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# Opportunities for and Limitations of Private Ordering in Family Law (Symposium Roundtable)

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# Opportunities for and Limitations of Private Ordering in Family Law (Symposium Roundtable)

**Authors**

Jeffrey E. Stake, Michael Grossberg, Martha Fineman, Akhil Reed Amar, Regina Austin, and Thomas S. Ulen

# Roundtable: Opportunities for and Limitations of Private Ordering in Family Law

## INTRODUCTION

JEFFREY EVANS STAKE<sup>1</sup> & MICHAEL GROSSBERG<sup>2</sup>

The Roundtable was constructed in an effort to contribute to the growing debate about private ordering in family law. Each member of the Roundtable was asked to take some position on the basic question of whether private ordering should be the dominant new force in family law. As the centerpiece of the Symposium, the Roundtable was intended to provide the audience with some overview of the topic, some of the broader connections going beyond the particulars to the larger issues and context, and to get a variety of perspectives on the significance, legitimacy, and efficacy of private ordering in family law.

It is obvious that a wide variety of laws—from rules governing marriage, divorce, and child custody through contract, professional responsibility, and wills—influence family structure and the behavior of family members. Family law is a site for highly visible and important contests between state regulation and individual or family autonomy. It appears to a new student of family law that one fundamental question cutting across many issues is how much freedom to allow individuals in choosing the legally enforced rules by which they as members of families will play and, on the other side, to what extent legal decisionmakers such as judges and legislators ought to define the rules. Should we adopt as a basic principle that it is good to avoid legal constraints on decisionmaking, leaving maximal freedom in structuring arrangements to institutions such as families, churches, and voluntary social and business groups? Or would it be better to start from the assumption that seems to have prevailed for centuries that it is up to society to define through the law a marriage, a divorce, or a will?

Clearly, there must be some socially imposed definition; if each person can define “marriage” or “will” to mean whatever he or she wishes, the words lose all meaning. So the question is one of degree. But there are huge differences in degree, leaving plenty of room for disagreement. When is private judgment inferior to social judgment on how relationships should develop and operate? And when should social judgment, if one is to be imposed, be exercised through the law rather than being left to other institutions? In particular, what criteria ought we to apply in deciding when an issue is for private decisionmaking and when one is for public control?

It sometimes looks like the law has shifted away from societally fixed rules toward more flexibility. But changes in family law over the past few decades have been somewhat contradictory and ambiguous in their embrace of private

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ordering. Private authority has decreased in areas such as child abuse, but has increased in others, such as the consequences of divorce. What is the trend, if any, and will it continue? What has it cost us so far and should it continue?

The debate over private ordering in family law raises fundamental questions about the power of the state and of individuals. Consequently, it has produced a variety of opinions, proposals, and conflicts. Political divisions of opinion on this issue can be interesting. Those objecting to constitutional protections of privacy seem to want to promote private ordering. Are these positions consistent? Those wanting more privacy to be protected by the Constitution sometimes want less private ordering. Can privacy and private ordering be on opposite sides?

Each of the presenters below had an opportunity to speak to these issues before the discussion was opened to the audience. The remarks were recorded, transcribed, and edited for publication here.

JEFFREY EVANS STAKE

I was once asked whether I believed in private ordering in the family law context. The question reminded me of the man who was asked whether he believed in baptism. His answer was "Believe in it? Hell! I've seen it done!" I too have seen it done, private ordering that is. We should keep in mind that most ordering is private. The question then is how much the law ought to lend a helping hand in private ordering, how much the law should enforce private arrangements of rights and obligations.

I think that we as a society have not taken full advantage of existing opportunities to assist in private ordering. There exist today areas of law in which people could benefit from being allowed to make decisions for themselves, but the state has not permitted or helped them to do so. The paper presented by Professor Eric Rasmusen earlier today provides one example.<sup>3</sup> I offer another example, an example which expands this family-law discussion to include what Professor Greg Alexander calls "family property" in his casebook on the subject of wills and trusts.

Suppose Dobie tells his lawyer to draw up a will giving everything to Thalia. His lawyer does so, and sends a draft to Dobie. After reading and approving the draft, Dobie signs it, and puts it in his lock box. He tells his relatives and friends, including the reliable witness Maynard, he is leaving everything to Thalia. Dobie then dies. When Maynard offers the will for probate, Dobie's brother Davey, his closest living relative, stands up and says, "Wait a minute. The will is no good. I get everything." He contests probate on the ground that no witnesses attested the will. The courts in most states will agree, refusing to admit unattested writings.

Scholarly reformers have argued, however, that this will should be admitted. Their position has been codified in a new provision of the Uniform Probate Code. Section 2-503 orders courts to relax the formalities if it is clear that Dobie intended the document to be his will.

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

There is no doubt that some decedents will benefit from 2-503. Their intent will be followed where it would not have been followed under the traditional Wills Acts because of a failure to follow some formality. The benefits of 2-503 accrue to the decedent.

Some of the costs of 2-503 also fall on the decedent. Section 2-503 will create an opportunity for chicanery. By eliminating the witness requirement, 2-503 will create opportunities for overbearing friends and relatives to exert undue influence and openings for swindlers to trick the unwary, deceiving them into signing documents they do not want to be their wills. In such cases, the intent of the decedent will not be followed. Likewise if the decedent made an impulsive will, without the sobering effect of the formalities. Section 2-503 is not limited to good documents. It improves the chances of admission of both kinds of instrument, good and bad.

Another cost borne by the testator, Dobie, before death, is worry. The dispensing power is not limited to cases involving first wills. It gives courts the power to admit subsequent wills to probate, revoking the earlier ones. So 2-503 gives people who have written wills a new worry to cope with, the worry that a bad document will revoke their good will and upset their testamentary scheme. These bad documents could be the result of devious persons preying upon the weak or the result of simple mistakes. And even if Dobie successfully resists attempts to upset his testamentary plan, it may be unpleasant for him to deal with those charlatans who try to manipulate him into giving them a portion of his estate.

The sum of it is that 2-503 generates both costs and benefits for decedents. The dispensing power might improve results for some people but it will not for others. It is possible for a sensible person to feel less comfortable with 2-503 on the books than without it. Indeed, though some (having heard this morning's discussion) may doubt whether I am sensible, I would prefer, as a decedent-to-be, that 2-503 not be adopted in Indiana.

Let us set aside the individual decedent for a moment and look at the rest of society's interests. Here 2-503 generates a loss, more costs than benefits. First, and most obvious, we can expect it to increase the number of cases disputed in probate court. Section 2-503 encourages anyone with a letter mentioning a gift to try to get that document probated. Litigation will be more frequent.

Second, 2-503 increases the cost of each case in two ways. The traditional formalities encourage testators to generate good evidence while they can at a low cost. The old formalities are like preventive maintenance, they encourage clarity in order to avoid suits later. By contrast, the message of 2-503 is that you might get your wish even if you do not leave good evidence behind. You need not bother being careful. Moreover, 2-503 is a fuzzy rule calling for the exercise of judgment rather than a relatively determinate, categorical rule requiring only mechanical application. Section 2-503 increases the body of evidence presented to a court, costing courts more time per case. Attempts to show by clear and convincing evidence that some instrument was or was not intended to be a will are more costly to resolve than disputes as to whether two witnesses signed because more evidence is relevant to the former question.

Third, by making it easier, even if only slightly, for dishonest persons to grab someone's assets, 2-503 encourages that behavior. In addition to the harm done

to the decedents and the injustice to their intended beneficiaries, such behavior is inefficient. Instead of spending time on something productive, some people will waste time attempting to induce others to sign a document that makes a gift contrary to their intents. Section 2-503 may increase such rent-seeking.

Where are the societal benefits that justify these societal costs? The UPC reform proposal urges states, in effect, to pick up these costs of following the decedent's intent more often. This is not, by itself, a surprising suggestion. As society gets richer, we should expect increased willingness on its part to purchase justice and other expensive goods (such as advanced medical procedures) that cannot be justified when it is a little closer question whether many of us will starve or freeze to death.

Before the state picks up this tab, however, we ought to make sure 2-503 buys something testators want. I have already said it is not something I want. In my case, society would incur increased litigation and other costs in order to make me *less* happy. That is a waste.

I do not conclude, however, that 2-503 should be rejected. Scholars can debate whether section 2-503 ought or ought not be adopted. I prefer an intermediate position: let Dobie decide whether 2-503 applies to his documents. The UPC position, allowing the court to dispense with formalities, could be the default rule. But it ought not be a limiting rule. Section 2-503 should be amended to allow Dobie to opt out. This could be accomplished by adding to the beginning of 2-503, "Unless the decedent has clearly provided otherwise in a previous will,".

Such an amendment would allow Dobie to save societal resources while making himself happier. Moreover, the law would empower Dobie to make a commitment to himself that he cannot easily undo. Only by enforcing his rules against him can the law give Dobie the sense of security and peace of mind that comes with the knowledge that he cannot, in a fit of peak, unravel all of the careful plans he has made for Thalia.

Stepping back for perspective, what do these proposals, one relating to grounds for divorce and the other to the dispensing power, have in common? In both, individuals are empowered to create their own legal regimes. Both arguments rest heavily on the notion that ordinary people can make sensible decisions for themselves. Both assert that people, as Professor Alexander mentioned earlier, can profitably bind themselves to the mast, as Ulysses did. And both contend that the law, like Ulysses' crew, ought to assist people in protecting themselves from the siren songs of today.

Is there a higher principle? Maybe not much higher. But there is a slightly broader principle, perhaps, and it is this: if the law vacillates between two regimes, individuals should be given their choice of the two. I call this the "Vacillation Principle," although I remain open to suggestions on the name. Anytime we recognize that two regimes exist or have recently existed, we should immediately ask ourselves why all people should not be given a choice between them. We should ask not which is better, but why either should be precluded. If A is a reasonable rule and B is a reasonable rule and there is a continuum between them, then let people choose.

The law once said divorce should be granted only for fault. The law now says no fault need be shown. Reformers have lately proposed returning to the fault

requirement. This vacillation should trigger the question: Why not let people decide for themselves which is the better legal regime? The law in Indiana says two witnesses are needed on a will. The law in Colorado says witnesses are not needed if the intent is clear. I say, it is time to ask ourselves: "Why not let people choose their own probate requirements?" When we see legal irresolution or uncertainty, when society wavers on a point of law, we ought not argue further but ought rather to ask why the point is not within the domain of private choice.

There are some limitations on the application of this vacillation principle. First, some rules of law are conventions for which universal adoption is critical. The English drive on the left, Americans on the right; Sweden has tried both. It will not do to let people choose their own rules of the road. Private ordering would be ridiculous.

Second, choices can be limited to those that are reasonable. The laws of some states and times are simply morally unacceptable. The law long ago said divorce was illegal. Knowing what we know today about wife abuse, it would be immoral to bind a woman to an abusive husband. The law need not let people choose unreasonable legal regimes. Some past rules, like slavery, are no longer acceptable.

Third, there is the usual question of externalities. We cannot expect all private choices to be honored, no matter the cost to society. If there are unproxied negative externalities to a proposed private regime, that regime need not be enforced by the law. A state may rightly say, for example, that it does not wish to pay the increased costs of litigation attending section 2-503.

The fourth limitation, and there may be plenty more, is that allowing private choice may be unhelpful when there are signalling problems. For an example, consider premarital agreements. The law enforces antenuptial contracts relating to the division of property at divorce. People do not take advantage of this private ordering opportunity, even though many people consider it a good idea. Why not? Because there is a signalling problem. No one wants to start the conversation, "By the way Honey, before we get married, we should decide what will happen to our assets if we divorce." Honey might get the wrong idea. We cannot be confident that merely providing the legal opportunity to negotiate will lead to good results. The law might best deal with that situation by taking away the couple's choice not to choose, forcing them to make a choice of divorce regime.

To sum up: Legal scholars often argue over what set of rules would be best, knowing that those rules will not fit all persons equally well, or well at all. We ought to ask, more often than we do, whether it is essential for all people to live under a single legal regime. I predict that on close look, we will see that a single regime by which all must abide is often unnecessary. On that closer look we will see that we can achieve a better fit with individual aspirations by allowing individuals to choose their legal regime. What I have called the vacillation principle can help us find those opportunities for replacing one-size-fits-all laws with individually tailored regimes.

MARTHA FINEMAN<sup>4</sup>

In *The Neutered Mother, the Sexual Family, and Other Twentieth-Century Tragedies*,<sup>5</sup> I argued for abolishing marriage as a legal category, and with it the whole set of special rules that we call "family law." By "family law," I refer not only to those rules that govern divorce and custody, but also to areas of regulation where family is a consequential category, such as inheritance and tax law. My call was for abolition of marriage as a legal concept. People could still choose to celebrate sexual unions as a religious or cultural event, but it would have no special legal significance.

Was this call for abolishing marriage also a call for private ordering and a retreat from the prospect of state regulation? In a way, it was. Private ordering would be the result as sexual affiliates (formerly known as husbands and wives) resorted to private law, contract, for example, to order the consequences of their relationship. But state regulation of the conduct of their relationship might actually increase. This is the case because it would not only be contract law that filled the void left by the withdrawal of family-law doctrine. We would also apply the rules that govern the relationships among strangers—torts and criminal law, for example—to interactions between sexual affiliates. In other words, marital privacy would be abolished along with marriage and sexually intimate relationships would no longer be shielded from public concern.

Feminists have made an effective case that marriage has hidden a lot of abuses. It has masked the unequal distribution of power existing within the so-called "private" sphere, where physical, economic, and other gendered differences in power profoundly effect the situation and prospects of women and men. One obvious implication of placing sexual affiliation in the same realm of rules that govern strangers in society would be that marriage would no longer serve as a defense to rape. It also would be impermissible for police and other state personnel to conceptually bracket off some assaults and label them "domestic" violence (therefore less serious than the undomesticated variety). Perhaps we might see the development of tort principles applied to sexual affiliates in the context of certain conduct clearly unacceptable when one is dealing with strangers—for example, harassment, assault, intimidation, and emotional abuse. Far beyond a mere call for private ordering through contract, the abolition of marriage suggests a more profound regulatory scheme—one that would afford married women the same protection the unmarried have.

There are a lot of issues raised in the context of this suggestion for abolishing marriage as a legal category. One set of questions has to do with the implications of referring interactions of sexual affiliates to existing doctrinal schemes of contract, tort, property, criminal law, equity, and so on. For example, how would these areas of law change if they had to be applied to sexual affiliates? What would the inclusion of this category of litigants do to current understandings and

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4. Professor, Columbia University School of Law.

5. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).



acceptance of the premises and assumptions underlying these areas of law? Certainly it is reasonable to conclude that there would have to be some (perhaps extensive) reconsideration of doctrinal assertions about things like duty or bargaining power, for example.

Even if we focus purely on the private ordering aspect of this discussion, there are important public-policy and regulatory issues that arise if there is no legal significance to marriage. If private ordering is desirable as to some issues in regard to sexual affiliates, then there are arguments for expanding the reach of contract to all areas of intimate life in lieu of special marriage rules. Why not include in the ability to contract events and interactions in which women are historically (and stereotypically) viewed as having a natural "monopoly" or as possessing more in the way of supply than they do in demand? Specifically, what about relegating to private ordering issues concerning reproduction and sex? If we want private ordering, we should abolish laws against prostitution and give women an option to charge for their sexual services. Perhaps we should also allow women to charge for gestational and other reproductive services. Gifts of reproductive labor might be appropriate, but compensation could be demanded, negotiated, and legally enforced. Certainly women should be able to contract as to ultimate custody and control of children in return for their investment in reproduction. Contract could ensure that nurturers were entitled to the benefits of their labors—custody of the child even if the noncaretaking biological parent wants to make a contrary claim. In fact, why not really privatize this area, removing obstacles and burdens now associated with pregnancy outside of marriage? We now invade an unmarried woman's privacy and use a lot of energy trying to get women to name a father even in cases where neither parent wants the tie established. There continue to be legal, medical, and social impediments for a single woman's use of sperm banks.

One area of extensive current regulation that would be open for reconsideration (and ultimate privatization) were marriage to be abolished, concerns nontraditional sexual affiliations. If there is no longer one state-preferred and -protected form of sexual affiliation (marriage), what would be the rationale for the state prohibiting nonmonogamous, heterosexual preferences and choices? Why not leave same-sex relationships, even group or plural "marriages," to individual or private arrangements?

As interesting as these types of questions might be to explore in the context of thinking about leaving intimacy to private ordering, it seems to me that there is another, more pressing issue to explore. If we are seriously considering the abolition of marriage as a legal category, it calls under critical examination the existing relationship between the institution of marriage and our definition of the nature and role of the state. I am particularly interested in the role that marriage has vis-à-vis the state. Once we consider abolishing marriage as a legal category, turning it over to private ordering, it becomes clear that the institution currently serves a significant social function. On ideological and rhetorical levels, marriage is the means whereby the state effectively privatizes dependency. The fact that the marital family is the repository for dependency in our grand social scheme explains why there has been so much valorization, protection, and concern for this particular relationship. Marriage is a public institution; it is constructed as a complement to the state, the mechanism through which we can

avoid assuming collective (or state-assumed) responsibility for dependent members of our society. The institution of marriage, therefore, is essential for the capitalistic myths of individualism, self-sufficiency, and autonomy to be played out. Without marriage we would have to confront the realities of dependency.

I have been working on developing a complex theory of dependency. While time constraints prohibit extended discussion here, the major premise of my analysis is that dependency is inevitable. By inevitable, I mean that dependency is a biological phenomenon. As a biological and developmental concept, dependency is also universal. All human beings were dependent as infants and children, and many of us will be dependent in the future as we age, grow ill, or become disabled. Dependency must first be understood, therefore, as a universal, inevitable category. But there is another, important, dimension to dependency. If biological dependency is inevitable and universal, "derivative" dependency is not. The concept of derivative dependency is premised on the simple but obvious fact that caretakers (those who assume responsibility for inevitable dependency) are dependent upon social and economic resources in order to fulfill their caretaking tasks. And, while inevitable dependency is universal, derivative dependency is culturally assigned to only some members of our society. This raises obvious questions about how that assignment is done and prompts consideration of the conditions under which caretakers should be expected by the society to undertake responsibility for inevitable dependency. Historically, caretakers have been referred to the private family for those resources necessary for caretaking. And, within those families, caretaking has been done, often at the sacrifice of individual autonomy and economic achievement.

The obvious realization when we think about dependency in this more complicated way is that the private family as an institution, and individual family members who consume and depend upon caretaking work within families (husbands, children, elderly parents, and so on), cannot accurately be described as self-sufficient and independent. Within that family structure the labor of the caretaker is appropriated to the advantage of the individual family members in the first instance and to the larger good of business and government in the long run. Domestic labor reproduces the world—produces consumers, students, employees, and voters. In the course of providing caretaking, potential individual economic accomplishments are routinely sacrificed or compromised. Dependency may be privatized, but only at the expense of this caretaker.

The individual that is the subject of liberal as well as economic analysis can only be theorized as self-sufficient when dependency is hidden within the family—when it is privatized. This is an exploitative model. It is also a model that is failing in contemporary society. Marriage is no longer able to serve its historic role as the repository for dependency. This is true for several reasons. The first is the widespread dissatisfaction with marriage which is expressed in the divorce rate as well as by the increasing number of women—particularly women from relatively middle-class backgrounds with some college education—choosing to become single mothers (reproduce outside the context of marriage). These behavior trends are related to the second reason that family no longer suffices as comprehensive social policy when it comes to dependency: women's aspirations and their expectations for themselves have changed. We are

no longer willing to accept domestic labor and caretaking as our primary responsibility—we have a more egalitarian model in mind.

To bring all this back to the issue at hand—private ordering and family law—I support the privatization of sexual affiliation in all its manifestations. This is what has been happening in terms of the economic consequences of marriage and in dissolution anyway. Privatization by undermining marital status as a legal consequence has important public consequences that will mean the provision of better protection for women. But, as we privatize adult family relationships, it becomes apparent that we must consider what will happen to dependency now hidden within rhetoric about the function of families. The next question for contract might well be: given the new realities, how should we rewrite the social contract in order to ensure collective or state responsibility for inevitable dependency?

AKHIL REED AMAR<sup>6</sup>

The answer to public-versus-private is obviously both—a more complete answer depends on the particular kind of question at issue, and we need to identify some of the relevant constitutional values. There are public concerns that I think Greg Alexander<sup>7</sup> very powerfully articulated—of dignity, I would add equality—and then there are all sorts of opportunities for private ordering because one size does not always fit all. So let me go through three or four different issues and how I would resolve in each context the public-private question, and in the context of that I will try to respond to the two papers that we have heard about this morning.<sup>8</sup> Very interesting papers. I have some questions about both of them, from different perspectives.

To begin with, let's talk about who can marry, a question that got asked about same-sex marriage. I would think that would be a pretty good occasion for private ordering: you pick the person that you love, and you want to spend the rest of your life with. In the spirit of private ordering, one size does not fit all here, and we let people organize their lives. I happen to also think that that would fit with norms of gender equality, getting rid of discrimination on the basis of sex or sexual orientation. (Perhaps heterosexism is a form of sexism.) On that ground some other forms of private ordering involving more than two persons could be distinguished perhaps. The current regime says "two persons but only if they are one man and one woman," and that seems to me a sex discrimination; broader situations involving more than two—polygamy or polyandry, or Bob and Carol and Ted and Alice and all of that—might have private ordering on their side, perhaps, but not quite the gender equality argument. So we would have to decide what the relevant contributions of those two concepts are. So let me now move to the marriage contract itself, Eric and Jeff's paper.<sup>9</sup>

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6. Southmayd Professor of Law, Yale Law School.

7. See Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503 (1998).

8. See *id.*; Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998).

9. See Rasmusen & Stake, *supra* note 3.

And since we were talking about traditional marriage, let me remind you of some of the things actually that traditional marriage was about. It was very gendered, of course. The woman was obliged to provide, in effect, sexual services to the husband. Failure to do that, I guess, was a kind of desertion or fault. It was a kind of contract that she entered into once and if you think that you can make an agreement to never rescind your consent thereafter, then this is a one-time consent in the marriage contract itself to be raped, maritally, by your husband; and so that should make us a little uneasy about certain kinds of agreements that you make in the marriage contract, that you can never try to rescind your consent to thereafter. Robin West has written very thoughtfully about that. I would want to bring in the Thirteenth Amendment as a constitutional value that helps adjudicate—it is about private ordering, in part, and about limits on private ordering, too, in the name of dignity and equality. Since the hypothetical was raised—by Mark Ramseyer, to the right of even Eric, on this question of spouse beating—let me remind you that traditional marriage gave a husband a right, maybe even a duty, of moderate discipline and chastisement. That is where we get the proverbial “rule of thumb,” that he could beat her with a stick so long as the stick was not bigger than a thumb in diameter. Question: his thumb, her thumb, or the judge’s thumb? I am not quite sure about whose chancellor’s foot we are talking about here, but that’s traditional marriage, and it should make us again think about where we draw the line. This was what Jeff was asking: when do we and don’t we allow people to contract into things, and contract into things irrevocably.

Then there is a whole set of law-and-economics issues that we could raise, again about possible limits of private ordering. Greg, I think, talked about a couple of them. The real problem here, from a law-and-economics perspective, is somewhat similar to corporations (we might conceptualize the corporation as a nexus of contracts). There is a real problem of renegotiation thereafter, amending the corporate charter, and here is the dilemma: if you allow renegotiation you can have renegotiation in the shadow of all sorts of threat advantage, but in a relational contract that is ongoing, many things cannot be well specified *ex ante*. One horn of this dilemma is what Eric was saying, that there is a problem about allowing renegotiation. On the other hand, if you prohibit renegotiation, that creates all sorts of problems, too, that Jeff identified, and that may very well mean that there are genuine limits on the ability of private ordering because this is a relational contract. Not everything can be specified. The number of permutations is just so vast. How many children are you going to have, what order, how they are going to be spaced out, what the economy is like, your relative job skills, health issues. Children may have special needs, and we cannot guarantee how all of these things are going to come out. And so that does, to some degree, limit the ability of the *ex ante* contract, really, in a relational world, where lots of things need to be worked out, to be specified.

I am in favor of the following kind of private ordering: that in the interior of the marriage, judges should not be constantly intervening to enforce contracts, especially in a specific-performance-like way. “You must provide sexual services. You must submit to this beating. You must provide dinner at 8 p.m.” And there are Thirteenth Amendment reasons that limit the enforcement of certain kinds of private contracts, voluntarily entered into. Historically, if we talk

about indentured servitude, you agreed to be someone's slave for seven years, and under one model that was voluntary, since you agreed at the outset, so long as you did not bind yourself to more than seven years. But after the Civil War, the time point at which we actually looked at consent was not the time you entered into this contract of adhesion, but when the performance was demanded and you wanted to get out of it. That actually was an evolution of our understanding of involuntary servitude. At what point do we look at consent as voluntary, *ex ante* or *ex post*?

Now finally, on dissolution and private ordering—again there are some specific-performance issues here. Would we prevent people from remarrying others if they so contracted, forever, or keep them chained into a relationship that is very unfree, forever? There are some genuine Thirteenth Amendment issues here. And finally, that brings me, thinking about dissolution, to children, the Brinig and Buckley paper, and what is in the best interests of children. I am a little bit more dubious of these joint-custody arrangements, especially mandatory ones, not just mandatory on the courts, as Saul Levmore<sup>10</sup> was talking about, but what are we, first of all, mandating on the parties? And one question might be, should this be something you can opt into or out of at the outset, Rasmussen-and-Stake-like. But there are other questions, too. Suppose the father does not want to do this. Are you going to impose mandatory visits and joint custody on him? No, you cannot under the Thirteenth Amendment force on him a relationship that he does not want. But now you are forcing it on the mother, in some ways, who is forced to be in a relationship, to hang around while her luggage is waiting to arrive, and this makes for difficulty. The husband might have been abusive, although not in a way that you could prove in court, and now you have ongoing judicial monitoring of all of this. Every dispute has to go to a judge who says to a woman, "You can move out of state or not," and now we have judges telling women, typically, where they can live, can they remarry, with whom, what job can they take, can they move out of state, and this starts to raise for me some genuine Thirteenth-Amendment-like concerns.

The Goldsteins, in their book, suggest that this is not in the best interests of the children, too, when it is imposed by the law rather than agreed to and worked out by the parties. Their model, and here I will close, is of a certain kind of strong preference for private ordering. The law lets people marry, and then once they are married the law sort of withdraws, and lets them try to work things out in the interior, and then when they cannot agree, when there are irreconcilable differences, and they cannot agree on custody, they come to court, and the law makes a one-time decision. It names the referee, the mom or the dad, and then withdraws and now we have a new intact family unit, and maybe we should, in that decision, pick one person—the primary caregiver. This might be a good mandatory rule on the courts, something like what Elizabeth Scott or something close I think to what maybe Martha Fineman has to say. And then the law withdraws, so that you do not have ongoing judicial monitoring every time there is a disagreement about *Robocop*, or about what the child eats, even though the child may be very confused by these two people telling her or him very different

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10. See Saul Levmore, *Joint Custody and Strategic Behavior*, 73 *IND. L.J.* 429 (1998).

things about how to grow up, about where you can live and the like. And let's separate all those issues from the money issue, because judges can, and the law can, say to him, "You have to pay more because your opportunities were created as a result of this initial partnership." And so rather than a lump sum (50% settlement of what you have at dissolution), 50% of your future earnings really should go to her instead, because all these opportunities were created initially during this partnership, thinking about it as a partnership model.

REGINA AUSTIN<sup>11</sup>

Ours is a society characterized by a great deal of status or social group stratification. The groups may be bound by various characteristics including race, ethnicity, class, gender, religion, and sexual orientation. The groups are arranged in a social hierarchy. However fixed the hierarchy may seem, and however accepting of their relative lot the inhabitants of this hierarchy might appear, there is much cultural conflict between groups and within groups. Underlying this conflict is a fierce, though often covert (especially covert in this society), struggle over political power and, more importantly, material resources. The state is not neutral in this war. The hierarchy would not exist without state-driven or state-sanctioned oppression, repression, and discrimination.

In some cases, the state usurps the power of private citizens and the groups to which they belong to structure their family lives and to live a good life with material resources adequate to the task. The law's impact is not limited to one or two areas of family life; it is pervasive. For such individuals and groups, family law is criminal law, tort law, immigration law, welfare law, public-housing law, health law, etc. For such individuals and groups, the quest for private ordering, as opposed to public control or regulation, of family life becomes relevant with regard to a number of practices, including: informal adoptions; informal establishment of paternity; group-controlled divorce mechanisms; rites of passage like circumcision, female genital surgery, or gang membership; the regulation of dating, courtship, and marriage, including arranged marriages and polygamy; the disciplining of children and domestic violence; accountability for the criminal or violent acts of family members; child labor; and alternative medicine and consent to medical care.

As far as I can tell, being free of state regulation in these areas is not, strictly speaking, what family-law scholars consider "public ordering." This leads me to think that the concept may need to be opened up a bit. Private ordering in the contractarian mode assumes that the parties have a certain level of material, social, and political security—not equality, but a minimum or floor—that simply does not apply across the board. Moreover, as I understand it, private ordering according to the contract model involves some relinquishment of the state's authority to impose moral values on family life. But this abdication seems to reflect a certain smugness about the pervasiveness of white, Judeo-Christian, bourgeois, mainstream values that are grounded in the supposed rationality, efficiency, and flexibility of modernity as opposed to the emotionalism and

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11. William A. Schnader Professor of Law, University of Pennsylvania.

rigidity of traditional cultures that operate according to different or antithetical belief systems. Tradition may be just what some groups and the families that belong to them want to uphold. Tradition, of course, should not necessarily be viewed as a static element, since culture generally changes with material conditions, and traditions accordingly evolve over time as well.

"Private ordering" could be a way of expanding the power of groups to exert influence in the domain of family life in situations where the state now intercedes to ill effect. There are three things that social groups can do to enhance or diminish family life: (1) they can insulate families and individuals from the oppressive power of the state; (2) they can isolate individuals from the potentially liberating protections of the state's laws; and (3) they can act as a conduit for the distribution of the state's resources to families and individuals. More "private ordering" in support of the first and last functions is justifiable. Private ordering in support of the second is not. Thus, to the extent that social groups create the spiritual and political context for family life, and allow for the maximizing or husbanding of material resources, they should have a role in an evolving law applicable to families.

Demographics may be the biggest factor working in the direction of private ordering via social groups. The "new American family" may turn out to be a family composed of new Americans whose values, material circumstances, and social organization are not compatible with a vision of intrafamily freedom based on individual bargaining. The new American family may be, as well, old American families that want to pursue a culturally distinctive way of life with others similarly situated. The question is whether there is a role for private ordering in the conducting of their affairs.

THOMAS S. ULEN<sup>12</sup>

My specialty is law and economics, and I shall approach the subject of this conference by attempting to show how economic analysis might contribute to an assessment of the prospects for private ordering in family law. But let me begin with a disclaimer: I know almost nothing about family law. Most of what I do know I have learned in the few hours of this Symposium. However, I believe that my remarks will be so general, and the tools of economics are so flexible, that my ignorance of the particularities of family law will constitute only a partial impediment to my contributing to this distinguished panel.<sup>13</sup>

The focus of this Symposium is the extent to which private ordering can help to evaluate the ability of consensual agreements to address the issues of the new American family. My aim is to elaborate two points on these matters. First, I

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12. Alumni Distinguished Professor, University of Illinois College of Law, and Professor, Institute of Government and Public Affairs, University of Illinois at Urbana-Champaign. I would like to thank Jeff Stake and his colleagues at the Indiana University School of Law for their hospitality and help in preparing this discussion.

13. There has been some fascinating writing from a law-and-economics perspective on the family. In addition to works by the members of this panel, there are GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976), GARY S. BECKER, *A TREATISE ON THE FAMILY* (rev. & enlarged ed. 1991), and RICHARD A. POSNER, *SEX AND REASON* (1992).

want to assert that the central tool of law and economics—rational choice theory—can help us understand the possibilities and limitations of private ordering in family law. This will involve a brief exposition of the economics of freedom of contract, with special reference to family-law matters. Additionally, I shall try to show how one might incorporate some more recent developments in rational choice theory into an evaluation of private ordering and the family. Second, I want to suggest how an economic analysis might explain some of the changes giving rise to the “new American family” and to suggest how a broader scope for private ordering might accommodate these and other changes in family structure more than would be the case in a legal regime that relied less on private ordering.

### *Rational Choice Theory Generally*

Let me begin with a very brief summary of rational choice theory. That theory assumes, first, that human decisionmakers can compute the costs and benefits of alternatives open to them, and second, that human decisionmakers have stable, well-ordered (transitive) preferences.<sup>14</sup> These assumptions imply that human decisionmakers behave so as to rationally maximize as many of their preferences as relevant constraints allow them to do.

To understand how decisionmakers might be said to behave in accordance with this theory, we need to examine decisions from an *ex ante* perspective, rather than from an *ex post* viewpoint. That is, investigators ought to evaluate decisions of rational maximization on the basis of how the decisionmaker perceived his or her options before actually taking the decision. Whether or not the decision turns out after the fact to have been a good one is not irrelevant, but it is also not central to the usefulness of rational choice theory. For instance, rational choice theory would ask us to evaluate the decision to marry or cohabit on the basis of the partners' perceived costs and benefits prior to the decision, not on the basis of whether the partnership failed or lasted a lifetime.

Where there is uncertainty about the future—as, of course, there almost always is—the relevant version of rational choice theory is “expected utility theory.” Expected utility theory hypothesizes that human beings can make consistent estimates of the probabilities of each of the various outcomes of the alternative courses of action open to them,<sup>15</sup> that they can estimate the dollar value of the alternative outcomes, and that they have preferences about risky outcomes—that is, they are risk-averse, risk-neutral, or risk-preferring. Decisionmakers then choose among uncertain outcomes in such a way as to maximize their expected utility.

The applicability of rational choice theory to explicit market decisions (whether certain or uncertain decisions) seems straightforward. What is novel

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14. Preferences are transitive when the statements “*A* is preferred to *B*” and “*B* is preferred to *C*” imply that “*A* is preferred to *C*.”

15. For the purposes of the theory it does not matter whether those probability estimates are objective or subjective. They merely need to obey the probability calculus, which requires, among other things, that the probabilities of all mutually exclusive outcomes add up to one.



about law and economics (and other innovative uses of the theory, as in political science) is its use of rational choice theory to look at nonmarket decisions. As a brief example of the application of rational choice theory to a legal issue, consider the decision to commit a crime. Potential criminals may be thought to compare the expected costs and the expected benefits of the crime. They will commit a crime if their perception is that the expected benefits of committing the crime exceed the expected costs and will refrain from committing the crime if their perception is that the expected costs exceed the expected benefits. There is a straightforward implication for criminal-justice policy: we may deter crime by structuring sanctions so that potential criminals perceive the expected costs as exceeding the expected benefits.

Let us assume that legal rules should foster efficient behavior. Speaking very broadly, law and economics argues that social efficiency will result from the behavior of rational maximizers unless certain well-defined impediments to their achieving that efficiency are present. Those impediments are deviations from competition, public goods, external costs and benefits, and asymmetric information. I shall not torture you with explaining why these are impediments. Let me simply make a couple of general points. First, please note that these impediments do not say anything at all about imperfections in the cognitive abilities of decisionmakers. (We shall come back to this distinction in a moment.) Rather, the impediments on which I am here focusing drive a wedge between private and social optimality; that is, they create a difference between what the individual maximizer will do and what society would like her to do. Second, I think that only two impediments are salient with respect to private ordering in family law—namely, external costs and benefits and asymmetric information. I shall show why they are salient in just a moment.

#### *Rational Choice, Private Ordering, and the Family*

How does all this apply to the issue of private ordering within family law? One important implication is that prospective partners in an affective relationship should be given a great deal of latitude in arranging their affairs. For example, they ought to be allowed to conclude prenuptial agreements, conditions for dissolving the partnership, and custody arrangements for children in accordance with their lawful preferences, subject to the usual contract-formation defenses and performance excuses.<sup>16</sup>

To what extent do these rational parties need assistance from the law in structuring their agreements? Perhaps the law ought to supplement these private consensual agreements by providing majoritarian, off-the-shelf, default rules,<sup>17</sup>

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16. These matters are explored in MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 43-57 (1993), Brinig & Buckley, *supra* note 8, Rasmusen & Stake, *supra* note 3, and Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533 (1991).

17. That is, rules that the majority of parties would agree to, if they had thought of the matter. For example, if parties thought to include terms about custody in the event of divorce, the vast majority of them would probably think to provide that the primary caregiver receive custody of the children when they are young and joint custody as the children grow older.

and, in a few cases, following Stake's proposal, mandatory rules.<sup>18</sup> To decide when these rules are necessary, we need to return to the relevant criteria for intervention in private decisionmaking noted above: external effects and asymmetric information. Consider these in turn. The external effects with which the law is principally concerned are external costs. As an example, consider the alleged dire consequences that might result when close relatives have children. Law can improve matters by forbidding even consensual arrangements between close relatives. Similarly, societies typically impose minimum ages on legitimate marriage. Another example would be the costs that society would bear if a partner to a marriage were to be left destitute and a ward of the state if her partner sought to defraud or disinherit her. Finally, consider that many societies stigmatize a child born out of wedlock; to minimize these stigmata society might encourage marriages to occur and make marriage a precondition for childbearing.<sup>19</sup>

Where there are external benefits from an activity, purely consensual agreements will not provide for enough of the benefit-generating activity. An example might be that, left to their own devices, parents might prefer their children to work rather than to study. Society, however, would prefer that more children be educated. Therefore, law might intervene in privately ordered family agreements to forbid child labor or failure to educate children. Many societies have sought to realize the external benefits of stable familial relations by outlawing polygamy and polyandry and by seeking to confine sexual behavior within the institution of marriage by forbidding adultery, rape, prostitution, and the seduction of children.<sup>20</sup>

The third ground for intervention in private agreements about family matters is the presence of asymmetric information. This means, simply, that there are situations in which a party has information relevant to another party but does not have an incentive to divulge that information. For instance, in prenuptial

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18. The distinction in law and economics is that parties may contract away from default rules but not from mandatory rules. Stake has argued in favor of the following mandatory rule: parties must submit a plan for dissolution of the partnership as a condition of marriage. See Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992).

19. Naturally, this is extremely difficult to do. The federal welfare-reform legislation that took effect July 1, 1997 sought to reduce out-of-wedlock births in various ways. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; *id.* sec. 116(a)(1), 110 Stat. at 2181. For instance, § 103(a)(1) allows for a bonus in the federal block grant for temporary assistance to needy families to be given to those states that reduce their illegitimate births. *Id.* sec. 103(a)(1), § 403(a)(2), 110 Stat. at 2118-19. Section 103(a)(1) also provides that no assistance may be given to teenage parents who do not attend high school or an equivalent training program. *Id.* sec. 103(a)(1), § 408(a)(4), 110 Stat. at 2135-36. Moreover, § 103(a)(1) requires, as a condition of support, that teenage parents live in an adult-supervised setting, *id.* sec. 103(a)(1), § 408(a)(5), 110 Stat. at 2136-37, and § 905 requires the Secretary of Health and Human Services, by January 1, 1997, to establish and implement a strategy for preventing out-of-wedlock teenage pregnancies and for assuring that 25 percent of communities in the United States have programs for teenage-pregnancy prevention, *id.* sec. 905, 110 Stat. at 2349.

20. For economic elaborations on these and other restrictions, see generally POSNER, *supra* note 13.

agreements one party could not defraud the other by failing to disclose relevant information (e.g., the presence of valuable assets). One can think of other legal interventions into consensual partnership arrangements that are designed to minimize the inefficiencies attendant upon asymmetric information.

*Recent Developments in Rational Choice and Their  
Applicability to Family Law*

The question to which I now want to turn is the possibility that law and economics might say more. The central issue, it seems to me, is to ask if economics can provide additional reasons beyond external effects and asymmetric information for believing that private parties are incapable of structuring their familial affairs in a mutually beneficial way. And if so, what implications do those additional grounds have for private ordering in family law?

One way to look at this issue is to ask the question, "Can economics, and rational choice theory in particular, give an account of how human beings might make mistakes in consensual agreements?" The standard rational choice theory says that mistakes arise only because of external factors: asymmetric information, external effects, monopoly, and the like. And that those mistakes are not mistakes of individual cognition, but, rather, mistakes of aligning individual with social desire. What I want to suggest are some reasons why individuals might make systematic mistakes about their own well-being.

What are these reasons for mistakes, and what effects will they have on family law? Painting with a very, very broad brush, I have in mind the sorts of mistakes that Gregory Alexander referred to this morning as cognitive limitations or cognitive illusions. There is a very large literature on this topic. Let me mention two of the cognition problems that are relevant to a consideration of the limits of consensual agreements. First, psychologists suggest that most human decisionmakers are overconfident in that they almost always exaggerate optimistic or favorable outcomes or assessments. If that is true, there are clear implications for the rational choice theory of criminal behavior or of bankruptcy, and of our topic here today—the ability of consensual agreements to provide socially optimal family relationships. For example, decisionmakers are likely to exaggerate the likelihood that their partnership will not dissolve, that they will be good parents, that they will not get ill and be unable to contribute to their family's well-being, and so on. As a result, they may not provide for any of these contingencies. Law can improve private ordering by seeking to encourage prospective partners to be more realistic about these unpleasant outcomes and providing appropriately for them.

Second, empirical evidence has identified other cognitive limitations that have given rise to questions about the suitability of expected utility theory for describing decisionmaking under uncertainty and an alternative called "prospect theory."<sup>21</sup> Prospect theory is to be distinguished from expected utility theory on

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21. On prospect theory, see Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992). For a general overview of overconfidence, prospect theory, and other cognitive limitations, see

two grounds. First, the frame of reference for making decisions about uncertain outcomes is the status quo. Decisionmakers evaluate uncertain courses of action according to whether they lead to losses or gains from their present situation. Second, decisionmakers are "loss-averse." Loss aversion arises because people apparently treat gains and losses from the status quo differently (and differently from what expected utility theory would predict to be the case). Specifically, people are risk-averse with respect to gains but risk-seeking with respect to losses. If we give someone a choice between (1) receiving \$50 with certainty and (2) a 50% chance of gaining \$100 and a 50% chance of gaining nothing, he will probably prefer the certainty of \$50. However, if we give that same person the choice between (1) a certain loss of \$50 and (2) a 50% chance of losing \$100 and a 50% chance of losing nothing, he will choose to take the gamble. That sort of behavioral regularity is not explained by expected utility theory, and yet it is important for us to recognize that the regularity has some important legal consequences. For example, if prospect theory is an accurate description of how people approach uncertain courses of action, an implication is that people may prefer litigation to settlement or bargain vigorously rather than lightly, where losses are in store. Perhaps that means, as suggested by Professor Estin this morning, that postdissolution negotiation may not succeed, and may not occur to the degree that expected utility theory would otherwise predict.

Let me summarize these two points. If people generally suffer from the two cognitive limitations that I have here mentioned—overconfidence and loss aversion, then the implications of these are for emendations in the broad scope delegated to consensual agreements to order the affairs of people in affective relations. Because individuals may make mistakes in consensual agreements and may fight more vigorously to avoid losses than they would to realize gains, family law should craft default and mandatory rules so as to achieve socially optimal affective relationships.

#### *Private Ordering and Changes in the Structure of the Family*

One of the focuses of this Symposium has been the appearance of the "new American family." Can economics explain why the average familial relationship changes over time in society, and how, if at all, private ordering can accommodate or stall those changes? In economics, secular social changes occur because of changes in technology or in preferences.<sup>22</sup> As examples of how a change in technology can affect a family-law issue, consider the facts that it is now much cheaper to establish paternity than it used to be and that the technology for controlling pregnancy is much cheaper and more accessible than was the case thirty years ago. Both of these developments have had profound effects on affective relations generally and familial relationships particularly. As

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SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993).

22. See generally POSNER, *supra* note 13, for examples of changes brought on by these forces.

examples of changing tastes, consider society's apparently increasing tolerance for divorce, adultery, and homosexual partnerships.

How does private ordering confound or accommodate these changes? My intuition is that the greater the scope for private ordering, then the more open society is to changes. To see this, imagine the contrary—namely, that there is small scope for private ordering. For example, if there are public laws against the recognition of homosexual marriage or laws requiring divorce in the event of a complaint of adultery, then it will be very difficult to alter matters if society's mores change so as to make either homosexual marriage or adultery less objectionable. But if partners are relatively free (within the limits mentioned earlier) to craft their own agreements, they will be able to craft consensual agreements that reflect these changes. And surely they will be able to do so far more flexibly than will courts or legislatures.

That being said, one should also recognize that this flexibility comes at a cost. Some changes caused by technology and altered preferences may have deleterious external costs that invite legal intervention. For instance, one might well argue that the social costs of the advanced technology for controlling pregnancy have been considerable.

#### MICHAEL GROSSBERG

Like everyone else on the panel, I struggled with the question of what I might add to this discussion. As I thought about it, I remembered a story that I would like to share. About twenty years ago, Stanton Wheeler of Yale Law School and David Rothman of Columbia University's history department held a conference on history and social policy. They were concerned about the lack of historical context and understanding in contemporary policy debates. They gathered together a group of leading historians of American social policy. At the conference, the historians each took the podium and talked about their particular policy issue before an audience of policymakers from various fields. As the historians spoke, a common refrain emerged. Whether the historian talked about schooling or crime or medicine, he or she contended that the history of the subject was very complicated, contained multiple concerns, and had multiple and even contradictory meanings. Finally a policymaker in the audience was exasperated by these common historical tales. He jumped up and declared, "When I have a problem, I want it addressed; I want costs calculated, solutions proposed. Historians bleed too much."<sup>23</sup>

Well after having spent many years mucking around family law's history, as my contribution to this Roundtable I guess that I want to spill a little blood. Like my colleagues twenty years ago, I want to say that the past does indeed speak to the issue before us. I think that it tells us that private ordering in family law is not new, and that it has a complicated past that has helped produce the equally complicated present in which we struggle over its meaning. And furthermore, I want to suggest that by treating private ordering in family law as a new

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23. SOCIAL HISTORY AND SOCIAL POLICY at iv (David J. Rothman & Stanton Wheeler eds., 1981).

phenomenon we simplify its complications at our, and too often, at others', peril. Consequently, it seems to me that one contribution I might make to this discussion is to try to give a little perspective on the present urge to give privileged place to private ordering in American family law by looking backwards.

And as I thought about how to do that, the first conclusion I reached was that the question of this Roundtable seemed misdirected. Rather than asking whether private ordering should be the dominant *new* force in American family law, I want to suggest that we ask two other questions. Why have there always been conflicts over private ordering in American family law? And why do we have another outbreak of these conflicts at this particular moment in time? After rephrasing the question in this manner, I want to begin suggesting how these two questions might be answered by arguing that we have inherited a persistent and consistent debate about private ordering in family law. This debate has been embedded in the historical record, and it can be recovered and used not only to examine the past but also to broaden our understanding of the present while we contest the future. So I would like to explain briefly how debates about private ordering in family law have been framed, offer a few examples of how such debates have waged in the past, and then suggest how those past stories might be read in the present.

I want to begin by explaining how I think debates about private ordering in family law have been framed. American family law has developed in a series of significant time-bound stages or periods. These range from what I would call its fundamental reconfiguration in the postrevolutionary era and its initial conceptualization as the law of domestic relations in the 1870s, to the basic alterations of the post-World War II era and the conflicts of the present. In each of these eras, however, private ordering has been a primary concern and its role in family law debated, often quite fiercely. Two critical considerations framed those debates.

First, Americans have generally talked about private ordering by using the metaphor of balancing. Teeter-totter-like we have always talked about the issue in terms of balancing individual and family rights and autonomy on one side, and state interests, legitimation, and regulation on the other; and we still do. For instance, the right to wed on one side, and the legitimate state interest in regulating marital choice on the other. And, equally important, as far as I know, there has never been a time in which there was complete unanimity for tilting the law in only one way. Quite the contrary, there have always been contests about which way the law ought to tilt, and the past is littered with examples of conflicts over the proper balance that should be struck between individual rights and state interests. Some of these have been more severe and profound than have others. As a result, the debate about the proper role of private ordering in family law is a very long one.

Second, contests over the proper balance in family law between public and private interests erupted because of time-bound concerns raised by the constant reality of American family diversity. That is, there is not now, nor has there ever been, a single American family. Instead there are and there always have been a wide range of family forms and choices. Debates over private ordering—about how to balance the family-law teeter-totter between public and private—have

focused on the legal standing of these various family forms. Specifically, I read the record of the past as saying that there have been constant conflicts between what I would call "functional families" and "ideological families." By "functional families" I mean the various ways women, men, and children actually lived; and by "ideological families" I mean the family configurations embedded in statutes, legal doctrine, administrative regulations, and other public narratives of this society. The two family forms coincide at some moments in time, and clash at others. Throughout American history, conflicts over the status of the two, particularly over the status of functional families, have continually upset the legal balance and spilled out into the public sphere, and helped ignite battles over private ordering in family law.<sup>24</sup>

In short, I want to argue that struggles over the balance between public and private interests provoked by conflicts over functional and ideological families have constantly and consistently framed debates about private ordering in American family law. We are engaged in one such debate right now. And thus I think an understanding of this persistent way of framing the issue is critical to any discussion of the subject. Recognizing the nature of this way of framing the issue also underscores the inherently unstable, contingent, and subjective nature of all such debates, including those in our own time. It helps us understand why there have been generational but not permanent solutions to these conflicts. I want to develop this argument a bit more fully by offering three brief, disparate examples from a family-law past littered with such conflicts.

My first example addresses the role of private ordering in marital choice. Marital choice raises a number of concerns about balancing public and private interests that always have the potential to provoke controversy and conflict: Who can wed? How will a marriage be solemnized? Which marriages will receive the state stamp of legitimacy and approval? Which unions will have the full rights and privileges of matrimony? As I read the record of marriage law in nineteenth-century America, two very different sets of answers were given to these questions.

The first answer came in the antebellum era. The preponderance of official and lay opinion tilted the family-law teeter-totter toward private ordering, or what then might have been termed "liberty." The result was to give privileged place to individual decisionmaking in marital choice and to limit state regulation. Statutory controls on marital choice through regulations that mandated parental consent, formal ceremonies, licenses, minimum ages, and the like, elicited endorsement as salutary for individual couples and socially beneficial, but adherence to these rules was not required for a legally valid marriage. The creation and the rapid diffusion of common-law marriage epitomized the era's legal balance in marital choice. Common-law marriage let men and women determine their own marital partners and at the same time secure state sanction and privileges for the choices that they made. In short, it institutionalized private ordering in marital choice. Equally important, the tilt of the era's policies toward

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24. For a fuller development of these points, see Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273 (1995).

marital-choice rules was also a period story that gave privileged place to functional families. Intent was the key. The law was encouraged to recognize all unions that individuals chose to form, from what might be called "conventional" marriages sanctified in a church wedding to what might now be considered simply "cohabitation." And yet opposition did exist. Parents, state officials, clergy, and many others protested the policies, championed greater state regulation, and contended that excessive nuptial liberty encouraged libertinism. In a few states resisters succeeded in rejecting common-law marriage. However, despite the opposition, the dominant tilt in the law was toward private ordering.

Like all balances between state and private interests in American family law, the antebellum answers to the questions of marital choice proved to be time-bound and unstable. Balances in family law always shift with changing legal and social conditions. And both changed in the late nineteenth century. In the years after the Civil War, amidst the changes that transformed the republic into an ethnically and racially diverse urbanized center of industrial capitalism, growing numbers of Americans concluded that family diversity bred far too many social problems. Indeed, treating the family as a kind of litmus test of social well-being, yet another persistent feature of American family law, they considered some families as sources of social evils. A family crisis erupted and the law's inherited antebellum balance of private and public interests fell under attack. Efforts to push the balance away from private choice and toward public regulation dominated marriage-law debates throughout the era. One result was a burst of legislation aimed at limiting marital choice through the imposition of new restrictions on those who sought to wed. These restrictions included mandatory rules that required higher minimum marital ages, disease checks, waiting periods, and a variety of other controls that tried to impose a new ideological vision of marriage on the diverse populace. Successful campaigns for bans on common-law marriage epitomized the family-law reform movements of the era. The effort against private ordering culminated in one of the most powerful exertions of state intervention into marital choice: first, significant geographical and group extensions of bans on interracial marriage, and then, a federal campaign against Mormonism and polygamy. Again, resisters emerged to protest the new tilt in the law and to defend greater individual choice. However, they could not stop the imposition of the new restrictions.<sup>25</sup>

I think that the conflicts during the nineteenth century over the balance between private ordering and public interest in marital choice illustrate the way such debates have been framed in teeter-totter-like terms and in response to attitudes about functional and ideological families. Every society restricts marital choice in some fashion. Thus the real issue is always determining what restrictions should be applied and how they can be justified. And even this brief rendition of nineteenth-century American experiences in the regulation of marital choice suggests to me that there is a historical record that tells us that trying to place stringent limits on what we are calling "private ordering in marital choice" is inherently repressive. It also convinces me that we should be very careful in

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25. For a more detailed discussion see MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 64-152 (1985).



employing one of our standard uses of the past, argument by analogy. By that I mean, the rhetorical strategy of making a case for a particular policy in the present by analogizing it to an experience in the past. The most obvious contemporary issue of marital choice that is fodder for such an argument is the contentious issue of same-sex unions. In the almost irresistible urge to argue by historical analogy, I would contend that the most appropriate analogy for debates about same-sex marriage is the ban on interracial marriage and its demise in *Loving v. Virginia*.<sup>26</sup> And I would resist using analogizing restrictions on same-sex marriages to the ban on polygamous unions and its endorsement in cases like *Reynolds v. United States*.<sup>27</sup> But my main point is that it is through contests over issues such as selecting the most appropriate and most effective historical analogy that the past continues to frame present debates about private ordering in family law.

My second example of past debates about private ordering in family law is a bit more complicated than marital choice. It deals with the issue of private ordering in child rearing and the attendant questions of who governs the home and who holds power within and over the home. And I think it suggests some of the complications raised by demands for private ordering of families in the past and thus in the present.

I want to discuss the question of private ordering in child rearing historically by returning to the family crisis of the late nineteenth and early twentieth centuries. In addition to concerns about unrestricted marital choices, fears about families also focused on child-rearing practices. Those worried by the state of American homes feared that children were not being raised properly. Fueling their fears was the constant reality of family diversity produced by the ever-present range of functional American families and by changing notions of child development. In this case, immigration, urban growth, industrial labor, and a variety of other factors combined to increase the range of child-rearing practices in the republic. At the same time, middle-class child experts called for childhood to be extended and for children to be excluded as much as possible from the market and from public life. Differing notions of the importance of schooling and child labor, clashing cultural beliefs about the authority of parents, especially fathers, contrasting understandings of the economic needs of families, and a litany of other conflicts flared into disputes over child rearing. They were fed by stories about abused, neglected, and overworked children. Family savers sought to end diversity in child rearing through the imposition of state-mandated uniform standards at the same time that they sought restrictions on marital choice. In the name of child protection, reformers helped construct new mechanisms for regulating the internal life of families deemed marginal or abnormal. They included quasi-public organizations charged with dealing with child neglect and abuse, juvenile courts, compulsory school laws, child-labor laws, mothers' pensions, and a variety of other policies and programs that constituted what political scientist Andrew Polsky has aptly called the "American

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26. 388 U.S. 1 (1967).

27. 98 U.S. 145 (1878).

therapeutic state."<sup>28</sup> This new complex of public and quasi-public agencies became the medium for a massive intervention into the homes of those considered on the social margin, primarily working-class and immigrant families. It succeeded in rearranging the balance of power between these families and the state. The goal of uniform family rearing expressed a middle-class ideal of proper family life and represented an effort to impose that ideal on all households by limiting the autonomy and authority of proscribed families.

And if that were simply the story, its meaning would be rather clear. Like the constraints on marital choice imposed at the same time, the new controls on child rearing could be considered yet another example of unnecessary restrictions on private ordering in families, and yet another story from the past that tells us to resist public intervention in the present. However, as I suggested earlier, the tale is a bit more complicated. If we look at some of the experiences produced by the actual operation of the new therapeutic state, we can see that like all such significant changes, it had unintended consequences. Not only did the new rules and agencies rearrange the balance of power between the state and individual families—as it was intended to do—it also affected the internal dynamics of power relations in some families. Most notably, juvenile courts, mothers' pensions, changes in age-of-consent laws, and kindred reforms became means through which married women and children challenged the power of husbands and fathers. Wives and children used the new therapeutic complex to contest issues from family finances to youthful sexual independence and to seek protection from domestic violence and abuse. The record is thus strewn both with examples of individual family members trying to gain protection and of agents of the therapeutic state trying to impose middle-class norms and beliefs on many of those same individuals.<sup>29</sup>

As a result of these mixed experiences, the late nineteenth- and early twentieth-century efforts to create a uniform standard of child rearing by tilting the family-law balance away from private ordering is a complicated tale filled with mixed messages and meanings. It does, though, underscore the reality that the distribution of power within and over the home is always involved in debates about the balance between private ordering and public regulation in family law, and the reality that attempts to alter the balance between the two always have unintended consequences.

As a final example of our inherited way of debating private ordering in family law, I want to turn to the issue of divorce and specifically no-fault divorce. There has been a debate in this country about the legitimacy and social utility of divorce since well before the Revolution. Indeed, that debate has been part of a broader one that continues to rage throughout western European society. Until the advent of no-fault, however, fault and notions of morality framed by fault had always dominated discussions about the proper balance between individual and public interests in divorce. And, unlike marital choice, the tilt in divorce had always been toward state regulation and severe limits on private ordering even though

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28. See ANDREW JOSEPH POLSKY, *THE RISE OF THE THERAPEUTIC STATE* (1991).

29. For discussion of these issues, see LINDA GORDON, *HEROES OF THEIR OWN LIVES* (1988); MARY E. ODEM, *DELINQUENT DAUGHTERS* (1995).

over time divorce became more accessible and more frequent. At the same time, the historical record is complicated by the fact that the act of divorce itself and its frequency and rules have consistently been considered measures of the well-being of the larger society rather than merely the products of claims for marital freedom by individuals. Divorce has thus been a barometer of conflicts within law and society over the issues at the heart of debates over private ordering in family law. These include the limits of individual autonomy, the sanctity of marriage, the public interest in preserving families, and the responsibilities of parents. In short, despite its growing acceptance over time, divorce has always been considered much more of a socially sanctioned privilege than an individual right like the choice to wed. The debate about private ordering in divorce was framed accordingly; indeed, it was bound and framed by fault. The very idea of private ordering in divorce had always drawn rebukes from judges, legislators, and other voices of family-law authority.

The creation and rapid diffusion of no-fault divorce obviously sought to reframe the debate about private ordering in fundamental ways. It represented a deliberate attempt to break free of the past and, in my language, to tilt the balance in the law permanently in the direction of private ordering. The goal was to make the law conform to what was considered the way marital dissolution actually functioned. And thus it represented one of the most direct endorsements of private ordering in family law, and its attendant redefinition of marital morality, ever attempted in American family law. But, as we all know now, this vigorous endorsement of family-law private ordering has had only limited success. Rapid enactment of no-fault divorce has not permanently reframed the issue. Instead it has provoked a renewed debate about the proper balance in divorce law between public and private interests. A backlash against the innovation has spread, fed by strong opposition to the very idea of no-fault. The renewed debate suggests once more the hold of the past on the present and the difficulties of permanently altering the balance of family-law rules. The past, it turns out, is not so easily left behind.

Equally significant for my argument today, once again, is that a change in family law's balance has had unintended consequences. One set of experiences is particularly revealing and has been captured in a recent book by Austin Sarat and William Felstiner.<sup>30</sup> They observed the actual negotiations in law offices between divorce lawyers and their clients in two states after the passage of no-fault statutes. Sarat and Felstiner discovered that many clients resisted the attempt to take fault completely out of the divorcing experience. Instead angry and hurt spouses wanted to tell the lawyers their stories of victimization. They wanted the lawyers to listen to their stories, join them in blaming their spouses, and provide them with some measure of support, vindication, and legitimation. The divorce lawyers, on the other hand, accepted the rules of the new no-fault regime and wanted the discussions to be rational, organized, and free of acrimony associated with the discarded fault system. They dismissed their clients' stories and claims of victimization as irrelevant and tried to get them to

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30. See AUSTIN D. SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS* (1995).

focus on the governing rules and processes. But the lawyers could not keep their clients from telling stories and seeking their support.

The persistent efforts of clients to bring fault back into no-fault divorce proceedings strikes me as quite significant. It documents some popular beliefs about the proper level of private ordering in family law, and it raises interesting questions about contemporary notions of rationality and the importance of individual storytelling in family-law disputes. And it also underscores the role of litigants in the creation and application of family law and in the maintenance or alteration of its balance between private and public ordering. These are not now, nor have they ever been, debates that can be completely orchestrated by legal professionals. The recently renewed debate over no-fault thus seems to me to be yet another telling example of the continued power of the inherited way we have framed family-law debates about private ordering to influence the present.

I want to conclude this brief foray into family law's past debates about private ordering by making it clear that by spilling a little blood my intent has not been to argue that the past has such a stranglehold on the present that change is impossible. Nor has it been to make facile one-to-one correlations between past and present experiences. Instead, I have merely wanted to suggest that there is much to be gained by engaging with the complications of the past and remembering that the question facing this Roundtable is not new. On the contrary, it is an old one in this republic and the historical record is strewn with answers to it. I also think that it is important to understand that private ordering's past not only continues to shape the present, but also resists any easy summation as well as any attempts at uniformity across the categories of family law and permanent policies. Thus to me the question posed issued to the participants in this Roundtable—Do you think that private ordering should be the dominant new force in American family law?—compels me to give two responses. First, private ordering is an old, not a new, force in family law. Second, now as in the past, its use and its consequences vary across the categories of family law and the experiences of family members. Thus my answer to the question facing members of this Roundtable is an unequivocal "maybe." After looking backwards, it seems to me that the appeal of private ordering in family law depends on the families and the family relations in question.

AKHIL REED AMAR

I was thinking about Jeff and Eric's paper, and let me identify four areas of law that might usefully bear upon some of the questions at issue. One is contract law, and an important distinction between one-shot contracts and relational contracts. Jeff, in the two hypotheticals you gave—one set of problems in the paper with Eric, and then the other with the probate code—there is a difference between those. At first, these vacillating laws seem similar: there are two options, you need a witness or you don't need a witness, or no-fault or fault divorce. Why not let people opt at an earlier stage into one box or the other? I think one possible difference might be that in probate, it is a little easier, perhaps, to foresee various things than in a marriage that lasts many years. You do not even know the configuration of family members, of kids, of employment. Connected to that, can

you change your mind at some intermediate point between the initial decision and the final point? That question of renegotiation, which is a big issue of contract law, is a dilemma. Eric set out one horn of the dilemma, renegotiation that basically undermines the initial deal and uses threat advantage; and Jeff, you set out the other prong of the dilemma: if you do not allow renegotiation, you trap people into this world that they never quite envisioned, and you force them to live in it. And that is a problem as well. That is probably less of a problem in the probate hypothetical.

The second area of law is corporate law—consider corporations as a nexus of contracts, and maybe the government providing various off-the-shelf models from the limited corporation and the public corporation, and you can opt into that, and you can tailor it and adjust it. But again the big issue of corporate law, is the renegotiation question, especially when renegotiation has effects on third parties who are not quite voters, and when a majority of the stockholders try to amend the charter of the corporation, but a minority really disagrees. Is this kind of an extortionistic taking advantage of opportunities that really breaches the underlying initial contract when you have a company taking over another? Are all the gains of that takeover really breaking implicit contracts with employees and all the rest?

The third area of law is partnership law. The problem with no-fault as I see it is that basically men typically are allowed to breach the implicit agreement that they made to take care of their partners and their children for the rest of their lives, and maybe that is because the equality idea of a 50-50 distribution makes a certain amount of sense, but we have just misconceptualized what it is to be divided. Just the pot of assets that actually exists at the time of dissolution? That is a pretty narrow conception of what it is to be divided, when the real assets are his law degree and partnership at Cravath, which will generate over the next thirty years quite a lot. If we think about a balanced federal budget, we have an anemic conception of a balanced budget if we focus on every year actually having to have a cash-flow balance, as opposed to a capital budget versus a current-expenditure budget, and partnership law may have more expansive resources for us to think about. Opportunities can be created during the course of a partnership that are only cashed in later on. Perhaps we might also have a trust model. I do not know enough about trust law to know whether that might also be a useful possible analogy when we think about the money issue, which is different from whom do you have to live with, and can you remarry.

And finally, the constitutional-law argument that I have been trying to highlight is a set of Thirteenth Amendment considerations, that is when you try to specifically enforce personal-service contracts, and when you are actually dealing with persons' bodies, and not just talking about money. And then questions about voluntariness emerge: at what point in time, and are you talking about persons' bodies, their reproductive services, who they can live with, who they spend time day-to-day with, and so on.

And I would say the law generally does really sharply distinguish between promises to pay over property and promises to actually perform with one's own body, personal service, and this is connected even to ideas of bankruptcy and fresh start, and certain things that are inalienable. We do not let one sell oneself in a future state into certain forms of limits on bodily liberty, and this was a shift

from the founding vision that said if you sign up at time  $T_1$  for servitude, that is voluntary, not involuntary, because you signed up for it, and as long as you did not agree to more than seven years, that was not unconscionable or a violation of public policy. Contrast that founding version with the Civil War understanding of involuntary servitude, when we looked at voluntariness at the time that Rumpelstiltskin comes and demands the child, at the time that performance is due, handing over another person. And the law does, I think, on Thirteenth Amendment grounds sharply distinguish between personal-service contracts, where you cannot contract for specific performance, and other things. Within marriage, I guess I would say if you have a preference for private ordering, the parties can work out whatever they want, and as long as they have their own arrangement, the law does not intervene, and they can have a church arrangement in which they do things, they can have private mediation. If certain people consent to certain kinds of touching, we might permit that. There might be certain things that no one can consent to, certain kinds of beatings, but there may be intermediate kinds of physical contact where consent matters, and I would think that judges and the state should not intervene in the interior of the marriage relationship, but should instead specify what are the conditions upon which exit is possible. And once we have that exit option, we should not have ongoing judicial supervision of the child custody and all the rest because that really does interfere with basically people's ability to structure their families. We should identify selective nodes of public intervention. Ordinary people decide whom they are going to get to marry, and then they can, and the state allows this marriage, and then the state says, "Here are the exit possibilities," and there may be some ability to contract about that within a limit, but in the interior of marriage, I guess I am a little nervous about judges getting involved.

MICHAEL GROSSBERG:

Martha, would you like to address this issue?

MARTHA FINEMAN:

It seems to me that as long as you have an institution like marriage, it is going to obscure things. Marriage does a lot of work in this society, and it does not make a lot of sense to talk about whether you can make a valid contract that includes either a \$100 penalty or a beating as the remedy for failure to put dinner on the table at the right time. Because, in fact, what happens is that some people in this relationship have more access to "self-help." So what might happen in a large number of cases would be that the wife gets both the beating and assessed the \$100 in compensation for her failure to have dinner on the table at the right time.

Our history with and understanding of the institution of marriage serve to influence our interpretations of the transactions that occur. Some actions get set aside and labeled "domestic"—responses that reflect the fact that they occur within the confines of private family interactions. Because a beating is a more "private" response, it is understood as a more predictable, even appropriate, response than an impersonal, court-enforced \$100 penalty. That is why I think we have to take away the whole protective shield of marriage and make all relationships subject to the same sets of default rules. So, the question would be

not whether a specific contract is valid within marriage. The question rather is, Is an explicit contract where a married woman agrees to a beating going to be enforced by a court? As it is now, beatings are permitted by the system, condoned by prosecutors, judges, and juries that refuse to convict for domestic violence—even before this, and by police who do not respond to calls of domestic violence. The question is why these responses are only validated within the context of marriage.

Q: Should they be?

MARTHA FINEMAN:

No! In my opinion, people should not be able to contract to be beaten for failure to serve dinner on time. It would be the same result if I beat you because you agreed to sit in another part of this auditorium. If I do resort to violence, you should have some sort of remedy against me for my doing so—both tort and criminal remedies. And the system should provide the same remedies for an irrational response to a failure to have dinner on the table at a specific time.

Q: And Martha, you believe that even if there were an antecedent contract that supposedly you signed, you know, see, because Eric says, “Oh but you signed the contract,” you and I are saying “But there are certain things you cannot be, you could not even sign . . .”

MARTHA FINEMAN:

I see that marriage is treated differently and transactions within marriage are treated differently. Our assumptions about the institution of marriage relieve us from consideration of larger principles. This is why we have to get rid of marriage as a legal institution. If the question is whether we should allow people to contract to do certain violent things to each other then let’s answer this for all people—just do not limit the ability to legalize abuse to certain categories of people. Marriage should not serve the purpose of exposing women to private abuses of power. It has had that role historically, of course.

Q: One question for Akhil, just on the Thirteenth Amendment, and the point of specific performance of contracts, of services, of personal-services contracts or others. You carefully distinguished those personal-services contracts from questions relating directly to money—will this money go that way, or will these assets, land go this way or that way—but there is something in between that at least I did not clearly hear you answer, and that is the personal-services contract, but where the only enforcement is by the damages remedy, as opposed to the specific-performance remedy.

AKHIL REED AMAR:

That ordinarily does not involve the Thirteenth Amendment. If I do not do this, I pay. There is a wonderful article by my friend Lea Vander Velde in the *Yale Law Journal* a few years ago in which she makes an observation about the genesis of the rule about personal-service contracts. Actually here is the rule that ultimately emerged: we will not force you to play for the Yankees, if you do not

want to, but you cannot play for anyone else. And this actually was a different rule than what many judges thought immediately after the Civil War, which is, you have to be able to get out of your contract, and you can play for another team, but you might have to pay damages. We could even talk about the permissibility of contracting for liquidated damages, but you got to play where you wanted. Our rule today is the rule of *Lumley v. Wagner*. Lea Vander Velde shows that it has very gendered origins. Actually, this initially arose not in the context of baseball players, but women opera singers and actresses. And in fact the image was of the fickle woman, the inconstant woman who is Madonna (the singer), Marilyn Monroe, Elizabeth Taylor. There are not male counterparts to this. The woman who flits from man to man—as I said, it is a very gendered image—and these were women who made agreements with their managers and then, in their fickle way, walked off and went into the arms of some other manager, and the rule that judges basically came down with was: We are not going to force you to work with this man but you cannot work for anyone else. Now what Lea shows is these are judges who, the very same day they are doing this, are issuing divorce decrees in favor of women of the following sort: We will let you escape this connection with this man, but we will not let you marry any other man. And it is fascinating, as I said, the very same day that they are deciding some of these personal-service cases they are deciding divorce cases, and with a similar kind of mentality.

And so even when you are talking about bodily service, we could talk about both the negative and affirmative variety, what we will affirmatively compel you to do, and what we will actually enjoin you from doing with your body, and all of that is different simply from having to pay money because these injunctions are specifically enforceable if permitted.

Q (to Professor Grossberg): Today are we experiencing a debate over private ordering in family law just like the ones of the past?

MICHAEL GROSSBERG:

Well, I think that the issue of private ordering in family law is being discussed now because we are once again in an era of severe conflict over families. Concerns about the state of American families emerged in the 1970s and took expression as they had before in calls for limits on family diversity—restraints on what I have called functional families. These calls were championed by organized groups of family savers like the Moral Majority, and they tried to tilt the balance in family law away from private ordering through state-imposed restrictions on abortion, divorce, and child rearing. As in the past, demands for greater uniformity in American family life arose for multiple reasons. Prominent among these was a fear about the well-being of American families fed by developments such as rising levels of juvenile delinquency, growing numbers of single-parent households, and escalating divorce rates. Critics considered these social problems and contended that they stemmed from the tolerance for family diversity that had characterized the previous era. We are now dealing with the results of the conflicts spawned by those movements. As has occurred many times in the past, we are grappling with basic questions about the balance between private and public interests in family law. However, I do not mean to



argue that we are simply experiencing the past repeating itself. Though, as I have tried to explain, the past influences the present, it is not the only source of contemporary conflict and contention. In our time, it seems to me that the debate about private ordering in family law is framed not only by past experiences but also by the privileged place that has been given to economic notions of private ordering. Assumptions of rationality and scientism that seem to me to be embedded in contemporary notions of private ordering in the market have spilled over into our debates about family life. These market-based ideals are considered by many people to be the appropriate models for analyzing family problems and the appropriate sources of remedies for those problems. Private ordering thus has a market meaning that is different in many ways from its past. The result is a debate that is different in many ways from those in the past about private ordering in family law. In short, as at any moment in time, our debates combine both continuity and change. To understand the debates of our time we need to sort out both.

