

## RECONSTRUCTING MARRIAGE: AN INTERSEXIONAL APPROACH

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*The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.*<sup>1</sup>

### INTRODUCTION

Commercialization of heterosexual relations, specifically marriage, has the potential to further the goals of queer theory by undermining gender and sexual orientation hierarchies. Focusing on marriage arguably implements Dorothy Allison and Esther Newton's imperative that queer theorists "deconstruct heterosexuality first,"<sup>2</sup> rather than deconstruct gay, lesbian and bisexual identity while paradoxically leaving unchallenged constructions of heterosexuality as natural, essential, superior, or inevitable. One way to deconstruct (and reconstruct) marriage is to attach value to labor done by homemakers for their families. While homemaking labor could be commodified using various market-based models,<sup>3</sup> I have

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1. BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 129 (1928). Another commentator on the reinvigoration of alimony used this quotation as an epigram in her comment on Joan Williams' proposal to redefine family wealth entitlements. See Emily Field Van Tassel, *Rebinding the Sticks: A Comment on Is Coverture Dead?*, 82 *GEO. L.J.* 2291 (1994) (commenting on Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227 (1994)).

2. The danger of queer theorists applying constructionist analysis only to discuss gay and lesbian issues is that doing so deconstructs homosexuality, leaving heterosexuality in its naturalized, superior position. Dorothy Allison and Esther Newton foresaw this danger and produced buttons demanding that queer theorists "Deconstruct Heterosexuality First." Lisa Duggan, *Queering the State*, in *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 179, 185 (Lisa Duggan & Nan D. Hunter eds., 1995) [hereinafter *SEX WARS*].

3. Other commentators have suggested partnership models as appropriate vehicles to justify post-divorce income sharing. See, e.g., Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *GEO. L.J.* 2423, 2454–60 (1994); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 *U. CHI. L. REV.* 67, 71 (1993). A recent article analyzes premarital agreements by exploring how U.C.C. Article 2, by analogy, might govern their terms and enforcement. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of*

proposed elsewhere that marriage be commercialized through Premarital Security Agreements, or PSAs.<sup>4</sup>

PSAs would establish a debtor/creditor relationship between spouses in order to quantify and value homemaker contributions to family wealth. Governed by the same rules as Article 9 of the Uniform Commercial Code, PSAs would arise at the beginning of the marriage, and would recognize homemaker contributions to family wealth by treating the primary homemaker as a creditor in relation to her<sup>5</sup> primary wage-earning spouse. The debt is based on the primary homemaker's contributions to the joint marital enterprise. Specifically, the primary wage-earner would be indebted to the primary homemaker for the value of the homemaker's domestic labor and lost opportunity costs, which enable him to attain "ideal worker" status.<sup>6</sup> If the marriage endures, the primary wage-earner pays his debt to the homemaker by sharing with her the stream of income he enjoys by virtue of his ideal worker status. If instead the spouses divorce, the divorce would constitute default on the loan, entitling the primary homemaker to foreclose on collateral (designated as 50 percent of marital property) in order to get the expected return (continued sharing of the primary wage-earning spouse's income) on her loan of homemaking services and lost opportunity costs. The amount of the debt would be calculated as an annual payment equal to 30 percent of the difference between the spouses' income at the time of di-

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*Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 188–89 (1998).

4. For a fuller analysis describing how PSAs could commercialize marriage, see Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998) [hereinafter Ertman, *Commercializing Marriage*].

5. This essay uses female pronouns to refer to primary homemakers and male pronouns to refer to ideal workers, since women and men are likely to play these respective roles in typical heterosexual marriages. The adjective "primary" reflects the wage labor of many people who also have primary responsibility for homemaking. In 1996, 70 percent of married mothers participated in the wage labor force. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 404 tbl. 631 (117th ed. 1997). But many of these women tailor their work force participation to accommodate caregiving responsibilities. They might, for example, work part time, only part of the year, or near home. See VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 41, 60 (1988). Consequently, women on average earn less than men. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 1996, at 26–27 tbl. 7 (1997). This gendered wage gap occurs in all racial groups, but is less pronounced between men and women of color than between white men and women. *Id.* Regardless of their employment status, women in heterosexual relationships do most of the housework. ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* 8 (1989). These patterns suggest the accuracy, on average, of using female pronouns to describe primary homemakers and male pronouns to describe primary wage-earners. However, there is nothing in the proposed Premarital Security Agreements that requires that gender or sex determine which role a spouse plays, or even that there be a primary homemaker and an ideal worker. Ertman, *Commercializing Marriage*, *supra* note 4, at 75–76.

6. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2255–56 (1994) ("A wife who shoulders childrearing and other domestic responsibilities allows her husband . . . to perform as an ideal worker.").

orce. These payments would continue for a period of years equal to half the duration of the marriage plus the difference between 18 and the age of the youngest minor child.

Set out as a formula, the calculation looks as follows:

$$\frac{\text{Annual Payment} \quad \text{Duration}}{2} = \frac{(.3(\text{high income} - \text{low income})) (\text{length of marriage} + (18 - \text{age of youngest minor child}))}{2}$$

PSAs are the latest contribution in a wave of recent scholarship which has sought to create a theory of alimony to alleviate the twin problems of displaced homemaker indigency and the general devaluation of women's work in both the home and market. Most analysis regarding reinvigorating alimony falls into four categories: legal economic and liberal, cultural, or radical feminist. Perhaps due to ideological divides between these approaches, no single proposal has generated broad-based support. Commercializing marriage through PSAs has the potential to achieve this cross-over appeal by satisfying much of what these disparate proposals seek to achieve.<sup>8</sup> In *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*,<sup>9</sup> I explain how PSAs would operate, and contend that PSAs have the potential to appeal to legal economic as well as liberal, cultural, and radical feminist approaches.

This essay further develops the crossover potential of PSAs, exploring whether commercializing marriage through PSAs has the potential to queer marriage doctrine.<sup>10</sup> If so, such commercialization would doctrinally implement some of the insights of intersectionality theory, as it implicates (to a greater or lesser extent) sex, gender, class, and sexual orientation.<sup>11</sup> Consistent with the theme of this Symposium, this approach could be described as InterSEXional.<sup>12</sup>

7. For further discussion of the amount of the marital debt secured by the premarital security interest, see Ertman, *Commercializing Marriage*, *supra* note 4, at 43–50.

8. See Ertman, *Commercializing Marriage*, *supra* note 4, at 63–97.

9. *Id.*

10. “Queer” is increasingly used as a verb to describe the application of queer theoretical insights to various contexts. See, e.g., CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 150 (1995) (contending that the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), “queers” the statute so that the boundary between acts and identities is muddied); Duggan, *supra* note 2, at 179 (“The time has come to think about queering the state.”); Jonathan Goldberg, *Introduction to QUEERING THE RENAISSANCE* 1, 1 (Jonathan Goldberg ed., 1994) (“[T]he process of queering the Renaissance has been under way for some time.”). While the definition of the term “queer” is deliberately left open to minimize essentialist dangers, when used as a verb it generally connotes applying the insights of queer theory to new contexts, such as law, activism, or history. To queer something is often to turn it on its head, show the contingency of its underpinnings, and perhaps reveal the subversive potential in something that seems to be the very cornerstone of traditional gender relations.

11. Some theorists might object to describing an analysis that accounts for dominant identities, such as heterosexuality, as intersectional (or interSEXional). For example, Peter Kwan states:

Part I of this essay briefly describes PSAs and sketches how they have the potential to appeal to a wide range of ideological positions. Part II expands this analysis to speculate what various queer theorists might appreciate and/or object to about PSAs. Specifically, PSAs might interest queer legal theorists because they could implement the insights of queer theory by: (1) revealing the constructed nature of heterosexuality and thus undermining compulsory heterosexuality;<sup>13</sup> (2) accounting for gender performativity and strategic provisionality;<sup>14</sup> (3) queering the state;<sup>15</sup> (4) intervening in legal conflations of sex, gender, and sexual orientation;<sup>16</sup> and/or (5) creating social space for same-sex marriage by focusing marriage doctrine on economic rather than gendered or sexed aspects of heterosexual marriage.<sup>17</sup> Some queer theorists might object to the way that PSAs could buttress compulsory heterosexuality, reinforce

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[S]traight white maleness arguably is a multiple identity, but intersectionality theorists would resist the claim by straight white males that theirs is an intersectional subjectivity. Central to intersectionality theory is the recovery of the claims and identities of those who, like African-American women, are pushed to the margins of the racial discourse because of assumptions of patriarchal normativity, and simultaneously pushed to the margins of the feminist discourse because of assumptions of racial normativity.

Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1275 (1997). Given the importance of deconstructing unmarked as well as marked categories, and in particular deconstructing heterosexuality first or at least concurrently with deconstructing marginalized sexual identities, *see supra* note 2, this essay describes its methodology as intersectional (or interSEXional) despite its focus on some privileged categories.

12. InterSEXionality is a term coined by the University of Denver faculty reading group as we planned this conference. The term is intended to invoke multiple levels of intersectional analysis while focusing on sexual orientation. First, it explores ways in which legal regulations invoke race, class, gender, sex, sexuality, and other identity categories, focusing on sexual orientation as the hub of the analysis. Second, InterSEXionality engages interdisciplinary methods to understand how various identities interact under legal regulation. In particular, InterSEXionality applies insights of queer theory (which actively contests identity categories) to legal analysis (which is firmly grounded in identity categories). Third, and perhaps most ambitiously, InterSEXionality explores interrelationships among ostensibly separate identity categories such as sex, gender, sexuality, and sexual orientation.

13. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227 (Henry Abelove et al. eds., 1993) [hereinafter Rich, *Compulsory Heterosexuality*].

14. *See* JUDITH BUTLER, *GENDER TROUBLE* 141 (1990) [hereinafter BUTLER, *GENDER TROUBLE*]; Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE OUT: LESBIAN THEORIES, GAY THEORIES* 13, 19 (Diana Fuss ed., 1991) [hereinafter Butler, *Imitation*].

15. *See supra* note 10.

16. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 6 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 129 (1995) [hereinafter Valdes, *Queers, Sissies, Dykes and Tomboys*]; *see also* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 211 (1996) [hereinafter Valdes, *Unpacking Hetero-Patriarchy*].

17. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1494-95 (1993).

race and class hierarchy by treating white, middle and upper-middle class marriages as paradigmatic, and/or ignore important concerns of many people of color and poor people by focusing on marriage as the major route for gay/lesbian liberation.<sup>18</sup> Finally, Part III briefly explores the feasibility and some implications of applying PSAs to same-sex relationships. If commercializing marriage through PSAs has at least some of the effects suggested, PSAs could well contribute to the transformation of marriage, perhaps reconstructing it into an institution in which the spouses are more equal than they are currently. PSAs, moreover, would shift the focus of marriage doctrine away from sex and gender and toward the economic aspects of the relationship. If PSAs could queer legal doctrine regulating marriage, they would make an important contribution toward reconstructing marriage. This reconstructed institution would further the goals of queer theory by subverting the construction of marriage (and heterosexual coupling) as natural. Once heterosexuality loses its naturalized status, legal regulations that penalize same-sex sexuality as deviant lose their justification. In short, queer legal theorists could make significant headway toward their ultimate goals by focusing on the (often unexamined) legal regulations governing heterosexual marriage.

## I. PREMARITAL SECURITY AGREEMENTS DESCRIBED AND APPLIED

### A. *Defining Premarital Security Agreements*

Premarital Security Agreements mirror commercial security agreements. In a typical secured transaction, a creditor extends credit to a

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18. This essay assumes that queer theorists care about race and class. This assumption, like any other assertion about queers or queer theory is made difficult by queer theory's deliberate refusal to define "queer." Some people define queer as not fitting in to the mainstream, and define the queer community as an "oxymoronic community"

of men, women, transsexuals, gay males, lesbians, bisexuals, straight men and women, African Americans, Chicanos, Asian Americans, Native Americans, people who can see and/or walk and people who cannot, welfare recipients, trust fund recipients, wage earners, Democrats, Republicans, and anarchists—to name a few . . . . Indeed, since difference from the "norm" is about all that many people in the "gay community" have in common with each other, these sorts of "gay and lesbian" gatherings, at their best and worst and most radical, seem to be spaces where cross-sections of the human multiverse can gather together to thrash out differences and perhaps to lay the groundwork for peaceful and productive futures. . . . In my most naively hopeful moments, I often imagine it will be the "queer community"—the oxymoronic community of difference—that might be able to teach the world how to get along.

Lisa Duggan, *Making it Perfectly Queer*, in *SEX WARS*, *supra* note 2, at 155, 163 (quoting Louise Sloan, *Beyond Dialogue*, S.F. BAY GUARDIAN LITERARY SUPPLEMENT, Mar. 1991, at 3). Suzanna Danuta Walters offers the following critique of queer theory:

[I]f all that we share is a nonnormative sexuality and a disenfranchisement, then why not be totally inclusive? This reduces queer politics to a banal (and potentially dangerous) politics of simple opposition, potentially affiliating groups, identities, and practices that are explicitly and implicitly in opposition to each other. To link politically and theoretically around a "difference" from normative heterosexuality imposes a (false) unity around disparate practices and communities.

Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 *SIGNS* 830, 838–39 (1996).

debtor, who grants the creditor a security interest in collateral to secure repayment of the loan. Article 9 of the Uniform Commercial Code generally governs secured transactions when the collateral is personal property.<sup>19</sup> The security interest can arise in several ways: the creditor can take possession of the collateral, the parties can execute a writing (the security agreement), or the interest can arise as a matter of law.<sup>20</sup> Executing a writing is the typical way to create the security interest. Once a lender has the status of a secured creditor, it can, upon default, repossess the collateral.<sup>21</sup> While not without its critics,<sup>22</sup> this arrangement has served both debtors and creditors by facilitating the extension of credit and by protecting creditors against the risks of default.

I have argued elsewhere that contemporary marriage resembles this credit relationship in several respects.<sup>23</sup> In many marriages, one spouse is the primary wage-earner and the other spouse is primarily responsible for childcare and other homemaking tasks. Joan Williams has dubbed this marriage between an ideal worker and primary homemaker “the dominant family ecology.”<sup>24</sup> Under this arrangement, the primary homemaker contributes to family wealth by supporting her spouse’s efforts to become an ideal worker. Specifically, the primary homemaker performs domestic services that enable the primary wage-earner’s full-time, year-round participation in the wage labor force, and in doing so she also incurs lost opportunity costs by devoting primary attention to her spouse’s income potential instead of her own. The homemaker thus extends credit to her primary wage-earning spouse, expecting to be repaid by sharing the primary wage-earner’s income over the course of the wage-earner’s career. Unfortunately for primary homemakers and their children,<sup>25</sup> distribution of

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19. See U.C.C. § 9-102 (1995) (“[T]his Article applies . . . to any transaction . . . which is intended to create a security interest in personal property.”).

20. See U.C.C. § 9-203 (1995) (describing how security interests arise under Article 9 by either possession of collateral or a signed writing describing the collateral); U.C.C. § 9-310 (1995) (recognizing statutory liens).

21. U.C.C. § 9-503 (1995) (allowing a secured creditor to take possession of collateral without judicial process if repossession can be accomplished without breach of the peace).

22. See, e.g., Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549, 550–51 (1997) (suggesting that Article 9 be amended to define specific actions which constitute breach of the peace).

23. See Ertman, *Commercializing Marriage*, *supra* note 4.

24. Williams, *supra* note 6, at 2229. The paradigmatic marriage in which women are financially dependent on men may be most prevalent among white middle and upper middle class marriages. See Twila L. Perry, *Alimony: Race, Privilege and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2486–89 (1994). In African American marriages, in contrast, there is less of a wage gap between men and women, and women are likely to contribute 40 percent of household income, compared to the 29 percent contributed on average by white wives. Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 793, 795–96 (1997).

25. Mothers are much more likely to be awarded custody of children of the marriage upon divorce. Williams, *supra* note 6, at 2227 n.144 (stating that “fathers gain sole physical custody in

family assets and liabilities at divorce does not reflect these homemaker contributions to family wealth. Since the major asset in most divorces is the primary wage-earner's stream of income,<sup>26</sup> it is particularly unfair that this asset is usually allocated entirely to the primary wage-earner.

One reason that homemaker contributions to the wage-earner's income stream have not been valued at divorce is the difficulty encountered in precise quantification of the homemaker's contribution. Precise valuation is elusive because the value of homemaking can be calculated in at least three different ways: the cost of replacing a homemaker's services with market labor; the lost opportunity costs borne by the homemaker; and/or econometric methods based on economic theory and statistical analysis.<sup>27</sup> While the lost opportunity cost model is popular among some commentators,<sup>28</sup> it also has been criticized by feminists because it focuses only on costs borne by homemakers and fails to account for the benefits primary wage-earners enjoy as a result of traditional gendered divisions of domestic labor.<sup>29</sup> Rough figures for quantifying the way that primary wage-earners benefit from their spouses' homemaking are suggested by two studies indicating that men whose wives do not participate in the wage labor force earn 20-25 percent more than men whose wives work for wages.<sup>30</sup> I propose a formula for calculating the debt that accounts for this research. The debt is calculated as annual payments of 30 percent of the difference between the spouses' incomes at the time of divorce, paid for a period equal to half the marriage plus the time until the youngest child turns 18. This formula accounts for primary homemakers' decreased wages due to their focus on homemaking rather than wage labor,<sup>31</sup> for the contributions custodians of young children make to their former spouses' post-divorce income, and also for the pre-divorce contributions of primary homemakers in marriages that end

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less than 10% of divorces" (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 112 (1992)).

26. Williams, *supra* note 6, at 2229.

27. See C.C. Fischer, *The Valuation of Household Production: Divorce, Wrongful Injury and Death Litigation*, 53 AM. J. ECON. & SOC. 187 (1994) (examining valuation of overall "household production" by applying methods of forensic economics).

28. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 54-55 (1989).

29. See, e.g., Singer, *supra* note 3, at 2444-47.

30. Joy A. Schneer & Freida Reitman, *Effects of Alternative Family Structures on Managerial Career Paths*, 36 ACAD. MGMT. J. 830, 831 (1993) (finding that male MBA degree holders with homemaker spouses and children made 20 percent more than men whose spouses worked for wages); Linda K. Stroh & Jeanne M. Brett, *The Dual-Earner Dad Penalty in Salary Progression*, 35 HUM. RESOURCE MGMT. 181, 195 (1996) (study showing that managers whose wives did not work enjoyed 11 percent more in salary increases over five years than managers whose wives worked for wages); see also Tamar Lewin, *Men Whose Wives Work Earn Less, Studies Show*, N.Y. TIMES, Oct. 12, 1994, at A1.

31. Remunerating primary homemakers for their contributions to family wealth through homemaking services and lost opportunity costs makes particular sense in light of the second shift that most women work in order to make up for their male partner's more modest involvement with household management. HOCHSCHILD, *supra* note 5, at 8.

after the children are grown.<sup>32</sup> While inexact, this valuation of homemaker contributions to family wealth improves on the current default rule, which fails in most circumstances to place any value on home-making.<sup>33</sup>

In short, PSAs would quantify the primary wage-earner's debt to the primary homemaker and designate 50 percent of all marital property as collateral securing the debt.<sup>34</sup> Dissolution of the marriage would be the equivalent of default on a commercial loan, giving the primary homemaker, like any other secured creditor, the right to repossess and dispose of the collateral to satisfy the debt.<sup>35</sup>

PSAs, like commercial security agreements, can arise in two ways: either through a writing conveying the security interest, or as a matter of law. If PSAs are created through a signed writing, that writing should describe the collateral. In either case the debtor must have an interest in the collateral and the creditor must give value.<sup>36</sup> Creating the PSA through a signed writing would be simple, since fiancées could sign the security agreement when they execute other documents necessary to obtain a marriage license. In the alternative, PSAs could arise as a matter of law, either through common law or statute. Statutory liens, for example, grant an auto mechanic a security interest in the automobile to secure payment for repair services.<sup>37</sup> Society should have at least as strong an interest in valuing homemaker contributions to family wealth as it does in protecting the auto repair business. There are advantages and disadvantages to each method of creating PSAs, but on balance a signed writing is preferable for purposes of both record keeping and allowing

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32. For further discussion of the formula, see Ertman, *Commercializing Marriage*, *supra* note 4, at 43–50.

33. Alimony is awarded in a minority of divorces. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106 (1989) (describing United States Census Bureau data indicating that 9.3 percent of women were awarded permanent alimony between 1887 and 1906, 15.4 percent in 1916, 14.6 percent in 1922, compared to Lenore Weitzman's data indicating that in 1968 less than 19 percent of divorcees were awarded alimony and, in 1977, only 16.5 percent of divorces included alimony awards).

34. It is important to note that the debt and the collateral are separate. Fifty percent of marital property is collateral securing the loan. Because the most important asset in most divorces is the post-divorce stream of income, my proposal designates part of post-divorce income as marital property. The debt, or actual loan, is considerably smaller. Ertman, *Commercializing Marriage*, *supra* note 4, at 52–53. Commercial creditors typically oversecure a loan with collateral worth more than the loan amount to ensure full repayment of the debt.

35. Tangible marital property could be repossessed and sold pursuant to U.C.C. §§ 9-503 and 504 (1995). Intangible property, such as stream of income, could be accessed through garnishment proceedings. Garnishment is already used to satisfy child support and maintenance obligations. *See, e.g.*, COLO. REV. STAT. § 14-14-111.5 (1997) (authorizing income assignment to collect child support and maintenance).

36. U.C.C. § 9-203 (1995).

37. *See, e.g.*, COLO. REV. STAT. §§ 38-20-106 to -116 (1997); *see also* COLO. REV. STAT. § 42-9-104(II) (1997) (establishing liens on property such as motor vehicles upon which repair work has been done but not paid for).



spouses to tailor their conduct during marriage to achieve desired results in the event of divorce.<sup>38</sup> To the extent that queer theorists have a stake in how PSAs are created, they might prefer a PSA created through a signed writing to one arising as a matter of law because executing the writing could destabilize gender hierarchies by making the spouses aware of the way that PSAs alter power differentials between spouses, and also could increase the possibility of men doing more homemaking in order to avoid the security interest in their post-divorce income.<sup>39</sup>

Whether PSAs are created by a signed writing or by operation of law, they would dramatically improve the financial situation of many primary homemakers. Women, on average, suffer a marked decrease in standard of living after divorce, while men enjoy a marked increase in post-divorce standard of living.<sup>40</sup> The Displaced Homemaker Network has reported that 57 percent of all displaced homemakers live in or near poverty, and that divorced women of color disproportionately suffer from impoverishment.<sup>41</sup> This gendered disparity in post-divorce standards of living could be due at least in part to statutory provisions which discourage long-term alimony.<sup>42</sup>

38. Ertman, *Commercializing Marriage*, *supra* note 4, at 55–57.

39. Queer theorists also might prefer consensual security agreements because they do not turn on the status of the parties in the same way that repair and mechanics' liens do. *See* U.C.C. § 9-102 cmt. 2 (1995). On the other hand, statutory liens become common knowledge after sustained use in the community, so that PSAs could affect the gendered nature of marriage even if they arose as a matter of law. Some queer theorists might, moreover, contest the distinction between the two ways of creating a security interest, arguing that the consensual nature of an executed security agreement is largely illusory given the state monopoly on recognizing marriage and allocating benefits based on it, paired with the forces of compulsory heterosexuality that push many people into marriage.

40. Lenore Weitzman's famous data suggested that, upon divorce, women's standard of living decreases 73 percent while men's standard of living increases 42 percent. *See* LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 338–39 (1985). Subsequent studies indicate that divorced women suffer a financial penalty (albeit less of one than that claimed by Weitzman). *See, e.g.*, Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 530–33 (1996) (replicating Weitzman's research on the same data and finding a 27 percent decrease in women's standard of living and a 10 percent improvement for men); Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537, 537–38 (1996) (contending that original data no longer exist but conceding a sample weighting error); *see also* Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (finding that women suffer an approximately 30 percent drop in their standard of living in the first year after divorce).

41. Starnes, *supra* note 3, at 79–80 (citing the Displaced Homemakers Network 1990 Status Report which states that 61 percent of African American and 62.3 percent of Hispanic displaced homemakers are poor, compared to 27.8 percent of white displaced homemakers).

42. Section 308 of the Uniform Marriage and Divorce Act (U.M.D.A.) provides that a court should order maintenance

only if . . . the spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

In commercial terms this pattern suggests a market failure in current divorce doctrine: Homemakers are extending credit to enable their spouses to become ideal workers, but many are not getting repaid. By allocating the risk of loss to the primary homemaker, current alimony doctrine both discourages people from being primary homemakers and gives primary wage-earners a windfall by allowing them to walk away from marriage with family wealth attributable to homemaker contributions. While numerous scholars bemoan the current divorce standards which devalue homemaking (reflecting and perpetuating the general devaluation of women's labor), no single proposal for remunerating homemaking has won support across the ideological spectrum.

### B. *Premarital Security Agreements' Crossover Potential*

Commentators have suggested divorce reforms that could correct this market failure. Proposals include reinstating fault-based divorce (or at least strengthening fault-based alimony),<sup>43</sup> redefining family property to include the primary wage-earner's post-divorce income,<sup>44</sup> reconceptualizing family as a mother and child unit and supporting this unit through the public fisc,<sup>45</sup> and using partnership and contract principles to divide gains and losses due to gendered divisions of wage labor and primary homemaking.<sup>46</sup> While all of these proposals share the insight that home-

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UNIF. MARRIAGE & DIVORCE ACT § 308(a) (amended 1973), 9A(I) U.L.A. 446 (1998). U.M.D.A. § 308 further directs courts to take into account six factors in determining the amount and duration of maintenance, including:

(1) the financial resources of the party seeking maintenance . . . ; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

*Id.* § 308(b). Although the U.M.D.A. uses the term "maintenance" to describe post-divorce payments from one spouse to another, this essay generally uses the term "alimony," as do most of the participants in the theoretical debate about post-divorce income-sharing. While practice distinguishes sharply between alimony and property division, experts have faltered when pressed to distinguish clearly between the two. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 592-93 (2d ed. 1987). Accordingly, while this essay focuses on alimony, the PSA could as easily be classified as a division of property.

43. See, e.g., Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 *BYU J. PUB. L.* 91, 93 (1993).

44. See Williams, *supra* note 6, at 2258.

45. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230-31 (1995).

46. See, e.g., Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 *TUL. L. REV.* 855, 885 (1988) (stating that no-fault "alimony, like contract damages, emphasizes restitution," and that the law analogizes marriage to a business partnership); Lloyd Cohen, *Marriage, Divorce and Quasi-Rents*; or, "I Gave Him the Best Years of My Life," 16 *J. LEG. STUD.* 267 (1987) (comparing the marriage contract to a commercial contract); Ellman, *supra* note 28, at 9-10 (criticizing the application of contract and partnership concepts to alimony and proposing a lost opportunity cost model); Joan M. Krauskopf, *Theories of Property Division/Spousal*

making should be valued at divorce, none of the proposals has garnered universal support. This lack of consensus is largely due to ideological differences among the proposals. As I have argued elsewhere, PSAs have the potential to attract the cross over appeal that has eluded other proposals.<sup>47</sup>

Most of the proposals for reinvigorating alimony are either legal economic or cultural feminist.<sup>48</sup> Legal economic approaches tend to focus on efficiency and deterring opportunism in marriage. Some legal economic approaches are also traditionalist, and make normative and positive claims about gendered specialization in marriage.<sup>49</sup> Cultural feminist approaches seek to value homemaking contributions to family wealth, and in doing so protect women and their children from indigency and near-indigency.<sup>50</sup> Liberal feminist approaches, in contrast, take the formal equality position that both men and women should be encouraged to share equally in wage and homemaking labor. Liberal feminist scholars thus worry that generous alimony rules would encourage women to adopt

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*Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 252, 255–71 (1989) (exploring various theories upon which to fashion practical distinctions between property division entitlements and spousal support obligations); Singer, *supra* note 33, at 1114 (suggesting an investment partnership model of marriage); Starnes, *supra* note 3, at 108–09 (proposing a business partnership model for valuing homemaking).

47. Ertman, *Commercializing Marriage*, *supra* note 4, at 63–97.

48. These labels are inevitably reductionist and do not (nor are they intended to) reflect the full range of feminist or legal economic thought. They do, however, give a sense of the ideological variation in approaches to divorce reform. For further discussion of these ideological approaches, see *id.* at 66, 74–75, 76–79, 88–92.

49. Legal economic approaches include Kristian Bolin, *The Marriage Contract and Efficient Rules for Spousal Support*, 14 INT'L REV. L. & ECON. 493, 501 (1994); Brinig & Carbone, *supra* note 46, at 901–02; June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 414–15 (1994); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 958–61 (1991); Cohen, *supra* note 46, at 303; Ellman, *supra* note 28, at 11; Joan M. Krauskopf, *Recompense for Financing Spouses' Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 416 (1980); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEG. STUD. 35, 62 (1978); Parkman, *supra* note 43, at 93; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 94 (1990).

50. Feminist approaches can be described in different ways. See, e.g., MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 67–118 (1994) (excerpting six feminist approaches, including the dominance critique of formal equality, a defense of formal equality, hedonic feminism, pragmatism, socialist feminism, and postmodern feminism). This essay and *Commercializing Marriage*, *supra* note 4, define liberal feminism as an approach which supports legal rules that treat men and women similarly in most situations, cultural feminism as an approach that seeks to value the work that most women do in the home (and workplace), and radical feminism as an approach that seeks to deconstruct the dualities of sex, gender, and sexual orientation that inform the discourse of gender and sex equality. Ertman, *Commercializing Marriage*, *supra* note 4, at 27–28.

Cultural feminist approaches include ideas suggested in FINEMAN, *supra* note 45, at 232; Ann Lacquer Estin, *Can Families Be Efficient?*, 4 MICH. J. GENDER & L. 1–2 (1996); Ann Lacquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 519–20 (1995); Ann Lacquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1086 (1995); Ann Lacquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 803 (1993); Singer, *supra* note 3, at 2423; Singer, *supra* note 33, at 1121; Starnes, *supra* note 3, at 71–72; Williams, *supra* note 6, at 2227.

traditional gender roles and remain dependent on men.<sup>51</sup> Finally, radical feminist analysis (at least the current, poststructural, version of radical feminism) rejects the dualism of male/female roles and fixed identity generally. Instead of freeing women *to* be women (cultural feminism) or *from* being women (liberal feminism), 1990s radical feminism suggests inverting the categories to undermine gender and sex duality and create the possibility of an equalitarian model of marriage that does not depend on male and female roles.<sup>52</sup>

I have argued that PSAs might cohere with these four ideologically disparate schools of thought, or in the alternative that PSAs could be a procedural tool for implementing one of the other proposals.<sup>53</sup> PSAs' commercial origins and their power to efficiently deter wage-earner opportunism further the goals of legal economics. The way PSAs increase the value of caretaking might appeal to proponents of cultural feminism. While liberal feminist concerns are likely to arise around PSAs' potential to create incentives for women to adopt traditional gender roles, liberal feminist scholars might appreciate PSAs' parallel potential to create incentives for more equal distribution of homemaking and wage labor. Finally, PSAs also serve the interests of radical feminism by transforming the cultural category of economically vulnerable housewife into that of a powerful market player, the secured creditor. In sum, PSAs may have cross-over analytical appeal as a solution to the problems of displaced homemaker indigency and the general devaluation of women's work.

This essay extends the ideological crossover analysis to queer theory, exploring whether PSAs might also cohere with queer legal theory. In doing so, this essay breaks new ground in its application of queer theoretical insights to heterosexual family law problems, a considerable

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51. See, e.g., Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 319 (1987); Herma Hill Kay, *Beyond No-Fault Divorce: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 36 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 90 (1987); Krauskopf, *supra* note 46, at 277-78; Perry, *supra* note 24, at 2519; J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1102-03 (1990); Barbara Stark, *Burning Down the House: Toward a Theory of More Equitable Distribution*, 40 RUTGERS L. REV. 1173, 1207 (1988).

52. Radical feminist scholars have been largely silent in this discussion, with notable exceptions. See, e.g., Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995) [hereinafter *Patriarchy Is Such a Drag*]. Some approaches combine cultural and radical feminist elements. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* 47, 176 (1991); JOAN WILLIAMS, *UNBENDING GENDER: MARKET WORK AND FAMILY WORK IN THE 20TH CENTURY* (forthcoming 1999); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2215 (1995); Williams, *supra* note 6, at 2229.

53. Ertman, *Commercializing Marriage*, *supra* note 4, at 63-97, 110-11.

extension beyond the usual focus of queer theory on gay/lesbian/ bisexual/transgendered issues.

## II. PREMARITAL SECURITY AGREEMENTS' APPLICABILITY TO QUEER LEGAL THEORY

Queer legal theory builds on the insights of poststructuralism, feminist and critical race theory, as well as critical legal studies to critique legal theory and doctrine based on their impact on gay people.<sup>54</sup> In doing so, queer legal theory focuses on issues of identity, specifically how legal regulations turn on identity. Still in its infancy (some would argue, still gestating), queer legal theory remains in a state of flux. At this moment, one of its key challenges is to theorize the legal relevance of intersecting identities.<sup>55</sup> Queer theory thus builds on intersectionality theory,<sup>56</sup> striving to account for the ways that legal theory and doctrine can account for each person's multiple identities (such as gender, sex, race, class, and sexual orientation).<sup>57</sup> Queer theorists have coined various terms to de-

54. I use the term "gay people" rather than "queers" because most queer theory scholarship focuses on gay men and lesbians. See, e.g., Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462 (1992); Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 161.

55. Two other fora also have addressed these issues. This topic was the subject of a program sponsored by the Sections on Gay and Lesbian Issues and Minority Groups titled *Race, Ethnicity and Sexual Orientation: Crossing New Intersections in Law and Scholarship* at the 1998 Annual Meeting of the Association of American Law Schools. The Hastings Law Journal also sponsored a symposium titled *Intersexions: The Legal & Social Construction of Sexual Orientation*, 48 HASTINGS L.J. 1101 (1997). Most relevant for purposes of the present symposium on InterSEXuality are the Hastings Law Journal symposium articles focusing on intersections of race, ethnicity, class, gender and sexual orientation. See Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363 (1997); Ruth Colker, *Sexual Orientation: Militarism, Moralism, and Capitalism*, 48 HASTINGS L.J. 1201 (1997); Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223 (1997); Kwan, *supra* note 11; Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997) [hereinafter Valdes, *Queer Margins*].

It is important to note that not all queer theorists contest all categories. See, e.g., DAN DANIELSEN & KAREN ENGLE, *AFTER IDENTITY* at xv (1995) ("Post-identity scholars articulate a set of strategies that acknowledge our simultaneous and ambivalent desire both to affirm our identities and to transcend them."); Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 56, 65 (1994) (suggesting that, unlike the category *woman*, the category *lesbian* is a coherent basis for lesbian legal theory because (1) "[t]he category lesbian is too young to be destabilized," and (2) lesbians share a "core experience" of experiencing and understanding "that transformative moment [of] realiz[ing] . . . personal erotic attraction to another woman").

56. The ground breaking piece on intersectionality theory is Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

57. Jane Schacter has argued that the anti-gay "discourse of equivalents" compares different groups in order to decide who is entitled to civil rights protections, thus missing both commonalities and differences between different forms of subordination. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 314

scribe this post-intersectional approach, including interconnectivity,<sup>58</sup> multidimensionality,<sup>59</sup> and cosynthesis.<sup>60</sup> The *Denver University Law Review*'s InterSEXionality Symposium is one more attempt to theorize legal approaches to these fundamental problems.

#### A. *Compulsory Heterosexuality and Gender Subordination in Marriage*

Exposing legal regimes that constitute and enforce compulsory heterosexuality can be viewed as a key function of queer legal theory.<sup>61</sup>

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(1994) (“While all struggles for social justice must be waged with these links in mind, being connected and being identical are not the same thing.”).

58. Valdes proposes interconnectivity as a theoretical approach which he describes as an inter-group ethic in legal scholarship that values and promotes sex/gender inclusiveness in critical endeavors—projects that interrogate not only the way in which a construct like “gender” affects various groups, but that also interrogate the way in which sites of oppression are structured, deployed, and operated under the conflation in inter-connected ways.

Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 211; *see also* Valdes, *Queer Margins*, *supra* note 55, at 1341 (“[S]econd stage theorizing must go beyond a mere application of conventional intersectionality to race, ethnicity, and sexual orientation. . . . [A] simple extension . . . is unworkable because the doctrinal potency of intersectionality depends on the formal illegality of all biases under inspection.”).

59. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 640 (1997) (defining multidimensionality as “a discursive project aimed at unveiling the complexity of subordination and identity and reshaping legal theory to reflect and respond to this complexity”); *see also* Berta Esperanza Hernández-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 71 (1996) (pointing out that multidimensionality incorporates many categories and is not limited to race and ethnicity). Pragmatism might offer a way to understand differences and similarities between and among groups. Scott Brewer et al., *Afterword: Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1911, 1928 (1990) (providing transcription of remarks by Jean C. Love, February 23–24, 1990, University of Southern California Law Center) (“Pragmatism has encouraged us to create a common language and in this way has helped us move toward a common understanding of the problem [of oppression based on sex, race, religion and sexual orientation].”).

60. *See* Kwan, *supra* note 11, at 1281 (“By paying attention to the cosynthesis of categories, one opens up spaces for conceptualizing identities that do not prioritize one category over others.”).

61. By explicitly identifying the compulsory nature of social systems that comprise heterosexuality, Adrienne Rich could be described as the grandmother of queer theory. But two considerations call this genealogy into question. First, Rich might object to lumping together lesbians and gay men, let alone all stigmatized sexual minorities. *See* Rich, *Compulsory Heterosexuality*, *supra* note 13, at 239 (distinguishing lesbian existence from male homosexuality). Rich, however, has softened her stance since writing *Compulsory Heterosexuality*, suggesting in a 1986 annotation to the essay that both lesbian identity and “the complex ‘gay’ identity we share with gay men” are relevant. *Id.* at 253 n.47. Second, Eve Kosofsky Sedgwick has been accorded the honor of being dubbed the mother of queer theory. *See* Duggan, *supra* note 2, at 182. Moreover, Rich’s statements in *Compulsory Heterosexuality* likely rankle many a contemporary queer theorist as essentialist. *See, e.g.,* Valdes, *supra* note 55, at 1329 (“Queer values, sensibilities and imperatives are . . . suspicious of all essentializing categorization.”). Despite these potential difficulties, this essay persists in understanding Rich’s contribution as an absolute prerequisite to the insights of queer theory. Designating Rich as the grandmother of queer theory emphasizes the generational specificity of much of queer theory (i.e., the relative youth of many of its proponents), and places some distance between her and contemporary queer theorists while still recognizing her unique contributions to queer theory’s basic precepts.

Thus, queer theorists might support PSAs to the extent that PSAs reveal, contest, and undermine compulsory heterosexuality.<sup>62</sup> If PSAs contribute to exposing, challenging, and eroding compulsory heterosexuality, they both queer legal theory and reconstruct marriage doctrine.<sup>63</sup>

#### 1. Premarital Security Agreements Could Undermine Compulsory Heterosexuality

PSAs could undermine compulsory heterosexuality in both theoretical and practical ways. On a theoretical level, PSAs undermine compulsory heterosexuality by framing marriage as a political and economic institution. As a practical matter, PSAs subvert compulsory heterosexuality by making many women in marriage more economically powerful (and thus expanding female exit options).

First, PSAs undermine compulsory heterosexuality by revealing the political and economic aspects of marriage. Adrienne Rich emphasizes that “[w]e need an economics which comprehends the institution of heterosexuality, with its doubled workload for women and its sexual divisions of labor, as the most idealized of economic institutions.”<sup>64</sup> PSAs have the potential to affect both the political and economic aspects of the “doubled workload for women and [the] sexual divisions of labor” within marriage. Economically, PSAs make the primary homemaker a secured creditor with the right to collect the debt upon dissolution. Thus PSAs make her an economically powerful party in the marriage, a secured creditor in relation to her debtor/primary wage-earning spouse. PSAs also reveal and improve the political implications of marriage for women. As a secured creditor, the primary homemaker enjoys a powerful role, particularly in relation to her primary-wage earning spouse. The PSA tempers the weakness of the homemaker role (gendered female and associated with domestic concerns) by adding to it the powerful role of a secured creditor, one associated with the market (and thus gendered male). By importing a commercial model into marriage and assigning the primary homemaker a powerful commercial role, PSAs thus lessen power imbalances in the home by adding power to the homemaker’s role and taking some away from the wage-earner’s role. In doing so, PSAs treat marriage as an economic institution, and destabilize the political and economic power of the traditional marital roles.

Second, PSAs could undermine compulsory heterosexuality to the extent that they alleviate the economic dependence of many wives on their husbands, thus expanding homemakers’ exit options. Rich defines

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62. Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 170 (discussing compulsory heterosexuality in terms of hetero-patriarchy).

63. But PSAs paradoxically could also support compulsory heterosexuality. This essay addresses each possibility in turn.

64. Rich, *Compulsory Heterosexuality*, *supra* note 13, at 245.

compulsory heterosexuality as, among other things, “a means of assuring male right of physical, economic and emotional access” to women.<sup>65</sup> As long as many women have few reasonable alternatives to marriage, and social and legal forces penalize them from exiting marriage, marriage remains compulsory.

Rich identifies some social forces that push women to marry:

Women have married because it was necessary, in order to survive economically, in order to have children who would not suffer economic deprivation or social ostracism, in order to remain respectable, in order to do what was expected of women, because coming out of “abnormal” childhoods they wanted to feel “normal” and because heterosexual romance has been represented as the great female adventure, duty and fulfillment.<sup>66</sup>

A queer legal analysis of the compulsory nature of heterosexuality might build on this analysis by focusing on exit options. If a legal doctrine facilitates (rather than frustrates) a woman’s exit from marriage, that doctrine undermines compulsory heterosexuality.

The current legal rule, which provides for only minimal post-divorce income sharing, reinforces compulsory heterosexuality by penalizing homemakers who exit marriage. The primary homemaker loses her share of the primary wage-earner’s income because legal doctrine disregards homemaking contributions to that income. Consistent with Rich’s analysis of compulsory heterosexuality’s corrosive effects on women’s freedom, this rule keeps women (particularly women in traditional gendered roles) in marriages by economically penalizing them for leaving. Replacing the current standard with PSAs could undermine compulsory heterosexuality by valuing homemaking labor, and remedying the injustice of the current rule. PSAs, unlike contemporary divorce doctrine, allow a traditional wife to exit marriage without substantial financial penalty. As such, PSAs arguably serve queer theory’s agenda of countering compulsory heterosexuality.

A third way to understand PSAs’ potential to undermine compulsory heterosexuality turns on the sex discrimination embedded in legal doctrine governing marriage. Andrew Koppelman has suggested that heterosexual marriage is grounded on (white) male supremacist ideals, so that the ban on gay marriage is sex discrimination.<sup>67</sup> He, like Nancy Chodorow, reasons that traditional gender roles in marriage perpetuate sexism by creating a family environment in which women are primary

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65. *Id.* at 238.

66. *Id.* at 242.

67. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201 (1994).



caretakers and men must individuate from their mothers in order to develop a mature sense of self.<sup>68</sup> Thus a legal rule which encourages men to play primary caretaking roles might incrementally alleviate sexism by undermining this tension between boys and their mothers (and thus between men and women). PSAs have the potential to further these ends in two ways. They create an incentive for men to increase caretaking, either by being primary caretakers (because doing so is economically and socially valued through PSAs), or by more evenly dividing caretaking responsibilities than they do now (to minimize the debt and thus evade the security interest in post-divorce income). In sum, by creating incentives for male homemaking, treating marriage as an explicitly economic and political institution, and increasing exit options for traditional women in marriage, PSAs have the potential to undermine compulsory heterosexuality.

## 2. Premarital Security Agreements Paradoxically Might Support Compulsory Heterosexuality

While PSAs have the potential to undermine compulsory heterosexuality, PSAs also could support compulsory heterosexuality in at least three ways: (1) PSAs' focus on marriage may contribute to compulsory heterosexuality by perpetuating the invisibility of lesbian existence;<sup>69</sup> (2) even if more men became the primary caretakers due to the effect of PSAs they could remain in power;<sup>70</sup> and/or (3) PSAs could strengthen traditional marriage by creating incentives for spouses to embrace traditional gender roles and tying a homemaker's economic situation to that of her husband.<sup>71</sup> These considerations suggest PSAs could have a more

68. See Nancy Chodorow, *Family Structure and Feminine Personality*, in WOMAN, CULTURE, AND SOCIETY 43, 66 (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974).

69. See, e.g., Rich, *Compulsory Heterosexuality*, *supra* note 13, at 227.

70. *Id.* at 232.

71. A fourth consideration suggests that the current alimony doctrine is not always a tool of compulsory heterosexuality in that it provides that alimony be terminated or decreased if the recipient remarries or cohabits with a romantic partner. UNIF. MARRIAGE & DIVORCE ACT § 316(b), 9A(II) U.L.A. 102 (1998) ("Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the . . . remarriage of the party receiving maintenance."). Sections 5.08 and 5.10 of the Proposed Final Draft of the ALI DRAFT PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (1997) provide that post-divorce income sharing terminates when the recipient remarries or cohabits (whether the cohabitation is opposite-sex or same-sex). As discussed above, the general rule disfavoring alimony supports compulsory heterosexuality by penalizing primary homemakers for leaving the marriage. But the U.M.D.A. provision cutting off alimony upon remarriage discourages some heterosexual coupling. PSAs could similarly have complex interactions with compulsory heterosexuality. On one hand, the stream of payments under PSAs would continue even after the primary homemaker remarried, so that PSAs arguably might discourage less heterosexual coupling than the current regime. On the other hand, a divorcee could remarry without affecting her entitlement to a share of her former husband's income, making remarriage more a matter of choice (and thus less compulsory). Moreover, because PSAs increase homemakers' exit options in marriage, and few

complex interaction with compulsory heterosexuality than suggested above.

The first reason that queer theorists might see PSAs as supporting compulsory heterosexuality is their complicit erasure of same-sex possibilities. This criticism recognizes the problems of attempting to alleviate the effects of compulsory heterosexuality by reforming marriage, an institution both closed to gay men and lesbians and historically a cornerstone of female and racial subordination.<sup>72</sup> But perhaps queer theorists have been overly shy about addressing heterosexual marriage reform. Given the commonly accepted construction of heterosexuality as natural, queer theorists should deconstruct heterosexuality first, or at least concurrently with marginalized sexual orientations.<sup>73</sup> By deconstructing and reconstructing heterosexuality, PSAs have the potential to highlight economic aspects of marriage, and thus alter the legal understanding of marriage to center more on financial aspects of the relationship than on the gender or sexual identity of the spouses. Once legal regulation of marriage is less sexed and gendered, the notion of lesbian and gay marriage becomes socially comprehensible. While same-sex marriage is not capable of making all gay people full legal subjects,<sup>74</sup> it would increase the cultural visibility of gay men and lesbians generally. Some feminists even argue that remunerating homemaking labor facilitates lesbian existence in that it enables women to come out as lesbians by giving them the economic opportunity to do so.<sup>75</sup>

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women are awarded or collect alimony under the current regime, the net effect of PSAs could be a decrease in the compulsory nature of heterosexuality.

72. See, e.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 53–69 (2d ed. 1980) (describing the rise and fall of miscegenation doctrine); Koppelman, *supra* note 67; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111 (1997) (describing nineteenth-century doctrinal developments which preserved gender hierarchies in marriage by eliminating overt hierarchical arrangements but retaining gendered rules governing domestic labor and domestic violence); see also Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 *YALE L.J.* 1033 (1997) (analyzing how the *Dred Scott* case might have come out differently had Harriet Robinson Scott been the focus of the case rather than her husband, and in doing so revealing profound racial and gender implications of nineteenth century marriage doctrine).

73. See Duggan, *supra* note 2, at 182 (noting the danger of deconstructing homosexuality without similarly deconstructing heterosexuality).

74. Hutchinson, *supra* note 59, at 589–90 (noting that social and economic forces would still function to oppress many gay people even if same-sex marriage were legalized). In a similar vein, I have argued that the process of gay people attaining full legal personhood may be gradual, stopping in contract along the way from public condemnation to full legal protections under doctrines such as marriage. See Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 *DENV. U. L. REV.* 1107, 1110 (1996) [hereinafter Ertman, *Contractual Purgatory*].

75. See Lesbian Women, Power of Women Collective, *Lesbian Women: Love and Power*, in *ALL WORK AND NO PAY: WOMEN, HOUSEWORK, AND THE WAGES DUE* 46, 48 (Wendy Edmond & Suzie Fleming eds., 1975). As one commentator noted in *Lesbian Women: Love and Power*:

The second reason queer theorists might question PSAs' ability to undermine compulsory heterosexuality focuses on whether PSAs have sufficient power to change gender and sexual dominance, even if they have the power to create incentives for men to be more gendered female and redefine the role of homemaker to make it more gendered male by associating it with market power. Men could retain their superordinate social and economic position even if they were primary caretakers,<sup>76</sup> leaving women subordinate in their new, market role as primary wage-earners.<sup>77</sup> Gendered hierarchies may be so entrenched that one gender will always be on the bottom. But this possibility should not discourage all efforts to realign gendered power differentials. The gender status quo hurts women (as well as gay people), so there is reason to chance a reform even if doing so carries the risk of unintended consequences. Perhaps PSAs would lead some men to become increasingly gendered female, and others to remain primarily gendered male. Such a mixture of responses would preclude a monolithic redistribution of male power to homemaking from the market. Indeed, PSAs could have a range of different consequences and therefore appeal to a broad ideological spectrum of people.<sup>78</sup> If PSAs affect different people in different ways, then they are not a monolithic solution, but rather one way to destabilize traditional constructions of sex, gender, and sexual orientation and to create a more eclectic set of domestic arrangements and social views thereof.

The third and most serious reason that queer legal theorists might object to PSAs stems from PSAs' potential to encourage both men and women to play traditional gender roles. By compensating women who play traditional gender roles in marriage, PSAs arguably buttress compulsory heterosexuality. As I have argued elsewhere, some traditionalist legal economists might appreciate the way that PSAs cohere with what they see as biologically determined traditional gender roles by providing disincentives for wage-earning husbands to opportunistically abandon

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We are fighting for Wages for Housework because this struggle will enable millions of other women to join us—to identify our struggles and our lives with their own, and, in many cases, to become lesbian. Thousands of lesbian women are shut behind doors with their children, only waiting for a bit of power to be able to come out.

*Id.*

76. See Rich, *Compulsory Heterosexuality*, *supra* note 13, at 232.

77. For a version of this scenario, see *If Men Could Menstruate*, in GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 366 (2d ed. 1995). Steinem suggests that power differentials might remain even if male and female biological traits were reversed, satirically predicting that if, for example, men could menstruate,

[g]enerals, right-wing politicians, and religious fundamentalists would cite menstruation (“*men*-struation”) as proof that only men could serve God and country in combat (“You have to give blood to take blood”), occupy high political office (“Can women be properly fierce without a monthly cycle governed by the planet Mars?”), be priests, ministers, God Himself (“He gave this blood for our sins”), or rabbis (“Without a monthly purge of impurities, women are unclean”).

*Id.* at 367.

78. See Ertman, *Commercializing Marriage*, *supra* note 4, at 96.

their homemaking wives.<sup>79</sup> If PSAs keep women and men in marriage (in traditional marriages, no less), then PSAs arguably strengthen rather than undermine compulsory heterosexuality. As Jane Schacter points out, this may well be the case.<sup>80</sup> But there are good reasons to suspect that PSAs are at least as likely to redefine traditional marriage as they are to reinforce it.<sup>81</sup> Given that the status quo of legal doctrine governing marriage is already hostile to gay people (through, for example, the ban on same-sex marriage) and women generally, it seems worth the risk to tinker with it. If nothing else, even a change that turns out to operate to the disadvantage of women and gay people creates a precedent for further changes, some of which might be more successful.<sup>82</sup>

In sum, queer theorists may justifiably suspect that PSAs could unintentionally strengthen compulsory heterosexuality by furthering gay people's invisibility and supporting traditional heterosexual marriage. Because of this dual possibility that PSAs could strengthen or undermine compulsory heterosexuality (or do both), further exploration is necessary to evaluate whether PSAs are appropriate tools to further the goals of queer legal theory.

#### B. *Premarital Security Agreements As Instruments of Gender Performativity and Strategic Provisionality*

Judith Butler's revolutionary theory of gender performativity (and her related proposal that radical reforms be strategically provisional) informs nearly every queer theory discussion. PSAs further the goals of queer legal theory by accounting for gender performativity and being strategically provisional.

##### 1. Gender Performativity

In *Gender Trouble*, Butler suggests that gender is performative, and that drag has the subversive potential to reveal this performativity.<sup>83</sup> Drag reveals that there is no such thing as a prepolitical, essential, or natural gender, but rather that representations of gender are an attempt to enact a

79. *Id.* at 72–73.

80. See Jane S. Schacter, *Taking the Intersexual Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255, 1257–58 (1998).

81. See Ertman, *Commercializing Marriage*, *supra* note 4, at 75–76, 92–97.

82. While I am sympathetic to Schacter's insight that "[r]etrenchment can be pretty bleak," Schacter, *supra* note 80, at 1258, this risk might be balanced by the tremendous promise in altering naturalized constructions of marriage. The no-fault revolution in divorce might not have uniformly helped women, but it did go a long way toward desanctifying the legal regulation of marriage, thus contributing to a climate in which PSAs are conceivable.

83. BUTLER, *GENDER TROUBLE*, *supra* note 14, at 136–39.

mythical ideal.<sup>84</sup> PSAs could implement Butler's theory of gender performativity by intervening in the constructed female gender role of wife, adding economic and social power to the wifely accoutrements of dependence and powerlessness, thus simultaneously undermining the naturalized hierarchies of market/family and male/female that currently construct heterosexuality as biological, imperative, and necessarily hierarchical.

Repetition is key to Butler's theory of gender performativity. Butler identifies the "critical task for feminism" as "locat[ing] strategies of subversive repetition enabled by those [constructed identities], to affirm local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and, therefore, present the immanent possibility of contesting them."<sup>85</sup> In other words, Butler suggests that feminists identify opportunities for subversive repetition of identity constructions, repeat those identity constructions, and in doing so reveal identity to be socially constructed rather than natural.<sup>86</sup>

In this same vein, Butler points out that "heterosexualized genders" are "*a kind of imitation for which there is no original*; in fact, [they are] a kind of imitation that produces the very notion of the original as an *effect* and consequence of the imitation itself."<sup>87</sup> Within Butler's analysis "heterosexuality is always in the process of imitating and approximating its own phantasmatic idealization of itself—and *failing*."<sup>88</sup> Legal rules which expose heterosexuality's perpetual, always unsuccessful, attempt to enact a mythical ideal demonstrate the performative nature of both gender and heterosexuality. Since heterosexuality is constructed as the original sexuality (rendering alternatives such as homosexuality poor copies thereof), queer theorists should welcome any legal interventions that undermine the naturalized status of heterosexuality.

By inserting an economic creditor/debtor model into heterosexual marriage, PSAs do just this. Redefining primary homemakers as secured creditors and primary wage-earners as debtors reveals the economic na-

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84. *Id.* at 137–38. Butler has clarified that she does not see gender as a free choice, akin to the way one chooses to wear a dress or trousers each morning. To the contrary, gender norms are part of what determine the subject, and thus constrain the range of choice one can exercise in performing a gender. JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* at x–xi (1993).

85. BUTLER, *GENDER TROUBLE*, *supra* note 14, at 147.

86. The repetition is endless, since [g]ender is a complexity whose totality is permanently deferred, never fully what it is at any given juncture in time. An open coalition, then, will affirm identities that are alternately instituted and relinquished according to the purposes at hand; it will be an open assemblage that permits of multiple convergences and divergences without obedience to a normative telos of definitional closure.

*Id.* at 16.

87. Butler, *Imitation*, *supra* note 14, at 21.

88. *Id.*

ture of the transaction between these two players and inverts existing power dynamics. It moreover subverts the dichotomous hierarchy of market over family by importing market roles to the family relationship. Investing politically and economically weak players (here, homemakers) with the powerful attributes of a market player also erodes the hierarchy of male power over women (sometimes masked as protectiveness) by blurring the very boundaries between public and private, male and female, and market and family, that legitimate the hierarchy. By injecting this economic model (and giving the homemaker the more powerful role), PSAs also demonstrate that the complementary roles of gendered domestic life are neither natural, essential, nor inevitable. Instead, they are economic, and subject to regulation and change just as any other economic institution.

PSAs further undermine the naturalized status of marriage by revealing the performative nature of both gender and of heterosexuality. Traditionally *homemaker* is constructed as married, female, and working for love rather than remuneration. PSAs intervene in the perpetual repetition of this homemaker role, adding the twists that the homemaker's domestic labors are commodified and that she is a secured creditor. Combining the (feminine) domestic role with the (masculine) market accoutrements of a secured creditor, the creditor/homemaker role reveals the constructed nature of domestic roles. Like a drag queen, the creditor/homemaker "juxtapos[es] gender norms and gender deviance to destabilize the whole structure."<sup>89</sup> The homemaker thus destabilizes the symbiotic hierarchies of male/female and market/family. This new creditor/homemaker identity contributes to a radical redefinition of both male and female gender, and also demonstrates that there is nothing natural, biological, or essential about either gender or heterosexuality.

PSAs also could reflect the performativity of masculine gender roles and have the practical impact of creating incentives for heterosexual men (perhaps unwittingly) to further some objectives of queer theory. If homemaking labor came with the security and status of a premarital security interest, perhaps more men would be interested in the job. PSAs thus might contribute to the erosion of gender hierarchy by undermining gendered specialization of labor in marriage. Once marriage strays from gendered specialization, marriage is less gendered, and thus can more easily accommodate same-sex couples. Feminists and queer theorists have long recognized marriage's deeply patriarchal characteristics.<sup>90</sup> If

89. *Patriarchy Is Such a Drag*, *supra* note 52, at 2004.

90. These inequalities in marriage are deeply rooted. Claude Levi-Strauss described marriage as the exchange of women, a process in which women are gifts men give to one another to solidify male-male alliances. See Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157, 173 (Rayna R. Reiter ed., 1975) ("[M]arriages are a most basic form of gift exchange, in which it is women who are the most precious of gifts." (articulating Levi-

PSAs made men more likely to participate in homemaking (either primarily or equally with their wives), then PSAs could further the queer theoretical goal of undermining the cultural meaning of marriage (and heterosexuality generally) as the only natural sexuality, grounded in biologically based complementarity of sexual and gender roles.

In sum, PSAs account for gender performativity by adding market accoutrements to the domestic roles of primary homemaker and primary wage-earner, and in doing so reveal that constructions of gendered labor specialization (and attendant power differentials) in marriage are malleable rather than natural or essential. PSAs thus deconstruct and reconstruct marriage by undermining doctrines which allocate family wealth at divorce in a way that values only market labor and thus perpetuates both homemaker dependency on primary wage-earners and the general devaluation of work deemed feminine. Remunerating “women’s work” would go a long way toward queering legal doctrine that currently reflects and constitutes hierarchies in which masculinity and heterosexuality subordinate femininity and gay/lesbian existence.

## 2. Strategic Provisionality

In addition to incorporating gender performativity, PSAs are strategically provisional. The fundamental instability of identity is central to Butler’s theory of gender performativity (and other poststructural approaches), and also central to queer theory. Yet legal theory relies heavily on notions of identity, posing serious impediments to importing queer theory into legal doctrine. A corporate officer’s rights and duties, for example, are dictated by her officer status. Other legal rights and obligations often turn on sexual orientation status: Marriage, for example, has wide-ranging legal ramifications.<sup>91</sup> Queer theorists have criticized legal distinctions based on sexual orientation status as incoherent and illegitimate.<sup>92</sup> But it remains difficult to see how the law might recognize the

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Strauss’s theory of marriage as a form of gift exchange)). Under this analysis of marriage rituals, women are conduits to relationships between men rather than participants in the transaction, objects rather than subjects. *Id.* at 174 (“If it is women who are being transacted, then it is the men who give and take them who are linked, the woman being a conduit of a relationship rather than a partner to it.”) While Levi-Strauss builds his argument that all kinship is based on men exchanging women from data gathered on non-industrial societies, remnants of the exchange model persist in contemporary America. Many married women do not participate in the wage labor force, marriage enhances men’s market potential, and women do the lion’s share of housework even when they do work outside the home. FUCHS, *supra* note 5, at 60, 83; HOCHSCHILD, *supra* note 5, at 8. The view of marriage as an exchange between men is further supported by elements of contemporary marriage such as the bride exchanging her father’s last name for her husband’s, and the father giving the bride to the husband during the wedding ceremony.

91. For a list of marital rights, duties, and entitlements, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 66–70 (1996).

92. See, e.g., Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1747–48 (1993).

personhood of gay people without invoking the very identity categories that queer theorists contend are instrumental to sexual orientation subordination. If, for example, Congress passed the Employment Non-Discrimination Act to amend Title VII of the Civil Rights Act of 1964 to include sexual orientation as a prohibited basis for employment decisions, this doctrinal change would simply add sexual orientation identity to the list of other identities that are protected against employment discrimination. PSAs might similarly graft creditor status onto the legal construction of homemaker and reify gendered specialization of labor in marriage.<sup>93</sup>

Some theorists suggest that selective use of identity categories, referred to as strategic essentialism, accommodates pragmatic political constraints while recognizing the power of queer theoretical deconstruction of identity categories.<sup>94</sup> But most queer theorists warn that strategic essentialism plays into power dynamics that disserve gay liberation.<sup>95</sup> Butler suggests that strategic essentialism risks its own violence, because in defining the members of any class who deserve protection against discrimination, inevitably someone will be left out.<sup>96</sup> As an alternative to strategic essentialism, Butler proposes strategic provisionality.<sup>97</sup>

93. Kwan, *supra* note 11, at 1276–77 (warning against the dangers of reifying marginalized identities through intersectional theory).

94. Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in *SELECTED SUBALTERN STUDIES* 3, 13–15 (Ranjit Guha & Gayatri Spivak eds., 1988). Judith Butler anticipates a more hostile response to identity deconstruction in a series of questions:

But *politically*, we might argue, isn't it quite crucial to insist on lesbian and gay identities precisely because they are being threatened with erasure and obliteration from homophobic quarters? Isn't the above theory *complicitous* with those political forces that would obliterate the possibility of gay and lesbian identity? Isn't it "no accident" that such theoretical contestations of identity emerge within a political climate that is performing a set of similar obliterations of homosexual identities through legal and political means?

Butler, *Imitation*, *supra* note 14, at 19 (emphasis in original).

95. Richard Delgado offers an example of such a warning:

The price of strategic essentialism is not only that you get away from your agenda and your heart-of-hearts goals. You'll develop what Antonio Gramsci calls false consciousness. You'll forget who you are and what your original goals and commitments were. . . . Spending time with Republicans means you will inevitably take on the mindset of a Republican. A Black man active in a white-dominated civil rights organization will eventually take on the traits and concerns he finds there. A Black woman working in a male-dominated group will risk losing her identity as a Black feminist. Some social scientists call this "alienation."

Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 653 (1993) (footnotes omitted).

96. Butler, *Imitation*, *supra* note 14, at 19 ("[A]ny consolidation of identity requires some set of differentiations and exclusions.").

97. *Id.* ("In avowing the sign's strategic provisionality (rather than its strategic essentialism), that identity can become a site of contest and revision, indeed, take on a future set of significations that those of us who use it now may not be able to foresee.").



Strategic provisionality involves using a sign in a way that does not foreclose future uses of the sign.<sup>98</sup> In other words, it recognizes the political necessity of using particular terms to describe identity, but anticipates that the identity's construction will change. In this way strategic provisionality counteracts the set of exclusions inherent in any identity-based classification by creating a status which is perpetually in flux. The question is whether the deep-seated essentialism in legal theory and doctrine can accommodate a changeable identity, one that is strategically provisional.

Janet Halley persuasively contends that legal theorists must transcend the impasse between essentialism and constructivism, and suggests focusing instead on the common ground between the essentialist and constructivist positions.<sup>99</sup> In pointing out that both essentialist and constructivist positions can be used to argue for either pro-gay or anti-gay policies,<sup>100</sup> Halley urges that pro-gay legal advocates abandon biological determinism and focus instead on "legal strategies that emphasize the political dynamics that inevitably attend sexual orientation identity—no matter how it is caused."<sup>101</sup>

In simultaneously entertaining identity and mutability, Halley's argument employs strategic provisionality. She proposes a "weak behavioral constructivism" which accommodates both essentialist and constructivist approaches:

Those pre-committed to same-sex contacts might be pederasts, sodomites, mollies, berdache, invertes, homosexuals, gay men, lesbians, queers and so on. People's subjective experience of sexuality, and the behavior they undertake to support it, would be radically contingent on the identity offered by their culture for persons of their object choice and on their own opportunities for altering or shaping the options on offer.<sup>102</sup>

In other words, Halley's behavioral constructivism and Butler's strategic provisionality both seek to focus on political implications of culture rather than an essential, fixed identity to counteract gendered and heterosexualized power dynamics.

PSAs recognize some of these insights. They are deliberately agnostic about gender and seek to alter the construction of heterosexuality. In Butler's terms, PSAs do not foreclose "the future uses of the sign"<sup>103</sup>

98. *Id.*

99. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

100. *Id.* at 517 (pointing out that "[n]either essentialism nor constructivism is necessarily gay-affirmative") (emphasis added)).

101. *Id.* at 506.

102. *Id.* at 561.

103. Butler, *Imitation*, *supra* note 14, at 19 (emphasis omitted).

*homemaker*. Instead, they intervene in the current construction of gendered labor specialization in marriage as natural, transforming *homemaker* into a hybrid of domestic and market elements. Because PSAs anticipate that the reallocation of power and wealth in heterosexual families might change the allocation of domestic and market labor in marriage, they deliberately anticipate a fluctuating construction of *homemaker*.

In Halley's terms, PSAs make "[p]eople's subjective experience of sexuality, and the behavior they undertake to support it . . . [here, gendered specialization of labor in marriage] radically contingent on the identity offered by their culture for persons of their object choice."<sup>104</sup> Here, PSAs offer the cultural debtor/creditor roles to supplement the traditional wage-earner/homemaker roles. If *homemaker* has the cultural meanings associated with domesticity in which one labors for love rather than remuneration, then the subjective experience of heterosexual marriage is one of complementary roles in which market and home are both necessary, but market is culturally superior because labor there is rewarded with pay. If, however, *homemaker* is supplemented with some market characteristics by making the primary homemaker a secured creditor in relation to her primary wage-earning spouse, then the meaning of *homemaker* changes dramatically. This switch demonstrates that there is nothing natural, essential, prepolitical or inevitable about home-making being unremunerated and less powerful. As such, PSAs treat gender and (heterosexual) sexual orientation as radically contingent on cultural forces.<sup>105</sup>

In sum, PSAs have the potential to queer marriage doctrine by both reflecting the insights of gender performativity and by being strategically provisional. By dressing homemakers as secured creditors and primary wage-earners as debtors, PSAs reveal the constructed nature of both gen-

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104. Halley, *supra* note 99, at 561.

105. Another level of strategic provisionality turns on PSAs' deliberate agnosticism about essentialist or constructivist understandings of sex and gender. As I describe at length in *Commercializing Marriage*, *supra* note 4, PSAs have the potential to either encourage or discourage traditional gender roles in marriage. Part of the reason that PSAs enjoy this flexibility (or, to put it negatively, indeterminacy) is that their predicted effects are determined by assumptions about sex and gender. If, for example, traditional gender roles are biologically determined (perhaps as a matter of sociobiological determination to maximize the chances that one's genes will be replicated in future gene pools), then women should play traditional roles regardless of legal incentives to do otherwise. Traditionalist legal economists take this position. If, on the other hand, gender is socially constructed and thus can be restructured based on legal incentives (as most feminists contend), then, given the right incentives, women might venture out into the wage labor force in a more focused way than many currently do. PSAs are malleable enough to accommodate both of these positions. Gender may be determined or not, and PSAs will protect the people (male or female) who play caretaking roles in marriage and family life. Thus, although Butler might object to PSAs' ability to accommodate essentialist notions of gender, she might appreciate their ability to serve both essentialist and constructionist notions of gender, thereby destabilizing either side's claim to truth.

der roles and of traditional heterosexual marriage itself. They thus intervene in the current constructions of both gender and heterosexuality to undermine naturalized constructions. PSAs moreover implement Butler's strategic provisionality and Halley's behavioral constructivism in their simultaneous use of the categories homemaker and creditor in relation to the same subject and their refusal to essentialize any particular understanding of sex, gender, or sexual orientation (or, for that matter, debtor or creditor).

### C. *Premarital Security Agreements Might Queer the State*

Lisa Duggan's influential essay *Queering the State* urges queer theorists to engage on both theoretical and practical levels by importing the insights of queer theory into mainstream debate, emphasizing that "we need . . . to be both transformative *and* effective."<sup>106</sup> As Duggan acknowledges, though, there are significant barriers to direct importation. She illustrates this point by imagining a *Nightline* panel with prominent queer theorists discussing the military's ban on gay service members:

It is not that these figures would have nothing interesting or useful to say. They would simply have a great deal of trouble making themselves understood (as many of us in the field of queer studies would). The problems are on the levels both of cultural legibility and political palatability. Imagine Bersani: "As I argue, Ted, in my article 'Is the Rectum A Grave?' . . . The ensuing discussion of heteromascularity's terror of penetration might put Ted in *his* grave."<sup>107</sup>

Because, as discussed above, PSAs import the insights of queer theory and also are mainstream in their focus on the value of homemaking, PSAs bridge this gap between theory and practice. PSAs might turn out to be both transformative and effective: transformative in the way they cohere with queer theory insights about gender performativity and strategic provisionality, and effective in their practical redistributive effects. PSAs, in short, appropriate liberal discourses toward radical ends.

As an example of appropriating liberal discourse to serve radical ends, Duggan suggests that queer activists borrow the liberal discourse of disestablishmentarianism in order to divert homophobic assaults on gay men and lesbians. Specifically, she suggests queer theorists and activists appropriate liberal arguments against a state-established religion to suggest that the state similarly separate itself from "the religion of heteronormativity."<sup>108</sup> Duggan explains that this strategy (which she dubs "No

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106. Duggan, *supra* note 2, at 193.

107. *Id.* at 183.

108. *Id.* at 189.

Promo Hetero”<sup>109</sup>) is “not a broad solution, but only a local tactic embedded in a larger strategy of destabilizing heteronormativity. It is one among many conceivable tactics.”<sup>110</sup> Like Duggan’s No Promo Hetero proposal, PSAs focus on heterosexuality, and apply queer theory to legal doctrine regulating heterosexuality. As such, they deconstruct heterosexuality first, attacking its naturalized position directly rather than by deconstructing gay and lesbian identities that are already marked as marginal.<sup>111</sup>

Duggan suggests that appropriating liberal discourse with a queer theory twist answers the need for “a less defensive, more politically self-assertive set of linguistic and conceptual tools to talk about sexual difference.”<sup>112</sup> PSAs respond to the need for offensive rather than defensive approaches. Duggan urges queer theorists to apply high theory strategically, and activists to think beyond formal equality, in both cases borrowing from liberal discourses to redirect the debate about queer humanity’s subject status.<sup>113</sup> Duggan is not suggesting that liberal discourse is the key to replacing heteronormativity with queer sensibilities, but rather that it is one way to translate the often arcane language of queer theory into mainstream discourse:

The question is: At this historical moment, can we transform *any* liberal rhetoric in the interests ultimately of going beyond liberal categories and solutions? Or, given the difficulty of translating our most radical insights and arguments into effective discourse, can we afford not to try?<sup>114</sup>

PSAs similarly are not everything to everyone, but they have the potential to radically restructure the way we think about marriage and gender roles, and thus make some headway toward queer theory’s goal of deconstructing “the natural and preferred status of heterosexuality.”<sup>115</sup>

#### D. *Premarital Security Agreements Are Doctrinal Interventions in Con- fusions of Sex, Gender, and Sexual Orientation*

A trilogy of recent articles similarly strives for an understanding of legal theory and doctrine that is both effective and transformative. In

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109. *Id.* at 188. Nan Hunter coined the phrase “No Promo Homo” to describe and critique “state-imposed penalties on identity speech—or speech that promotes or professes homosexuality.” Nan D. Hunter, *Identity, Speech and Equality*, in *SEX WARS*, *supra* note 2, at 140. Duggan takes Hunter’s insights a step further, suggesting that the state should adopt a policy of No Promo Hetero instead of merely refraining from suppressing the promotion of homosexuality.

110. Duggan, *supra* note 2, at 191–92.

111. *See id.* at 185.

112. *Id.* at 192. However, while Duggan focuses on the differences between heterosexuals and gay people, PSAs focus on the different situations of men and women in marriage.

113. Duggan, *supra* note 2, at 181–86.

114. *Id.* at 193.

115. *Id.* at 190.

these articles Mary Anne Case,<sup>116</sup> Katherine Franke,<sup>117</sup> and Frank Valdes<sup>118</sup> have made important contributions to legal theoretical understanding of the intersections (or inter-connections) between sex, gender and sexual orientation.<sup>119</sup> Given that PSAs, too, strive to transform legal theory and doctrine as well as to achieve practical change benefiting marginalized people, the approaches of Case, Franke, and Valdes offer a yardstick for evaluating PSAs' relevance for queer legal theory. The depth and complexity of each scholar's approach justify a full article exploring the relationship among them, but such detail is beyond the scope of this essay. The purpose of this essay is instead to engage in a brief, inevitably reductionist, examination of how PSAs might cohere (or conflict) with Case's, Franke's, and Valdes's approaches to intersectionality.

One can read the Case, Franke, and Valdes trio of articles as advocating for an expanded understanding of sex discrimination law to include gender and/or sexual orientation discrimination. At this level, there is reason to believe that all three approaches may resonate with PSAs.

While Case, Franke, and Valdes all promote an expansive understanding of sex discrimination law that protects people from gender and sexual orientation as well as sex discrimination, each scholar takes a unique approach. The crux of Case's argument is that femininity (expressed by men or by women) should be protected.<sup>120</sup> Franke argues for an expanded understanding of sexual identity that goes beyond biology to include "a more behavioral or performative conception of sex."<sup>121</sup> Valdes contends that the law tolerates a great deal of sex and gender discrimination by labeling it sexual orientation discrimination.<sup>122</sup> A synthesis of Case's, Franke's and Valdes's approaches suggests that anti-discrimination law inaccurately perceives overlap and separation among sex, gender, and sexual orientation, and that it should instead understand sex discrimination to include protection for effeminate men, people whose gender does not match their sex, and gay people. PSAs share some commonality with all three approaches.

Case favors protecting those who exhibit feminine behavior from discrimination, reasoning that the world will be safe for women in "frilly

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116. Case, *supra* note 16.

117. Franke, *supra* note 16.

118. Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16.

119. While there is substantial overlap between their approaches, each can be said to focus on a different point in the triangle of sex, gender, and sexual orientation: Case on gender, Franke on sex, and Valdes on orientation. Case, *supra* note 16, at 105 n.39.

120. Case contends that Title VII "correctly applied, already provide[s] the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts." Case, *supra* note 16, at 4.

121. Franke, *supra* note 16, at 8.

122. Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16, at 17.

pink dresses” when it is safe for men in dresses.<sup>123</sup> PSAs protect men as well as women who engage in homemaking, an activity which is arguably as feminine as wearing a dress.<sup>124</sup> PSAs moreover add a masculine (market) element to feminine homemaking conduct to remedy the financial straits of displaced homemakers and to increase the social value of women’s work generally. Not unlike Case’s proposal for protecting effeminate men in order to increase the social value ascribed to femininity,<sup>125</sup> PSAs alter the social meaning of homemaking by quantifying its contribution to family wealth and protecting the primary homemaker’s interest in that investment with a security interest. If the increased economic and social valuation of homemaking induces some men to increase the time they devote to caring for their families, then PSAs could further contribute to the valuation of so-called women’s work because more men would be doing it.<sup>126</sup> Thus, reforms which make the world safe for people (men or women) in aprons share the spirit of reforms that make it safe for anyone who wants to wear a frilly dress. In both cases, social roles that are stigmatized as feminine are redefined as at least partly masculine, and thus more valuable both socially and economically.

While Case seeks to value femininity by protecting men who exhibit it, Franke seeks to expand (and perhaps replace) the understanding of sex to include what we commonly think of as gender.<sup>127</sup> She contends that

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123. Case, *supra* note 16, at 7 (“It is my contention that, unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.”).

124. One could argue that dresses are unambiguous markers of femininity, while homemaking is behavior that both women and men engage in, albeit in varying degrees. In other words, a married father could leave the practice of law to teach secondary school in order to have more time with his children, and retain social ascriptions of masculinity. If, however, this same man substituted a golf skirt for khakis, or started sporting pearls, he would be subject to social penalties for transgressing sex/gender norms. This comparison may illustrate the differential penalties for various types of demasculinization. The former lawyer may suffer economically for his family-driven career change, but also benefit socially both from the deeper relationship with his family and from social value ascribed to those men who demonstrate dedication to their families. The cross-dressing man, however, suffers both socially and economically, indicating that the sartorial elements of gender normativity may be stronger than those associated with participation in homemaking and wage-labor. See MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 52–66 (1992) (analyzing historical examples of cross-dressing).

125. See Case, *supra* note 16, at 4.

126. While it is not clear whether “the feminine tend[s] to be devalued because it is associated with women, or . . . women [are] devalued because they manifest feminine characteristics,” Case mines cross-cultural evidence to suggest that the “the stronger line of causation runs from a disfavoring of women.” Case, *supra* note 16, at 33. Thus “feminine characteristics are devalued relative to masculine ones, to the detriment not only of men displaying those feminine characteristics but of women generally.” *Id.* at 28.

127. Franke, *supra* note 16, at 3 (“[S]exual identity—that is, what it means to be a woman and what it means to be a man—must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms.”).

biological notions of sex allow considerable gender discrimination to go unchecked because “most, if not all, differences between men and women are grounded not in biology, but in gender normativity.”<sup>128</sup> Franke prefers an understanding of sex discrimination that protects, in addition to transgendered people, “the male senior associate in a law firm who wants neither to be ridiculed by his male colleagues nor penalized when he comes up for partner because he requests time off from work to care for his newborn child.”<sup>129</sup> Thus, Franke wants the law to account for gender performativity by protecting against discrimination based on gender normativity.<sup>130</sup>

Just as PSAs cohere with Case’s argument that sex discrimination law should protect effeminate men, PSAs are consistent with Franke’s suggestion that sex discrimination law should remedy injuries suffered as a result of hostility to gender non-conformity.<sup>131</sup> As discussed above, PSAs are consistent with Butler’s theory of gender performativity, a theory which also informs Franke’s approach.<sup>132</sup> PSAs account for the performativity of gender in the context of a traditional marriage. Under a PSA the primary homemaker’s contributions to family wealth are recognized and remunerated by making the homemaker a secured creditor and her primary wage-earning spouse a debtor. This change reveals that the homemaker/wage-earner dyad is not natural, but rather economic and changeable. When homemakers are also secured creditors, heterosexuality itself is reconstructed as an economic, rather than natural, relationship. By combining these market and domestic roles, PSAs offer a way of thinking about marriage that is gendered rather than sexed, and in doing so support sex and gender equality. PSAs thus cohere with Franke’s focus on a performative notion of sex and gender.

Just as PSAs are consistent with Case’s focus on femininity and Franke’s focus on gender performativity, PSAs also cohere with Valdes’s focus on sexual orientation discrimination. Valdes argues that gender and sex discrimination often go undetected and unpunished when they seem to take the form of sexual orientation discrimination.<sup>133</sup> He proposes a triangular model in which sex, gender, and sexual orientation interact, and suggests that the legs of this triangle reveal legal and social confla-

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128. *Id.* at 5.

129. *Id.* at 8–9.

130. Franke makes the important clarification that gender performativity does not mean that one dons a gender in the morning like an outfit; to the contrary, Butler’s theory of gender performativity “regards gender norms as part of what determines the subject. As such, construction is a constitutive constraint.” *Id.* at 50–51 n.211.

131. *Id.* at 1–3.

132. *Id.* at 51–58.

133. See Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16, at 17.

tions between the categories.<sup>134</sup> Valdes's point is that the law perpetuates compulsory heterosexuality through these conflation.<sup>135</sup>

Valdes's approach presupposes the desirability of legal doctrines which destabilize androsexism and heterosexism.<sup>136</sup> PSAs do just that. PSAs reconstruct the category *wife*, which currently is sexed woman, gendered female, and presupposes a heterosexual orientation. Under PSAs, *wife* becomes less gendered female when it is merged with the gendered male (market) category of secured creditor, because homemaking work is no longer done for only love but receives remuneration just as market labor does. Once *wife* becomes less gendered female, perhaps men will be less reluctant to engage in caretaking behavior, and *wife* may even come to represent the activities of caretaking rather than the sex of the person doing the homemaking. Finally, if *wife* ceases to be constructed as sexed and gendered female, then marriage itself undergoes a reconstruction. It would no longer be defined as requiring one gendered/sexed male and one gendered/sexed female, instead requiring two people engaged in wage labor and homemaking, perhaps equally and perhaps in a specialized way.

The reconstruction of marriage through PSAs could ultimately benefit many gay people. If PSAs replaced the current gendered focus of marriage with an economic one, then PSAs also could contribute to a social climate in which same-sex marriage is no longer oxymoronic. In other words, if marriage is an economic relationship in which two people align to pool their economic and emotional resources (rather than primarily to beget and raise children in traditionally gendered roles),<sup>137</sup> then

134. *Id.* at 13; Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 165.

135. Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16, at 42; Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 169 (“[T]he conflationary status quo represents a regime of compulsory hetero-patriarchy.”).

136. See Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16 at 162–63 (contending that the critique of the Euro-American sex/gender system as neither ahistorical nor universal allows “critical reconsideration of the legal value of human desire and intimacy,” and that such a critique could contribute to “chang[ing] law from an instrument of sex/gender oppression to an engine for sex/gender liberation”).

137. The legislative history of the Defense of Marriage Act (D.O.M.A.) illustrates this construction of traditional heterosexual marriage. The House Report in support of the D.O.M.A. included the following statement: “Marriage is the central cultural recourse for reconciling men and women’s separate natures and different reproductive strategies. Indeed, the most important purpose of marriage is to unite men and women in a formal partnership that will last through the prolonged period of dependency of a human child.” H.R. REP. NO. 104-664, at 14 n.50 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2918 n.50 (quoting Barbara Dafoe Whitehead, *The War Between the Sexes*, 7 AM. ENTERPRISE 26 (1996)). Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College similarly testified:

[S]exuality [is] imprinted on our very natures—in the obdurate fact that we are, as the saying goes, “engendered.” We are, each of us, born a man or a woman. . . . Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is to say the function and purpose of begetting.



the ban on same-sex marriage loses much of its purpose. Thus PSAs offer a legal doctrine that intervenes in the conflation of sex, gender, and sexual orientation that Valdes posits is key to the subordination of women and sexual minorities.<sup>138</sup>

In sum, PSAs may queer legal theory by intervening in law's current conflation of sex, gender, and sexual orientation. By treating primary homemakers as secured creditors, they alleviate the indigency of displaced homemakers and value women's work. Moreover, PSAs cohere with Case's, Franke's, and Valdes's theoretical and doctrinal approaches to sex discrimination by counteracting economic penalties currently exacted on those who perform the feminine labor of homemaking, understanding gender as performative, and intervening in the construction of *wife* as sexed and gendered female and heterosexual. These effects are largely gender-related, but PSAs also contribute to a social and legal construction of marriage that could include same-sex marriage.

E. *Premarital Security Agreements Could Contribute to the Push for Same-Sex Marriage*

William Eskridge has articulately made the case for same-sex marriage.<sup>139</sup> If PSAs focus on economic aspects of marriage (and downplay its gendered aspects), then they may contribute to creating a social climate capable of recognizing same-sex marriage. Mainstream opposition to same-sex marriage stems from a belief that it undermines the natural order of things, which is taken to be the state recognizing only those relationships between men and women entered into for the primary purpose of begetting and raising children.<sup>140</sup> As long as marriage is constructed in this highly sexed and gendered way, same-sex marriage will remain oxymoronic.<sup>141</sup> If PSAs contribute to a legal regulation of marriage that focuses on economics rather than traditional gender roles, however, same-sex marriage makes more sense. Thus PSAs, despite their

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*Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. of the House Comm. on the Judiciary*, 104th Cong. 99–100 (1996) (testimony of Hadley Arkes).

138. Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 163.

139. ESKRIDGE, *supra* note 91; Eskridge, *supra* note 17, at 1419.

140. *See supra* note 137 (describing the legislative history of the Defense of Marriage Act).

141. Same-sex marriage may make more sense in many people's minds as the baby boom in the gay and lesbian community (dubbed the "gayby boom") takes hold in primary schools, emergency rooms, family law courts, and other arenas around the country. The idea of gay couples having children has penetrated the popular imagination through celebrity couples such as Melissa Etheridge and Julie Cypher, who demonstrated generous openness when they had publicly discussed their decision to have a child together. *See* Mark Miller, *We're a Family and We Have Rights*, NEWSWEEK, Nov. 4, 1996, at 54 (interviewing Melissa Etheridge and Julie Cypher). Once a critical mass of run-of-the-mill gay and lesbian couples begin interacting with PTA boards, school teachers, hospitals, and other social actors, parenthood may cease to be understood as unique to opposite sex couples. For further discussion of the way that the gayby boom could influence PSAs' applicability to same-sex couples, see *infra* Part III.

potential to reward wives in traditionally gendered marriages,<sup>142</sup> could paradoxically have the effect of contributing to social conditions that would allow for social recognition of same-sex marriage. While gay marriage is one of the most prominent items on the national agenda for gay rights, given the possibility that some states might lift the ban on same-sex marriage,<sup>143</sup> numerous commentators have suggested that there are significant pitfalls with putting gay marriage at the top of a gay rights agenda.

#### F. *Queer Theory Qualms About Same-Sex Marriage*

Darren Hutchinson is one of many queer theorists to suggest that same-sex marriage may not be everything it is cracked up to be.<sup>144</sup> Hutchinson makes a powerful argument that focusing on marriage ignores the interests of many gays and lesbians of color and those who are poor. In other words, claims that gay people are “virtually normal,” needing only marriage to bring them into the mainstream, misapprehend and further marginalize the experiences of many gay people.<sup>145</sup> Hutchinson argues that upper middle class white men would benefit more from marriage than many gay people of color and gay poor people. Specifically, he notes that the paradigmatic model of family as two spouses and their biological children overlooks the fact that “Africans, American blacks, and other non-white cultures place tremendous impor-

142. See Ertman, *Commercializing Marriage*, *supra* note 4.

143. This possibility became remote when Hawaii voters amended their constitution to authorize the state legislature to ban same-sex marriage. Sam Howe Verhovek, *The 1998 Elections: The States—Initiatives*, N.Y. TIMES, Nov. 5, 1998, at B1. Alaska voters similarly intervened in marriage litigation by amending their constitution to define marriage as a union between a man and a woman. *Id.* However, same-sex marriage litigation continues in Vermont. See Gustav Niebuhr, *Laws Aside, Some in Clergy Quietly Bless Gay “Marriage,”* N.Y. TIMES, April 17, 1998, at A1.

144. See Hutchinson, *supra* note 59, at 586–602; see also Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321, 326 (1991) (“[W]e should work to change the definition of family and the exclusive class-based ways that our society provides privileges, rather than encourage more people—gay or straight—to enter the institution of marriage.”); Paula L. Ettelbrick, *Legal Marriage Is Not the Answer*, HARV. GAY & LESBIAN REV., Fall 1997, at 34 (arguing that “the battle for legal marriage is too narrow and too limited for our own community’s interests, and that in pursuing it as our primary political objective we will rob ourselves of an important opportunity to challenge heterocentric sexual and family hierarchies”); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1536 (1993) (“[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”); Charles R. P. Pouncey, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMPLE POL. & CIV. RTS. L. REV. 363, 370 (1998) (“The extension of same-sex marriage will cloak gay and lesbian couples in the traditions of patriarchy and heterosexism. Heterosexual norms will become the standards applied to lesbian and gay relationships, and the development of queer cultural constructions of intimate relationships will be stunted.”).

145. Hutchinson, *supra* note 59, at 597–98.

tance on 'extended families,' rather than rigid nuclear bodies."<sup>146</sup> Moreover, he points out that poor gay people would not be able to take advantage of many economic benefits of marriage.<sup>147</sup> Thus PSAs' focus on middle and upper middle class couples, coupled with some queer theorists' lack of enthusiasm about PSAs' potential to contribute to paving the path toward legal recognition of same-sex relationships, could prevent a number of queer theorists from embracing PSAs.

There is good reason to suspect that PSAs might exacerbate rather than alleviate the marginalization of poor people and many people of color. PSAs are based on a paradigmatic marriage comprised of a primary wage-earner and a primary homemaker where the wage-earner earns considerably higher wages than the homemaker. This model applies best in white middle and upper-middle class marriages, and has less applicability in communities of color where wage differences between men and women are less extreme than those between white men and women.<sup>148</sup> Moreover, women of color (both historically and currently) are more likely to participate in the wage labor force than white women, often doing domestic labor for wages.<sup>149</sup> Finally, poor women are more likely to marry poor men, making the redistribution of wage-earner income from men to women largely illusory for many women. For these reasons, there is reason to question whether PSAs can be said to be inter-SEXional given their modest interventions in (and possible support of) class and race hierarchies.

These concerns merit serious consideration. While PSAs may work best in white middle and upper-middle class marriages, they may also improve on current legal treatment of many people of color and poor people. First, the race and class critique applies to any post-divorce income sharing proposal, suggesting that if these considerations prevent PSAs from queering legal theory then they would also prevent much privatized divorce reform from reconstructing marriage. Such an approach might overlook substantial benefits of PSAs that could outweigh these problems.

First, marriage likely has beneficial as well as marginalizing implications for poor people and many people of color. It might, for example, benefit some poor people who currently do not avail themselves of it. Cynthia Bowman has argued, for example, that common law marriage should be revitalized to protect the interests of poor women and many women of color who would not otherwise be entitled to enjoy state bene-

146. *See id.* at 592 (footnote omitted).

147. *See id.* at 593.

148. Brown, *supra* note 24, at 795–96; Perry, *supra* note 24, at 2486; *see also* Ertman, *Commercializing Marriage*, *supra* note 4, at 104–05.

149. Perry, *supra* note 24, at 2487–98; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997).

fits such as Social Security and worker's compensation death benefits.<sup>150</sup> PSAs also could benefit middle, upper-middle, and working class women of color since women of color are much less likely to be awarded alimony than white women.<sup>151</sup> Moreover, PSAs could benefit many low-income women who would otherwise bear more than their share of marital debt upon divorce. If PSAs were treated as securing a debt of the primary wage-earner (or the non-homemaker if neither spouse is fully employed) to the primary homemaker, this marital debt could off-set the primary homemaker's liability for other marital debts.<sup>152</sup> Finally, on a macro level, PSAs could benefit the many poor women who perform domestic labor in other people's homes by increasing the social and economic value of that labor.<sup>153</sup> If PSAs increase the overall value of domestic labor, then they could result in an increase in the wages of domestic workers.

This survey of selected queer theoretical approaches suggests that PSAs have the potential to queer existing doctrine through an interSEX-ional approach. They have the potential to undermine compulsory heterosexuality, reflect a performative understanding of gender, queer the state, intervene in legal conflation of sex, gender, and sexual orientation, and contribute to the social and legal fight for same-sex marriage. While they may also inadvertently be manipulated to support compulsory heterosexuality by rewarding women in traditional gendered marriages and ratifying race and class hierarchies, these drawbacks should not prevent queer theorists from seriously considering PSAs as one doctrinal tool for queering legal theory by reconstructing marriage. Even if queer theorists reject PSAs, queer theorists should consider other proposals which aim to alter the unmarked, heterosexual categories prior to (or contemporaneously with) deconstructing gay/lesbian/bisexual, transgendered, and transsexual identity categories.

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150. See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 762 (1997). Bowman discusses the racialized history of the repeal of common law marriage, including Louisiana's treatment of common law marriage in order to discourage manumission of slaves through liaisons between white men and female slaves. See *id.* at 737.

151. Perry, *supra* note 24, at 2483 (describing 1987 Census Bureau statistics that 18 percent of white women were awarded alimony, compared to less than 8 percent of African American women).

152. Ertman, *Commercializing Marriage*, *supra* note 4, at 105. Nancy Staudt similarly proposes to tax housework and create a household income tax credit. Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1630-31 (1996).

153. Achieving this goal would require that PSAs also intervene in the dichotomy between spiritual and menial housework, so that all homemaking would be commodified and valued. See Roberts, *supra* note 149.

### III. PREMARITAL SECURITY AGREEMENTS IN SAME-SEX RELATIONSHIPS

Perhaps the most practical question for queer theorists who examine PSAs is whether PSAs would apply to same-sex relationships. While PSAs are modeled on heterosexual marriages (and traditionalist ones at that), they could be tailored to remunerate homemaking in gay and lesbian families. Differences between same-sex and heterosexual partnerships, however, suggest that PSAs might function better as the exception than as the rule in same-sex relationships.

One problem with directly importing PSAs to same-sex relationships is that PSAs are premised on a model of gendered specialization of labor in marriage. If lesbians and gay men are less specialized in their domestic roles, PSAs may have less applicability for gay and lesbian relationships than they do in heterosexual relationships. Empirical research suggests that same-sex relationships do tend to be less gendered than heterosexual ones,<sup>154</sup> so remunerating homemaking through PSAs simply might not reflect the typical same-sex relationship dynamic.

Research on how couples divide household chores indicates that lesbian and gay households tend to be less gendered in this way than heterosexual ones. This pattern is not surprising given the fact that, by definition, neither partner in a same-sex relationship is “the” man or “the” woman, so that tasks cannot be divided on those grounds. Perhaps because of this dynamic (coupled with many lesbians’ feminism), lesbian and gay couples tend to “strive for egalitarian relationships,” and are less marked by power imbalances than heterosexual relationships.<sup>155</sup> This

154. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 148–51 (1983) (suggesting that “same-sex couples cannot assign housework on the basis of who is male and who is female”); Lawrence A. Kurdek, *The Allocation of Household Labor in Gay, Lesbian, and Heterosexual Married Couples*, 49 J. SOC. ISSUES, Fall 1993, at 127, 138 (finding that gay and lesbian couples allocate household labor on bases other than gender); see also Janet Lever, *Lesbian Sex Survey*, *ADVOCATE*, Aug. 22, 1995, at 22. The *Advocate* survey indicates:

There is very little evidence that images of masculinity or femininity relate to who takes the role of sexual aggressor within relationships. Who does the cooking is also unrelated to relative butch-femme ratings, but there is a strong correspondence to who does more driving—even being just somewhat more masculine than a partner puts one behind the wheel far more often.

*Id.* at 28. This data from the *Advocate* survey should, however, be taken in the context of respondents’ demographics: The average age was 34; 86 percent of the respondents were white (compared to 8 percent Hispanic/Latina, 2 percent African American or black, 1 percent Native American, 1 percent Asian, and 2 percent “other”); nearly two-thirds had at least a college degree and more than 25 percent had a graduate degree (compared to 14 percent of American women holding a bachelor’s degree and 6 percent having an advanced degree); and the average personal income was \$32,000. *Id.* at 25.

155. See Michelle Huston & Pepper Schwartz, *The Relationships of Lesbians and Gay Men*, in *UNDER-STUDIED RELATIONSHIPS: OFF THE BEATEN TRACK* 89, 108–11 (Julia T. Wood & Steve Duck eds., 1995). *But see* Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 340 & nn.34, 36 (citing CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* (1992) in asserting

situation is further facilitated by the fact that same-sex partners tend to have similar options for wage labor, and thus are relative financial equals. As a result of these factors, housework is negotiated rather than sex-based, and same-sex partners tend to compensate one partner who expends more time on homemaking labor.<sup>156</sup>

A related difference between heterosexual and same-sex couples is that same-sex couples generally expect both partners to be self-supporting.<sup>157</sup> While gay men seem somewhat more tolerant of playing the provider role than lesbians are, same-sex couples generally are more stable when both partners contribute equally or proportionately to the household.<sup>158</sup> Although same-sex couples tend to share homemaking and wage-earning tasks more equally than heterosexual partners, in both kinds of relationships there is a direct relationship between hours worked in the wage labor market and the amount of homemaking a partner does. In other words, the partner who works more does less homemaking.<sup>159</sup> This common pattern suggests that PSAs might be most justified in the same-sex relationship context where one partner is less than fully employed for a significant period of time. Raising a child could be one of the circumstances in which this type of pattern might emerge in same-sex relationships.

However, having children seems to be more the exception than the rule in same-sex relationships.<sup>160</sup> As such, assuming that childcare (actual or anticipated) is a major reason that many married women devote primary attention to homemaking, perhaps it makes sense for PSAs to be the rule in heterosexual marriages and the exception in same-sex relationships. In either situation the spouses could contract around the rule

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that domestic violence in same-sex relationships occurs with the same frequency and in a similar manner as domestic violence occurring in opposite-sex relationships).

156. Huston & Schwartz, *supra* note 155, at 108–11.

157. In particular,

Both gay and lesbian partners will engage in the provider role, but they each prefer a co-provider situation. Gay men, like other men, do not expect that a provider will take care of them. When one gay partner is the provider, the partner who is being provided for tends to be more dissatisfied with the situation. In contrast, lesbians do not expect to support another person financially, except temporarily. Lesbians are not socialized, as many men are, to take pleasure in a paternalistic provider role. A lesbian who finds herself in the role of provider is likely to be the more dissatisfied partner with the situation.

Virginia Rutter & Pepper Schwartz, *Same-Sex Couples: Courtship, Commitment, Context*, in *THE DIVERSITY OF HUMAN RELATIONSHIPS* 197, 209 (Ann Elisabeth Auhagen & Maria von Salisch eds., 1996).

158. *Id.*

159. BLUMSTEIN & SCHWARTZ, *supra* note 154, at 148–49.

160. Given the legal and social hostility to gay people caring for children, it is difficult to calculate the number of gay and lesbian parents. Certainly the number of same-sex couples with children seems to be on the rise. *See supra* note 141. But even if gay parenting is becoming increasingly prevalent, it seems likely that a higher percentage of heterosexual couples (particularly those who are married) have children than same-sex couples.

(either by earning equivalent wages or through an express waiver of the PSA). Given that PSAs are firmly grounded in gendered allocations of homemaking and wage labor in most marriages, this differential application of PSAs makes more sense than applying them to all couples in the same way.<sup>161</sup> In any case, PSAs would not make much of a difference for most same-sex couples because the partners earn roughly equivalent wages, so that the formula for calculating the debt due to one partner as remuneration for specializing in homemaking would yield modest, if any, payments.

An additional barrier to applying PSAs to same-sex relationships is that, unlike heterosexual marriage, no state currently provides rules for either creating or dissolving gay or lesbian relationships (let alone the distribution of property or payment of alimony). States would have to recognize same-sex relationships before they could administer break-ups and apply the PSA as appropriate. Some states are moving in that direction with marriage litigation<sup>162</sup> and reciprocal beneficiaries legislation,<sup>163</sup> and other states, including Colorado, are exploring what kind of legislation should govern same-sex relationships.<sup>164</sup> It is important to note that state recognition of same-sex marriage (or domestic partnerships or reciprocal beneficiary relationships) does not dispose of the issue of whether such relationships should be governed by PSAs. Given the above discussion of the relative equality of partners in same-sex relationships, perhaps reverse default rules should govern heterosexual and same-sex marriages, at least regarding PSAs. However, even if PSAs were applied across the board, to both same-sex and heterosexual couples, much of the potential inapplicability of PSAs to same-sex relationships would be mooted by the partners' ability to contract around the PSA terms by conduct.

Finally, same-sex partners can resort to private law by contractually creating PSAs until such time as the state recognizes same-sex relation-

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161. For another gay-affirmative argument favoring differential treatment of same-sex and heterosexual couples, see Pouncy, *supra* note 144, at 370.

162. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996) (enjoining the state from denying marriage licenses "solely because applicants are of the same sex"). While the Hawaii legislature may exercise its recently acquired power to ban same-sex marriage, Vermont's litigation continues apace. See *supra* note 143.

163. HAW. REV. STAT. § 572C (Supp. 1997).

164. Peggy Lowe, *Same-Sex Registrations Endorsed*, DENV. POST, July 9, 1998, at B1; GOVERNOR'S COMM'N ON THE RIGHTS AND RESPONSIBILITIES OF SAME-SEX RELATIONSHIPS, STATE OF COLO., REPORT, FINDINGS AND RECOMMENDATIONS (1998) (copy on file with the author). As a member of the legal subcommittee of Governor Romer's Commission on Rights and Responsibilities of Same-Sex Relationships, I participated in numerous spirited and nuanced debates about optimal state regulations of same-sex relationships. Like Jane Schacter, I prefer a legal regime which recognizes a "pluralism of affiliative structures." Schacter, *supra* note 80, at 1259. However, given the gendered divisions of labor upon which PSAs rest, PSAs might be more justified under a marriage model than within an alternative such as domestic partnership.

ships. Courts tend to enforce same-sex relationship contracts, even when state statutes ban same-sex marriage or criminalize same-sex sexual activity.<sup>165</sup> Since gay couples must contractually create most family law rights, they (or their lawyers) could incorporate a PSA into cohabitation agreements.<sup>166</sup> For those couples with children, or who otherwise choose to specialize in wage and domestic labor, such contracting makes particular sense.

One final objection to adopting PSAs in same-sex relationships suggests that perhaps the gendered division of labor is not the best template to mimic.<sup>167</sup> But if couples are engaging in such specialization, the advisability of doing so is beside the point.

#### CONCLUSION

Queer legal theorists should be interested in commercializing marriage through Premarital Security Agreements. PSAs recognize homemaker contributions to family wealth (specifically, primary-wage-earner income) by making the homemaker a creditor in relation to her primary wage-earning spouse. The amount of the wage-earner's debt could be calculated based on the difference between the spouses' income at divorce, the duration of the marriage, and the age of any minor children. This debt would be secured by 50 percent of all marital property. In the event of divorce, the primary homemaker, like any other secured creditor, could foreclose on that collateral in order to obtain her fair share of marital property.

In addition to deconstructing heterosexuality before, or at least concurrently with, deconstructing marginalized sexual orientations, PSAs queer legal doctrine governing marriage in a number of ways. First, they undermine compulsory heterosexuality. Second, they account for gender performativity and strategic provisionality. Third, they queer the state by using liberal constructs toward radical ends. Fourth, they intervene in legal confluences of sex, gender, and sexual orientation. Finally, by

165. Ertman, *Contractual Purgatory*, *supra* note 74, at 1137–40 (discussing same-sex cohabitation contracts and the remarkable case *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992), in which the Georgia Supreme Court invoked the parol evidence rule to exclude evidence that a cohabitation contract between two women was based on “illegal and immoral” consideration). The Florida Court of Appeals similarly enforced a same-sex cohabitation contract, reasoning that:

[E]ven though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. . . . Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations.

*Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997); *see also Silver v. Starrett*, 674 N.Y.S.2d 915, 918 (Sup. Ct. 1998) (“In non-marital breakups, the law largely leaves the post-relationship consequences to such agreements as its parties may work out.”).

166. This point also holds true for PSAs as applied to heterosexual couples. *See Ertman, Commercializing Marriage*, *supra* note 4, at 110.

167. *See supra* text accompanying note 79.



changing the focus of marriage doctrine from sex, gender, and sexual orientation to economics, PSAs could contribute to a social climate which recognizes same-sex marriage. Queer theorists could object to PSAs on the ground that PSAs could unintentionally support traditional gender roles or further marginalize poor people and/or many people of color, but the benefits of experimenting with divorce reform (and reconstructing marriage) outweigh inevitable risks that the reform might have unintended consequences.

As a doctrinal tool to implement some of the most radical insights of queer theory, PSAs have the potential to be both effective and transformative. But even if they do not achieve everything suggested in this essay, they could contribute to other, perhaps more effective and/or more transformative, measures changing the law of heterosexual marriage. The question is not whether PSAs resolve all the issues raised by queer legal theory, but rather whether we can afford not to seriously consider PSAs or other proposed reforms of marriage law.<sup>168</sup>

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168. Duggan, *supra* note 2, at 193 (“The question is: At this historical moment, can we transform *any* liberal rhetoric in the interests ultimately of going beyond liberal categories and solutions? Or, given the difficulty of translating our most radical insights and arguments into effective public discourse, can we afford not to try?”).