MARTHA E. ERTMAN: Before I jump into my topic, Marriage Markets, I'd like to thank the *Journal of Gender & Law* and the University of Michigan Law School, as well as the various departments that have sponsored what is one of the most interdisciplinary conferences that I've ever attended. The last panel and Beth Robinson's talk just now, along with this morning's panels, show how conversations

across disciplines can enrich our analysis of whether marriage is cutting edge or obsolete.

My own particular intervention into this topic, on this panel titled "Expanding Marriage and Family Conventions," has to do with talking about how we might expand what it means to be married. Beth Robinson's incredibly moving talk (given her rhetorical skills it is no surprise that she and the lawyers at GLAD—Gay and Lesbian Advocates and Defenders) won the Vermont marriage case—addressed the point about who gets to marry. Mine goes to the level of asking what it means to be married. What does it mean to be a husband? What does it mean to be a wife? This question goes to the heart of the purpose of this Journal as I understand it, to investigate the way that law constructs gender and of course the way gender constructs law. Any time we talk about gender, of course, we're very deeply in the territory of sexual orientation, class-related issues, and race as well.

My talk today has to do with ways that business models and commercial models, and contractual understandings generally, can enrich our understanding of domestic relations law. In particular, what I do in my work is challenge what I call the naturalized understanding of family. Generally, in both law and culture, we think of intimate affiliation as either "natural" or "unnatural." This morning, talking about estates and trusts, we heard phrases like "who is the natural beneficiary of one's bounty in a will," reflecting legal and cultural tendencies to think and talk about what is a natural way to organize one's life.

I would argue that naturalized understandings of family are intimately associated with either ideas of divine mandate (they're natural because some divine being dictates that it be so) or biology (that because men are built one way and women are built another, they fit together to procreate, a pattern that is natural, rendering all else unnatural and thus unworthy of legal recognition). There's a third way of thinking about what we mean when we use the term "natural", an understanding that is particularly legal. In tort law we refer to a particular type of liability as *res ipsa loquitur*. This phrase literally means, "the thing speaks for itself." Similarly, calling something "natural," relieves the speaker of any burden of explaining why it's a good thing. We just defend it by saying it's natural, the way things are. Perhaps it's divinely ordained, perhaps it's biologically mandated, but it is nothing we have to think about, nor do we have to present reasons why a particular outcome is good.

There are a lot of inadequacies and inequalities in domestic relations law, both within relationships and among different kinds of relationships, which are artifacts of this naturalized model. Thus we

need a new model. The major competitor to the naturalized model is the business-type market analysis. In the legal academy, of course, we've been exploring all kinds of topics—including abortion and accidents—from a legal economic perspective for some thirty years. That rich literature suggests that maybe we can think of intimate affiliations as being, not just about love, pet names, notes left in lunch bags, hearts and flowers, but also about how intimately affiliating with other people also involves engaging in economic transactions. In other words, our hopes for living happily ever after are as much about economic issues—having a beautiful home, for example, or sending children to the college of their choice—as they are about the more abstract rewards of emotional intimacy and jointly shared lives.

What I propose to do is to build on traditional law and economics approaches. I do this in my work by suggesting that we think about intimate affiliation in market metaphors. If we think about contract—in other words, about intentionality, consent, and functionality—when we worry about what rules should govern intimate relationships, then in fact we'll get a more adequate and a more equal set of legal rules. This approach would apply to marriage as well as other relationships.

The particular example that I'm using today, marketizing marriage, demonstrates one way we can import market models to understand marriage. In my work I have proposed something called a Premarital Security Agreement. It differs from a conventional premarital agreement in that it's based on debtor/creditor relations law. This is one of the few family law conferences I've attended where I am the second person to mention the Uniform Commercial Code. Ordinarily nobody else does, but Professor Waggoner mentioned it earlier as the most successful project of the National Conference of Commissioners on Uniform State Laws. For those of you who haven't taken commercial law, took it years ago, or recall it from a bar review course, I will recap shortly the rules governing debtor/creditor regulations. What I do is explore the possibility of treating primary homemaking spouses as secured creditors in relationship to their primary wage-earning spouses. What would it look like if a housewife were a secured creditor in relation to her primary wage-earning husband? I say "she," not because only women are or could be homemakers, but because of demographic patterns, that most often in a heterosexual affiliation the person who engages in the primary house maintenance work is female rather than male.

So what is a security agreement? A security agreement is an agreement between a debtor and a creditor where there's collateral and the collateral is personal property. For example, when you go to the car

dealership, and buy a car on credit, a finance company such as GMAC helps you finance it and takes a security interest in the car to protect its right to be repaid. If you stop making payments, or let your insurance lapse, GMAC has this extraordinary right, the right to engage in self-help to protect itself, its interests. If you've seen the movie *Repo Man*, this is what that movie is all about. Repossession people get the tremendous right of taking debtors' property without state intervention. It's private law, largely governed by private ordering. When I talk about importing U.C.C. Article 9 rules to the law of domestic relations, I am talking about taking the private law of the family and the private law of contract, and showing the ways that those two are much more closely associated than what they're commonly thought to be. You could say it's taking the private law of family and making it really private.

The way it works in the context of Premarital Security Agreements, which I call "PSAs," is that there's a debt between wage earners and primary homemakers. In marriages in which the spouses engage in specialization of labor, where one is a primary homemaker and the other is a primary wage-earner, the primary homemaker extends credit to her primary wage-earning spouse by engaging in household labor and foregoing developing her own wage labor potential. She, logically, extends that credit expecting to share in family wealth that is accumulated as a result of the primary wage-earner doing his part.

What happens when they divorce is the equivalent of a default on a loan, the equivalent of not making your car payment. She doesn't get what she had hoped to from the relationship, which is an ongoing sharing of the primary wage-earner's income. At that point, the debtor, the primary wage-earner, is in default, and must pay the full amount of the loan.

Upon default, secured creditors can exercise their self-help rights to repossession to collect the amount due on the loan. I'll define the debt in a moment, but first I want to describe the collateral. Generally speaking, secured transactions involve a debt, collateral, and an event of default. The collateral under Premarital Security Agreements is half of the marital property. Secured creditors often over-collateralize, meaning that they get a security interest in collateral that's worth more than the debt because there is rarely enough collateral to go around once the debt goes bad. Consequently, it's in their interest to ensure that the value of collateral will be greater than the amount of the debt.

How much is the debt? How much is it worth to take children to soccer matches, shop for clothes, go to parent-teacher conferences, clean the floors and keep family relations on an even keel? This work, if well done, often remains invisible, at least as work, like sending out holiday

cards and making sure that the family gets together at Thanksgiving. There are a lot of different ways you could calculate the value of this work, and thus the debt secured by the PSA. Economists have come up with a range of models. One method, the one that I have employed, uses a formula to take into account the differences between the spouses' income at the time of the divorce, the length of the marriage, and the age of any minor children.

Many former homemakers, known in the literature as "displaced homemakers," suffer from poverty (or close to it). If in fact we replace the current alimony regime with a regime of entitlement based on an investment model, recognizing that the primary homemaker has invested in family wealth by performing domestic services as well as foregoing the opportunity to develop her own wage-earning potential, then she is entitled to a payback.

Treating alimony as an entitlement, a right to be repaid for contributions to family wealth, would give primary homemakers the set of rights enjoyed by secured creditors. Because these rights involve the exercise of power, they would expand what it means to be married by taking a very weak social and legal role, primary homemaker, and grafting it onto an extremely powerful commercial role, a secured creditor.

What I hope would happen in this process of importing law from the private world of contract into the private world of domestic relations is that we'd begin to think differently about what it means to be a wife, to be a husband, to be married. That, if primary homemakers enjoyed an entitlement to post-divorce income sharing, perhaps their primary wage earning spouses might increase their respect for the work of taking care of home and children. Moreover, I suspect that if homemakers were compensated, people might be less likely to engage in specialized labor, both spouses instead engaging in both wage-earning and homemaking labor, because specialization would become more expensive for the wage earner. Of course, only elite families fully specialize, where one is a full time homemaker and the other is a full time wage earner. Even so, compensating homemakers could, in the long run, encourage more men to more fully engage in homemaking, and more women to maximize their wage earning potential.

Particularly important to keep in mind is who pays the price for the conventional arrangements in marriage. Right now current doctrines that govern the distribution of assets at divorce rarely enforce meaningful income-sharing after divorce, causing indigency or near indigency of a number of homemakers. The real reason behind this

failure to compensate homemaker contributions to family wealth is that we just don't value the work that's being done. One way to value it is by putting a price tag on it, and Premarital Security Agreements represent one means of doing just that.

I want to change the way we think about how marriage is organized because thinking in economic ways allows us to distance ourselves from naturalized understandings of family. If we import contract and business models, then we can think in functional ways that inquire about the value of particular work being done as opposed to assuming that a homemaker is specializing in homemaking labor because that role is divinely or biologically mandated. Finally, having very briefly described the idea of importing U.C.C. Article 9 to domestic relations law to remedy the devaluation of homemaking labor, I suggest starting to think in business ways about conventional marriage opens up the possibility of thinking about intimate affiliation generally.

One of the major reasons that many people oppose same-sex marriage is that they think there is one natural superior model of intimate affiliation that the state should recognize, and that everything else is inherently inferior. If instead we thought about intimate affiliations more along the lines that we think about business, we would likely recognize a range of affiliations. In business law we have corporations, general partnerships, limited liability companies. There's no moral judgment that accompanies organizing your business as a corporation, a partnership or a limited liability company. If we start thinking about intimate affiliation in functional terms, rather than worrying about which people or affiliations are morally superior to others, we can open up the possibility for thinking about both conventional and untraditional affiliations in new ways. In doing so, we create the possibility of remedying both inadequacy and inequality in domestic relations law.