good they most struggled over.

It does not appear that the Obamas engaged in much explicit prenuptial bargaining about the division of labor or allocation of time in their marriage. Rather, as Barack describes it in the chapter on family in *The Audacity of Hope*, they brought to the marriage expectations they had grown up with—he as an only child accustomed to spending time alone, she as part of a close-knit nuclear household centered on family activities.¹¹⁸ They worked at adjusting to one another, and, after the birth of their first child, even found

117. Among the sources of this story are the chapter on family in BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 325–52 (2006); interviews with and profiles of the Obamas separately and as a couple in print and broadcast media from the New York Times to Oprah; journalists' interviews with Obama family friends such as Valerie Jarrett; and books and documentary films reporting on the Obama campaign, such as RICHARD WOLFFE, *RENEGADE: THE MAKING OF A PRESIDENT* (2009).

118. OBAMA, *supra* note 117, at 325–52.

useful synergy in some of their differences; for example, that he was a night owl and she an early riser facilitated child care in the early months when both were at home to care for baby Malia.¹¹⁹ But once they both returned to work and he added an unsuccessful run for Congress to an already crowded schedule of teaching and commuting to the state legislature, the stresses on their time grew and Michelle's frustration at his "suddenly . . . less endearing . . . failure to clean up the kitchen,"¹²⁰ led her to the form of self-help Pollak, following Bergstrom, calls "harsh words and burnt toast."¹²¹ By the time Sasha was born, Barack observed:

[M]y wife's anger toward me seemed barely contained.

"You only think about yourself," she would tell me. "I never thought I'd have to raise a family alone."¹²²

Consistent with my predictions as to the effect of internalized social norms on departures from gender norms, Barack's initial response was to feel aggrieved because he gave so much more and asked so much less than traditional male sex roles would have allowed:

I thought she was being unfair. After all, it wasn't as if I went carousing with the boys every night. I made few demands of Michelle—I didn't expect her to darn my socks or have dinner waiting for me when I got home. Whenever I could, I pitched in with the kids. All I asked for in return was a little tenderness. Instead, I found myself subjected to endless negotiations about every detail of managing the house, long

119. *Id.* at 338–39.

120. *Id.* at 340.

121. Pollak, *supra* note 102, at 269 (quoting Theodore C. Bergstrom, *Economics in a Family Way*, 34 J. ECON. LITERATURE 1903, 1926 (1996)).

122. OBAMA, *supra* note 117, at 340. Michelle Obama's complaints are hardly unique to her, or even to women with her level of education and ambition. *See, e.g.*, SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 98–108 (1998) (describing mothers' "implicit resentment of" and their "[s]trategies for downplaying gender inequities in child rearing," given that, in the study's sample, "[t]here is not a single household in which fathers . . . take responsibility for all child-rearing tasks, and men rarely take primary responsibility for any single child-rearing duty," and "mothers . . . , on average, spend four times the hours men do as the primary caregivers").

lists of things that I needed to do or had forgotten to do, and a generally sour attitude.¹²³

Although he wanted to see himself as “liberated” and Michelle as an “equal partner . . . [whose] dreams and ambitions were as important as my own—the fact was that when children showed up, it was Michelle and not I who was expected to make the necessary adjustments.”¹²⁴ Barack reports Michelle as also internalizing some degree of conventional norms, feeling guilty and conflicted about her inability to fulfill to her own high standards her household and professional roles.¹²⁵

Applying the analysis of the relationship between status and contract I used for *McGuire* to the Obama marriage, I would argue that until the birth of Sasha and the failure of his congressional campaign, the Obamas, like the McGuires, seem to have had no explicit bargain or contract between them; rather, they had conflicting visions of what the status obligations of the husband in a marriage should be. From that time forward, however, they have negotiated and renegotiated explicit and very public bargains and had their compliance with those bargains monitored, as few couples can, in the court of public opinion.

“Barack and I, we’re doing a lot of talking,” Michelle would tell friends and colleagues after Malia’s birth.¹²⁶ According to Barack, “Michelle would say, ‘Well, you’re gone all the time *and* we’re broke? . . . How is that a good deal?’”¹²⁷ His response “to his wife’s assertions that he was leaving her to raise their children alone,” according to family friend Valerie Jarrett, was “I’ll make it work. . . . We can make it work. I’ll do more.”¹²⁸

The Obamas had some unusual advantages in reaching a cooperative equilibrium, beginning with her forthrightness and his sense of his own shortcomings in light of his perception of the

123. OBAMA, *supra* note 117, at 340.

124. *Id.* at 340–41.

125. *Id.* at 341.

126. Jodi Kantor, *The Obamas’ Marriage*, N.Y. TIMES, Nov. 1, 2009, § 6 (Magazine), at MM44.

127. *Id.*

128. *Id.*

fairness of her demands.¹²⁹ They did not lack for resources to ease their burdens, above all intangible resources such as the mother and close friends Michelle could turn to for some of the help with parenting she had expected and failed to receive from Barack.¹³⁰ Perhaps most intriguingly, they had an unusual alternative threat point in addition to the usual, such as divorce—she could withhold her support for his political career. Indeed, much of their explicit bargaining centered around the conditions under which she would consent to his candidacy, first for the Senate and then for the presidency. Before she would support his bid for the presidency, Michelle negotiated hard, not only with Barack but also with his team of advisors, to “get over the hurdles and [be] sufficiently comfortable that he’ll be available to be the father that we want him to be.”¹³¹ As she had with his Senate race, she extracted the commitment that if the campaign were unsuccessful it would not be repeated the next time around. Although when he became Senator he “wanted her to move to D.C. so the family could be together,” Michelle, having “reconciled herself to the fact that their home life would never be the same as the nuclear family she had known as a child, with a father who was home every night for dinner,” insisted on staying in Chicago close to her support network of friends and family.¹³² What helped sell her on the presidential race was the prospect that, with a less grueling travel schedule and the Oval Office under the same roof as the White House family quarters, being President would somewhat paradoxically allow Barack to be more present and involved in family life.¹³³

129. Near the end of *The Audacity of Hope*, for example, Barack admits that his “recent success in politics does little to assuage the guilt” of not being there for his family, so he does his “best to answer the accusation that floats around in my mind—that I am selfish, that I do what I do to feed my own ego” by participating as an active parent to the fullest extent his travel schedule permits. OBAMA, *supra* note 117, at 348.

130. Michelle acknowledged to reporter Jodi Kantor in 2007 that she had “want[ed] a certain type of model, and our lives didn’t fit that model. . . . I just needed the support. It didn’t have to be Barack.” Kantor, *supra* note 126.

131. WOLFFE, *supra* note 117, at 54.

132. *Id.* at 52.

133. See, e.g., Kantor, *supra* note 126 (“‘This is the first time in a long time in our marriage that we’ve lived seven days a week in the same household with the same schedule, with the same set of rituals,’ Michelle Obama pointed out. . . . ‘That’s been more of a relief for me than I would have ever imagined.’”).

I wish I could see the Obamas' story as a triumph of extralegal enforcement for an untraditional marital bargain in an ongoing marriage. But the court of public opinion, far from supporting Michelle, faulted her for nagging him.¹³⁴ Even with her extraordinary strength of purpose and his extraordinary willingness to try to do right by her on the terms she set, what they have ended up with is an equilibrium fairly close to that predicted by Lundberg and Pollak's separate spheres model, an equilibrium defined rather more in terms of traditional gender roles and gender role expectations than either of the Obamas have said they would prefer, one in which, as Barack recounts somewhat wistfully:

It is left to Michelle to coordinate all the children's activities, which she does with a general's efficiency. When I can, I volunteer to help, which Michelle appreciates, although she is careful to limit my responsibilities. . . .

. . .

In all [my efforts at participation in the children's lives] I am encouraged by Michelle, although there are times when I get the sense that I'm encroaching on her space—that by my absences I may have forfeited certain rights to interfere in the world she has built.¹³⁵

134. See, e.g., Andrew Lynch, *Too Feisty for First Lady?*, SUNDAY BUS. POST, Feb. 24, 2008, <http://www.sbpost.ie/archives/2008/0224/too-feisty-for-first-lady-30670.html> ("At the start of the presidential campaign, she undermined his saintly image by calling him a domestic slob who never picks up his dirty socks or puts the butter back in the fridge.").

135. OBAMA, *supra* note 117, at 349–52.