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The Public and Private Ordering of Marriage

Brian H. Bix[†]

A same-sex couple seeks state recognition of their relationship;[1] a couple about to marry but dissatisfied with current divorce law wants to enter a binding agreement preventing either partner from filing for no-fault divorce;[2] another couple about to marry wants to enter an enforceable agreement waiving one party's claims to alimony or to certain property, should the marriage end in divorce;[3] and a same-sex cohabiting couple wants to enter an enforceable agreement protecting each member's individual property interests.[4] These examples, and many others, raise the question of the proper extent of public and private ordering of marriage, and marriage-like relationships. Such questions usually turn on the proper role of the state: if, and when, it should encourage certain forms of relationships by recognition and benefits, and when it should empower individuals to organize their own lives (in ways which may vary from the state's "preferred structures") through enforceable agreements. In this Article, I offer a brief overview and restatement of this question, focusing more on the nature of claims about "public ordering" and "private ordering" than on moral and policy arguments. I hope to clarify the terms of the debate, with the hope that this analysis

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[1] See, for example, *Goodridge v Department of Public Health*, 798 NE2d 941 (Mass 2003) (holding that the exclusion of same-sex couples from the state marriage statute was contrary to the Massachusetts state constitution).

[2] See, for example, American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 7.08(1) (2002) (referring to such agreements and suggesting that they should not be enforceable).

[3] See Uniform Premarital Agreement Act, § 3, 9C Uniform Laws Annotated 43 (West 2001 & Supp 2003) (discussing the permissible topics for premarital agreements).

[4] See, for example, Mike McCurley, *Same-Sex Cohabitation Agreements*, in Edward L. Winer & Lewis Becker, eds, *Premarital and Marital Contracts* 195-215 (ABA 1993).

might in turn illuminate the moral and policy arguments within the substantive debates.[5]

In recent years, a number of commentators have urged more private ordering—or, more precisely, greater public recognition of private ordering—of marriage and marriage-like relationships.[6] Discussions of "private ordering" cut across a wide variety of issues and ideological positions: from wealthy people who want to protect their wealth from spouses or potential spouses;[7] to same-sex couples who want to have their relationships, or their connections to a child, given public recognition;[8] to (opposite-sex) couples who want to bind themselves to a higher level of marital commitment than state marriage and divorce laws permit.[9]

One can easily become confused while listening to the debates about public and private ordering, due to the variety of fact situations, and the corresponding ways that ideological views (for example, traditional, feminist, libertarian, and conservative[10]) seem to appear on different sides of the debate as one goes from

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[5] See, for example, Lynn D. Wardle, et al, eds, *Marriage and Same-Sex Unions: A Debate* (Praeger 2003) (discussing arguments for and against the legal recognition of same-sex unions); Eric Rasmusen and Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind L J 453, 466, 468, 469 (1998) (discussing the arguments for and against the legal enforcement of a wide range of premarital agreements, concluding in favor of broad enforcement); American Law Institute, *Principles* § 7.08 (cited in note 2) (discussing the arguments for and against the legal enforcement of premarital agreements, concluding that enforcement should be limited regarding both the scope and substance of such agreements); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J L & Feminism 229 (1994) (offering arguments against the enforcement of premarital agreements regarding post-dissolution financial terms, on the basis that such agreements disproportionately harm women).

[6] Rasmusen and Stake, 73 Ind L J at 464-65 (cited in note 5) (advocating greater enforcement of premarital agreements on various topics); Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 228-30 (Routledge 1995) (arguing that private contract should replace state regulation of marital relationships).

[7] Rasmusen and Stake, 73 Ind L J at 461 n 40 (cited in note 5); Brod, 6 Yale L J & Feminism at 243 (cited in note 5) (describing the common situation of a wealthy older man presenting a premarital agreement to a younger, financially inexperienced woman).

[8] *Goodridge*, 798 NE2d at 949.

[9] Rasmusen and Stake, 73 Ind L J at 463 (cited in note 5).

[10] For example, one can find both law and economics theorists and feminists arguing for greater private ordering of marriage and marriage-like relationships. Compare id at 464-65 (advocating greater enforcement of premarital agreements on various topics) with Fineman, *The Neutered Mother* at 228-30 (cited in note 6) (arguing that private contract should replace state regulation of marital relationships); and one can find feminists on both sides of the debate about the private ordering of marriage and marriage-like relationships. Compare id (building on the existence of premarital agreements to support a claim for wholesale contractual governance of marital relationships) with Brod, 6 Yale J L & Feminism at 240 (cited in note 5) (arguing that the enforcement of premarital agreements increases gender inequality).

situation to situation, and also due to the amorphous nature of the terms "public ordering" and "private ordering." If one is going to discuss the public and private ordering of marriage and marriage-like relationships, then one should begin with some understanding of what is meant by "public ordering" and "private ordering." Parts I and II offer an overview of what these terms mean. Part III considers problems with or objections to private ordering (for example, that private agreements may contravene the public interest, that negative effects may harm third parties, and that problems of bounded rationality may arise). Parts IV and V offer remedies and responses to these problems and objections, including procedural and substantive constraints that seek to protect the vulnerable while still maintaining significant party autonomy.

I. PUBLIC ORDERING

In discussing the private ordering of intimate relationships and families, much confusion comes from a misunderstanding of what is included, in this country and at this time, by the idea of a public ordering. "Public ordering" relates to, but remains distinct from, the "public interest" in marriage. Public ordering refers to the governmental regulation of marriage and marriage-like relationships, while public interest refers to the interest society or government might have in the marital status of citizens or in how they organize their intimate lives (for example, some believe that society is better off when a larger percentage of its citizens are married, or when most children are raised by married parents).[11]

"Public ordering" of marriage in this country, in the sense of direct governmental regulation, is in some ways quite modest—sometimes paradoxically so. Excepting prohibitions on same-sex, polygamous, and incestuous marriages, those who meet the minimum age and competence requirements face only minor legal barriers to entry into marriage—usually modest licensing or ceremonial formalities.[12] Even within marriage, courts have re-

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[11] For a general discussion on this subject, see Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U Miami L Rev 1 (2000). Views about the connection between marriage and the public interest underlie recent proposals for government promotion of marriage. See, for example, Robert Pear and David D. Kirkpatrick, *Bush Plans $1.5 Billion Drive for Promotion of Marriage*, NY Times A1 (Jan 14, 2004).

[12] See, for example, Mary Ann Glendon, *The Transformation of Family Law* 35-84

mained reluctant, under the doctrine of "marital privacy," to enforce duties of mutual support imposed by statute or common law.[13]

People can easily circumvent the little regulation of entry into marriage that does exist (almost all of it occurs at the state level).[14] For example, under traditional choice of law rules, a person could marry in one state with the general expectation that the marriage would be recognized as valid in any other state;[15] thus, avoiding some[16] state policies codified in the marriage-entry rules of that individual's home state. A person can even obtain a divorce in a jurisdiction different from where he or she

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(Chicago 1989) (summarizing modern U.S. marriage law and comparing it with the rules in Western Europe).

[13] The standard citation for this (non-constitutional) doctrine of "family privacy" is *McGuire v McGuire*, 59 NW2d 336 (Neb 1953), where the court refused to order the husband to give greater support to his wife in an intact marriage. See, for example, Ira Mark Ellman, et al, *Family Law: Cases, Text, Problems* 130-35 (LexisNexis 3d ed 1998) (using *McGuire* as the case grounding a discussion of family privacy). There are rare cases that allow an award of maintenance despite the continuing existence of an intact marriage, for example, *Coltea v Coltea*, 856 So2d 1047 (Fla App 2003), but these cases are highly exceptional. Courts have occasionally invoked the marital duty to invalidate agreements purporting to modify them. See, for example, *Borelli v Brusseau*, 16 Cal Rptr 2d 16 (Cal App 1993). *Borelli* is discussed in greater detail in notes 87-90 and accompanying text.

It appears that matters were different some centuries back when the ecclesiastical courts regulated English marriage law. See R. H. Helmholz, *Marriage Litigation in Medieval England* 67 (Cambridge 1974) (discussing specific enforcement of marriage contracts, including orders "that the defendant accept the plaintiff as his legitimate spouse and treat her with marital affection"); R. H. Helmholz, *Canonical Remedies in Medieval Marriage Law: The Contributions of Legal Practice*, 1 St Thomas L Rev 647, 651 (2003) (describing the willingness of the medieval church courts to order "specific performance" of matrimonial contracts).

[14] Though other aspects of public ordering are not so easily circumvented, as those who want to have a same-sex union celebrated or recognized have learned. See *Rosengarten v Downes*, 802 A2d 170, 178 (Conn App 2002) (holding that the dissolution of a Vermont civil union was not within the court's subject matter jurisdiction because of "strong legislative policy" against same-sex marriages); *Burns v Burns*, 560 SE2d 47, 48-49 (Ga App 2002), cert denied 2003 Ga LEXIS 626 (refusing to view a Vermont civil union as a "marriage" for the purpose of interpreting a consent decree visitation clause); Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, NY Times 9-2 (Apr 6, 2003) (reporting that a Texas court refused to grant a divorce to a Vermont civil union; the Vermont civil union statute requires those seeking the dissolution of a civil union within Vermont to have been resident in that state for one year). But see Elissa Gootman, *Judge Allows Suit in Death of Gay Mate*, NY Times D8 (Apr 16, 2003) (describing a Long Island, New York, case in which a civil union partner was allowed to file a wrongful death lawsuit as a spouse).

[15] See, for example, Eugene F. Scoles, et al, *Conflict of Laws* § 13.5 at 548-51 (West 3d ed 2000). This is subject to limited exceptions based on "public policy" and, in a handful of states, "marriage evasion legislation." Id at 551-65.

[16] There are some limits, in some states, on the ability to circumvent state laws and policies. See id (discussing marriage-evasion rules and public policy grounds supporting them).

was married or where he or she lived during the marriage,[17] and the jurisdiction hearing the divorce generally applies its own laws, even if that state had little prior connection to the couple or the marriage.[18] The resulting divorce judgment is enforceable in all other jurisdictions.[19]

Despite minimal regulation of the formation and dissolution of the marriage relationship, the status of marriage has great significance under many federal laws,[20] state laws,[21] and private contractual provisions (for example, in insurance policies and employment agreements),[22] such that spouses have rights that non-spouses do not have.[23] Given the right of individuals to structure their own lives outside of marriage, and their significant freedom to structure their lives even within marriage, why does the government wish to constrain individuals' ability to structure their marital lives even to the limited extent that the current laws do?

One argument for public ordering of marriage is that it maintains uniformity.[24] First, uniformity could reflect a judgment that a certain package of rights, benefits, and obligations will work best for most couples, even if not for everyone. Even if this assumption is true, it would support, at most, the creation of

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[17] Though this may require establishing domicile in the forum state. See *Bell v Bell*, 181 US 175 (1901) (invalidating a divorce decree based on lack of jurisdiction by the granting court, where neither party had established a domicile in the forum state).

[18] See Scoles, *Conflict of Laws* § 15.4 at 609 (cited in note 15).

[19] See *Williams v North Carolina*, 317 US 287, 301 (1942) (holding that full faith and credit applies to divorce decrees); The Full Faith and Credit Clause, US Const, art IV, § 1.

[20] The standard reference is to there being over one thousand federal laws which recognize status, rights, or benefits that turn on whether one is married or not. Nancy F. Cott, *Public Vows* 2, 231 n 3 (Harvard 2000) (citing a 1996 Report of the U.S. General Accounting Office).

[21] Along with numerous state law rights and benefits analogous to the federal rules discussed in note 20, state laws relating to marital status prominently include, in nearly every state, the right of spouses to a certain share of their partner's estate upon death, regardless of the deceased partner's wishes. Eugene F. Scoles and Edward C. Halbach, Jr., *Problems and Materials on Decedents' Estates and Trusts* 92 (Little, Brown 5th ed 1993).

[22] See, for example, Caroll J. Miller, Annotation, *Who is a "Spouse" Within Clause of Automobile Liability, Uninsured Motorist, or No-Fault Insurance Policy Defining Additional Insured*, 36 ALR4th 588 (1985) (listing cases).

[23] See *Baehr v Lewin*, 852 P2d 44, 59 (Haw 1993) (listing benefits accruing to married couples in Hawaii).

[24] In a federal system, the question of uniformity has its own complications: the fact that family law is primarily a matter of state law invites a certain lack of uniformity from state to state, but the Full Faith and Credit clause, US Const Art IV, § 1, and other constitutional constraints limit the extent of diversity and difference within the country. Some of these tensions are discussed in Bix, 55 U Miami L Rev at 15-26 (cited in note 11).

a default rule—as in commercial transactions and corporate governance[25]—that operates only if the parties do not expressly choose a different rule, thus allowing them to "opt out" if they so desire.

Second, perhaps a rigid uniform rule, rather than a default rule, helps garner social support for any particular formulation of marriage.[26] If friends, acquaintances, and the general public are to enforce legal rules (and social norms) governing marriages, it is easiest if those rules and norms remain constant across marriages.[27] If the standards vary, then society cannot as effectively enforce those norms, absent a low-cost way to inform people which set of rules apply to which marriages. However, if the state imposes relatively few standards for marriage, and enforces only a fraction of those standards, thus allowing citizens generally to act as they wish within marriage,[28] how much of a claim can the state have for "clear signals"[29] about marital status?[30]

There are certain forms of private ordering of intimate relationships where the state does not prohibit the private ordering through criminal or civil laws, but rather the state refuses to

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[25] On the possible analogy between marriage rules and Uniform Commercial Code default rules, see note 96 and accompanying text.

[26] See Eric A. Posner, *Family Law and Social Norms*, in F.H. Buckley, ed, *The Fall and Rise of Freedom of Contract* 256, 270 (Duke 1999) (arguing that "restrictions on freedom of marital contract" facilitate "community enforcement").

[27] As Professor Mary Anne Case has pointed out (in conversation), it may not be easy to ascertain someone's marital status if he or she chooses not to disclose or to mislead on the subject (for example by wearing a wedding ring even though not married, or not wearing one even though married).

[28] There are certain limited exceptions. For example, while a married couple might privately agree to have an "open marriage," one that condones extramarital affairs, should one partner later change his or her mind, the earlier informal agreement might not be a defense for a claim of adultery. See *Hanger v Hanger*, Civ No D1382-74 (DC Super Ct 1974), excerpted in Judith Areen, *Family Law: Cases and Materials* 382 (Foundation 4th ed 1999) (holding that a separation agreement clause that the parties would live separate and apart with the right to conduct themselves as if sole and unmarried does not prevent one spouse from suing for divorce on the grounds of adultery). In some states, claims of adultery can not only ground a claim for divorce, but can also affect financial provisions and (albeit rarely) child custody provisions. See Ellman, *Family Law* 423-36, 635-36 (cited in note 13) (discussing the role of adultery in property division, alimony, and custody decisions).

[29] "Signaling" is a way of displaying through actions one's abilities or inclinations (where "talk is cheap"). For a discussion of signaling and its importance for legal and social norms, see Eric A. Posner, *Law and Social Norms* (Harvard 2000).

[30] One might contrast a religious community that had strict norms regarding behavior within marriage and its own extra-legal sanctions (for example, shunning). Within such a community, it would be crucial to know who was married and who was not because of the strict standards of behavior that varied according to one's marital status and the strong consequences for violation of the norms.

recognize the relationship in any formal way. Such private ordering without public recognition includes polyamorous households (in all jurisdictions),[31] same-sex unions, and long-term opposite-sex non-marital unions (in most jurisdictions).[32] One standard explanation for the lack of public recognition is that by refusing to recognize some sorts of unions, the state encourages couples to enter marriage.[33] This argument obviously has greater force with opposite-sex couples who could get married under state law than same-sex couples and polyamorous groups who could not. The usual effect of not recognizing same-sex unions, for example, is simply to harm any children being raised by the couple, and perhaps also to undermine whatever other benefit might accrue to society by having people in long-term committed relationships.[34]

Alternatively, lack of recognition may sometimes reflect a judgment that certain relationships are harmful, either to the parties involved, to society generally, or to both. Thus, both family law and contract law refuse to recognize agreements that reflect a "meretricious relationship" (payment of money for sexual services); in this sense the older family law (and contract law) did not distinguish between prostitution, extramarital affairs,

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[31] No American jurisdiction recognizes polygamous unions as a legal category. See <http://usmarriagelaws.com/search/united_states/polygamy/index.shtml> (visited February 5, 2004) (reviewing state laws regarding polygamy). If the polyamorous partners try to make their group relationship legal, they will come up against rules criminalizing, or at least prohibiting, attempts at bigamy and polygamy. See, for example, Richard A. Posner and Katharine B. Silbaugh, *A Guide to America's Sex Laws* 143-54 (Chicago 1996). As regards the toleration of "private" polyamory, while a number of states criminalize extramarital sex, these statutes are rarely enforced. In modern America, polyamorous groups are more likely to come into trouble from zoning laws than from fornication statutes. See, for example, Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU Rev L & Soc Change (forthcoming 2004) [on file with U Chi Legal F] (reviewing the bigamy, polygamy, and zoning laws polyamorous groups face).

[32] On the limited rights of nonmarital cohabitants, see, for example, Ellman, *Family Law* 932-96 (cited in note 13); see also *Fitzsimmons v Mini Coach of Boston*, 799 NE2d 1256 (Mass 2003) (refusing to extend spousal consortium rights to long-term cohabitants on the basis that the state has an interest in restricting certain rights and benefits to married couples); *Boland v Catalano*, 521 A2d 142, 145 (Conn 1987) ("The rights and obligations that attend a valid marriage simply do not arise where the parties choose to cohabit outside the marital relationship. . . . Ordinary contract principles are not suspended, however, for unmarried persons living together, whether or not they engage in sexual activity.")

[33] See, for example, *Hewitt v Hewitt*, 394 NE2d 1204, 1207-11 (Ill 1979) (arguing that recognizing property claims arising from a nonmarital cohabitation relationship would undermine the strong public policy in favor of marriage).

[34] See, for example, James Q. Wilson, *The Marriage Problem* 7-18 (HarperCollins 2002) (arguing that strong marriages and families have significant benefits both for individuals and for society generally).

and nonmarital cohabitation.[35] The implied policy argument was that all three practices, by undermining traditional marriage, contradicted the public interest.[36] Some commentators have tried to argue that recognition of same-sex couples would similarly cause general harm to society.[37]

A different sort of argument has been offered[38] as regards polygamous marriages: that even if such marriages are not immoral, they create administrative difficulties (that certain rights and benefits are easier to administer when there is only one other marital partner) that the state can reasonably choose to avoid.

In summary, there is a sense in which the government (at least in the United States, and probably in many other countries) does not so much "order" or "regulate" marriage, as "privilege" it and "subsidize" it.[39] Like the criminal prohibition on some forms of intimate relationship and the public "recognition" of other forms of intimate relationships, government subsidy of some relationships (often connected with recognition, but the two actions can be separated) frequently has the purpose or effect of affecting private choices in intimate matters.

At one time, divorce rules helped to enforce state norms about appropriate marital behavior: only innocent and victimized spouses had a right to obtain a divorce,[40] and "guilty" spouses

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[35] See, for example, *Taylor v Fields*, 178 Cal App 3d 653 (1986) (refusing to enforce an oral contract between a man and his mistress because it rested on "meretricious" consideration). Washington State, in the course of recognizing limited property rights arising out of a long-term nonmarital cohabitation, has ironically labeled the status "meretricious relationship," thus making it the one state where rights arise from asserting that one was in such a relationship, rather than by denying it. For a general discussion of Washington State's doctrine and recent caselaw applying it, see Amanda J. Beane, Note, *One Step Forward, Two Steps Back:* Vasquez v Hawthorne *Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples*, 76 Wash L Rev 475 (2001).

[36] See *Hewitt*, 394 NE2d at 1207-08 (arguing that recognizing property claims arising from a nonmarital cohabitation relationship would undermine the strong public policy in favor of marriage).

[37] See, for example, Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 Widener J Pub L 401 (2002) (arguing that recognizing same-sex unions will create significant systemic harms).

[38] I have heard it from Professor Mary Anne Case, in private conversation.

[39] See Fineman, *The Neutered Mother* at 228-30 (cited in note 6) (discussing the way that current law privileges traditional marriage over other forms of intimate relationship). Whether subsidies should be considered a public "ordering" of such relationships is a question about word usage that need not detain us.

[40] See Lawrence M. Friedman, *A History of American Law* 204-08 (Simon & Schuster 2nd ed 1985) (summarizing the history of divorce law before no-fault divorce).

suffered financial penalties upon divorce.[41] For instance, wives guilty of adultery were sometimes forbidden by statute from receiving alimony,[42] at a time when the rules of coverture[43] during marriage and property division at divorce excluded most wives from leaving marriage with anything financially beyond their rights to alimony.[44] Given the current prevalence of no-fault divorce statutes, however, contemporary divorce rules rarely enforce state norms of marital behavior.[45]

Much of the actual "regulation" of marriage could be said to occur more informally, through "social norms."[46] Social norms can be seen as an intermediate between public and private ordering; however, they are, in an important sense, a substitute for public regulation. They are "public" in the sense that they reflect community standards rather than the preferences of the individuals most directly involved.[47]

II. PRIVATE ORDERING

"Private ordering" is a deceptively complex concept. At one level, references to the private ordering of relationships resonate with a type of privacy, with the way that individuals (especially after *Lawrence v Texas*[48]) can structure their personal and social

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[41] Two states, Georgia, Ga Code Ann § 19-6-1(b) (Lexis 1999 & Supp 2003), and North Carolina, NC Gen Stat Ann § 50-16.3A (Lexis 2001), continue to forbid adulterous spouses of either gender from receiving alimony. South Carolina, SC Code Ann § 20-3-130 (Law Co-op 1976 & Supp 2002), prohibits alimony awards to spouses who commit adultery before the "signing of a written property or marital settlement agreement" or before a court "order approving a property or marital settlement agreement." Additionally, in Virginia, Va Code § 20-107.1(B) (Supp 2003), adultery is a bar to alimony in all but exceptional cases.

[42] Chester G. Vernier and John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 Law & Contemp Probs 197, 202 (1939).

[43] The rules of coverture usually included a wife's disability to own property or enter contracts in her own name, with the husband owning any property she brought to the marriage and having the right to enter agreements for her. See Cott, *Public Vows* 11-12 (cited in note 20) (discussing coverture).

[44] Lenore J. Weitzman, *The Marriage Contract* 44 (The Free Press 1981).

[45] Even in contemporary divorce law, judgments of marital fault can play a limited role in the financial and custody judgments arising from divorce, see, for example, Ellman, *Family Law* 423-26, 632-38 (cited in note 13), but these remain more the exception than the rule.

[46] Posner, *Family Law and Social Norms* at 256-74 (cited in note 26).

[47] There are often good policy or efficiency reasons why the government might prefer to delegate regulation to social norms rather than trying to do so through the law. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U Chi L Rev 133 (1996).

[48] 123 SCt 2472 (2003) (holding that a Texas statute criminalizing homosexual sodomy violates the Due Process Clause of the Fourteenth Amendment).

lives as they wish without interference from the government, and with a certain level of minimal state protection against coercive interference by other citizens.[49] Another sense of private ordering involves having the power to order one's life by being able to enter binding agreements for the future distribution of property (for example, through wills).[50] This form of private ordering requires a government (or social institution or other social force) willing and able to enforce the commitments entered into. This form of private ordering could also be understood as a willingness to bind a later self to the preferences and plans of an earlier self. A contract stating that, at some future date, X will provide a service to Y at a given price, holds X and Y to those terms even if at a later date, one of those parties (the "later selves" of X or Y) no longer wants that exchange. While talk of "past selves" and "future selves" seems gimmicky, it may provide a different perspective on certain aspects of public and private ordering. The move from the historical no-divorce ("no exit") or fault divorce ("difficult exit") legal rules to those of no-fault divorce ("[relatively] easy exit"[51]) could be re-characterized in terms of moving away from protecting the preferences of earlier selves (who make the commitment of marriage) and moving toward the preferences of later selves (who want to get out of the commitment).[52]

Under a more conventional characterization, where we do not separate the identity of "past selves," "present selves," and "future selves," the ability to enter legally binding agreements and commitments has important welfare implications. In commercial agreements, one party's willingness to expend money on a project will reasonably turn on whether its commercial partners will be forced either to complete the transaction or to pay compensation for those expenses—and perhaps for lost profits as well.[53]

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[49] Id.

[50] See, for example, H.L.A. Hart, *The Concept of Law* 27-28 (Oxford 2d ed 1994) (discussing "power-conferring rules").

[51] I do not mean to discount the pain and expense that can accompany nearly all divorces, even those brought under no-fault provisions and where no terms of the divorce are seriously contested.

[52] I realize, of course, that matters are much more complicated. Depending on the structure of the fault and no-fault systems, the move can also be seen as from a fully consensual system (no marriage or exit from marriage without the consent of both parties) to a unilateral system (where exit from marriage is allowed on the choice of one spouse, even when the other objects).

[53] This can be understood as compensation for the alternative profitable projects one did not and could not enter when one committed to doing this one. See, for example, Lon

Similarly, one's willingness to enter a marital or quasi-marital connection with another person, and to make certain sacrifices—regarding one's career, for instance—for the sake of that other person or for the sake of the household, may depend on the extent to which society or government will hold the other party to carrying through with the joint (marital) project,[54] or at least force the other person to make compensatory payments should he or she choose to abandon the commitment.

For same-sex cohabiting couples that are not allowed to marry, but who want their private arrangements enforced,[55] this becomes an especially important issue. In particular, same-sex couples considering raising children face significant problems.[56] In such circumstances, only one partner can be the biological parent of the child, and typically only one of the partners can be the legal parent of the child.[57] A number of states allow the second partner to adopt the child, thus making both partners legal parents of the child,[58] but many states have not accepted this option.[59] It is reasonable for a partner not to want to raise a child without assurance that his or her legal rights to the child will be protected. For that reason, many same-sex couples who wish to

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L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages: Part 1*, 46 Yale L J 52, 60-62 (1936) (arguing that expectation damages can be justified as a way of recovering hard-to-prove reliance damages).

[54] In thinking about the limits of such ideas, one can look at the suggestion made in Chile, where divorce was until recently unavailable, and legislators were considering proposals for introducing divorce. One commentator had suggested that couples should have the possibility of marrying with a "no divorce" option if they so choose. Larry Rohter, *Chile Inches Toward a Law That Would Make Divorce Legal*, NY Times A4 (Sept 29, 2003).

[55] Even when the couple enters express, detailed written agreements regarding financial matters, where there can be no doubt about the parties' intention that the agreement be legally enforceable, states vary to the extent that they are willing to enforce the agreements. Among the decisions upholding the enforceability of such arrangements among same-sex couples are *Whorton v Dillingham*, 248 Cal Rptr 405 (Cal App 1988), *Posik v Layton*, 695 So2d 759 (Fla App 1997), *Crooke v Gilden*, 414 SE2d 645 (Ga 1992), and *Silver v Starrett*, 674 NYS2d 915 (NY Sup 1998).

[56] For a general discussion, see Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 Cardozo L Rev 1299 (1997) (discussing the private and public ordering of gay and lesbian couples and families). See also McCurley, *Same-Sex Cohabitation* at 195-215 (cited in note 4) (making drafting suggestions for such agreements).

[57] See Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J Am Acad Matrimonial L 95, 109 (2002).

[58] Id at 109 n 52 (citing cases).

[59] See, for example, *Matter of Adoption of T K J*, 931 P2d 488 (Colo App 1996) (interpreting a Colorado statute to preclude second-parent adoption); *In re Adoption of Jane Doe*, 719 NE2d 1071 (Ohio App 1998) (interpreting an Ohio statute as inconsistent with second-parent adoption).

raise a child together have entered express written co-parenting agreements, by which each partner agrees to recognize the other partner's parental rights should the relationship later break down. However, a number of the states that have faced the question have refused to recognize co-parenting agreements in such contexts.[60]

Much of the academic discussion of private ordering of marriage involves agreements in which the parties attempt to alter the statutory terms of marriage (for example, the available grounds for divorce, the rules of property ownership during the marriage, and the rules of property division and alimony upon divorce). Why would couples want to enter such agreements?[61] One reason would be to seek a greater level of commitment than is possible under the state's divorce rules (which, for most states, amounts to allowing unilateral no-fault divorce[62]). This may simply reflect the parties' commitment to each other or their ideas about marriage; or, it may be a means one party uses to try to protect his or her current and future sacrifices in the marriage.

Parties may also enter marriage agreements to ensure particular financial terms, usually favoring the party initiating the negotiations, upon divorce.[63] For example, a spouse might seek to

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[60] See, for example, *In re Interest of Z J H*, 471 NW2d 202 (Wis 1991) (refusing to enforce co-parenting agreement on the grounds that it violated public policy); *In the Matter of Alison D v Virginia M*, 572 NE2d 27 (NY 1991) (holding that a co-parent did not have standing to seek visitation with child despite the fact that the co-parents "planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing"); *Curiale v Reagan*, 272 Cal Rptr 520, 521 (Cal App 1990) (holding that co-parent who was not "natural mother, step-mother, nor adoptive mother" does not have standing to seek custody and visitation with child); *Nancy S v Michele G*, 279 Cal Rptr 212, 216 (Cal App 1991) (holding that a de facto parent does not have the "same rights as a parent to seek custody and visitation over the objection of the children's natural mother"). The effect of *Z J H* in Wisconsin was largely undermined by a later case recognizing a lesbian co-parent's rights, though the decision was not grounded primarily on that couple's contract. *In re H S H-K*, 533 NW2d 419 (Wis 1995) (holding that co-parent could seek visitation with child because of her parent-like relationship with the child).

[61] In asking this question, one must keep in mind the relative ignorance of parties regarding the terms that *will* be applied. See Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U Mich J L Ref 217, 234-37 (1990) (discussing the relative ignorance of most people regarding the rules of marriage and divorce). This ignorance reflects both the fact that most people enter marriage with only a limited—and usually erroneous—idea of what the rules of marriage and divorce are in their state; and the fact that the current rules in their state may not be applied, either because the state changes the rules, the parties move to another state during the marriage, or one of the parties moves after separation and seeks a divorce in another state.

[62] Ira Mark Ellman and Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1999 U Ill L Rev 719.

[63] Another reason for entering agreements is that such agreements might be required

limit his or her partner's alimony claims, or determine in advance the property that each partner will receive upon divorce.[64] Many of the premarital agreements litigated in reported cases or discussed in articles involve the arguably unsavory situation of a richer partner seeking to protect his or her wealth by asking the poorer partner to waive his or her rights to property or alimony.[65] Occasionally, one comes across the more sympathetic set of facts where the premarital agreement sought to protect the interests of children born from a prior marriage, or to keep a family business or family heirlooms within the family.[66]

There are other complex interactions of "public ordering" and "private ordering": for example, the negotiations that occur when partners decide whether and when to enter or leave the marriage and how to divide tasks within the marriage occur in the context of the alternatives set by society and social norms on one hand, and legal rules on the other.[67] Thus, whether a spouse can end the marriage without the consent of the other spouse, and what terms of property division and alimony the state sanctions upon termination, have obvious effects on the bargaining

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or encouraged by one's religion or by community tradition. There is some caselaw regarding the enforcement of Jewish and Islamic premarital agreements. See Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 Colum J L & Soc Prob 359 (1999) (discussing court treatment of the Jewish *Ketubahs*); Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of* Mahr *Agreements in American Courts*, 15 J L & Relig 67 (2000); Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting* Mahr *Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S Cal L Rev 189 (2002). These agreements raise special complexities, in part because of the constitutional requirement of separation of church and state (which may make enforcement, or specific enforcement, of such agreements problematic), and in part because the terms of such agreements tend to be non-negotiable and they may not reflect the parties' specific preferences (these last two factors are also potential arguments for being less willing to enforce religious premarital agreements as opposed to other premarital agreements).

[64] See, for example, *In re Marriage of Bonds*, 99 Cal Rptr 2d 252, 254 n 1 (Cal 2000) (upholding a premarital agreement in which a wealthy baseball player and his far-less-wealthy fiancée both waived their community property rights, agreeing to treat property each acquired during the marriage as separate property not subject to division at divorce).

[65] Id. See Brod, 6 Yale J L & Feminism at 234-40 (cited in note 5) (arguing that the "purpose and effect" of most premarital agreements is to protect the earnings of the "economically superior" spouse).

[66] See, for example, *Goodwin v Goodwin*, 592 So2d 212, 213 (Ala 1991) (premarital agreement preserving homestead for children from a prior marriage); *Simeone v Simeone*, 581 A2d 162, 170 (Pa 1990) (McDermott dissenting) (noting that a premarital agreement may properly protect an heirloom).

[67] See Amy Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 Va L Rev 509, 565-75 (1998) (discussing the effects of social norms, legal rules, and social and economic realities on bargaining between couples).

power of spouses where divorce is a possible threat or an alternative to a bargained solution.[68]

One complication in the policy discussions regarding when and whether private (re-)ordering of marriage should be legally enforced is that most parties *enter marriage* ignorant of the financial terms and other legal rights and duties of marriage, and usually remain so unless and until they face legal separation or divorce.[69] though this may raise more questions about the enforcement of the "default rules" than it does about agreements altering those rules.[70]

III. PROBLEMS WITH PRIVATE ORDERING

The general argument for making enforceable the private ordering of marriage and marriage-like relationships reflects the general ideals underlying other forms of private ordering (e.g., contracts, trusts, property, and wills): that it better serves both private and public interests to allow parties to order their lives as it suits them.[71] Michael Trebilcock and Steven Elliott have effectively summarized some of the difficulties in applying this general view to the area of contracts within intimate relationships.[72] As they point out, parties entering financial agreements with family members are less likely than non-family members to be motivated by their own interests, and less able to protect those interests, because of the greater likelihood in the family

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[68] Thus, if a husband can end a marriage without his wife's consent and the likely terms of the divorce would leave the wife with little property and little or no alimony (and if one adds that she may have sacrificed her career to raise children during the marriage, leaving her with few marketable skills), then the husband's threat to leave could give him coercive pressure, allowing him to "persuade" his wife to sign an agreement with one-sided terms in his favor.

[69] See Baker, 23 U Mich J L Ref at 234-37 (cited in note 61) (discussing the relative ignorance of most people regarding the rules of marriage and divorce).

[70] If parties entering marriage are unaware of the terms of marriage, then there is a strong argument that they have not given their knowing consent to those terms. However, parties entering marriage are nonetheless bound to those terms. This contrasts with the rules of premarital agreements, where the law seems to be moving towards a requirement that the parties be informed in clear language of the rights being altered by the agreement. See American Law Institute, *Principles* § 7.04(3)(c)(i) (cited in note 2) (stating that it is a criterion of informed consent to a premarital agreement that if a party is not represented by counsel the agreement must explain in clear language the nature of the rights altered by the agreement).

[71] Michael J. Trebilcock and Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in Peter Benson, ed, *The Theory of Contract Law: New Essays* 45, 47-48 (Cambridge 2001).

[72] See id at 45-85.

context of altruism and coercion.[73] The way interests intersect in a family (for example, that one's own happiness is frequently a function of how happy a spouse or child is), and the subtle forms of coercion and domination attached to the often-intricate dynamics of intimacy and interdependence, may make us doubt that enforcing family agreements advances individual welfare as frequently or as clearly as it does with commercial agreements between non-family members. However, to raise doubts differs from concluding that such agreements should *not* be enforced. Indeed, there are possible safeguards that, if imposed, might make enforcement more desirable, as discussed in Part IV.

Why do courts refuse to enforce agreements ordering marriage and marriage-like relationships? The protection of third parties is a standard justification for non-enforcement of certain agreements,[74] and the protection of children is a standard, and important, concern in marriage and family agreements.[75] Notably, courts refuse to enforce terms of premarital agreements involving child custody.[76] Also, in separation agreements entered into at the end of marriage, courts generally give no special deference to terms regarding child custody and child support, and courts have a duty to review those terms to make sure that they protect the best interests of the children.[77] Similarly, if it were shown that certain kinds of premarital agreements would likely lead to marriages which create harmful environments for raising children, or that certain post-divorce arrangements make it difficult to raise children, then there would be good reasons not to enforce or encourage those sorts of agreements, despite the desires of the contracting parties.

Another standard argument for non-enforcement is that agreements of this sort tend to arise in an area where we may have an inadequate ability to protect our own interests, in part because of the well-documented cognitive limitations on our abil-

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[73] See id at 49-54.

[74] See *Edwardson v Edwardson*, 798 SW2d 941, 946 (Ky 1990) (noting that that "[q]uestions of child support, child custody and visitation are not subject to [premarital] agreements").

[75] See, for example, *Goodwin*, 592 So2d at 213 (addressing a premarital agreement intending to protect children of former marriage).

[76] *Edwardson*, 798 SW2d at 946 (noting that that "[q]uestions of child support, child custody and visitation are not subject to [premarital] agreements").

[77] See, for example, the Uniform Marriage and Divorce Act § 306, 9A Part I Uniform Laws Annotated 248-49 (West 1998 & Supp 2003) (authorizing different levels of scrutiny for provisions of separation agreements involving property and those relating to children).

ity to evaluate alternatives—limitations sometimes summarized as "bounded rationality."[78] One such limitation may stem from an inevitable optimism at the beginning of a relationship: when two people are deeply committed to one another, it may be hard to take seriously the possibility that the relationship could turn out badly, and thus one or both of the parties might fail to consider how financial or other provisions should be ordered in such a circumstance.[79]

Few, if any, commentators have argued for *unlimited* state enforcement of private ordering of marriage.[80] For example, the doctrine of "marital privacy"[81] is usually cited as the basis for not enforcing agreements between spouses regarding aspects of their daily interaction (for example, who will clean the house or pick up the kids; how the spouses will speak to one another; and the details of the couple's sexual lives). While some have argued that it might be valuable *to the individuals themselves* to work out the details of their life together in a written agreement,[82] agreements regarding the mundane and intimate interactions within a marriage have never been enforceable, and it is hard to find anyone who argues that legal enforcement of such agreements would be either practical or valuable.

Even in areas where we believe that agreements should be presumptively enforceable—commercial transactions, for instance—there are usually boundaries beyond which bargaining strategies or substantive terms will be considered inappropriate and unenforceable. In contract law, these terms fall under doctrines like "duress," "undue influence," "misrepresentation," and

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[78] On "bounded rationality" generally, see Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge 1982) (summarizing, through a series of articles, social science work documenting these cognitive limitations). On the application of bounded rationality to premarital agreements, see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan L Rev 211, 254-58 (1995) (discussing how the limits of cognition justify the courts' approach to premarital agreements); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 Wm & Mary L Rev 145, 193-200 (1998) (discussing how bounded rationality might justify some limits on the enforcement of premarital agreements).

[79] Id.

[80] For example, while Rasmusen and Stake conclude that the government should allow greater private ordering in marriage, they also argue that individuals should not have as much freedom of contract as in the commercial context. Rasmusen and Stake, 73 Ind L J at 499-502 (cited in note 5).

[81] See note 13 and accompanying text.

[82] See, for example, Weitzman, *The Marriage Contract* 225-333 (cited in note 44) (arguing for the advantages, in an "intimate" relationship, of a written contract).

"unconscionability."[83] Some of these doctrines have vague boundaries, and this unsettled nature only tends to increase when they are applied to the private ordering of intimate relationships.[84] For example, courts have disagreed about whether presenting a premarital agreement on the eve of marriage constitutes duress.[85] In any event, there *are* such doctrinal rules and boundaries, and they seem to reflect some judgment regarding the ability of parties to protect themselves when entering these sorts of agreements or the courts' unwillingness, as a matter of public policy, to enforce agreements that appear to be heavily one-sided.[86]

A well-known California case, *Borelli v Brusseau*,[87] indirectly raises other issues relating to the limits of acceptable bargaining. A wife had claimed that her late husband had orally agreed to leave her certain properties in exchange for her agreement to care for him personally during his illness.[88] The alleged agreement involved giving the wife certain property and money—arguably comparable to financial rights that the wife would have had in any case had she not signed a premarital agreement waiving some of her rights.[89] The court refused to enforce the marital agreement of property for services because, the court concluded, the contract lacked consideration and contravened public policy—basing both conclusions on the argument that under California law spouses owe one another an obligation of care, and the wife thus merely promised to do what she already had an obligation to do.[90]

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[83] See E. Allan Farnsworth, *Contracts* §§ 4.9-4.20, 4.28, 9.2-9.4 at 241-76, 307-16, 619-37 (Aspen 3d ed 1999) (discussing these doctrines).

[84] On the application of contract law principles to premarital agreements, see Bix, 40 Wm & Mary L Rev at 182-200 (cited in note 78).

[85] Compare *DeLorean v DeLorean*, 511 A2d 1257, 1259 (NJ Super Ch 1986) (finding that presenting agreement a few hours before the marriage is not duress) with *In re Estate of Hollett*, 834 A2d 348 (NH 2003) (refusing to enforce an agreement presented less than forty-eight hours before wedding and signed the morning of the ceremony).

[86] See, for example, the discussion in note 78 and the accompanying text, regarding why "bounded rationality" might justify constraints on the enforceability of premarital agreements.

[87] 16 Cal Rptr 2d 16 (1993).

[88] Id at 17.

[89] Id at 17-18 (mentioning the premarital agreement). As California is a community property state, absent a premarital agreement, the wife would have an equal partnership interest during the marriage in wealth acquired during the marriage (other than by gift, bequest, or inheritance), Cal Fam Code §§ 751, 752, 760, 770 (West 1994 & Supp 2004); and she would have inherited at least half of that "community property" upon her husband's death. See Cal Prob § 6401 (West 1991 & Supp 2004).

[90] The dissenting opinion argued that by promising to care for her husband *person-*

Without claiming that the following hypothetical describes the facts in *Borelli*, one can imagine a situation where one partner has bargaining leverage at the time of marriage—perhaps she wants to get married, but he is at best indifferent on the subject—and on that basis the parties enter a premarital agreement where one waives some rights in order to persuade the other to marry. Later, years into the marriage, it might be that the bargaining leverage shifts—perhaps because he wants personal care or because he wants the marriage to continue more than she does—and on that basis he transfers certain rights to her in exchange for her personal care or for her staying in the marriage. Both sorts of cases force us to consider what we think about one partner using his or her bargaining advantage to get something that the other partner wants (and keeping in mind that something significant is still being offered in return).[91] As discussed in Part IV, one type of response would be to allow parties leeway to bargain, even to an extent that might seem somewhat "one-sided," but to set *some* limits in terms of minimal fairness or unconscionability.

IV. RESPONSES: RANGES OF OPTIONS, REQUIREMENTS OF INDEPENDENT ADVICE, AND COOLING OFF PERIODS

One response to the difficulties inherent in private ordering in this area is to allow private ordering, but to put some constraints on the private arrangements that will be enforced. This approach is sometimes described in terms of "menus of op-

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ally, the wife was promising more than her statutory obligation, *Borelli*, 16 Cal Rptr 2d at 22-24 (Poche dissenting), but the majority did not accept this argument.

There is reason to believe that the court actually made its decision because of its fear that the alleged oral agreement never existed. It is hard otherwise to explain this statement in the middle of the opinion, not relevant to the argument that came just before: "There is as much potential for fraud today as ever, and allegations like appellant's could be made every time any personal care is rendered." Id at 20. The dissent also discusses the issue of fraud. Id at 23 (Poche dissenting). However, for present purposes, it is more useful to treat the agreement as actual.

[91] A colleague once argued against enforcing such agreements by comparing them to someone charging a starving man in the desert one thousand dollars for a glass of water. However, the starving man case is an extreme example of one party's extracting a large profit due entirely to the other party's circumstances, without any sacrifice on the provider's part. Premarital and marital contracts are not always like that, even when the terms appear somewhat one-sided. Marrying when one has doubts about marriage, or staying in a marriage when one is inclined to leave, can be significant sacrifices, and should at least sometimes be seen, in the full context of the relationship, as relatively fair exchanges for whatever rights are given in return.

tions."[92] Parties about to marry would be able to choose among a variety of marital regimes (different sets of marriage and divorce rules), with the idea being that a legislature or other governmental body would have judged each alternative acceptable (as a matter of fairness or social consequences).[93]

The notion of a range of acceptable forms of private ordering, with state-imposed constraints at the extremes where the arrangements are considered too unfair, is exemplified in one aspect of current practice: the limited review of the fairness of separation agreements.[94] These agreements determine the financial provisions and custody arrangements for the vast majority of couples who divorce. Judicial deference in this area implies a broad range of acceptable settlements for any given marriage, but some arrangements are considered "out of bounds."[95]

The rationale for a range of options is to offer a compromise, allow parties significant choice, and limit the problems that arise from one-sided agreements.[96] The three states (Louisiana, Arkansas, and Arizona) that offer "covenant marriage,"[97] offer a

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[92] See Bix, 40 Wm & Mary L Rev at 177-79 (cited in note 78).

[93] I explore similar ideas in Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 Fam L Q 255 (2001), where I suggest allowing parties to choose a combination of marriage/divorce laws from those available in any of the states.

[94] According to the doctrine in most jurisdictions, the settlement provisions relating to child custody and child support should receive no deference, while the non-child-related financial provisions should receive only limited scrutiny for fairness. See, for example, Uniform Marriage and Divorce Act § 306, 9A Part I Uniform Laws Annotated 248-29 (cited in note 77) (authorizing different levels of scrutiny for provisions of separation agreements involving property and those relating to children). Practitioners indicate that in practice most judges given only cursory scrutiny of the agreement, and all the provisions in settlement agreements tend to be "rubber stamped." See Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950, 994-95 (1979) (discussing child support agreements).

[95] Uniform Marriage and Divorce Act § 306, 9A Part I Uniform Laws Annotated 248-49 (cited in note 77) (stating that courts will not enforce provisions that are unconscionable).

[96] This could be considered similar to what occurs in the Uniform Commercial Code, where the Code sets default terms, terms that the parties can usually contract around, but contracting around would then be subject to a back-up unconscionability review. See, for example, Uniform Commercial Code § 2-309(3); 1A Uniform Laws Annotated 72 (West 1989 & Supp 2003) (mandating that for agreements of indefinite duration, there must be reasonable notice before termination, and "an agreement dispensing with notification is invalid if its operation would be unconscionable").

[97] Ariz Rev Stat Ann §§ 25-901 to 25-906 (West 2000 & Supp 2003); Ark Code Ann §§ 9-11-801 to 9-11-811 (Lexis 2002 & Supp 2003); La Rev Stat Ann §§ 9:272-275.1 (West 2000 & Supp 2004).

In covenant marriage, the parties about to marry agree to premarital counseling, and to restrict their right to divorce, by agreeing to pre-divorce counseling, and to limiting the grounds on which divorce can be sought (generally, only fault grounds or mutual consent and an extended period of separation). For a general discussion, see Katherine

limited variation of such a menu, in the sense that people marrying in that state have a choice between two different sets of marital rules: conventional marriage and covenant marriage.[98]

Another response that similarly tries to avoid problems of unfairness while retaining significant party choice and control involves the requirement of independent advice for enforceability.[99] Access to independent counsel might overcome problems of insufficient information regarding the consequences of choices and the availability of alternatives.[100] It also offers a source of advice from someone not subject to the emotional pressures of the situation.[101] Of course, independent advice will not solve all problems. For example, those strongly inclined to sign an unwise agreement might still feel so inclined, even after getting good advice to the contrary.[102] California recently enacted legislation making premarital agreements unenforceable unless the parties signing it had access to independent legal advice, or expressly waived the right in writing.[103] The American Law Institute recommends a similar requirement.[104]

Another tool for avoiding unfair agreements without significant intrusions on party choice is use of a "cooling off period."[105] Parties should have time to reflect on agreements without the pressure of immediate events, or have the right to rescind assent within a brief time after signing.[106] This represents the rule for

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Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 La L Rev 63 (1998) (discussing the origins and details of the Louisiana covenant marriage proposal). While generally an option for couples about to marry, these laws also allow couples already married to "convert" their marriage to a covenant marriage. See, for example, Ariz Rev Stat Ann § 25-902 (West 2000 & Supp 2003).

[98] Id.

[99] Cal Fam Code § 1615(c)(1) (West 1994 & Supp 2004).

[100] Baker, 23 U Mich J L Ref at 234-37 (cited in note 61) (discussing the lack of public knowledge of the terms of marriage contracts).

[101] See Trebilcock and Elliott, *Legal Paternalism* at 64-67 (cited in note 71) (summarizing the functions of "independent advice" as a correction to contract failure).

[102] Id at 66-67.

[103] Cal Fam Code § 1615(c)(1) (West 1994 & Supp 2004).

[104] American Law Institute, *Principles* § 7.04(3)(b) (cited in note 2) (listing "both parties [being] advised to obtain independent legal counsel, and [having] reasonable opportunity to do so, before the agreement's execution" as part of what is necessary for there to be a rebuttable presumption that a premarital agreement was voluntary).

[105] See, for example Minn Stat Ann § 259.24, subd 6a (West 2003 & Supp 2004) ("A parent's consent to adoption may be withdrawn for any reason within ten working days after the consent is executed and acknowledged."). Cooling off periods are also familiar in some consumer protection legislation. See, for example, 15 USC § 1635 (2000) (detailing, as part of the Truth in Lending Act, the right to rescind within three days of execution certain loan contracts that involve a mortgage on the consumer's principal residence).

[106] Id.

consent to adoption in many states, such that parties can withdraw consent within a brief period after signing.[107] Comparably, the American Law Institute recommends a presumption in favor of the voluntariness of premarital agreements signed at least thirty days prior to the marriage.[108]

V. RESPONSES: REMEDIES AND ALTERNATIVES

In discussions of private orderings, those commentators who have objections to the enforcement of such arrangements[109] should consider the possible consequences of non-enforcement. As Richard Craswell has pointed out in the related area of one-sided commercial agreements, the conclusion that certain terms may be unfair or that the agreement was entered into in a less than fully voluntary way is only the beginning of the analysis.[110] One must consider the extent to which the refusal to enforce terms or the judicial rewriting of terms will lead to a better outcome—both in the case at hand, and in future cases affected by the general rule.[111]

First, what will be the effect when private orderings of intimate relationships are not recognized or legally enforced? On some occasions, people will refuse to enter commitments that will not have the force of law: some same-sex couples may decide not to raise a child (if the second parent cannot have his or her parental rights legally recognized), and some couples may end up not marrying (if a premarital agreement waiving the rights of one of the spouses is not enforceable). Whether this result is a good thing or a bad thing may itself be a matter of contention, especially for those who contend that children are harmed when raised by same-sex couples,[112] or for those who believe that a

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[107] See, for example Minn Stat Ann § 259.24, subd 6a (West 2003 & Supp 2004).

[108] American Law Institute, *Principles* § 7.04(3)(a) (cited in note 2). See Trebilcock and Elliott, *Legal Paternalism* at 72 (cited in note 71) (discussing "cooling off" periods).

[109] See, for example, Brod, 6 Yale J L & Feminism at 283 (cited in note 5) (arguing for limited enforcement of premarital agreements).

[110] Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U Chi L Rev 1, 35-41 (1993) (discussing alternatives to judicial enforcement).

[111] Craswell's central argument is that judicial intervention does not solve the basic problem of parties entering terms on a less than fully voluntary basis. At best, the process substitutes judge-imposed terms for powerful-party-imposed terms, and this may be a beneficial alternative in some cases, but it may not be so in every case; it requires analysis and argument to get to that conclusion. See id.

[112] See, for example, Paul Cameron and Kirk Cameron, *Homosexual Parents*, 31 Adolescence 757 (1996).

marriage on significantly unequal terms is worse than no marriage at all[113] (both for those directly concerned[114] and for society generally).

If the state refuses enforcement of agreements of a certain kind, as most states once did to divorce-focused premarital agreements,[115] and as many states now do to co-parenting agreements of same-sex couples,[116] some couples will not make commitments that they otherwise would have made, had states agreed to enforce the agreements.

At the same time, these people, who would otherwise have preferred to enter enforceable agreements, might go forward with their commitments and relationships in any event (if perhaps less happily).[117] For example, what might have been a marriage on one-sided terms (had one-sided premarital contracts been enforceable) would instead be a marriage on more equal terms.

It is important to recall that for many of these situations, reliance on social norms or self-help is not a viable alternative to public recognition, because of the government's role in ordering matters elsewhere.[118] Thus, the government's failure to recognize a same-sex co-parenting agreement will often go hand in hand with enforcing one partner's request that the other partner not receive visitation or other parental rights regarding the child.[119] And the failure to give validity to same-sex relationship contracts

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[113] This position is implied by those who, like Brod, argue for limited enforcement of premarital agreements. See Brod, 6 Yale J L & Feminism at 283 (cited in note 5).

[114] Part of the evaluation here will necessarily turn on how highly one values "autonomy" (and on how one defines that term). Some might think it a great harm to refuse to enforce even quite one-sided agreements, while others might either not consider such agreements the product of "true autonomy" or might think the cost of autonomy worth the gain in other values.

[115] See Bix, 40 Wm & Mary L Rev at 148-52 (cited in note 78).

[116] See Tiffany L. Palmer, *Family Matters: Establishing Legal Parental Rights for Same-Sex Parents and Their Children*, 30 Hum Rt 9 (2003) (reviewing state treatment of co-parenting agreements for same-sex couples).

[117] I am indebted to Katharine Silbaugh for the basic point of this paragraph. I discuss it in somewhat more detail in Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 Duke J Gender L & Pol 231, 240-41 (2001).

[118] See, for example, *In the Matter of Alison D v Virginia M*, 572 NE2d 27, 28 (NY 1991) (holding that a co-parent did not have standing to seek visitation with child despite the fact that the co-parents "planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing"); *Curiale v Reagan*, 272 Cal Rptr 520, 521 (Cal App 1990) (holding that co-parent who was not "natural mother, stepmother, nor adoptive mother" does not have standing to seek custody and visitation with child).

[119] *Alison D*, 572 NE2d at 28; *Curiale*, 272 Cal Rptr at 521.

may affect who has the right (and who has no right) to make medical decisions for a partner who is not competent to do so,[120] or whether children will receive Social Security survivor benefits.[121]

Alternatively, the state might choose to give only presumptive enforceability to such agreements, refusing agreements deemed unfair relative to the time that they were entered, or whose effects would be unfair given subsequent events.[122] If the standard of unfairness is a matter of judgment, or if enforceability turns on subsequent events, then the enforceability of agreements will be uncertain, to a greater or lesser extent, at the time they are entered. Uncertainty may cause some commitments and relationships not to be entered (by those who will only enter them with agreements whose enforceability is certain), but it may, ironically, encourage others (as one party enters the agreement because he or she thinks the agreement *is* enforceable, while the other is willing to enter it precisely because he or she thinks it *is not*).[123]

Will the rules affect behavior in the way they are intended to do? In some circumstances, it seems unlikely. Refusal to enforce agreements between same-sex couples may discourage some people from entering long-term commitments with a partner, but it is unlikely that it will frequently cause such people to enter opposite-sex marriages instead.

A basic question regarding the evaluation of remedies is whether we think judges can effectively evaluate the issues: the voluntariness or fairness of intimate agreements, where these questions necessarily require reference to the particular contexts and preferences of parties. In the terms of Trebilcock and Elliott (concerning a related, but narrower set of topics), do we think that judges are well-placed to distinguish coercion and oppression from altruism and true self-sacrifice in intimate agree-

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[120] See, for example, Yvonne Abraham, *Gay Couples are Pressing for Equal Benefits*, Boston Globe B4 (Nov 9, 2003) (mentioning the right to make health care decisions for one's partner as one of the major benefits sought from same-sex marriage or civil union legislation).

[121] See, for example, Maria Newman, *Survivor in Gay Union Appeals Denial of Benefits to Boy*, NY Times B5 (Oct 15, 2003).

[122] The latter is the primary focus on the American Law Institute's approach to premarital agreements. See American Law Institute, *Principles* § 7.05 (cited in note 2) ("When Enforcement Would Work a Substantial Injustice"); Bix, 8 Duke J Gender L & Pol at 237-39 (cited in note 117) (discussing § 7.05).

[123] For this last point, I am again indebted to Katharine Silbaugh.

ments?[124] If we think judges are poorly placed to make such judgments, bright-line rules may be preferable to making enforceability turn on later judgments of fairness or voluntariness.[125]

CONCLUSION

Few people are likely to globally favor public ordering or private ordering for all of the examples given in this Article. One's substantive views regarding, for example, the nature, role, and value of marriage or the morality and/or value of same-sex relationships and same-sex parenting will strongly influence one's opinion about these topics.

The basic questions are: (1) what is the role of marriage, both in society and for individuals?; and (2) what structures in the institution of marriage are necessary (and which can be altered, at least within a certain range) for marriage to serve its functions? A related question: is there a proper place for the state's encouragement of some forms of private ordering over others? These are questions that turn on difficult moral and political claims, and, equally importantly, empirical data. As to the last point, while many of the moral and policy conclusions depend on certain causal claims (for example, that certain family forms or certain rules will have particular consequences), the data to support these claims is frequently either non-existent or sporadic and contested.[126]

This Article does not deny the importance of these moral, policy, and empirical debates, but tries to offer an analytical structure within which such claims can be discussed and evaluated, hoping that a surer analytical footing may clarify the resulting discussions.

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[124] Trebilcock and Elliott, *Legal Paternalism* at 68-69 (cited in note 71) (noting the difficulty of externally distinguishing acts of altruism from coerced acts).

[125] Id.

[126] See, for example, Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U Ill L Rev 833, 841-52 (questioning the reliability of the social science evidence that supports the conclusion that children are not harmed by having homosexual parents).