# The Privatization of Family Law

**Jana B. Singer**

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INTRODUCTION

Over the past twenty-five years, family law has become increasingly privatized. In virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family-related behavior. This preference for private over public ordering has encompassed both the substantive legal doctrines governing family relations and the preferred procedures for resolving family law disputes.¹

¹ Recent historical scholarship suggests that this process of privatization may represent an acceleration and intensification of trends that began as far back as the late
The no-fault divorce revolution is perhaps the most obvious example of this privatization process. Under the fault-based divorce system, the state determined when and whether a couple could divorce. If a spouse seeking divorce failed to establish one of the state-sanctioned grounds for terminating a marriage, she could not legally end her union, even if both she and her partner desired to do so. Under the current no-fault system, by contrast, the spouses themselves—and often one spouse acting unilaterally—can choose whether and when to terminate a marriage. Divorcing couples today also have considerably more freedom than ever before to determine privately the financial and parenting consequences of their marital dissolution.

The no-fault divorce revolution is highly significant in and of itself. It is also emblematic of a much larger revolution in family law—the transformation from public to private ordering of behavior. This Article seeks to explain and critique that larger family law revolution. Part I of the Article will trace the privatization process in four areas of family law: marriage and consensual alternatives to marriage; divorce and its financial consequences; adoption and surrogate parenting; and the rise of mediation as a preferred means for resolving divorce and custody disputes.


2. A plethora of recent studies establish that no-fault divorce results in severe economic dislocation for many women and children. See, e.g., Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985); Rosalyn B. Bell, Alimony and the Financially Dependent Spouse in Montgomery County, Maryland, 22 Fam. L.Q. 225, 284 (1988); Robert E. McGraw et al., A Case Study in Divorce Law Reform and Its Aftermath, 20 J. Fam. L. 443 (1981-82); James B. McLindon, Separate But Unequal: The Economic Disaster of Divorce For Women and Children, 21 Fam. L.Q. 351 (1987); Barbara R. Rowe & Alice M. Morrow, The Economics of Divorce and Remarriage for Rural Utah Families, 16 J. Contemp. L. 301 (1990); Charles E. Welch III & Sharon Price-Bonham, A Decade of No-fault Divorce Revisited: California, Georgia, and Washington, 45 J. Marriage & Fam. 411 (1983); Heather R. Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L.Q. 79 (1986). While it is questionable whether women fared better economically under the old fault-based divorce system, it is clear that the current no-fault system does not adequately or equitably meet their needs. See generally Jana B. Singer, Divorce Reform and Gender Justice, 67 N.C. L. Rev. 1103 (1989). Cf. Stephen D. Sugarman, Dividing Financial Interests at Divorce, in Divorce Reform at the Crossroads 130-65 (Stephen D. Sugarman & Herma H. Kay eds., 1990) (questioning whether women are importantly worse off under California's no-fault system than they were under the prior fault regime, but acknowledging that divorced women fare considerably poorer than men under both regimes).
Part II of the Article will set privatization in its larger context by relating the privatization of family law to doctrinal and jurisprudential developments in a number of other areas. This examination is designed to highlight the connections between the legal doctrines and theories governing family relationships and the development of legal principles in areas that have traditionally been viewed as unrelated to family law. Among the connected legal phenomena that this Part examines are the migration from constitutional to family law of liberal notions of privacy and individual autonomy; the rejection of traditional gender roles and the push for formal gender equality; the rise of law and economics analysis and the application of economic thinking to the family; and the increased dissociation of law and morality in the family context.

Exploring the relationship between these developments and the privatization of family law also provides a useful vantage point for evaluating the privatization process, a task I take up in Part III of the Article. This Part examines briefly both the benefits of a more privately-ordered family law regime and its potential dangers. The examination suggests that privatization may be particularly useful as a sort of transition strategy—a way of moving from an outdated and unjust public law regime to a system whose publicly-imposed constraints more accurately reflect social reality and more fairly distribute the benefits and burdens of family life.

I. THE PRIVATIZATION PROCESS

A. Marriage and Consensual Alternatives to Marriage

Traditionally, the legal principles governing marriage and consensual alternatives to marriage reflected a strong preference in favor of public ordering of behavior. First, and perhaps most important, the law distinguished sharply between marriage and other intimate relationships and used marriage or marital status as a criteria for allocating a wide variety of public benefits and burdens. Second, the state, and not individual marriage partners, determined many of the consequences of marital status, particularly the legal and economic relationship between spouses. Third, the law prescribed certain premarital procedures for entering into a valid formal union. Fourth, the law controlled entry into marriage by restricting who could marry whom.

In each of these four areas, the state has ceded some of its traditional authority, in favor of increased private ordering of behavior. Most strikingly, the sharp legal line between marriage and nonmarriage has become increasingly blurred, as the state has extended to nonmarried persons many of the benefits that it traditionally reserved for married couples. At the same time, the law has accorded individual spouses a
substantial degree of authority to define the terms of their relationship and has ceased to view marriage as a critical determinant of an individual's legal status. The law governing the marriage process also reflects an increased role for private ordering. Although the state still regulates entry into marriage, parties contemplating matrimony today have considerably more choice about who they will marry and what premarital procedures they will follow than did their counterparts a generation ago.

1. THE BREAKDOWN OF DISTINCTIONS BASED ON MARITAL STATUS

Perhaps the most significant way the law traditionally regulated intimate behavior was by distinguishing sharply, in virtually all important contexts, between married persons and persons in nonmarital intimate relationships. Through laws criminalizing adultery, fornication and nonmarital cohabitation, the law carved out marriage as the only legitimate arena for sexual intercourse. Tort causes of action for enticement, alienation of affections and criminal conversation penalized third parties who intentionally interfered with the marriage relationship; loss of consortium claims protected husbands (and later wives) against those who negligently impaired marital relations. No similar doctrines protected nonmarital intimate relationships from deliberate or negligent third party impairment.

An elaborate network of statutes and common law doctrines also distinguished sharply between children born within marriage and those born outside of it. As one family historian explained, "[t]he law used matrimony to separate legal from spurious issue. It defined the latter as 'filius nullius,' the child and heir of no one." Although reform efforts during the nineteenth century resulted in the acknowledgment of some legal ties between illegitimate children and their mothers, twentieth century legal doctrine continued to deny the connection between men and their out-of-wedlock offspring, unless that connection was necessary to protect the public purse. Similarly, state and federal programs designed

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3. See HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 261-69 (1968). Intentional interference in the parent-child relationship was also actionable, via suits by parents for abduction, enticement and seduction of a daughter. Id. at 269-72.

4. Id. at 272-78.

5. Courts today are still reluctant to apply these doctrines to nonmarital intimate relationships. See infra text accompanying notes 34-35.

6. GROSSBERG, supra note 1, at 197.

7. Id. at 207-15.

8. Mary E. Becker, The Rights of Unwed Parents: Feminist Approaches, 63 SOC. SERV. REV. 496 (1989). The legitimate child typically assumed her father's surname, and she was entitled to his companionship and financial support; the illegitimate
to compensate families for the death or disability of a wage-earner typically excluded out-of-wedlock children as eligible beneficiaries. A major justification for these sharp distinctions between marital and nonmarital children was to protect the exclusivity of the marital unit and to punish adults (particularly women) who engaged in sex outside of marriage.

A series of Supreme Court decisions between 1968 and 1983 eliminated as unconstitutional most of the categorical legal distinctions between marital and nonmarital children. These decisions explicitly rejected the traditional notion that differential treatment of legitimate and illegitimate offspring was justified as a way of encouraging matrimony and of expressing society’s “condemnation of irresponsible liaisons beyond the bonds of marriage.” A related series of Supreme Court decisions established that unmarried fathers who develop a relationship with their children must be given the same rights with respect to adoption and custody decisions as are accorded to married fathers.


10. Becker, supra note 8, at 497; see KRAUSE, supra note 9, at 73-78.


judicial declarations were paralleled and reinforced by the Uniform Parentage Act, promulgated in 1973 and approved by the American Bar Association in 1974. The Act abandons the concept of legitimacy and declares that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." In reality, the economic and social circumstances of children born outside of wedlock continue to be significantly more precarious than those of their marital counterparts. Moreover, some legal distinctions between marital and nonmarital children continue to exist. But the legal distinctions that remain are more likely to reflect the difficulties of proving paternity than they are to demarcate a separate and unequal legal status for children born outside of wedlock. As one commentator has explained, the equalization of the legal status of legitimate and illegitimate children has "gone far toward depriving formal marriage of one of its traditionally most important effects, that of distinguishing the legitimate family from all others." Another way the law traditionally privileged marriage over nonmarital intimate relationships was by denying unmarried cohabitants access to the judicial system for resolving financial disputes arising out of their relationship. In particular, contracts between unmarried cohabitants v. Walcott, 434 U.S. 246 (1978). In Michael H. v. Gerald D., 491 U.S. 110 (1989), the Court rejected a constitutional challenge to a California statute that conclusively presumed that a child born to a woman cohabiting with a fertile husband was a child of the marriage. CAL. EVID. CODE § 621(a) (West Supp. 1989) (amended 1990). The effect of this statute in Michael H. was to deny a nonmarital father who had developed a relationship with his biological child the opportunity to establish his paternity and thereby to obtain parental prerogatives. The Court distinguished its earlier unwed father cases on the ground that they did not involve a father who was seeking to obtain parental rights over a child born into an extant marital union.


16. See, e.g., Lalli v. Lalli, 439 U.S. 259 (1978) (relying on "peculiar problems of proof" in upholding New York intestate succession statute allowing illegitimate children to inherit from their father only where there had been an adjudication of paternity before the father's death).

17. MARY ANN GLENDON, STATE, LAW AND FAMILY 82 (1977).
that related in any way to their sexual relationship were considered unenforceable as contrary to public policy.\textsuperscript{18} The rationale for this traditional rule was that the law should not "lend its aid to either party to a contract founded upon an illegal or immoral consideration."\textsuperscript{19}

Over the past fifteen years, this traditional rule has eroded significantly.\textsuperscript{20} The erosion began with the celebrated \textit{Marvin} case, in which an ex-cohabitant claimed that she had given up a promising acting career in order to become a full-time homemaker and companion; in return, she claimed, her unmarried partner had agreed to support her financially for the rest of her life.\textsuperscript{21} The California Supreme Court, reversing the dismissal of the plaintiff's complaint, ruled that such an agreement between unmarried cohabitants was enforceable unless it explicitly stated that the consideration for one partner's financial support was the other partner's meretricious sexual services.\textsuperscript{22} The mere connection between an unmarried couple's sexual relationship and their financial arrangements was no longer enough to invalidate their cohabitation agreement. The \textit{Marvin} court also suggested that, aside from the plaintiff's contract claim, she might be entitled to a share of the property accumulated during the couple's cohabitation relationship under equitable theories such as constructive trust, quantum meruit and resulting trust.\textsuperscript{23}

In the decade that followed \textit{Marvin}, courts in many states applied both express and implied contract remedies to resolve disputes about property and financial arrangements arising out of cohabitation relationships.\textsuperscript{24} In doing so, courts largely abandoned public policy objections to enforcing the private agreements of parties engaged in sexual relationships outside of marriage.\textsuperscript{25} A few courts have reached beyond contract


\textsuperscript{19} Rehak v. Mathis, 238 S.E.2d 81, 83 (Ga. 1977) (emphasis added).

\textsuperscript{20} CLARK, DOMESTIC RELATIONS II, supra note 18, at 18.

\textsuperscript{21} Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

\textsuperscript{22} Id. at 114.

\textsuperscript{23} Id. at 122-23. On remand in \textit{Marvin}, the trial court found no contract had been proved but awarded the plaintiff $104,000 for rehabilitation purposes to enable her to retrain herself for the resumption of her career. Marvin v. Marvin, 5 Fam. L. Rep. (BNA) 3077 (Cal. Super. Ct. Apr. 17, 1979); see CLARK, DOMESTIC RELATIONS II, supra note 18, at 18-19 n.6. The $104,000 award was reversed on appeal on the ground that it was not within the issues framed by the pleadings in the case. Marvin v. Marvin, 557 P.2d 106 (Cal. 1981).

\textsuperscript{24} Carol S. Bruch, \textit{Cohabitation in the Common Law Countries a Decade After Marvin: Settled In or Moving Ahead?}, 22 U.C. DAVIS L. REV. 717, 722 & n.19 (1989) [hereinafter Bruch, \textit{Cohabitation}].

\textsuperscript{25} CLARK, DOMESTIC RELATIONS II, supra note 18, at 18; Bruch, \textit{Cohabitation},
in resolving cohabitation disputes, and have applied principles of partnership law or have reasoned by analogy to state marital property division statutes.\textsuperscript{26} Consistent with the modern emphasis on private ordering, however, most courts have been unwilling to grant nonagreement-based support rights to unmarried cohabitants or to extend statutory divorce obligations, such as the payment of attorneys fees.\textsuperscript{27}

Although courts have shown an increased willingness to enforce the private commitments made by unmarried cohabitants to each other, they have been somewhat more reluctant to expand the rights of unmarried cohabitants vis-a-vis third parties.\textsuperscript{28} The California Supreme Court recently refused to extend the logic of \textit{Marvin} to support a claim for intentional infliction of emotional distress brought by an unmarried cohabitant who had witnessed the tortious injury and death of his partner.\textsuperscript{29} Similarly, only a few courts have extended to nonmarital partners the common-law right of a married person to recover for loss of

\textsuperscript{26} See, e.g., Carrol v. Lee, 712 P.2d 923 (Ariz. 1986) (implied partnership agreement applied to jointly held property); Pickens v. Pickens, 490 So. 2d 872 (Miss. 1986) (analogy to common-law partnership applied without regard to title); Artiss v. Artiss, 8 Fam. L. Rep. (BNA) 2313 (Haw. Cir. Ct. Jan. 5, 1982) ("ostensible family relationship" of 24 years justified property division under express contract and, in equity, by analogy to divorce statute's equitable distribution statutes upon an implied-in-fact agreement); Marriage of Lindsey, 678 P.2d 328 (Wash. 1984) (applying a rule analogous to that provided by statutes governing disposition of community property upon divorce).


\textsuperscript{28} For a general discussion of the ways in which the law disfavors unmarried people (including, but not limited to, people in non-marital intimate relationships), see Jennifer Jaff, \textit{Wedding Bell Blues: The Position of Unmarried People in American Law}, 30 \textit{Ariz. L. Rev.} 207 (1988).

a spouse's consortium, and each of these decisions has been brought into question by later developments.30

Unmarried cohabitants have also had mixed success in qualifying for statutory benefits traditionally reserved for married couples. In some situations, unmarried cohabitants have benefitted from federal and state statutes, such as the Equal Credit Opportunity Act, which prohibit discrimination based on marital status.31 In addition, at least one state has explicitly amended its worker's compensation statute to provide relief for the death of a nonmarital partner,32 and courts in several other states have construed existing worker's compensation laws to provide statutory benefits to dependent cohabitants.33 Courts in other states, however, have refused to extend such benefits to nonmarital partners, relying on a


31. See, e.g., Markham v. Colonial Mortgage Service Co., 605 F.2d 566 (D.C. Cir. 1979) (lender's refusal to aggregate the earnings of cohabitants who applied for a home mortgage violates the Equal Credit Opportunity Act's ban on discrimination based on marital status); Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979) (police officer cannot be dismissed because of his refusal to answer questions about his nonmarital relationship).

32. OR. REV. STAT. § 656.226 (1989) (authorizing award to surviving de facto spouse if cohabitation lasted at least one year and children of the relationship survive).

strict construction of statutory terms such as "spouse" and "family." Courts have also reached inconsistent results on whether an unmarried cohabitant who quits her job to relocate with her partner qualifies for unemployment benefits that would be available to a spouse in similar circumstances.

Despite these inconsistencies, the fact that courts today seriously consider such claims for benefits by unmarried cohabitants constitutes a significant departure from prior law. Like the judiciary's increased willingness to resolve cohabitation disputes, and the demise of illegitimacy as a legal category, these developments indicate that the once-sharp legal line separating marriage from other consensual, intimate relationships has blurred considerably. One commentator has even suggested that these developments presage the "withering away" of marriage as a legal concept. While marriage is unlikely literally to wither away, it clearly has lost its privileged legal status as the only legitimate arena for intimacy, sex and procreation. Instead, marriage has become just one of several permissible choices for individuals who wish to pursue an intimate relationship within the framework of the law.

Other recent legal developments underscore the erosion of the traditional distinctions between formal marriage and other consensual adult unions. A small but growing number of municipalities now accord legal recognition and a variety of employment-related benefits to "domestic partnerships"—unmarried heterosexual or homosexual couples who publicly register their relationship and pay a fee, procedures substantially similar to the filing of marriage licenses. A 1990 San

34. See, e.g., Nieto v. Los Angeles, 188 Cal. Rptr. 31 (Cal. Ct. App. 1982) (woman whose nonmarital partner was killed by police officer lacked standing to sue under state wrongful death statute); Powell v. Rogers, 496 F.2d 1248 (9th Cir. 1974), cert. denied, 419 U.S. 1032 (1975) (denying benefits under Longshoremen's and Harborworkers' Compensation Act to woman who cohabited with decedent for 14 years and bore three children with him); Crenshaw v. Indus. Comm'n, 712 P.2d 247 (Utah 1985) (worker's compensation death benefits). See generally, Bruch, Cohabitation, supra note 24, at 732-33.

35. Compare Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904 (Cal. 1983) (quitting job to move with non-marital partner with whom claimant had shared all income and expenses for three years does not constitute "good cause" for purposes of qualifying for unemployment benefits) with MacGregor v. Unemployment Ins. Appeals Bd., 207 Cal. Rptr. 823 (1984) (female cohabitant who quit her job to move with male partner and their child to New York qualified for unemployment benefits since claimant's desire to preserve her family unit constituted "good cause" for leaving her job).


37. See Registration of Domestic Partners Passed in S.F., Nat'l. Rep. on Work & Fam. (BNA) at 8 (Nov. 9, 1990). These municipalities include New York City; Cambridge, Massachusetts; Seattle, Washington; Madison, Wisconsin; Takoma Park,

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Francisco ordinance, for example, amends the city’s administrative code “to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives.”

City employees in domestic partnerships also qualify for a variety of family benefits, including up to one year’s unpaid leave to care for a sick lover or partner. Other municipalities have adopted similar ordinances extending to unmarried heterosexual or homosexual cohabitants various work-related benefits traditionally reserved for married couples.


38. Registration of Domestic Partners, supra note 37, at 8. The measure is a scaled down version of an earlier initiative adopted by the San Francisco City Council in 1989 but defeated by city voters that November. In addition to authorizing registration of domestic partnerships, the earlier initiative forbade discrimination by the city against such partnerships and explicitly granted domestic partners the same sick leave, bereavement leave and maternity leave as married employees. See Beck, supra note 37, at 19; San Francisco Board Approves Measure Giving Rights to City Workers’ Partners, Nat’l Rep. on Work & Fam. (BNA) at 1 (May 26, 1989). The 1990 ordinance does not explicitly extend benefits to domestic partnerships.

39. In 1990, the San Francisco Civil Service Commission expanded its definition of the family to include persons “related together by strong social and emotional bonds and/or by ties of marriage, birth, and adoption.” This change allows city employees in domestic partnerships to qualify for a variety of family benefits, including up to one year’s unpaid leave to care for a sick lover or partner. Nat’l Rep. on Work & Fam. (BNA) at 2 (Nov. 9, 1990). The changes adopted by the Civil Service Commission were the result of recommendations made in June 1990 by a mayoral task force on family policy. Id.; see Nat’l Rep. on Work & Fam. (BNA) at 5 (June 22, 1990).

40. See Berger, supra note 37, at 423-27; Eblin, supra note 37, at 1072-77; Bruch, Cohabitation, supra note 24, at 735 & n.68. These initiatives have been described as “a self conscious attempt to try to equalize benefits between married couples and couples who are not married, either through choice or because they are barred from marriage.” Berger, supra note 37, at 447 (quoting Berkeley, California Domestic Partnership Information Sheet (1987)). The District of Columbia recently passed a Family Leave Act that includes nonmarital domestic partners in its definition of family members. District of Columbia Family and Medical Leave Act of 1990, D.C. CODE § 36-1301 et. seq. (Supp. 1991). A growing number of private businesses, universities and non-profit groups have also extended family-related employment and/or consumer benefits to couples in nonmarital intimate relationships. See Berger, supra note 37, at 418 n.16; Eblin, supra note 37, at 1078.
A recent New York Court of Appeals decision illustrates a similar erosion of the line between marriage and other consensual intimate relationships. In *Braschi v. Stahl Associates Company*, New York's highest court ruled that a tenant's long-term gay life partner fell within the definition of "family member" under the New York City rent control laws and was therefore entitled to remain in the couple's rent controlled apartment after the tenant's death. The majority explicitly rejected the dissent's suggestion that the regulatory reference to "family member" should be limited to "objectively verifiable relationships based on blood, marriage and adoption, as the State has historically done in the estate succession laws, family court acts and similar legislation." Instead, the court emphasized the privately chosen aspects of the couple's life, including the exclusivity and longevity of their relationship, their "interwoven social lives," and shared financial obligations.

Consistent with the analysis in *Braschi* and the growing recognition of "domestic partnerships," a number of policy makers and scholars have recently argued that the law should abandon its traditional reliance on marriage and marital status as a basis for distributing economic and social benefits, and should instead embrace a contextualist approach that focuses on the functions performed and the values served by family-like relationships. An explicit purpose of such a switch from formality to function...
is “to give individuals greater control over the structure of their family lives.”

2. CONTROL OVER THE CONSEQUENCES OF MARITAL STATUS

The shift from public to private control over the definition and structure of family relationships extends as well to control over the consequences of marital status. Traditionally, the law underscored the public nature of marriage by defining for all participants the salient aspects of the marriage bond, particularly the legal and economic relationship between spouses. Although marriage has often been described as a civil contract, until recently it was the state, and not the parties, that set the terms of this contract. Parties could choose whether to enter into marriage, but they could not define the terms of their union. As the Supreme Court explained in *Maynard v. Hill*:

> [Marriage] is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.

The state-imposed terms of the traditional marriage contract were both hierarchical and rigidly gender-based. The husband, as head of household, was responsible for the financial support of his wife and children. The wife, as the domestic partner, was responsible for providing household services, including housework, sex and childcare.

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45. *Family Resemblance*, supra note 44, at 1641; see Boyle, *supra* note 44, at 139-40; Brown, *supra* note 44, at 1069.

46. CLARK, DOMESTIC RELATIONS II, *supra* note 18, at 24-25 (“Underlying all aspects of the definition of marriage was the principle, frequently announced by the courts, that the method of contracting marriage and the incidents of the relationship were the province of the law and were not within the control of the parties.”); Gregg Temple, *Freedom Of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL’Y 121, 123 (1985) (“Once the marriage is created, traditional marriage law gives the state control of the terms of the relationship.”); see Fricke v. Fricke, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950) (“There are three parties to a marriage contract—the husband, the wife, and the state.”).


This compulsory gender-based division of labor persisted well into the 1960s, as did the inability of spouses to alter in any binding way the legal and economic incidents of marriage.\(^9\)

The law employed a number of devices to prevent spouses from modifying the state-imposed terms of the marriage contract. Under traditional contract doctrine, private agreements that purported to change the "essential incidents" of marriage—defined as the husband’s support duties and the wife’s domestic obligations—were void as a matter of public policy.\(^5\) As a New York court explained, "[p]ublic policy in such a vital matter as the marriage contract should not be made to yield to subversive private agreements and personal considerations."\(^51\)

Other, more specific, contract doctrines further restricted the opportunities for private ordering. Courts sometimes refused to enforce agreements between husbands and wives on the ground that these agreements lacked the consideration necessary to support a binding contract.\(^52\) Courts also made liberal use of factual and legal presump-

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49. See generally, WEITZMAN, supra note 48; Monrad Paulsen, Support Rights and Duties Between Husband and Wife, 9 VAND. L. REV. 709 (1956).

50. See, e.g., Graham v. Graham, 33 F. Supp. 936, 938 (E.D. Mich. 1940) ("The law is well settled that a private agreement between persons married or about to be married which attempts to change the essential obligations of the marriage contract as defined by the law is contrary to public policy and unenforceable."); RESTATEMENT OF CONTRACTS § 580 (1939); 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1474 at 618 ("An agreement attempting to relieve the husband of his duty to furnish support, or otherwise to vary and regulate the marital relations of the parties has been held contrary to sound policy and illegal."). See generally Marjorie M. Shultz, Contractual Ordering of Marriage: A New Model For State Policy, 70 CAL. L. REV. 207, 230-32 (1982).

51. Mirizio v. Mirizio, 150 N.E. 605, 608-09, (N.Y. 1926) (refusing to recognize an agreement between husband and wife that they would not engage in sexual relations until they had been married in a religious, as well as a civil, ceremony).

52. For example, an early Wisconsin decision held that a husband’s promise to maintain his wife did not constitute valid consideration for the wife’s return promise to devise property to him since, by pledging his continued financial support, the husband had promised only what the law already required of him. Ryan v. Dockery, 134 Wis. 431, 114 N.W. 820 (1908). Similarly, a Virginia court found that a married woman’s promise to give up her home and business in order to live with her husband was merely the performance of her legal and moral duty as a wife, and hence did not constitute valid consideration for her husband’s written agreement to release all rights in her estate. Ballard v. Cox, 62 S.E.2d 1 (Va. 1950). Accord Ritchie v. White, 35 S.E.2d 414 (N.C. 1945) (wife could not recover under contract for services rendered to a helpless husband since "[p]erformance of wifely services is expected as part of normal married life"); Tellez v. Tellez, 186 P.2d 390 (N.M. 1947) (husband’s antenuptial agreement to leave
tions to deny enforcement of agreements between husbands and wives. Although a wife's performance of services outside the scope of her usual domestic duties could, in theory, constitute valid consideration for her husband's return promise of compensation, courts often presumed that such extraordinary services by a wife were intended to be gratuitous and, hence, not in exchange for pay or other compensation. Other courts reasoned that, even where spouses had entered into written agreements purporting to govern their activities during marriage, they could not have intended for their agreements to result in enforceable legal obligations.

Over the past twenty-five years, the law has loosened its control over the legal and economic incidents of marriage in three related ways. First, the state-imposed marriage contract is a far less comprehensive or precise instrument than it was a generation or two ago. In particular, the reciprocal rights and obligations of spouses are both less well-defined and less extensive than they were in previous generations. Second, individual couples today have considerably more freedom than in the past to vary by private agreement what little remains of the state-imposed marriage contract. Third, the law increasingly treats marriage partners as individuals, rather than as a single merged unit, for purposes of doctrinal analysis.

a. The demise of the state-imposed marriage contract

The modern trend in favor of sex-based equality has eliminated many of the explicitly gender-based terms of the traditional marriage contract. A wife is no longer required to assume her husband's surname or to accede to his choice of domicile. Wives are not automatically entitled

all property to his prospective wife if she would care for him until his death is without consideration and void against public policy).


55. Recent scholarship shows that the widely-followed practice of married women assuming their husbands' surname was based largely on custom and not required by common law. HERMA H. KAY, SEX-BASED DISCRIMINATION 197-98 (1988); see Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975). Several states, however, interpreted their laws to require that married women assume their husband's surnames for various purposes. See, e.g., Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd per curiam, 405 U.S. 970 (1972) (Alabama may require a wife to use husband's surname in applying for driver's license); Whitlow v. Hodges, 539 F.2d 582 (6th Cir. 1976) (unwritten Kentucky regulation requiring married woman to apply for driver's license in husband's surname even if she ordinarily uses her maiden name does not violate 14th Amendment).
to their husbands' financial support, nor husbands to their wives' domestic services. In most community property states, laws that previously gave husbands the right to manage and control community property during marriage have been repealed or replaced by statutes providing for joint management by both spouses.56

In some areas, the gender-based terms of the traditional marriage contract have been replaced by gender-neutral obligations that apply equally to husbands and wives. Husbands and wives in virtually all states, for example, are jointly responsible for the financial support of children born into a marriage.57 In other areas, however, the elimination of gender-specific marital obligations has tended to dilute or erase the obligations altogether. For example, although the gender-neutral alimony provisions found in most states' divorce statutes might suggest a reciprocal duty of spousal support, the fact that alimony is generally restricted to ex-spouses who are incapable of self-support severely circumscribes the scope and extent of any such reciprocal obligation.58 Similarly, courts and legislatures in several states have chosen to eliminate entirely the common law doctrine of "necessaries" rather than extend to both spouses the husband's common law obligation to pay for "necessary" goods and services supplied to his wife by third parties.59

The shift from fault-based to no-fault divorce, discussed in detail in the next section, also heralded the demise of the state-imposed marriage

58. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT, § 308, 9A U.L.A. 347-48 (1987) (court may order maintenance only if it finds that the requesting spouse lacks sufficient property to provide for her financial needs and is unable to support herself through appropriate employment or is occupied with child care). Recently, a few commentators have noted an appellate trend in favor of slightly more generous alimony awards, particularly after long-term traditional marriages. See, e.g., Joan M. Krauskopf, Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony, in ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE 65 (A.B.A. Section on Family Law 1988).
contract. Through prohibitions such as those against adultery and cruelty, which carried substantial indirect economic penalties, fault-based divorce law addressed central aspects of spousal behavior and interpersonal relations.60 One spouse’s breach of these state-imposed obligations not only entitled the other spouse to dissolve the marriage, but also played a major role in determining the economic consequences of divorce. Under the no-fault system, by contrast, breaches of the state-imposed marriage contract are, at best, peripheral and are often irrelevant.61 Since parties could never enforce most state-imposed obligations during an ongoing marriage,62 and since, under no-fault divorce rules, they are of minimal importance at the time of divorce, one can reasonably question whether marriage continues to entail any meaningful state-imposed obligations.

b. Alteration of marital obligations by private contract

Even where state-imposed marital obligations remain as the background legal regime, spouses today have considerable freedom to alter those background obligations by private contract, either before or during marriage. For example, the Uniform Pre marital Agreement Act, which has been adopted by sixteen states since its promulgation in 1983, authorizes prospective spouses to contract with each other with respect to their property rights and support obligations, as well as “any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”63 The commentary explains that this provision is meant to cover such matters as the choice of abode, the freedom to pursue career opportunities and the upbringing of children.64 Similarly, while the Second Restatement of Contracts continues to disapprove of marital contracts that would change an essential incident of marriage “in a way detrimental to the public interest in the marriage relationship,”65 the Restators’ comments make clear that both the essential incidents of marriage and the public’s interest in the marriage relationship are to be interpreted more narrowly than in

64. Id. § 3 cmt., 9B U.L.A. 374.
65. Restatement (Second) of Contracts § 190(1) (1979). Marital contracts are also unenforceable if they “tend[ ] unreasonably to encourage divorce or separation.” Id. §190(2).
the past.\textsuperscript{66} Several states have also amended their domestic relations laws to facilitate enforcement of a broad range of spousal contracts concerning the economic aspects of marriage.\textsuperscript{67}

While much private contracting between persons in or contemplating marriage concerns rights and obligations in the event of divorce, there are indications that the law is becoming more receptive to enforcing private agreements that relate to the structure of an ongoing marriage.\textsuperscript{68}

Moreover, wholly apart from enforcement by courts, many scholars, marriage counselors and manuals urge couples to use contracts or contract-like structures to govern the details of their relationship.\textsuperscript{69} Indeed, an entire body of literature has developed around "contracting" as a tool of marriage and family counseling.\textsuperscript{70} These practitioners not only contract with their clients about the goals and methods of therapy; they also initiate contracting processes between spouses as part of marital counseling, reconciliation or divorce preparation.\textsuperscript{71} Although the "contracts" that result from these processes generally are not legally enforceable, the counselors' use of contract terminology is intentional and significant. In particular, "the contract label dramatizes the preference for private ordering over the intrusion of outside norms as the basis for choices about life-styles."\textsuperscript{72}

\footnotesize
\textsuperscript{66} See \textsc{Restatement (Second) of Contracts} ch. 8, introductory note to topic 3 (1979); \textit{id.} \S 190 cmt. a; \textit{id.} \S 190, reporter's note, cmts. a-c.

\textsuperscript{67} See, e.g., \textsc{N.Y. Dom. Rel. Law} \S 236B(3) (Consol. 1992) (permitting enforcement in a matrimonial action of certain agreements concerning property, support or "other terms and conditions of the marriage relationship").

\textsuperscript{68} See, e.g., \textsc{Unif. Premarital Agreement Act} \S 3 \& cmt., 9B U.L.A. 371, 373-74 (1983) (authorizing prospective spouses to contract with respect to such aspects of an ongoing marriage as choice of abode and freedom to pursue career opportunities); \textsc{Unif. Marital Property Act} \S 10(c)(2), 9A U.L.A. 103, 121 (1987) (authorizing spouses to enter into marital property agreements respecting, \textit{inter alia}, the management and control of property during marriage); \textit{cf.} Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y.) (enforcing antenuptial agreement that required husband to appear before a religious tribunal), \textit{cert. denied}, 464 U.S. 817 (1983); \textit{but cf.} Judith Younger, \textit{Perspectives on Antenuptial Agreements}, 40 Rutger's L. Rev. 1059, 1071-72 (1988) (predicting that courts will continue to view such agreements as unenforceable).

\textsuperscript{69} See, e.g., Shultz, \textit{supra} note 50, at 253 ("Contractual ordering [of marriage] offers a set of tools and governance strategies that legitimate pursuit of individual satisfaction through planning and negotiation among equal parties.").

\textsuperscript{70} See, e.g., \textsc{Clifford Sager, Marriage Contracts and Couple Therapy} (1976); \textsc{Richard B. Stuart, Helping Couples Change} 164-70 (1980); Clifford J. Sager et al., \textit{The Marriage Contract}, in \textsc{10 Fam. Process} 311-26 (1971).

\textsuperscript{71} Shultz, \textit{supra} note 50, at 257.

\textsuperscript{72} \textit{id.} at 258.
c. Treatment of married partners as individuals

A third way in which the state has ceded control over the legal and economic incidents of marriage is by treating married persons as individuals, rather than as a merged unit, for purposes of legal analysis. Traditionally, the common law treated married persons not as individuals, but as a single legal entity.73 Marriage stripped a woman of her independent legal existence and merged it into that of her husband; she became a “femme couvert,” literally “a woman under cover” of her husband.74 This notion of marital merger had far-reaching legal consequences in a wide variety of doctrinal areas. Because husbands and wives were considered one, they could neither contract with nor sue each other.75 Nor could spouses testify for or against each other in civil or criminal proceedings.76 As the legal representatives of their wives, husbands were considered responsible for any torts their wives committed.77 The notion of the unity of husbands and wives also had consequences for criminal law. Husbands and wives, being one, could not constitute the two parties necessary to make up a criminal conspiracy.78 More generally, the legal fiction that the husband and wife were a single entity was one of the rationales that supported the law’s traditional refusal to recognize marital rape or to provide remedies for victims of spousal violence.79

Although the marital unity doctrine was formally abandoned in the mid-nineteenth century with the passage by virtually all states of the Married Women’s Property Acts,80 the notion of married persons as a

73. Younger, supra note 48, at 50 (“Common law rules recognized husband and wife not as individuals but as ‘one person in law.’”).
74. Id. The classic statement of this doctrine is found at 1 WILLIAM BLACKSTONE, COMMENTARIES *442. In 1966, Supreme Court Justice Hugo Black summarized the doctrine this way: “This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband.” United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).
75. CLARK, DOMESTIC RELATIONS II, supra note 18, at 287-88. Because marriage deprived women of an independent legal existence, married women were disabled from entering into contracts with anyone. Id. at 286. The State of Illinois successfully relied on this contractual disability as justification for excluding women from the legal profession until the late 19th century. See Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).
76. CLARK, DOMESTIC RELATIONS II, supra note 18, at 288.
77. Id.
78. Id.
80. Even before passage of the Married Women’s Property Acts, some American wives were able to escape the rigors of the marital unity doctrines through equitable
single legal entity continued to exert a significant influence on the law affecting spouses well into the twentieth century. As late as 1958, the Supreme Court reaffirmed the evidentiary rule that precluded spouses from testifying against each other in criminal cases—a rule one scholar has described as "an archaic survival of [the] mystical religious dogma [that husband and wife] 'are two souls in one flesh.'" Interspousal tort immunity, also founded on the fictitious unity of husband and wife, persisted in a majority of states until the mid-1970s; it still exists in modified form in a number of jurisdictions. Still more tenacious is the common law rule that a husband is legally incapable of raping his wife; this remnant of the marital unity doctrine persisted intact until the early 1980s and remains part of the criminal law in a substantial number of states.

Despite these vestiges of the marital unity doctrine, the trend in most areas of law today is to view married persons as two separate individuals, rather than as a single unit, for purposes of legal analysis. Since 1971, at least twenty-five states have abolished interspousal tort immunity, thus allowing spouses to sue each other for negligent and other tortious behavior. Judicial decisions abrogating the immunity have explicitly rejected the argument that the doctrine is justified as a means of preserving marital

81. Hawkins v. United States, 358 U.S. 74 (1958). In Trammel v. United States, 445 U.S. 40 (1980), the Supreme Court overruled its decision in Hawkins and vested the federal privilege against adverse spousal testimony in the witness (rather than the defendant) spouse. At the time Trammel was decided, eight states provided that one spouse was incompetent to testify against the other in a criminal proceeding. An additional 16 states provided a privilege against adverse spousal testimony and vested the privilege in both spouses or in the defendant-spouse alone. Trammel, 445 U.S. at 48 n.9.

82. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 145 & n.50 (2d ed. 1972) (quoting COKE, COMMENTARY ON LITTLETON 6b (1628)).

83. See CLARK, DOMESTIC RELATIONS II, supra note 18, at 373 & nn. 22-23 for a list of jurisdictions that have retained the immunity in whole or in part.

84. As of 1983, the marital rape exemption was codified in 34 American jurisdictions. Thomas R. Bearrows, Note, Abolishing the Marital Exemption for Rape: A Statutory Proposal, 1983 U. ILL. L. REV. 201, 203. Although a number of states have recently narrowed or modified the exemption, a majority of jurisdictions continue to treat rape in marriage differently than rape outside of it, either by allowing prosecution only if the spouses are not living together, by according marital rape a lower level of criminality than extramarital rape or by criminalizing only certain sorts of marital assaults. See generally Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 FLA. L. REV. 45, 45-49 (1990).

85. See CLARK, DOMESTIC RELATIONS II, supra note 18, at 372 n.21 for a list of cases and statutes abolishing interspousal tort immunity.
harmony. Even those jurisdictions that continue to recognize some aspects of interspousal immunity, disclaim reliance on the notion of marital unity. The increased ability of spouses to contract with each other is similarly grounded in the notion of married persons as separate individuals, with potentially disparate interests.

Changes in the laws of evidence and the doctrines governing criminal responsibility also reflect the legal individuation of the married couple. The common law rule that a husband and wife could not make up the two parties necessary to constitute a conspiracy has been abolished in virtually all jurisdictions. In 1980, the Supreme Court abolished a criminal defendant's privilege against adverse spousal testimony, noting that the ancient foundations for so sweeping a privilege—including the denial to women of a separate legal identity—had long since disappeared. The marital rape exemption has been abolished or narrowed in many jurisdictions. Virtually all states have enacted or strengthened civil and criminal statutes designed to protect victims of domestic violence.

89. Trammel v. United States, 445 U.S. 40, 52 (1980). Under Trammel, the privilege is vested in the witness spouse; a witness spouse may choose not to testify but a defendant can no longer prevent his spouse from voluntarily testifying against him. Id. at 53.
91. As of 1989, 48 states and the District of Columbia had enacted statutes designed to protect victims of domestic violence through the issuance of civil orders of protection. Peter Finn, Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse, 23 FAM. L.Q. 43, 43 (1989). These civil protection orders generally enjoin batterers from further violence against their partners. Depending on the jurisdiction, the order may also evict a batterer from a shared residence, grant temporary custody of children, limit child visitation rights, require payment of child support and order the batterer to attend mandatory counseling. Id.

Despite the existence of these statutes, many law enforcement authorities have remained reluctant to arrest and prosecute wife batterers. See, e.g., Amy Eppler,
The overriding effect of these developments is that marriage no longer constitutes a primary determinant of an individual's legal status. For most legal purposes, married persons retain their status as individuals and are free to contract with, or otherwise treat each other, as any two nonspouses might. Conversely, when a married person engages in behavior towards a spouse that would be unacceptable outside the marriage context, the law is no longer likely to interpose marriage as a barrier to the pursuit of civil or criminal redress. Taken together, these developments both reduce the public significance of marriage and vest in private individuals, rather than the state, the authority to define important elements of the marital relationship.

3. ENTRY INTO MARRIAGE

In addition to enhancing private control over the consequences of marital status, recent legal and constitutional developments have significantly restricted the state's authority to block an individual's decision to marry. Traditionally, the state limited entry into marriage in a variety of ways. For example, to marry at all, a person had to have obtained a minimum age and to have legally terminated any previous marriages. Certain categories of persons, such as prison inmates and the "feebleminded," were categorically prohibited from marrying.92 Others, such as those adjudicated the "guilty" party in a divorce, were temporarily barred from marrying again.93 A person's choice of marriage partners was also constrained; only a male and a female could

Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?, 95 YALE L.J. 788, 790 (1986). To combat this reluctance, a number of jurisdictions have passed mandatory arrest statutes that require police to make an arrest whenever they have probable cause to believe that a domestic assault or the threat of an assault has occurred, regardless of the existence of a protection order. See, e.g., Dirk Johnson, Abused Women Get Leverage in Connecticut, N.Y. TIMES, June 15, 1986, § 4, at 8 (citing Connecticut, Delaware, Maine, Minnesota, North Carolina, Oregon and Utah as states with such mandatory arrest statutes); Rogers Worthington, Family Violence Laws Fill Jails, CHI. TRIB., June 4, 1989, at 16 (reporting on Wisconsin's adoption of mandatory arrest law); Karlyn Barker, Domestic Abuse Arrests Expected to Soar Under New D.C. Law, WASH. POST, Aug. 27, 1990, at B1 (describing enactment in 1990 of D.C. mandatory arrest statute).


legally wed, and persons related closely by blood or marriage could not marry each other.

The state still exercises considerable control over entry into marriage. Both courts and legislatures have uniformly rejected attempts by same-sex couples to marry,94 although a growing number of municipalities have begun to recognize such unions. Similarly, courts have rejected constitutional challenges to age-based restrictions on the ability to marry.95 Despite this continuing state control, there has been substantial movement toward private ordering of the decision to marry. In Zablocki v. Redhail, the Supreme Court struck down as unconstitutional an attempt by the State of Wisconsin to prohibit marriage by parents who had failed adequately to support their existing children.96 The Court characterized marriage as a fundamental constitutional right and held that state regulation that substantially interfered with the decision to marry would be subject to rigorous judicial scrutiny.97 More recently, in Turner v. Safely, the Court invalidated regulations promulgated by the Missouri Department of Corrections that significantly restricted the ability of prison inmates to marry.98

The law has also eased its control over an individual's choice of marriage partners. Several recent cases have held that statutory prohibitions against incestuous marriage do not apply to relationships created by adoption.99 With respect to other kinship restrictions, states have


95. See, e.g., Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981), aff’d, 669 F.2d 67 (2d Cir. 1982). Although state regulation regarding the age at which persons may marry (both with and without parental consent) remains extensive, the basis of regulation has largely shifted from the reinforcement of family control over the marriage decision to social concern about the risks supposedly involved in youthful marriages. GLENDON, supra note 17, at 28.


generally narrowed the circle of prohibited degrees of relationship, and many have eliminated kinship restrictions based on affinity, rather than on common ancestry. Moreover, where close relatives do marry despite existing statutory bans, those "illegal" marriages today produce many of the same legal effects as any other marriage.

Even the requirement of "one spouse at a time" is not as rigid as it used to be. To be sure, simultaneous marriage to more than one person remains unlawful in all fifty states. But, like prohibited kinship marriages, such unions in fact produce legal consequences that increasingly resemble those of any lawful marriage. For example, the children of bigamous marriages are no longer considered "illegitimate," even where state law characterizes such marriages as "void." Moreover, several commentators have noted that the attitude of criminal law toward plural marriages seems to be growing less harsh. Criminal laws are seldom enforced today against bigamists or polygamists and, in some states, bigamy has ceased to be a crime.

The effect of a polygamous marriage on the right to rear children has also changed. In 1955, the Utah Supreme Court upheld a finding of child neglect, and the removal of several children from their parents' home, unconstitutional as violative of equal protection); Bagnardi v. Hartnett, 366 N.Y.S.2d 89 (Sup. Ct. 1975) (marriage between adoptive father and adopted daughter legally permissible).

100. GLENDON, supra note 17, at 41 ("Prohibitions based on affinity and remote consanguinity have been gradually dropping out of state law, do not appear in the Uniform [Marriage and Divorce] Act, and are in any event of doubtful constitutionality." A 1984 survey reports that only 15 states continue to forbid marriage between persons related only by marriage. IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 58 (1986). In 1968, 20 states and the District of Columbia prohibited such affinity-based marriages. Drinan, supra note 92, at 370.

101. GLENDON, supra note 17, at 43.

102. See Glendon, supra note 36, at 672.

103. GLENDON, supra note 17, at 39; see UNIF. MARRIAGE AND DIVORCE ACT § 207(c), 9A U.L.A. 168 (1987) ("Children born of a prohibited marriage are legitimate.").


based solely on the parents' unlawful polygamous marriage. In 1987, however, that same court ruled that a divorced mother's polygamous remarriage could not be used as the primary ground for granting her ex-husband's request for custody of the couple's children. Most recently, in 1991, the Utah Supreme Court held that polygamy, standing alone, is insufficient automatically to disqualify polygamists as adoptive parents.

These developments show that while the law still exercises considerable control over entry into marriage, the balance between public and private ordering has shifted significantly. Individuals contemplating marriage today have substantially more freedom than did their counterparts a generation ago to determine whether and under what circumstances they will wed, and to effectuate their choice of marriage partner. Moreover, even where the law continues formally to proscribe certain marriage choices, the consequences of exercising those choices in violation of the legal rules are considerably less severe today than they were a generation ago.

4. FORMAL REQUIREMENTS FOR MARRIAGE

A final way the law has traditionally regulated marriage is by requiring certain procedural formalities for entering into a valid ceremonial union. For example, all states require prospective spouses to obtain a marriage license, and most impose additional procedural requirements, such as a waiting period and a physical examination. A number of states also regulate various aspects of the marriage ceremony.

107. Sanderson v. Tryon, 739 P.2d 623 (Utah 1987). The court distinguished its earlier child neglect decision by noting that the legislature had deleted from its child neglect statutes the reference to moral neglect relied on by the earlier judges.
109. A limited number of American jurisdictions also recognize common law marriage. In general, to enter into a valid common law marriage, parties must agree to be husband and wife and must hold themselves out to the world as married. See, e.g., Anderson v. Anderson, 131 N.E.2d 301 (Ind. 1956); In re Dallman's Estate, 228 N.W.2d 187 (Iowa 1975). See generally CLARK, DOMESTIC RELATIONS II, supra note 18, at 48. Common law marriage, however, is a dying institution. As of 1979, only 14 states and the District of Columbia continued to recognize the validity of common-law marriages contracted within their borders. IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 29 (2d ed. 1991).
110. GLENDON, supra note 17, at 50.
These procedural formalities have undergone only minor alterations over the past two decades, but what small changes have occurred have been in the direction of increased private control over the procedural prerequisites for formal marriage.\textsuperscript{111} One of the major purposes of the Uniform Marriage and Divorce Act, approved in 1970 by the National Conference of Commissioners on Uniform State Laws, was to "greatly simplify\([y]\) premarital regulation."\textsuperscript{112} The minimal solemnization and registration requirements contained in the Act were "designed to take account of the increasing tendency of marrying couples to want a personalized ceremony, without traditional church, religious or civil trappings."\textsuperscript{113} The drafters of the Uniform Act also suggested the abolition of the traditional forms of premarital medical examination then required by most states, characterizing such medical requirements as "both avoidable and highly inefficient."\textsuperscript{114}

A number of jurisdictions have followed the lead of the Uniform Act, and have either reduced or eliminated various traditional premarital formalities. While a few states have attempted to impose additional premarital requirements, these attempts have generally been short lived.\textsuperscript{115} Moreover, as a result of the Supreme Court's characterization of marriage as a fundamental constitutional right, procedural restrictions that substantially interfere with the decision to marry are vulnerable to constitutional challenge.\textsuperscript{116}

\begin{thebibliography}{116}
\bibitem{111} See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 35-36 (1989); GLENDON, supra note 17, at 24-25, 49-51.
\bibitem{113} Id. § 206 cmt., 9A U.L.A. 167. See GLENDON, supra note 17, at 55 (characterizing the UMDA as "really just a marriage registration law" and noting that "it is not too much of an exaggeration to say that the present regulation of marriage in the United States is already basically just a matter of licensing and registration").
\bibitem{114} UNIF. MARRIAGE AND DIVORCE ACT § 203 cmt., 9A U.L.A. 164.
\bibitem{115} In 1987, for example, the Illinois legislature mandated that all marriage license applicants be tested for exposure to the AIDS virus. In 1988, the first full year of the law's operation, the number of marriage licenses issued in the state dropped by 25% as many couples either went out of state to be married or simply declined to get married. Of the 221,000 people married in Illinois during the first 18 months of the statute's operation, only 44 tested positive for HIV exposure. In June 1989, the legislature repealed the testing requirement. Isabel Wilkerson, Prenuptial Tests for AIDS Repealed, N.Y. TIMES, June 24, 1989, at A6. Louisiana similarly mandated premarital AIDS testing for a brief period of time but repealed that requirement along with other medical testing requirements in 1988. See LA. REV. STAT. ANN. § 9:230-31 (West Supp. 1988) (repealed 1988).
\end{thebibliography}
The impact of those premarital requirements that continue to exist is further diluted by the minimal consequences of noncompliance. Courts have repeatedly held that a couple's failure to comply with applicable marriage formalities does not invalidate their marriage. Nor will a marriage be declared invalid because the person who presided over the marriage ceremony lacked the legal authority to do so. Moreover, although some states provide criminal penalties for parties who obtain a marriage license by fraud, or for officials who knowingly preside over an unlicensed marriage, such crimes are rarely detected and even more rarely prosecuted.

Thus, the formal prerequisites to marriage that exist today do not constitute a significant restraint on private ordering of the marriage process. Moreover, any attempt by the state to reassert control in this area by imposing more onerous premarital requirements would present serious constitutional difficulties.

B. Divorce and Its Financial Consequences

1. THE SHIFT FROM FAULT-BASED TO NO-FAULT DIVORCE

The shift from public to private ordering of marriage has been accompanied by the privatization of divorce and its financial consequences. Until the late 1960s, American law recognized no such thing as a consensual or privately-ordered divorce. Rather, statutes in each state established specific grounds for terminating a marriage. Most of these grounds required the spouse seeking a divorce to prove to a court that her partner had committed a marital offense and that she was innocent of marital fault. Thus, divorce was not the recognition of a private decision to terminate a marriage; it was a privilege granted by the state.

117. See, e.g., Carabetta v. Carabetta, 438 A.2d 109 (Conn. 1980).
118. See Annotation, Validity of Marriage as Affected by Lack of Legal Authority of Person Solemnizing It, 13 A.L.R.4TH 1323 (1982); UNIF. MARRIAGE AND DIVORCE ACT § 206(b), 9A U.L.A. 167 (“The solemnization of the marriage is not invalidated by the fact that the person solemnizing the marriage was not legally qualified to solemnize it, if neither party to the marriage believed him to be so qualified.”).
119. ELLMAN ET AL., supra note 109, at 25.
121. If both spouses were guilty of marital offenses, the defense of recrimination precluded the granting of a divorce. See CLARK, DOMESTIC RELATIONS II, supra note 18, at 527.
to an innocent spouse against a guilty one. The Tennessee Supreme Court stated the concept succinctly:

Divorce is . . . not a matter to be worked out for the mutual accommodation of the parties in whatever manner they may desire, or in whatever manner the Court may deem to be fair and just under the circumstances. It is conceived as a remedy for the innocent against the guilty.

The model of divorce as a state-bestowed remedy for an innocent spouse began eroding long before the formal adoption of no-fault divorce statutes. The adoption of these statutes, however, signaled an important shift in the legal paradigm governing divorce. The state, in essence, abandoned its role as the moral arbiter of marital behavior. In particular, the state "washed its hands" of attempting to determine when the goal of providing relief to an innocent spouse outweighed the strong public interest in preserving marriage. With the adoption of no-fault divorce statutes, the state ceded to the spouses themselves—and often to one spouse acting unilaterally—the authority to make this judgement.

Thus, under no-fault divorce, the decision to end a marriage generally rests on unreviewed private judgment; the state’s role is diminished to one

122. Friedman, supra note 120, at 653; see Sally B. Sharp, Divorce and the Third Party: Spousal Support, Private Agreements and the State, 59 N.C. L. REV. 819, 822 (1981) ("In a very real sense, divorce [under the fault-based system] was a kind of offense against the state, and an offense implied an offender.").


124. See O’Connell, supra note 123, at 471-92 for a description of this process of erosion.

125. Although some early no-fault decisions suggested that judges should determine independently whether a marriage was truly "irretrievably broken," these decisions soon gave way to almost total deference to the judgment of the party or parties seeking a divorce. See Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. REV. 79, 107 (1991) (vast majority of states have adopted no-fault divorce laws that make it possible for one party unilaterally to obtain a no-fault divorce, despite the objections of the other spouse); Elaine C. Berg, Irreconcilable Differences: California Courts Respond to No Fault Dissolutions, LOY. L.A. L. REV. 453 (1974); Stephen L. Sass, The Iowa No Fault Dissolution of Marriage Law in Action, 18 S.D. L. REV. 629, 650 (1973); Alan H. Frank et al., No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary, 58 NEB. L. REV. 1, 61-65 (1978). Cf. WASH. REV. CODE ANN. § 26.09.030(b)(ii) (West 1986) (judge must grant divorce if both parties say marriage is irretrievably broken or if one party continues to so maintain after the couple has undergone counseling).
of solemnization and recording, akin to its role in marital licensing.\textsuperscript{126}

The shift from fault-based to no-fault divorce took place in this country with remarkable speed. In 1969, California became the first state to eliminate fault-based grounds for divorce.\textsuperscript{127} By 1976, forty-six other states had effectively removed fault impediments to dissolution, either by replacing their fault-based divorce statutes with pure no-fault legislation or by adding no-fault provisions to their existing grounds for divorce.\textsuperscript{128} By 1985—only sixteen years after California's pioneering divorce legislation—not a single American jurisdiction retained a pure fault-based system of divorce.\textsuperscript{129} This nationwide transformation is all the more striking in light of the absence of federal involvement and the significant variation that states have traditionally shown in their approaches to domestic relations law.\textsuperscript{130}

The transformation of divorce from publicly-bestowed remedy to private transaction has also led to various procedural innovations designed to decrease state involvement in the divorce process. At least six states

\begin{itemize}
  \item \textsuperscript{126} Shultz, supra note 50, at 272; see Wardle, supra note 125, at 96 ("Replacing the old fault-notion of divorce was the assertion that divorce was a private matter that the state had no legitimate interest to restrict when the marriage was irretrievably broken and the parties to the marriage had agreed to terminate the marriage.").
  \item \textsuperscript{127} Act of Sept. 4, 1969, ch. 1608, 1969 Cal. Stat. 3312. While California was the first jurisdiction to adopt an exclusively no-fault approach to divorce, no-fault grounds for divorce have existed since the 19th century. As of 1966, approximately a dozen states had statutes that permitted divorce without regard to fault where the parties had lived separately and apart for a prescribed period of time. Walter J. Wadlington, Divorce Without Fault Without Perjury, 52 VA. L. REV. 32, 63 (1966). The prescribed time periods ranged from two to seven years. Id. at 77-78.
  \item \textsuperscript{128} Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 YALE L. J. 104, 107 (1976); see Doris J. Freed, Grounds for Divorce in the American Jurisdictions, 8 FAM. L.Q. 401, 401 (1974) (As of June 1974, there remained only five states in which marital misconduct was the sole basis for divorce.).
  \item \textsuperscript{129} Fifteen states currently have "pure" no-fault laws that abolish all fault-based grounds for divorce and substitute a judicial finding of marriage breakdown; twenty-one states have added to their list of fault-based grounds a no-fault provision based either on "irreconcilable differences" or some form of marriage breakdown; and fourteen states and the District of Columbia provide a no-fault ground based on separation or incompatibility in addition to their fault-based grounds. See Herma H. Kay, Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath, 56 U. CIN. L. REV. 1, 5-6, 26-55 (1987).
  \item \textsuperscript{130} See Wadlington, supra note 127, at 38; Wardle, supra note 125, at 82-91. For an historical study of the adoption of no-fault divorce legislation, see HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988). For a critique of Jacob's study, see Grace G. Blumberg, Reworking the Past, Imagining the Future: On Jacob's Silent Revolution, 16 LAW & SOC. INQUIRY 115 (1991).
\end{itemize}
have adopted summary divorce procedures designed to achieve a convenient divorce by mutual consent.131 A growing number of states also allow divorcing parties to proceed by affidavits in lieu of court appearances.132 The effect of these procedural innovations is to reinforce the private nature of divorce and to further reduce its public component.

The shift from fault-based to no-fault divorce also signaled a diminished role for attorneys in the divorce process. Indeed, the widespread adoption of no-fault legislation spawned a proliferation of published manuals and “kits” designed to enable spouses to dissolve their marriage without the assistance of lawyers.133 Not surprisingly, the legal profession reacted negatively to these developments, emphasizing the continuing complexity of divorce issues and the financial pitfalls of do-it-yourself divorce.134 The profession’s attempts to prevent the de-legalization of divorce, however, have been, at best, only partially successful. Although divorce remains, in theory, an adversary legal proceeding, the removal of fault impediments to divorce has both reduced the importance of legal knowledge and diminished the need for legal services in many categories of consensual divorce. Moreover, as explained more fully below, the rise of divorce and custody mediation has deprived the

131. ELLMAN ET AL., supra note 109, at 192. These procedures are usually available only for couples with no minor children and require that the parties submit sworn statements indicating that they have agreed upon the disposition of any marital property and waive any claim for support. Id. See, e.g., CAL. CIV. CODE § 4550 (West 1983); OR. REV. STAT. § 107.485 (1990).


133. See Project, supra note 128, at 105 & app. A (listing divorce kits and services which have been available at some point in 14 states); Meredith, supra note 132, at 733-34 (describing contents of divorce kits); Arthur R. Miller, Comment, Lay Divorce Firms and the Unauthorized Practice of Law, 6 U. MICH. J.L. REFORM 423, 430 (1973) (describing two main approaches to lay divorce assistance). One recent study found that 47% of the divorces obtained in the Superior Court in Phoenix, Arizona during 1985 did not involve lawyers. Debra C. Moss, Self Helpers on the Increase, A.B.A. J., March 1, 1988, at 40.

134. See, e.g., Warren H. Resh, Do-It-Yourself Divorce Kits and Services, 47 WIS. B. BULL., Feb. 1974, at 23 (describing as “one of the inevitable consequences” of pro se divorces “the terrible burden they place on the courts and court personnel”); Gerald F. Marine, Do-It-Yourself Divorce—Wisconsin—Update, 38 UNAUTH. PRAC. NEWS 131, 132 (1974); C. Ian MacLachlan, Pro Se Marriage Dissolution in Connecticut—Some Considerations, 51 CONN. B. J. 15 (1977). Bar associations in a number of jurisdictions initiated “unauthorized practice of law” actions against the providers of divorce kits and other lay divorce services. See Project, supra note 128, at 110 & app. A (listing suits brought against lay divorce enterprises); Meredith, supra note 132, at 738-40.
adversary system of its monopoly over the process of marital dissolution, thus further diminishing the role of lawyers and legal knowledge.\textsuperscript{135}

2. THE ECONOMIC CONSEQUENCES OF DIVORCE

Particularly in its early stages, the no-fault divorce revolution also heralded a significant retrenchment in state supervision of the economic consequences of marital dissolution. Under the fault-based system, the state not only asserted broad authority to define when divorce was appropriate; it also played a significant role in structuring the spouses' post-divorce economic relationship and the relationship of the ex-spouses to their children.\textsuperscript{136} In large part, this role was premised on the state's interest in enforcing the terms of the traditional marriage contract, in particular the husband's duty to support his wife and the wife's reciprocal domestic and childrearing obligations.\textsuperscript{137} With the adoption of no-fault divorce, and the accompanying demise of the state-imposed marriage contract, the legitimacy of the state's role in structuring a couple's post divorce economic and parenting relationship has become increasingly problematic.\textsuperscript{138} Indeed, one noted commentator has claimed that "American law now recognizes explicitly that a primary function of law at the time of divorce is to provide a framework within which divorcing couples may exercise great freedom to determine for themselves their post dissolution rights and responsibilities."\textsuperscript{139}

Consistent with this recognition, most states now permit divorcing couples to make binding and nonmodifiable separation agreements with respect to both property division and spousal support.\textsuperscript{140} Moreover, although courts are required in theory to review spousal agreements


\textsuperscript{136.} Mnookin, supra note 120, at 1015.

\textsuperscript{137.} See Sharp, supra note 122, at 822-23.

\textsuperscript{138.} See Wardle, supra note 125, at 115 n.148 (adoption of no-fault divorce "has created significant problems for the justification of the imposition of any post-dissolution continuing spousal support or sharing obligations"); Ira M. Ellman, The Theory of Alimony, 77 CAL. L. REV. 1, 5-6 (1989) (modern divorce reform has completely undermined traditional justifications for alimony).

\textsuperscript{139.} Mnookin, supra note 120, at 1015.

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regarding child support and custody, courts typically rubber-stamp separation agreements, even in divorces involving children.\textsuperscript{141}

The shift from fault-based to no-fault divorce has also occasioned a fundamental rethinking of the law's attitude toward premarital agreements affecting divorce. Historically, the law viewed such private attempts to predetermine the economic consequences of divorce as contrary to public policy, and therefore void.\textsuperscript{142} Courts and commentators offered a number of reasons for refusing to countenance such agreements. One was that premarital agreements encouraged divorce and were therefore inconsistent with the publicly-espoused idea that marriage was forever.\textsuperscript{143} Another was that the husband's state-imposed duty of support constituted an essential incident of marriage and was thus not a proper subject for a private contract.\textsuperscript{144}

With the advent of no-fault divorce and the demise of the state-imposed marriage contract, these rationales lost much of their force. As a result, judicial hostility toward premarital agreements has been replaced by the view that such private agreements are an acceptable and indeed desirable method of resolving the financial issues incident to divorce.\textsuperscript{145} Thus, such premarital agreements are generally enforceable, even over the objection of one party, as long as they meet applicable contract law standards of voluntariness, disclosure and conscionability, and do not leave either spouse in danger of becoming a public charge.\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{141} Mnookin, \textit{supra} note 120, at 1016; Sharp, \textit{Fairness Standards, supra} note 140, at 1409-10.
\item \textsuperscript{142} CLARK, DOMESTIC RELATIONS II, \textit{supra} note 18, at 6; Gregg Temple, \textit{Freedom of Contract and Intimate Relationships}, \textit{8 HARV. J.L. & PUB. POL'Y} 121, 129 (1985).
\item \textsuperscript{143} Fricke v. Fricke, 257 Wis. 124, 127-28, 42 N.W.2d 500, 502 (1950); Crouch v. Crouch, 385 S.W.2d 288 (Tenn. Ct. App. 1964).
\item \textsuperscript{144} French v. McAnarney, 195 N.E. 714, 716 (Mass. 1935); See Nora J. Lauerman, \textit{A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce}, \textit{56 U. CIN. L. REV.} 493, 512 (1987).
\item \textsuperscript{145} See, e.g., DeLorean v. DeLorean, 511 A.2d 1257, 1259 (N. J. Super. Ct. App. Div. 1986) ("Initially, it is clear that 'antenuptial agreements fixing post-divorce rights and obligations [are] . . . valid and enforceable' and courts should 'welcome and encourage such agreements' at least to the extent that the parties have developed comprehensive and particularized agreements responsive to their peculiar circumstances.") (quoting D'Onofrio v. D'Onofrio, 491 A.2d 752 (N.J. Super. Ct. App. Div. 1985)).
\item \textsuperscript{146} See, e.g., Simeone v. Simeone, 581 A.2d 162 (Pa. 1990); Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985); Doris J. Freed & Timothy B. Walker, \textit{Family Law in the Fifty States: An Overview}, \textit{FAM. L.Q.}, Winter 1988, at 417, 560 ("[M]any states are upholding [premarital] agreements as long as they are: (1) free from fraud and overreaching, (2) reflect a full and fair disclosure by and between the parties of their respective assets, and, in some states, (3) not unconscionable as to property division or
The Uniform Premarital Agreement Act, approved in 1983, illustrates the modern view. Section 3 of the Act authorizes parties contemplating marriage to contract with respect to their respective property rights and obligations, the disposition of property upon separation or divorce, the modification or elimination of spousal support and "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Under section 6 of the Act, such agreements are enforceable unless the opposing party proves that she did not execute the agreement voluntarily or that the agreement was unconscionable at the time of execution.

In order to invalidate a premarital agreement on grounds of unconscionability, an opposing party must also show that she (i) was not provided a fair and reasonable disclosure of the other party's assets or obligations; (ii) did not waive disclosure; and (iii) did not have an adequate knowledge of spousal support.

Some jurisdictions subject premarital contracts to a substantive fairness review not generally applicable to commercial contracts. E.g., Buettner v. Buettner, 505 P.2d 600 (Nev. 1973); Warren v. Warren, 523 N.E.2d 680 (Ill. Ct. App. 1988). In other jurisdictions, the substantive unconscionability of a premarital agreement raises a presumption of overreaching, Carnell v. Carnell, 398 So. 2d 503, 506 (Fla. Dist. Ct. App. 1981), or shifts to the agreement's proponent the burden of showing that it was entered into voluntarily and with full disclosure of assets. Posner v. Posner, 257 So. 2d 530, 534 (Fla. 1972). Finally, a few jurisdictions continue to hold unenforceable, on public policy grounds, all premarital agreements purporting to limit post divorce spousal support. E.g., In re Marriage of Winegard, 278 N.W.2d 505, 512 (Iowa 1979); Duncan v. Duncan, 652 S.W.2d 913, 915 (Tenn. Ct. App. 1983).

As of 1990, sixteen states had adopted the Uniform Premarital Agreement Act: Arkansas, California, Hawaii, Illinois, Kansas, Maine, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas and Virginia.


149. Id. § 6, at 376. The comments to section 6 explicitly adopt the standard of unconscionability used in commercial law. Id. at 376-77. The section contains a very limited exception to these requirements if the enforcement of a premarital agreement eliminating spousal support would cause one party to the agreement to be eligible for public assistance. In that instance, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. Id. § 6(b), at 376. For a discussion and critique of the Uniform Act's enforcement provisions, see Ronald S. Ladden & Robert J. Franco, The Uniform Premarital Agreement Act: An Ill-Reasoned Retreat From the Unconscionability Analysis, 4 AM. J. FAM. L. 267 (1990).
of the other party's assets or obligations.\textsuperscript{150} These standards do not differ appreciably from the general contract law standards for assessing the validity of agreements negotiated as part of an arms-length business transaction.\textsuperscript{151}

A comparative perspective may be helpful in assessing the magnitude of the shift from public to private ordering that has accompanied this country's no-fault divorce revolution. As Mary Ann Glendon has recently noted, the transformation of divorce in the United States took place contemporaneously with the liberalization of divorce laws in almost every other Western industrialized country.\textsuperscript{152} The divorce revolution in the United States, however, went further than in most other countries in at least two important respects. First, although divorce by mutual consent is readily available in Western Europe, most Western European countries permit one spouse to divorce an unwilling and legally guiltless partner only after a lengthy period of separation.\textsuperscript{153} Most American jurisdictions, by contrast, permit unilateral non-fault divorce after a separation of one year or less.\textsuperscript{154} Second, the divorce laws of England, France and West Germany contain "hardship clauses" that (at least in theory) permit judges to deny a unilateral non-fault divorce, even after expiration of the required separation period, if the divorce would result in exceptional hardship to the nonconsenting spouse or to the couple's children.\textsuperscript{155} No American jurisdiction has enacted anything resembling such a hardship clause.

Moreover, in virtually all Western European countries, the government has assumed a far more active role in regulating the economic consequences of divorce than the government has in the United States. In part, this reflects broader political and ideological differences between

\textsuperscript{150} The objecting party bears the burden of proof on each of these issues. \textit{Unif. Premarital Agreement Act} § 6(a)(2), 9B U.L.A. 376.

\textsuperscript{151} If anything, the requirements for proving unconscionability are more rigorous than the general contract law requirements. \textit{See} Ladden & Franco, \textit{supra} note 149, at 274-75.

\textsuperscript{152} \textit{Mary Ann Glendon, Abortion and Divorce in Western Law} 66 (1987) [hereinafter \textit{Abortion and Divorce}].

\textsuperscript{153} \textit{Id.} at 70. Sweden is considerably more tolerant than England, France or Germany of unilateral non-fault divorce. There, one spouse can petition for divorce without having to give any reason. If the other spouse opposes the petition, or if there are children under 16, a six month "period of consideration" must be observed. This six month waiting period is not required where the parties have already been separated for at least two years. \textit{Id.} at 75-76.

\textsuperscript{154} \textit{Id.} at 76.

\textsuperscript{155} \textit{Id.} at 70, 72, 74. In practice, these hardship clauses are rarely used to deny a divorce in England and Germany, but they are occasionally used to deny a divorce in some parts of France. \textit{Id.} at 74.
the United States and Western Europe regarding the appropriate role of government. In part, however, it reflects differences in the legal meaning of the freedom to terminate an unsatisfactory marriage. In the United States, far more than in Western Europe, the liberalization of grounds for divorce has been accompanied by a lifting of economic responsibilities toward former spouses and dependents. Particularly with respect to spouses, the shift from public to private ordering of divorce has encompassed the notion that divorce presumptively ends not only the parties' legal union, but also their financial responsibilities toward each other. In Western Europe, by contrast, the private decision to end a marriage does not spell the end of such publicly imposed financial responsibilities.

C. Adoption, Surrogate Mothering and Parenthood by Contract

In the context of adoption, the shift from public to private ordering has been more subtle, but equally profound. Most significantly, there has been a change in the perceived purpose of American adoption law, from promoting the welfare of children in need of parents—traditionally and unproblematically a "public" function—to fulfilling the needs and desires of couples who want children.

This shift in purpose is most evident in the context of surrogate mothering, where the procreative desires of couples who are unable (or unwilling) to bear children drive the process and where there is no child

156. See id. at 104-05 ("In fact, the United States appears unique among Western countries in its relative carelessness about assuring either public or private responsibility for the economic casualties of divorce. More than any other country among those examined here, the United States has accepted the idea of no-fault, no-responsibility divorce."); Lenore J. Weitzman, The Divorce Revolution 368-71 (1985) (no-fault divorce laws embody the idea that family support responsibilities terminate upon, or soon after, divorce); cf. Stephen D. Sugarman, Dividing Financial Interest on Divorce, in Divorce Reform at the Crossroads 30, 103-65 (Stephen D. Sugarman & Herma H. Kay eds., 1990). (critiquing prevailing justifications for post-divorce income sharing and suggesting that divorce law may not be the appropriate place to ameliorate income disparities between women and men).

157. See Leo A. Huard, The Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743, 748-49 (1955) (distinguishing feature of American adoption law is the paramount concern for the welfare of the child/adoptive); Ruth-Arlene W. Howe, Adoption Practice, Issues, and Laws 1958-1983, 17 Fam. L.Q. 173, 174-75 (1983) (unlike Roman adoption law, which was based on the needs and rights of the adoptive parents, "American law, from the beginning, protected the welfare of adopted children"); Sanford N. Katz, Rewriting the Adoption Story, 5 Fam. Advoc. 9, 10 (1982) (describing as primary goal of adoption "to provide a permanent, secure and loving home for a child whose birth parents are unable or unwilling to meet the child's needs").
in existence at the time the "adoption arrangement" is entered into.\textsuperscript{158} The shift is also evident in the increased popularity of so-called independent or private placement adoptions, in which prospective adoptive parents solicit available infants directly through newspaper ads and physician referrals.\textsuperscript{159} Finally, the transformation of adoption from a publicly-regulated child welfare institution to a privately ordered consumer system is reflected in the increased acceptance (at least within the legal academy) of calls for the legalization of a (modified) free market in babies, championed by United States Court of Appeals Judge Richard Posner.\textsuperscript{160}

1. AGENCY-FACILITATED ADOPTION

American law recognizes two methods of placing children for adoption with non-relatives: agency placement and independent or private placement,\textsuperscript{161} sometimes referred to as "gray market" adoption.\textsuperscript{162} In an agency adoption, the biological parents generally relinquish their parental rights to a public or private adoption agency, after they have been counseled about their options for raising the child.\textsuperscript{163} The agency

\textsuperscript{158.} See Margaret J. Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1931 (1987) ("Unlike a mother relinquishing a baby for adoption, the surrogate mother bears a baby only in response to the demand of the would-be parents: their demand is the reason for its being born."). This is true whether the surrogate mother is paid or unpaid. Id.

\textsuperscript{159.} See Howe, supra note 157, at 181 ("Despite rhetoric about providing a loving home for a child and meeting the needs of birth mothers who desperately desire an opportunity to continue their lives free of unwanted parenthood, the true focus of independent adoption is to service the needs of the adopter(s).”).


\textsuperscript{161.} Joan H. Hollinger, Introduction to Adoption Law and Practice, in ADOPTION LAW AND PRACTICE p. 1-1, p. 1-61 (Joan H. Hollinger ed. 1992). At least half of all adoptions of children that take place in the United States each year are by stepparents or other close relatives. Id. at p. 1-53; James B. Boskey, Placing Children for Adoption, in ADOPTION LAW AND PRACTICE, supra, at p. 3-1, p. 3-6. Because adoptions by relatives generally involve the formalization of existing custodial arrangements, rather than the "placing out" of children, this discussion of placement methods generally excludes adoption by close relatives.


\textsuperscript{163.} Hollinger, supra note 161, at p. 1-62. Frequently, if the biological parents are not married, the birth mother will have had some contact with the agency prior to the
is then responsible for placing the child with adoptive parents. Traditionally, in agency adoptions, the birth parents played little or no role in selecting adoptive parents and had no contact with the adoptive parents once they had been selected by the agency. This is changing, however, largely in response to competition from private placement adoption. Thus, many adoption agencies now permit birth parents to play a more active role in selecting an adoptive family.\textsuperscript{164} State laws relaxing the confidentiality of adoption records have also facilitated contact between the biological and the adoptive parents in agency adoptions.

Adoption agencies are also generally responsible for investigating the fitness of prospective adoptive parents. Traditionally, many adoption agencies restricted eligibility for adoption based on factors such as age, marital status, race, religion, financial stability and emotional health.\textsuperscript{165} These restrictions disqualified many prospective parents from participating in agency adoptions and discouraged others from even applying to agencies.

Once an agency approves prospective parents for adoption, those parents are typically placed on a waiting list until a suitable child becomes available for adoption. The waiting period for a healthy infant today can be as long as four to six years.\textsuperscript{166} When a possible child becomes available, the agency often performs additional studies on the biological parents and adoptive parents in an effort to ensure the success of the adoption. Agencies also provide for the care of the child should problems arise in the adoption process, and may perform follow-up studies after placing the child in the adoptive home, to ensure that the child and family are adjusting well.\textsuperscript{167}

birth of her child. Although the mother may tentatively plan to relinquish her child during pregnancy, she will have to reaffirm her intention after the child's birth, since a mother's pre-birth consent to the adoption generally is not enforceable.


167. Wallisch, supra note 165, at 331.
Adoption agencies are heavily regulated by the state. In all states, such agencies must be licensed and, in most, they must operate as nonprofit entities. Some adoption agencies are dedicated exclusively to the provision of adoption services; others are part of multi-service agencies or government entities. The Child Welfare League of America, a voluntary association of social service agencies, has published standards for adoption services provided by agencies.

2. INDEPENDENT OR PRIVATE-PLACEMENT ADOPTION

Independent or private-placement adoptions occur without the assistance of a licensed adoption agency. Instead, birth mothers and prospective adoptive parents deal directly with each other or, more commonly, through an intermediary such as a physician or a lawyer. Often, potential adoptive parents seek out pregnant women who are considering adoption by placing advertisements in newspapers or magazines. These advertisements typically promise a loving and financially secure home for the baby, along with payment of the pregnant

168. Id. at 332-33; Boskey, supra note 161, at p. 3-18.
169. Child Welfare League of America; Standards for Adoption Services (Rev. Ed. 1978); see Boskey, supra note 161, at p. 3-7 & n.20.
170. Wallisch, supra note 165, at 334; Tegeler, supra note 162, at 132. All but seven states apparently allow parents to place their children with unrelated prospective adopters, either through a direct private placement or with the assistance of an intermediary. In the seven states that do not allow private placement, only licensed state or private agencies are authorized to place children for adoption by non-relatives. Even in these states, however, birth parents may be able to arrange to have an agency place the child with someone selected by the parents, or to get a judicial or administrative waiver of the agency-placement requirement, if they can show that a waiver is in the best interests of the child. Hollinger, supra note 161, at p. 1-66.
171. In an independent adoption, an attorney or other intermediary will generally deal only with the biological mother and will only infrequently meet or have substantive dealings with the biological father. David K. Leavitt & Althea L. Jordan, The Attorney’s Role in Independent Adoption: Dual Representation, in ADOPTION LAW AND PRACTICE, supra note 161, at p. 5-1, p. 5-7 & n.6.
172. See Barbara L. Atwell, Note, Surrogacy and Adoption: A Case of Incompatibility, 20 Colum. Hum. Rts. L. Rev. 1, 12-13 (1990). Some states explicitly permit third party intermediaries to assist a birth parent in locating prospective adopters and in arranging for the actual physical transfer of the child. These states supposedly hold intermediaries to strict accounting requirements for their fees and expenses. Boskey, supra note 161, at p. 3-32. Other states permit private placements by parents, but prohibit unlicensed intermediaries, including lawyers, from engaging in “child-placement” activities. Even in these states, however, it is considered appropriate for lawyers representing prospective adoptive parents to advise them on how to locate a child, and for lawyers representing birth parents to advise them on how to evaluate prospective adopters. Id. at pp. 3-32 to 3-33.
woman's medical and legal expenses. Some lawyers specializing in private adoptions engage in similar advertising directed at expectant mothers. Couples seeking to adopt privately are also counseled to send their resumes to obstetricians and to post their resumes in public places, particularly on college campuses.

Over the past ten years, there has been a marked increase in private-placement adoptions, particularly for healthy white infants. A recent treatise on adoption asserts that today "the overwhelming majority of healthy infants are adopted through private placements." Other commentators report that, in California and other states that allow private adoption, up to eighty percent of all newborn adoptions are handled privately. In the mid-1970s, by contrast, private adoptions accounted for less than a third of all infant placements.

173. See Lichtenstein, The Baby-Go-Round: Want-Ad Adoptions, N.Y. MAG., Sept. 28, 1981, at 40. One such advertisement, in a South Carolina newspaper, read: Adoption: Loving financially secure, college educated couple. Much love & happiness to give to adopted white newborn. We invite you to live with us. Share our vacations. Live like a queen. All expenses paid. Legal & confidential. Please consider this an opportunity for a new start for you in a booming area (Houston) . . . .

174. See Adoption Lawyer's Advertising Pamphlet Aimed At Pregnant Women Criticized By Bar, 14 Fam. L. Rep. (BNA) 1497 (Aug. 23, 1988). A number of states, however, prohibit such advertising. See, e.g., ALA. CODE § 26-10-8 (1986) (prohibits advertising by anyone other than a licensed agency); CAL. CIV. CODE § 224p (West 1988).

175. CYNTHIA D. MARTIN, BEATING THE ADOPTION GAME (1980); Leavitt & Jordan, supra note 171, at pp. 5-14 to 5-15.

176. See, e.g., Mitchell A. Charney, The Rebirth of Private Adoptions, A.B.A. J., June 1985, at 55; Wallisch, supra note 165, at 328; Ranii, supra note 166; Tegeler, supra note 162, at 131. Data gathered in 1987 showed that between 1980 and 1987, 28% of the adoptions of unrelated children were arranged without the benefit of an agency, compared to 23% in the 1970s. PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, ADOPTION IN THE 1980'S, ADVANCE DATA No. 181 (1990). In fact, as the title of the Charney article suggests, these statistics may represent not an initial trend but a return to the notion of private adoption. It was not until the mid-1800s that states first passed adoption laws asserting public control over the adoption process. Prior to the passage of these state laws, adoption had been "a private legal act, like a conveyance of real estate or a commercial contractual transaction." Katz, supra note 157, at 9.

177. Hollinger, supra note 161, at p. 1-64. A 1984 article reported that approximately half of the healthy white infants adopted annually in the United States were adopted through private placement. Ranii, supra note 166.

178. Charney, supra note 176, at 55; Leavitt, supra note 166, at 142.

179. Ranii, supra note 166. For a thoughtful and provocative discussion of some of the forces that have facilitated the growth in independent adoptions, see Jane M. Cohen, Posnerism, Pluralism, Pessimism, 67 B.U. L. REV. 105, 130-35 (1987).
Private-placement adoption differs from illegal baby-selling primarily in that payments to the birth mother are limited to her pregnancy-related expenses, and payments to the intermediary (if any) are restricted to the provision of professional services.\textsuperscript{180} The line between such permissible and impermissible payments, however, is often difficult to draw.\textsuperscript{181} State laws differ substantially on what qualifies as a compensable pregnancy-related expense on the part of the birth mother.\textsuperscript{182} Similarly, the distinction between legitimate professional services and illegal "child placement activities" on the part of an adoption intermediary is neither clear nor uniform across the country.\textsuperscript{183}

\textsuperscript{180} See Posner, \textit{supra} note 160, at 60, 71; Atwell, \textit{supra} note 172, at 13-14 n.62 ("A black market adoption differs from a legal private placement or gray market adoption only in that the intermediary receives a disallowable fee."); Paul T. Fullerton, Note, \textit{Independent Adoption: The Inadequacies of State Law}, 63 WASH. U. L.Q. 753, 754 (1986) ("A legitimate gray-market adoption becomes an illegal black-market adoption when the intermediary or biological parent accepts an illegal fee.").

\textsuperscript{181} See Boskey, \textit{supra} note 161, at pp. 3-31 to 3-32 ("The question of whether a particular private placement is lawful, or constitutes a 'black market' baby-selling transaction may not be easy to answer."); Atwell, \textit{supra} note 172, at 14 n.62 ("Since it is so easy to cross the line between a permitted private placement and an illegal black market sale of a child, the threat of a black market adoption is greater with independent adoptions.").

\textsuperscript{182} South Carolina, for example, permits payment of "reasonable living expenses incurred by the mother... for a reasonable period of time." S.C. CODE ANN. § 20-7-1690(f)(1) (Law. Co-op. 1991). North Carolina, by contrast, does not permit any payments to the birth mother, even for hospital expenses or prenatal care. N.C. GEN. STAT. § 48-37 (1984). Many states require an accounting of all adoption-related expenses to be presented to the court at the adoption hearing. Leavitt & Jordan, \textit{supra} note 171, at p. 5-35 n.1. Wide variations exist both within and among jurisdictions regarding what expenses are properly compensable. Compare, e.g., \textit{In re Adoption of Anonymous}, 501 N.Y.S.2d 240 (Sur. Ct. 1986) (disallowing reimbursement for mother's pre- and post-delivery living and travel expenses) with \textit{In re Baby Boy}, 552 N.Y.S.2d 1005 (Fam. Ct. 1990) (birth mother may be reimbursed for wages lost in 10 week maternity leave; court decries vagueness in statutory standards for allowable reimbursement). For a compilation of state statutory provisions regarding permissible adoption expenses, see \textit{ADOPTION LAW AND PRACTICE}, \textit{supra} note 161, app. 1-A, answers to question IIC.

\textsuperscript{183} See Boskey, \textit{supra} note 161, at pp. 3-32 to 3-34. Many states prohibit attorneys and other adoption intermediaries from providing "child placement" services or from charging a fee for placing or locating a child for purposes of adoption. Katherine G. Thompson & Joseph R. Carrieri, \textit{The Attorney's Role in Independent Adoptions: Separate Representation of Each Party}, in \textit{ADOPTION LAW AND PRACTICE}, \textit{supra} note 161, at p. 6-1, pp. 6-35 to 6-38 & n.15 (listing statutes). Interpretation of these statutes has varied widely. In \textit{In re Baby Girl B.}, 544 N.Y.S.2d 963 (Sur. 1989), the court held that an attorney-intermediary did not violate the statutory prohibition on the placing out of children when he physically transferred a baby from the hospital to adoptive parents whom the birth mother had never met. The court ruled that the attorney's actions were proper, since he had acted at the request and with the authorization of the birth mother—a standard that would authorize virtually all placement activities by adoption intermediaries.
Despite the fine line between private-placement adoption and illegal baby selling, private adoption has become increasingly acceptable today, in both legal and nonlegal circles. The 1988 Draft ABA Model State Adoption Act not only allowed parents generally to place a child privately for adoption, but also permitted intermediaries (such as doctors and lawyers) to "assist a parent in locating or evaluating potential adopting parents and transferring legal custody of the child to the potential adopting parents." The Draft Act also permitted potential adoptive parents to pay the birth mother's "legal, medical, hospital, transportation, maternity home, counseling and necessary living expenses... preceding and during pregnancy-related incapacity" as long as the payment is not contingent upon the mother's consent to the adoption. According to one of its drafters, the Model Adoption Act did not regard adoption as primarily a public or social work activity; the Act was designed to "return control of adoption as much as possible to the parties themselves and eliminate unnecessary obstructions to adoption.

Consistent with this view of adoption, a growing number of legal commentators view private adoption as superior to agency-facilitated placements, particularly for infants. Proponents of private adoption


185. MODEL STATE ADOPTION ACT § 31 (Proposed Official Draft 1987), reprinted in 19 FAM. L. Q. 103 (1985) [hereinafter, DRAFT MODEL STATE ADOPTION ACT]. This Model Act was approved by the Family Law Section Council in August 1987 and presented to the ABA House of Delegates in August 1988. The House of Delegates failed to approve the Act. However, the Model Act is influencing the efforts of a drafting committee appointed in 1989 by the National Conference of Commissioners on Uniform State Laws to develop a new Uniform Adoption Act for enactment by state legislatures. See Hollinger, supra note 161, at 3 (Supp. 1992).

186. DRAFT MODEL STATE ADOPTION ACT § 32(a). Subsection (b) of this section makes it a misdemeanor for a birth mother to receive payment for pregnancy or maternity-related expenses with the intent not to complete the adoption. Id. §32(b). The Model Act also requires the petitioner in an adoption proceeding to file an accounting of all disbursements made in connection with the adoption. Id. §22. See In re Baby Boy, 552 N.Y.S.2d 1005, 1005 (Fam. Ct. 1990).

187. Leavitt, supra note 166, at 141.

188. See, e.g., JOAN HOLLINGER, REFLECTIONS ON INDEPENDENT ADOPTIONS, LEGAL ADVOCACY FOR CHILDREN AND YOUTH 366 (1986); Leavitt, supra note 166; Charney, supra note 176, at 53; Anthony T. Carsola & Susan Day Lewis, Independent Adoptions: An Alternative for Adoptive Parents, 9 Fam. L. Rep. (BNA) 4019 (Apr. 19, 1983). Independent adoptions have also received favorable attention from the popular press. See, e.g., William R. Greer, The Adoption Market: A Variety of Options, N.Y. TIMES, June 26, 1986, at C1; Lois Gilman, Adoption: How To Do It On Your Own,
argue that, unlike agency placement, private adoption allows both the biological and the prospective adoptive parents to exercise control over the adoption process. The birth mother can decide which adoptive family will provide the best home for her child;\textsuperscript{189} the prospective adoptive parents can find out "specifically and in detail who their child was born to, what the family tree is like, and what the obtainable family health histories are."\textsuperscript{190} Because of this element of control, and because parties to independent adoptions knowingly "choose each other," proponents claim that private adoption results in "fewer regrets on the part of the birth parent(s) and a lower incidence of refusals to sign consents to adoption."\textsuperscript{191} Proponents also emphasize that private adoption appropriately minimizes state intervention into the private lives of both birth parents and adoptive families.\textsuperscript{192}

A minority of commentators are more skeptical of private adoption. They caution that placement (or facilitation of placement) of children by unlicensed intermediaries may not adequately protect the welfare of the parties involved in the adoption, particularly the child.\textsuperscript{193} They note that while agencies generally conduct extensive preplacement screening of potential adoptive parents, only an abbreviated form of post placement screening occurs in many private adoptions.\textsuperscript{194} Critics also argue that

\textsuperscript{189} See Carsola & Lewis, supra note 188, at 4019. Others suggest that it is the intermediary, and not the biological mother, who makes the placement decision in most independent adoptions. See JOAN MCNAMARA, THE ADOPTION ADVISER 77 (1975); Wallisch, supra note 165, at 333.

\textsuperscript{190} Leavitt, supra note 166, at 147.

\textsuperscript{191} Carsola & Lewis, supra note 188, at 4023; see Leavitt & Jordan, supra note 171, at p. 5-11 ("The opportunity to meet and form a personal bond with the potential adoptive parents enables the biological parents to entrust the child to others, close the door and walk away from the child with a clear conscience.").

\textsuperscript{192} Hollinger, supra note 161, at p. 1-65 (couples who adopt privately, rather than through agencies, are "able to minimize the scope of public intrusions of their privacy").


\textsuperscript{194} A home study is required by virtually all adoption agencies prior to the placement of a child in an adoptive home. In private adoptions, by contrast, a home study generally has not been performed prior to placement, although such a study must be performed prior to finalization of the adoption. Boskey, supra note 161, at p. 3-20.
the limited supply of "adoptable" babies, in contrast to the great demand for them, inevitably generates pressure for unscrupulous intermediaries and parents to sell babies at whatever price desperate adoptive couples are willing to pay.\footnote{195}

3. FROM PRIVATE-PLACEMENT TO MARKET ADOPTION

Although a majority of jurisdictions now permit private-placement adoption, baby selling and baby brokering are currently illegal in all fifty states.\footnote{196} While few politicians openly advocate repealing these laws, the notion of relying explicitly on the market to allocate children for adoption has received increasing acceptance within the legal academy in recent years.

The leading advocate of using market structures to govern the adoption process is former professor and now federal appellate Judge Richard Posner. In 1978, Posner co-authored an article that is usually (though he claims incorrectly) described as advocating a free market in babies.\footnote{197} The article provoked strident criticism in both the popular and the scholarly press.\footnote{198} Critics of the law-and-economics movement seized upon the article as an example of the fundamental misguidedness

Critics have argued that such post placement home studies are insufficiently thorough and that, even if the study reveals problems with the adoptive home, judges are reluctant to remove a child from an adoptive home in which she has spent any substantial period of time. See Wallisch, supra note 165, at 353-54. In response to these criticisms, an increasing number of states that permit private adoptions have begun to require preplacement approval of prospective private adopters. See, e.g., FLA. STAT. ANN. § 63.092 (West 1985 & Supp. 1992); N.M. STAT. ANN. §§ 40-7-34, 40-7-40 (Michie 1986); WASH REV. CODE ANN. § 26.33.190 (West 1992). However, these statutory requirements are routinely waived in some jurisdictions. See James F. Thompson, Note, South Carolina Adoption Law: Out of the Cradle Into the Twenty-First Century, 40 S.C. L. REV. 767, 772-73 (1989).

\footnote{195} Schur, supra note 184, at 139-40; see Boskey, supra note 161, at p. 3-29. For a recent example of the activities of such unscrupulous intermediaries, see Kathleen Hunt, The Romanian Baby Bazaar, N.Y. TIMES MAG., Mar. 24, 1991, at 24.

\footnote{196} See Atwell, supra note 172, at 27-29 & nn.109, 110 (listing statutes).


of an economic approach to law.\footnote{See, e.g., Robin West, \textit{Submission, Choice, and Ethics: A Rejoinder To Judge Posner}, 99 Harr. L. Rev. 1449, 1449 (1986).} Nine years later, Posner reiterated his proposal in slightly modified form; this time it was the centerpiece of a major law review symposium entitled “Adoption and Market Theory.”\footnote{Posner, supra note 160.} Not surprisingly, the proposal received a more favorable reception than it had a decade earlier. One of the other symposium authors, generally supportive of Posner’s approach, characterized his proposal to allow birth mothers to sell their infants as “both unremarkable and unobjectionable.”\footnote{Ronald A. Cass, \textit{Coping With Life, Law, and Markets: A Comment on Posner and the Law-And-Economics Debate}, 67 B.U. L. Rev. 73, 73-74 (1987). The two other articles in the forum were critical of Posner’s approach. Even those articles, however, viewed Posner’s proposal as worthy of serious academic analysis. Tamar Frankel & Frances H. Miller, \textit{The Inapplicability of Market Theory to Adoptions}, 67 B.U. L. Rev. 99 (1987); Jane M. Cohen, \textit{Posnerism, Pluralism, Pessimism}, 67 B.U. L. Rev. 105 (1987).}

Judge Posner is up front about the “pressing social problem” to which his market-oriented proposals are designed to respond: the imbalance between the relatively small supply and the considerably larger demand for healthy white adoptable babies.\footnote{Posner, supra note 160, at 61; see Cohen, supra note 201, at 105-06. At least some of Posner’s critics appear to agree with his characterization of the problem. See, e.g., J. Robert S. Prichard, \textit{A Market For Babies}, 34 U. Toronto L.J. 341, 342 (1984) (describing as “tragic” the results of the existing adoption system, which leaves “many couples deprived of the privileges and joys of child rearing”).} Judge Posner’s advocacy of market principles thus makes explicit what has largely been implicit in the growing acceptance of private-placement adoption: that the primary purpose of adoption reform should be the satisfaction of “consumer” demand for more (and better) adoptable babies. Attempts by politicians, including President Bush, to persuade pregnant (and potentially pregnant) women to “choose” adoption, rather than abortion, similarly reflect this consumerist orientation. Posner’s explanation of how a (regulated) baby market would work also reveals that our current independent adoption system already contains significant market elements.\footnote{Id. Accord ELLMAN ET AL., supra note 109, at 1306 (characterizing Posner’s proposal as seeking simply to improve the functioning of the existing adoption market). The “modest changes” that Posner proposes, however, have enormous practical and symbolic consequences. See Cohen, supra note 201, at 135-55 (exploring potential effects of a baby market).} Thus, Posner may not be far wrong in claiming that his baby-selling proposal entails only modest changes in “the existing market in babies for adoption.”\footnote{199. See, e.g., Robin West, Submission, Choice, and Ethics: A Rejoinder To Judge Posner, 99 Harr. L. Rev. 1449, 1449 (1986). 200. Posner, supra note 160. 201. Ronald A. Cass, Coping With Life, Law, and Markets: A Comment on Posner and the Law-And-Economics Debate, 67 B.U. L. Rev. 73, 73-74 (1987). The two other articles in the forum were critical of Posner’s approach. Even those articles, however, viewed Posner’s proposal as worthy of serious academic analysis. Tamar Frankel & Frances H. Miller, The Inapplicability of Market Theory to Adoptions, 67 B.U. L. Rev. 99 (1987); Jane M. Cohen, Posnerism, Pluralism, Pessimism, 67 B.U. L. Rev. 105 (1987). 202. Posner, supra note 160, at 61; see Cohen, supra note 201, at 105-06. At least some of Posner’s critics appear to agree with his characterization of the problem. See, e.g., J. Robert S. Prichard, A Market For Babies, 34 U. Toronto L.J. 341, 342 (1984) (describing as “tragic” the results of the existing adoption system, which leaves “many couples deprived of the privileges and joys of child rearing”). 203. See Posner, supra note 160, at 60. 204. Id. Accord ELLMAN ET AL., supra note 109, at 1306 (characterizing Posner’s proposal as seeking simply to improve the functioning of the existing adoption market). The “modest changes” that Posner proposes, however, have enormous practical and symbolic consequences. See Cohen, supra note 201, at 135-55 (exploring potential effects of a baby market).}
Nor is Judge Posner the only public advocate of legalizing the market in babies. One South Carolina family court judge reportedly stated:

Even if baby selling does exist, what's so horrible about that? If the child is going to a home with good parents who can give it all the love and security it will ever need, why should we care if the parents paid $50,000 for the privilege? The child is happy, the parents are happy, so what is the harm?205

Conservative spokesperson Phyllis Schlafly apparently agrees: "Where there is a willing seller and an eager buyer, and the baby moves from an unwanted environment into a home with loving adoptive parents, where's the crime? . . . If there is such a thing as a victimless crime, this is it."206

4. SURROGATE MOTHERING

In many ways, surrogate mothering is the ultimate form of private adoption; many also describe it as babyselling.207 In a surrogate parenting arrangement, potential adoptive parents contract to procure a child even before that child has been conceived. The parties to a surrogacy agreement find and deal with each other privately, either directly or through a private, for-profit intermediary. State involvement in the surrogacy process (assuming all goes well) is limited to approval of the adoption that eventually results.208

Although surrogate motherhood has an ancient pedigree, the use of surrogacy contracts as a reproductive option is a recent phenomenon. According to one expert, contract surrogacy emerged around 1976.209 By the end of 1986, approximately 500 children had been born as a result

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206. McTagueart, supra note 193, at 317. Cf. Prichard, supra note 202, at 356 ("We may well be in just such a period of transition to a society in which the objections to the baby market will lose much of their force.").
207. See, e.g., Atwell, supra note 172, at 15 ("Surrogate parenting agreements are, in effect, a form of independent adoption."); Posner, supra note 160, at 71-72 (describing surrogate motherhood as an "important example of legal baby selling"). Experts estimate that as many as 4000 babies have been born to surrogate mothers in the United States. Jay Mathews, California Surrogate Stirs Dispute, WASH. POST, Sept. 21, 1990, at A8.
of surrogacy contracts; by mid-1990, this number had increased to approximately 4000. A 1989 Detroit News article estimated that, during the 1980s, would-be parents spent more than $33 million dollars in connection with more than 1200 commercial surrogacy births.

As both the incidence and the publicity surrounding surrogacy have grown, more and more people have come to consider surrogacy an acceptable means of becoming a parent. In a 1987 Gallup survey, 35% of adults polled indicated that they would consider surrogacy if they wanted a child but could not have one because of fertility or other health problems. An even greater percentage of people generally approve of contract surrogacy, even if they would not personally avail themselves of such a reproductive option. Approximately 66% of magazine readers responding to a 1986 poll on reproductive technologies favored surrogate motherhood, while only 21% opposed it. An even larger majority—70%—favored gestational surrogacy arrangements undertaken in connection with in vitro fertilization, an option only 18% opposed.

Even the widely publicized Baby M decision, which held that paid surrogacy contracts violated New Jersey’s baby selling laws, does not seem to have undermined public approval of contract surrogacy. A 1991 National Law Journal poll reported that more than half of adults surveyed

210. Id.
211. Mathews, supra note 207.
213. Surrogate Mothers: A Newsweek Poll, NEWSWEEK, Jan. 19, 1987, at 48. Fifteen percent of the women questioned in that same survey indicated that they would consider becoming surrogates for the standard $10,000 fee. Id.
214. See Lori B. Andrews, Between Strangers: Surrogate Mothers, Expectant Fathers & Brave New Babies 209 (1989). Polls conducted by Newsweek, Glamour and Parents magazines produced similar results. In the Parents poll, 58% of respondents approved of surrogacy, while 32% opposed it. Only 22% of respondents favored laws that prohibited surrogate motherhood. Thirty-nine percent favored laws that would permit surrogacy with appropriate regulation, while 35% opposed any sort of legislation on the grounds that this is a personal matter in which the government should not become involved. Id. at 209-10.
215. Id. In a gestational surrogacy arrangement, the egg of the intended mother is fertilized in vitro with the sperm of the intended father and the resulting pre-embryo is then transferred into the uterus of the surrogate mother. See Karen H. Rothenberg, Gestational Surrogacy and the Health Care Provider: Put Part of the ‘IVF Genie’ Back Into The Bottle, 18 LAW, MED. & HEALTH CARE 345, 350 n.1 (1990). This differs from the more typical genetic surrogacy arrangement, in which the surrogate mother both provides the egg and gestates the pregnancy. Id. Since 1986, there have been about 100 births by gestational surrogates in the United States. Id.; see Martin Kasindorf, And Baby Makes Four: Johnson v. Calvert Illustrates Just About Everything That Can Go Wrong in Surrogate Births, L.A. TIMES MAG., Jan. 20, 1991, at 10.
thought that couples should be allowed to pay a woman to conceive a child for them using the sperm of the husband; 65% said that the surrogate should be legally required to give up the child; and 57% thought that she should have no visitation rights.216 Among younger adults, 18 to 34 years old, 65% supported the surrogacy option.217 Similarly, more than half of those questioned in a 1989 Detroit News poll said that surrogacy should not be regulated or restricted by the government, while only 27% supported a government ban on pregnancy-for-pay.218

The typical surrogacy arrangement involves a married couple who desire a biologically-related child but cannot produce one on their own because the woman is unable to conceive or to carry a pregnancy.219 In a so-called “traditional” surrogacy arrangement, the surrogate mother is artificially inseminated with the sperm of the commissioning father; she is thus genetically as well as gestationally related to the child that she contracts to bear.220 In a second and increasingly common type of surrogacy, infertile couples hire surrogates to carry their own genetic material. Under such “gestational surrogacy” arrangements, the egg and sperm of the commissioning parents are fertilized in vitro and transferred to the womb of a genetically unrelated surrogate mother, who agrees to carry the pregnancy to term.221 Gestational surrogacy is both more

216. Rorie Sherman, Bioethics Debate; Americans Polled on Bioethics, NAT'L L.J., May 13, 1991, at 1; see also AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMM. ON ETHICS, ETHICAL ISSUES IN SURROGATE MOTHERHOOD, COMMITTEE OPINION NO. 88 (NOV. 1990) [hereinafter ETHICAL ISSUES IN SURROGATE MOTHERHOOD] (concluding that paid surrogate parenting arrangements are morally justifiable, in cases of medical need).

217. Sherman, supra note 216. According to the survey, blacks are far less supportive of surrogate parenting that are whites. Only 30% of black respondents, compared to 54% of whites, endorsed the practice. The survey also found that people with college degrees were approximately twice as likely as those with some high-school education to endorse surrogacy: 61% vs. 36%. Id.


219. FIELD, supra note 209, at 5; Surrogacy arrangements may also involve a single man, a gay male couple, a single woman unable to become pregnant, or a married couple that decides for reasons of inconvenience, rather than infertility, that the wife should not become pregnant. Indeed, surrogacy attorney and pioneer Noel Keane maintains that “[s]urrogate parenting is an idea whose time is coming, not only for infertile married couples but also for single men and women who want to have children without romantic entanglements.” NOEL P. KEANE, THE SURROGATE MOTHER 15 (1ST ED. 1981).


221. Rothenberg, supra note 215, at 350 n.1; see Lawson, supra note 220.
expensive and more complicated medically than arrangements that use the intended father's sperm and the surrogate mother's egg. Nonetheless, physicians and other experts report that gestational surrogacy, which is often undertaken in connection with in vitro fertilization, has become an increasingly popular reproductive option.

Under a surrogate-parenting contract, the surrogate mother generally agrees to conceive, bear and give birth to a child, to terminate her parental rights, and to relinquish custody of the child to the biological father or commissioning couple. In return, the commissioning father or couple agrees to accept custody of the child and to pay the surrogate mother a fee, as well as medical expenses, travel costs and attorneys' fees. Typically, the surrogate mother also promises not to form or attempt to form a relationship with the child, to restrict her activities during the pregnancy, and to submit to genetic testing and to an abortion at the biological father's request. Failure to comply with any of these

222. Lawson, supra note 220; see Rothenberg, supra note 215, at 348-49. In a gestational surrogacy arrangement, a physician must administer hormones to the genetic mother to stimulate multiple egg production and to coordinate her menstrual cycle with that of the gestational surrogate. The surrogate then continues on hormonal injections for several weeks to maximize the chances of successful implantation and pregnancy. Moreover, to maximize the chances of achieving a pregnancy, multiple embryos are often transferred to the gestational surrogate; this, in turn, increases the likelihood of multiple births, as well as maternal morbidity and mortality. Rothenberg, supra note 215, at 348-49; Lawson, supra note 220. A recent article estimated that the total cost of gestational surrogacy to the contracting couple is about $40,000, approximately $10,000 more than the cost of traditional surrogacy. Id.; see Powers & Belloli, supra note 212, at 6S (cost of gestational surrogacy typically totals more than $40,000).

223. See, e.g., Lawson, supra note 220. ("The experts say more and more infertile couples are creating embryos from their own eggs and sperm and hiring other women to carry the fetuses to term."); Gina Kolata, When Grandmother Is the Mother, Until Birth, N.Y. TIMES, Aug. 5, 1991, at A1 (experts say gestational surrogacy "is becoming increasingly common"); John A. Robertson, A Grandma's Surrogacy Could Be Liberating Step, NEWSDAY, Oct. 24, 1991, at 119 (leading bioethicist and law professor characterizes gestational surrogacy as "an important advance" that will enable some infertile couples to "fulfill their strong desire to form a family with biologically related offspring").

224. Brian J. Carney, Note, Where Do The Children Go?—Surrogate Mother Contracts and the Best Interests of the Child, 22 SUPPOLLK U. L. REV. 1187, 1192-93 (1988); Thomas A. Eaton, Comparative Responses to Surrogate Motherhood, 65 NEB. L. REV. 686 (1986). To circumvent the baby-selling laws, the wife of the biological father is generally not a party to the contract, unless she is also a genetic parent. Carney, supra, at 1192 & n.37.

225. Carney, supra note 224, at 1193 & n.41. Under the terms of the contract in the Baby M. case, for example, Mary Beth Whitehead agreed to "undergo amniocentesis or similar tests to detect genetic and congenital defects. In the event said test reveals that the fetus is genetically or congenitally abnormal Mary Beth Whitehead, Surrogate, agrees to abort the fetus upon demand of William Stern, Natural Father. . . ." In re Baby M.,
provisions may jeopardize the gestational mother's right to compensation under the contract.

Infertile couples generally find surrogate mothers through for-profit agencies or brokers.226 These intermediaries solicit potential surrogates through advertisements in newspapers and flyers; they also use radio and television appearances as recruiting devices.227 Most agencies screen potential surrogates for physical health, genetic disease and mental stability, although both the method and the extent of the screening vary.228 Although some surrogate parenting agencies also screen potential adoptive couples to determine their suitability as parents, the adoptive couple's ability to pay is generally the most important determinant of eligibility.229

537 A.2d 1227, 1267-68 app. A (N.J. 1988) [hereinafter Baby M. II], aff'g in part, rev'g in part, remanding 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) [hereinafter Baby M. I]. If such a compelled abortion took place before the fifth month of pregnancy, the contract provided that Whitehead would receive no compensation. If it took place after that, she would receive $1000. Id.

226. A 1989 Detroit News study reported that 27 surrogacy agencies and brokers have operated in the United States since 1976. Powers & Belloli, supra note 212, at 108. The article noted, however, that more than half of these agencies have gone out of business and that, as of 1989, only 14 surrogacy brokers were still active. Id. See Carney, supra note 224, at 1190 (referring to approximately a dozen surrogate parenting agencies). More recent newspaper reports estimate the number of surrogate parenting brokers at more than 30 nationwide; this figure includes more than a dozen surrogacy arrangers in California alone. See Kasindorf, supra note 215.


228. Charney, supra note 224, at 1191. Most agencies also make some attempt to screen out potential surrogates who would have difficulty relinquishing custody after the child is born. Id. But such screening may be minimal and full results may not be disclosed either to surrogate or to potential adoptive parents. Judith Areen, Baby M. Reconsidered, 76 GEO. L.J. 1741, 1755 (1988); see Nakamura, supra note 227, at 3020 (psychologist who screens for leading surrogacy agency has “a moral objection to screening out people” and rarely rejects a potential surrogate).

229. Charney, supra note 224, at 1191; see Powers & Belloli, supra note 212, at 85 (“Most programs do not scrutinize clients who come to them for babies, as adoption agencies do.”). Some surrogacy agencies require that prospective adoptive couples undergo medical and/or psychological testing. AMY Z. OVERVOLD, SURROGATE PARENTING, 166-68 (1988). Agency directors agree, however, that there is a lack of clinical data defining the components of proper screening. In the absence of such data, many agencies report that they base many of their acceptance decisions on “intuition” and “trust.” Id. at 168-69.
Courts have reached different results on the legality of surrogate parenting contracts. In the most widely publicized case, the New Jersey Supreme Court, reversing a trial court decision, held that a paid surrogacy contract that included the surrogate mother's irrevocable consent to surrender the child at birth violated both New Jersey's adoption statutes and the state's public policy, and was therefore illegal and unenforceable.\textsuperscript{200} Notwithstanding its determination that the surrogacy contract was illegal, the New Jersey Supreme Court awarded custody of the child to the contracting father and his wife under a "best interests of the child" standard.\textsuperscript{231}

In a more recent California case, a trial court upheld and specifically enforced a gestational surrogacy contract, over the objection of a surrogate mother who had changed her mind about relinquishing custody after the birth of the baby.\textsuperscript{232} The appeals court affirmed, holding that the surrogate mother—who was not genetically related to the child she had borne—was not the child's "natural mother" and therefore had no parental rights.\textsuperscript{233}

A number of other state courts have also dealt with issues relating to surrogacy contracts. Several decisions initially suggested that paid surrogacy contracts did not violate state baby-selling statutes, since surrogacy did not present the evils or pose the dangers that the baby-selling statutes were designed to address.\textsuperscript{234} More recently, courts have upheld statutory restrictions on commercial surrogacy against claims that those restrictions violate the commissioning parties' constitutional rights; these courts have emphasized, however, that the challenged statutes did not preclude couples from entering into surrogacy arrangements where compensation is limited to the surrogate mother's actual medical

\textsuperscript{230} Baby M. II, 537 A.2d 1227.
\textsuperscript{231} Id. at 1255-61. The New Jersey Supreme Court remanded the case to the trial court for resolution of the surrogate mother's visitation rights. Id. at 1261-64.
\textsuperscript{233} Id. at 376-81. The court reasoned that because the gestational surrogate was seeking parental rights independent of the surrogacy contract, it did not have to decide whether the contract was enforceable. Id. at 381.
\textsuperscript{234} See, e.g., Syrkowski v. Appleyard, 362 N.W.2d 211 (Mich. 1985) (state paternity statute could be applied to give the sperm donor in a surrogate parenting arrangement the right to establish his paternity in court); Surrogate Parenting Assocs. Inc., v. Armstrong, 704 S.W.2d 209 (Ky. 1986) (paid surrogacy contracts did not violate state baby-selling statutes, since those statutes were designed to keep baby brokers from pressuring parents with financial inducements to part with a child already conceived). The Kentucky legislature subsequently passed a statute specifically outlawing surrogate parenthood. KY. REV. STAT. ANN. § 199.590(3) (Michie/Bobbs-Merrill 1991).
A number of courts have also approved adoptions arising out of surrogacy arrangements, albeit while expressing doubts as to the legality of the underlying surrogacy contracts. 35

State legislatures have also taken various approaches to the enforcement of surrogacy contracts. As of November 1990, thirteen states had passed legislation dealing with surrogate parenting. 36 A majority of these statutes declare paid surrogacy contracts void or unenforceable as contrary to public policy; a few jurisdictions also make it a crime to broker or participate in commercial surrogacy. 37 In several of these jurisdictions, however, unpaid surrogacy arrangements may be enforced under certain circumstances. The Florida statute, for example, explicitly authorizes noncommercial surrogacy contracts (which it refers to as "preplanned adoption agreements") so long as they contain certain terms


and so long as they give the gestational mother the opportunity to rescind her relinquishment of parental rights within seven days after the child’s birth. The statute also allows reimbursement to the surrogate mother for medical, legal and “reasonable living” expenses. Enactments in New Hampshire and Nevada appear to allow both paid and unpaid surrogacy contracts; to be enforceable in New Hampshire, such contracts must be preapproved by a court and must give the surrogate seventy-two hours to rescind her agreement to surrender the child.

In addition, both the Family Law Section of the American Bar Association and the National Conference of Commissioners on Uniform State Laws have promulgated model acts addressing surrogacy. The Model Act of the Family Law Section provides for the enforcement of paid surrogacy contracts that comply with certain disclosure, screening and compensation requirements; the Act also authorizes the surrogate’s pre-birth relinquishment of her parental rights and authorizes the adoptive parents to sue for specific performance—that is, court-enforced delivery of the child—if the surrogate changes her mind. The Uniform Status of Children of Assisted Conception Act, adopted in 1988 by the National Conference of Commissioners on Uniform State Laws, contains two alternatives for surrogacy. Alternative A provides for the enforcement of surrogacy contracts that have been preapproved by a court. Alternative B provides that surrogacy agreements are unenforceable and

241. Id.
242. N.H. REV. STAT. ANN. § 168-B:1 to B:32 (1990); see NEV. REV. STAT. § 127.287 (Supp. 1991) (excludes from baby-selling prohibitions a “lawful contract to act as a surrogate” while also not “prohibit[ing] a natural parent from refusing to place a child for adoption after its birth”).
245. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, ALTERNATIVE A §§ 5-6, 9B U.L.A. 128-30 (Supp. 1992). Under this alternative, any party may terminate an approved surrogacy contract before the surrogate becomes pregnant. Id. § 7(a). In addition, a surrogate who is also a genetic contributor may terminate the contract at any time during approximately the first six months of pregnancy. Id. § 7(b). This time period was a compromise, chosen in part to correspond to the abortion right recognized under Roe v. Wade. See id. § 7 cmt.
that the gestational mother and her husband, if a party to the agreement, are the legal parents of any child resulting from such an arrangement.\textsuperscript{246} A tremendous amount has been written by both legal and other scholars on all sides of the surrogacy debate.\textsuperscript{247} Most legal commentators who have expressed concern about the enforcement of surrogacy contracts have focused primarily on two issues: compensation to the surrogate mother (and to any broker or intermediary) and the surrogate’s prebirth consent to adoption. Only a few scholars have focused more broadly on the propriety or the wisdom of allowing the sort of private transfer of parental rights and obligations that surrogate parenting entails.\textsuperscript{248} Indeed, the New Jersey Supreme Court in Baby M. stated explicitly that it found no legal obstacles to surrogate parenting when the surrogate mother receives no payment and is given the opportunity to change her mind and reassert her parental rights after birth.\textsuperscript{249} The failure of most courts and commentators to examine critically the private transfer of parental rights that characterizes both paid and unpaid

\textsuperscript{246} UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, ALTERNATIVE B § 5, 9B U.L.A. 136 (Supp. 1992). If the surrogate’s husband is not a party to the agreement, Alternative B provides that paternity of the child is governed by the Uniform Parentage Act. Id. One state (North Dakota) has adopted this alternative.


\textsuperscript{248} Two important exceptions are Janice G. Raymond, Reproductive Gifts and Gift Giving: The Altruistic Woman, HASTINGS CTR. REP., Nov.-Dec. 1990, at 7, and Dolgin, supra note 247. See also Areen, supra note 228, at 1745 (characterizing recognition of surrogacy contracts as an extension of the general trend in family law toward privatization of family issues).

\textsuperscript{249} Baby M. II, 537 A.2d 1227, 1264 (N.J. 1988).
surrogacy is not surprising; to do so would call into question not just surrogate parenting contracts, but most forms of private adoption as well.

D. Privatization of the Dispute Resolution Process

The shift from public to private ordering not only distinguishes substantive doctrinal developments in a variety of family law areas; it also characterizes important changes in the procedures for resolving family disputes. In particular, mediation—both voluntary and compelled—has replaced adjudication and lawyer-conducted negotiation as the preferred means of resolving legal disputes relating to divorce and child custody.

Although mediation as a dispute resolution process has a long history in a variety of cultures, the use of mediation to resolve legal issues relating to marital dissolution is a relatively recent phenomenon. Under the fault-based divorce system, mediation played little or no role in processing divorce-related disputes. A number of states had court-connected conciliation services, but the focus of these services was to provide marriage counseling aimed at reconciliation, not to resolve disputes related to divorce.

Court-connected divorce and custody mediation became firmly established in the 1970s. With the advent of no-fault divorce, the focus of existing court conciliation services shifted from reconciliation to divorce counseling and custody mediation. In addition, a number of states initiated court-connected conciliation services as part of their


251. See, e.g., Kenneth Kressel, The Process of Divorce 178 (1985) ("The field of divorce mediation is no more than ten years old, and only within the last five years has it gained any real degree of public and professional visibility."); Daniel G. Brown, Divorce and Family Mediation: History, Review, Future Directions, Conciliation Cts. Rev., Dec. 1982, at 1, 3 ("[T]he direct application of mediation specifically to divorce disputes has a very short history.").

252. Milne & Folberg, supra note 250, at 5.

253. Linda R. Singer, Divorce Mediation in the United States: An Overview, in The Role of Mediation in Divorce Proceedings: A Comparative Perspective 11, 13 (Vermont Law School Dispute Resolution Project 1987). Although the rise of divorce mediation can be seen as part of a broader movement in favor of alternative methods of dispute resolution, the extraordinarily rapid growth of divorce mediation programs indicates a particular willingness on the part of policymakers to institute alternative processes (primarily mediation) in divorce and family matters. See Susan Myers et al., Divorce Mediation In the States: Institutionalization, Use, and Assessment, St. Ct. J., Fall 1988, at 17, 17-18 [hereinafter Divorce Mediation in the States].

254. Milne & Folberg, supra note 250, at 5-6; see Fineman, supra note 135, at 743.
adoption of no-fault grounds for divorce. Although these services initially focused on reconciliation, as no-fault divorce became more accepted, this focus was replaced first by a divorce therapy model and ultimately by the contemporary mediation ideal. In the process, many social service personnel who had previously been associated with court-connected conciliation programs were transformed into divorce and custody mediators, often with minimal, if any, retraining.

The rise of court-connected mediation programs was accompanied by a flurry of state legislative activity. By 1983, at least seventeen states had passed legislation specifically addressing mediation as a form of dispute processing for marital dissolution cases. Individual jurisdictions also jumped on the mediation band wagon. Between 1973 and 1985, at least seventy-eight divorce mediation programs were initiated in various court systems across the country. By 1988, court-connected divorce mediation had been implemented in one form or another in thirty-six states and the District of Columbia, with more than 120 programs operating nationwide. Virtually all of these programs mediate child custody and visitation issues; a significant percentage also mediate other issues relating to divorce, such as child support and property matters.

In 1981, California became the first state to mandate mediation of divorce-related custody and visitation disputes. In the wake of California's action, a number of commentators predicted that the majority of states would follow California's mandatory mediation lead, just as almost all states had followed California's example in adopting no-fault divorce legislation. While this prediction has proven somewhat

255. See Fineman, supra note 135, at 743.
256. Fineman, supra note 135, at 743.
259. Divorce Mediation in the States, supra note 253, at 18 fig. 1.
261. Divorce Mediation In the States, supra note 253, at 22-23.
263. Michelle Deis, California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes, 1 OHIO S.J. ON DISP. RESOL. 149, 152 (1985); see Jay Folberg,
exaggerated, a handful of additional states have passed legislation mandating mediation of divorce-related child custody disputes on a statewide basis. 264 Several other states have enacted statutes or court rules that give judges the authority to order mediation in individual divorce and custody cases, without regard to the consent of the parties. 265 In addition, local jurisdictions in at least eighteen states have instituted mandatory mediation programs. 266 A recent nationwide survey of more than 100 court-connected divorce mediation programs reports that thirty-seven percent of the programs are mandatory for at least some issues. 267

Private, noncourt-connected mediation of divorce-related disputes also grew rapidly in the 1970s. In 1974, attorney and marriage counselor O.J. Coogler established the Family Mediation Center in Atlanta, Georgia. 268 Coogler’s book, Structured Mediation in Divorce Settlement, helped popularize the idea of divorce mediation and provided one of the first theoretical models for the conduct of divorce and custody mediation. 269 His structured mediation model also formed the basis for

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266. See Divorce Mediation in the States, supra note 253, at 19 fig.2. The states are Georgia, Idaho, Missouri, Nevada, New Mexico, Oregon, Pennsylvania, Hawaii, Kansas, New Jersey, North Carolina, Florida, Minnesota, Texas, Washington, New York, Virginia and Wisconsin.

267. Id. at 21. This 37% figure does not include programs in which individual judges may require certain cases to go to mediation. Id.


the first wave of heavily publicized and attended mediation training sessions across the country. After Coogler’s death in 1982, the Academy of Family Mediators was established to carry on his mediation model and training methods.

As the practice of divorce and custody mediation has grown in popularity, it has also become increasingly professionalized. A number of professional organizations, including the Association of Family and Conciliation Courts and American Bar Association, have sponsored mediation training programs and have formed committees to assist with professional development of the practice. At least two national professional membership organizations for family mediators have also been established. In 1984, both the American Bar Association and the Association of Family and Conciliation Courts issued model standards of practice for divorce and family mediators. Various state and local court systems have also adopted practice standards and/or minimum qualifications for mediators.

270. See Daniel G. Brown, Divorce and Family Mediation: History, Review, Future Directions, CONCILIATION CTS. REV., Dec. 1982, at 1, 14. Coogler is referred to by many mediators as the father of divorce mediation. JOAN BLADES, FAMILY MEDIATION 126 (1985); see Penny L. Willrich, Resolving the Legal Problems of the Poor: A Focus on Mediation in Domestic Relations Cases, 22 CLEARINGHOUSE REV. 1373, 1374 (1989) (referring to Coogler as “the acknowledged patriarch of private family mediation”). A 1983 survey reported that nearly half of all mediators then working in both the private and public sectors had been trained by the Family Mediation Association. Jessica Pearson et al., A Portrait of Divorce Mediation Services in the Public and Private Sector, CONCILIATION CTS. REV., June 1983, at 1, 7.

271. Willrich, supra note 270, at 1374.


273. The Family Mediation Association and the Academy of Family Mediators.

274. See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS, reprinted in 17 FAM. L.Q. 455 (1984); MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATION, reprinted in DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 250, at 419. For a discussion of these two sets of standards, see Thomas A. Bishop, Standards of Practice for Divorce Mediators, in DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 250, at 403.

275. See, e.g., CAL. CIV. PROC. CODE § 1745 (West 1982 & Supp. 1992) (requiring conciliation counselors in state's mandatory mediation program to have a master's degree in a behavioral science); OR. REV. STAT. §§ 107.610, 107.775 (1983) (mediator qualifications are the same as those providing conciliation services; conciliator must have master's degree in behavioral sciences, or bachelor's degree and one year training in behavioral sciences and two years case work or clinical experience, or behavioral science bachelor's degree and four years case work or clinical experience).
Despite this growing professionalization, the qualifications of mediators vary widely. For example, a 1988 survey reports that many court-connected mediation programs rely to a significant degree on unpaid volunteers to mediate divorce and custody cases.\(^{276}\) Similarly, a recent law review article asserts that even within California's mandatory mediation system, instituted nearly a decade ago, "the services offered are frequently inadequate at best, even from the perspective of proponents of mandatory mediation."\(^{277}\)

Divorce and custody mediation has also received widespread attention and endorsement in both the popular and the scholarly press.\(^{278}\) Over the past fifteen years, scores of books on divorce mediation have been written and published across the country.\(^{279}\) A number of these books

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\(^{276}\) Divorce Mediation In the States, supra note 253, at 23 (Just over one third of responding mediation programs reported the use of unpaid, trained workers to mediate cases.).


\(^{279}\) Full length books devoted exclusively to divorce and/or custody mediation include Leonard Marlow & S. Richard Sauber, THE HANDBOOK OF DIVORCE MEDIATION (1990); EMPIRICAL RESEARCH IN DIVORCE AND FAMILY MEDIATION (J. Kelly ed., 1989); John M. Haynes, MEDIATING DIVORCE (1989); F. Hanson, MEDIATION FOR TROUBLED MARRIAGES (1989); Diane Neumann, DIVORCE MEDIATION: HOW TO CUT THE COST AND STRESS OF DIVORCE (1989); DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Ann Milne eds., 1988); Stephen K. Erickson, FAMILY MEDIATION CASEBOOK: THEORY AND PROCESS (1988); DIVORCE MEDIATION AND THE
are essentially enthusiastic "how to" manuals addressed to the prospective or novice divorce mediator. Legal and social science scholarship devoted to divorce and custody mediation has also proliferated, as have mediation-related courses at both the graduate and the professional school level.280

Mediation proponents account for the growing popularity of divorce and custody mediation by asserting that it offers a number of advantages over both adjudication and adversarial divorce negotiation. They argue, first, that mediation reduces hostility and minimizes divorce-related trauma to both spouses and children.281 It does this, they claim, by facilitating direct communication between the parties and by converting disputes that the adversary system tends to present as zero-sum conflicts into problems that can be solved with gains to both parties, as well as to children.282 By reducing divorce-related hostility, mediation is said to both increase the likelihood that divorcing parties will reach agreement and increase the parties' commitment to any agreement reached.283 Enhanced party commitment, in turn, results in increased compliance with divorce-related obligations and decreased post-divorce conflict between

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280. See Brown, supra note 270, at 22. In 1983, Mediation Quarterly became the first professional journal devoted exclusively to the theory and practice of family mediation. More recently, the journal has expanded its focus to encompass the use of mediation in other settings, including environmental, commercial, international and educational disputes. See Editor's Notes, 7 MEDIATION Q. 1 (Fall 1989).


283. Schepard, supra note 278, at 768-69; Folberg, supra note 278, at 422-23.
Proponents also claim that, because of its emphasis on party control, mediation promotes feelings of competence and enhances the conflict management skills of the participants. By contrast, under the adversary system, "because lawyers replace rather than assist couples with negotiations, the agreements generated inspire little commitment and fail to enhance the conflict management skills of the parties." Mediation proponents also claim significant systemic benefits. They assert that the widespread substitution of divorce mediation for more adversarial forms of dispute processing will result in significant cost savings to both divorcing couples and the public. In particular, proponents argue that, where parties can afford to pay for mediation privately, mediation presents "the unique opportunity to return to the private sector part of an area that has been an escalating expense to the public." Proponents also claim that successful mediation is swifter than either contested court proceedings or adversarial negotiations; they acknowledge, however, that these time savings evaporate where mediation fails to produce agreement and the parties must resort to adjudication. Finally, proponents argue that mediation is superior to adversarial

284. Schepard, supra note 278, at 769; Folberg, supra note 278, at 425-27; Maxwell, supra note 278, at 205-06. The available data does not fully support this claim. See Jessica Pearson & Nancy Thoennes, Divorce Mediation: An Overview of the Research Results, 19 COLUM. J. L. & SOC. PROBS. 451, 469-70 (1985) [hereinafter Pearson & Thoennes, Divorce Mediation] (reporting mixed evidence regarding the compliance patterns associated with mediated and adjudicated agreements).

285. Milne & Folberg, supra note 250, at 9; Deis, supra note 263, at 164. ("Mediation also demonstrates the kind of behavior required to make the agreement work and forms the negotiation skills necessary to resolve future conflicts without the help of a mediator or counselor.").


288. Folberg, supra note 278, at 428.

289. Id. at 431; see Jessica Pearson & Nancy Thoennes, Mediating and Litigating Custody Disputes: A Longitudinal Evaluation, 17 FAM. L.Q. 497, 507 (1984) [hereinafter Pearson & Thoennes, Mediating and Litigating] ("Successful mediation clients move through the court system faster than their purely adversarial counterparts, but unsuccessful mediation respondents travel slowest.").
decision making because it produces higher rates of "user satisfaction" than either adjudication or attorney-conducted negotiation.290

Many of the claims made by mediation proponents are controversial and have been questioned or criticized elsewhere.291 Others have been the subject of disagreement, even within the mediation community.292 It is not my purpose here to examine the substance of these claims. Rather, I note them to show that both the growing popularity of mediation and the arguments offered in support of it parallel the substantive privatization of family law in a number of important respects. First, as mediation proponents have emphasized, mediation is consistent with the underlying premise of no-fault divorce—that the responsibility for determining when divorce is warranted rests with individual spouses, not with the public.293 “The introduction of divorce mediation as a means of allowing divorcing individuals to develop their own financial, property, and parental agreements continues the philosophy of returning decision-making to the family.”294 Mediation extends this preference for private over public authority to cover not only the decision to divorce but also the financial and parenting consequences of that decision. “[M]ediation’s first


293. Milne, supra note 272, at 15.

294. Id. at 15-16; Ann L. Milne, Private Sector Divorce Mediation in the United States—Scope & Relationship to Formal Proceedings, in THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS, supra note 253, at 91, 91 (Divorce mediation continues the philosophy of reducing third party involvement in matrimonial disputes and vesting decision-making authority with the parties.); Folberg, supra note 278, at 414 ("Mediation is a process of conflict resolution and management that returns to the parents the responsibility for making decisions about their children.").
principle is a reliance on private ordering and parental autonomy. Self-determinism is the basic premise.\(^295\)

Mediation proponents also emphasize that mediation allows divorcing couples to exercise this decision-making authority unfettered by generalized societal norms and other traditional legal constraints.\(^296\) As a leading mediation scholar explains:

> The ultimate authority in mediation belongs to the parties themselves and they may fashion a unique solution that will work for them without being governed by precedent or by concern for the precedent they may set for others. The parents may, with the help of the mediator, consider a comprehensive mix of their children's needs, their interests and whatever else they deem relevant, regardless of rules of evidence or strict adherence to substantive law.\(^297\)

Thus, in the eyes of at least some mediation theorists, any attempt on the part of the state, or even on the part of an individual mediator, to insist that a couple's post divorce financial and parenting arrangements conform to public notions of fairness infringes on the divorcing couple's right "to make the decisions that affect their lives on their own, free of third-party interference."\(^298\) This emphasis on enhancing the authority of private

\(^{295}\) Silberman & Schepard, supra note 281, at 756; see Peter D. Axelrod et al., Custody and Visitation Mediation, in HANDLING CHILD CUSTODY CASES: FAMILY LAW SERIES 42 (Ann M. Haralambie ed., 1983) (Mediation "makes the family, rather than the legal system, become the place of first resort, providing parental control over the issues which will influence the family members' lives.").

\(^{296}\) See BLADES, supra note 279, at 40 ("Mediation encourages couples to rely on their own sense of fair play and justice rather than on generalized societal norms.").

\(^{297}\) Folberg, supra note 278, at 419; see MARLOW & SAUBER, supra note 279, at 8 (listing, as a basic assumption of mediation, that "there are no legal answers" to the essentially personal questions involved in a divorce and criticizing attempts "to obfuscate this self-evident fact with misleading labels which refer to legal answers as legal rights"); W. Richards Evarts & Frances H. Goodwin, The Mediation and Adjudication of Divorce and Custody: From Contrasting Premises to Complementary Processes, 20 IDAHO L. REV. 277, 282 (1984) (Mediation "posits the superiority of consensus as a foundation of settlement over the concept of rectitude, or standards of commonly agreed legal principles."). This disregard for precedent and lack of reliance on legal rules distinguishes mediation from adversarial divorce negotiation, which is conducted in the shadow of the law. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1979).

\(^{298}\) MARLOW & SAUBER, supra note 279, at 41; see id. at 64-65 (Divorce mediation "rejects the idea that these legal rules and principles embody any necessary wisdom or logic. In fact, it views them as rather arbitrary principles, having little to do with the realities of a couple's life and certainly not superior to the judgments that they
decision makers by freeing them from publicly-imposed rules and constraints tracks precisely the rhetoric that has accompanied the shift from public to private ordering of the substantive legal doctrines governing marriage, divorce and the transfer of parental rights.

Mediation theorists also espouse the view that divorce is not primarily a legal event to be resolved with reference to public norms, but rather an emotional and psychological process to be managed within the family system. As such, divorce does not entail primarily the termination of a legal status and the allocation of benefits acquired during that status, but rather the restructuring of an ongoing personal and family relationship. Having redefined the nature of divorce from a legal event to a psychological process, mediation proponents argue convincingly that the adversarial system is ill equipped to perform the essentially nonlegal tasks associated with ongoing family management.

Mediation proponents, like other enthusiasts of private ordering, also rely heavily on the notions of individual choice and consent. They argue both that divorcing parties are entitled "to choose from a bevy of professional services" in managing their divorce, and that the process of mediation is superior to adversary decision making because it affirms
and enhances party choice. In this respect, mediation proponents share with other advocates of private ordering the conviction that arrangements that are based on private consent are inherently superior to those that rest on outside authority, including the authority of the law.

Mediation is also private in the more traditional sense of being hidden from public view, a characteristic that proponents view as a significant advantage. "Mediation is conducted in private, so that private matters may be freely discussed without concern that the discussion is part of a public record." Proponents view the private nature of mediation as appropriately enhancing party control and as furthering the policy of minimum state intervention in the family. Supporters of independent adoption and surrogate parenting make similar privacy-based arguments in favor of reducing government involvement in the process of child transfer. Similarly, supporters of no-fault divorce legislation successfully attacked the fault-based divorce system for forcing a divorcing couple to air their dirty laundry in public.

The arguments made by mediation proponents have received a favorable reception from judges, many of whom are uncomfortable deciding custody disputes under the indeterminate "best interest of the child" standard and at least some of whom believe that matrimonial cases clog up the judicial system, taking valuable time away from more important and more legitimately public matters. Thus, instead of

304. See, e.g., Milne & Folberg, supra note 250, at 7 ("Mediation is first and foremost a process that emphasizes the participants' responsibility for making decisions that affect their lives."); Meyer Elkin, Divorce Mediation: An Alternative Process For Helping Families To Close The Book Gently, CONCILIATION CTs. REV., June 1982, at iii, v ("Divorce mediation, resting as it does on self-determination, endows the participants with a dignity that flows from the ability to rationally determine the course of one's future life through one's internal authority, strength and intelligence . . . ."); W. Patrick Phear, Family Mediation: A Choice of Options, ARBIT. J., Mar. 1984, at 22, 29-30.

305. Evarts & Goodwin, supra note 297, at 287 (Mediation asserts "the superiority of consensus rather than the superiority of judgment and authority over the parties."). See generally Mnookin & Kornhauser, supra note 297, at 956-57.

306. Folberg, supra note 278, at 419.

307. Milne & Folberg, supra note 250, at 9-10; see Folberg, supra note 278, at 419 ("Family mediation furthers the policy of minimal state intervention and recognizes the family as a self-governing unit, even in decisions regarding its dissolution."); Janet M. Spencer & Joseph P. Zammit, Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents, 1976 DUKE L.J. 911, 919 ("As used here, the concept of privacy goes beyond merely closing the courtroom doors to the public. It means not having one's domestic problems made a matter of public record and not having one's future depend upon governmental fiat.").


309. See Fineman, supra note 135, at 759.
opposing the shift from adjudication to mediation as an incursion upon judicial authority, the judiciary has generally welcomed the opportunity to reduce its involvement in divorce and custody disputes. This judicial willingness to cede its traditional authority over the financial and parenting consequences of divorce has further reinforced the idea—implicit in the substantive privatization of marriage, divorce and adoption—that the formation and dissolution of family relationships are essentially private matters, as to which the public has little legitimate interest and no important regulatory role.

II. PRIVATIZATION IN ITS LARGER CONTEXT

The privatization of family law has not occurred in a legal vacuum. Rather, it is a natural outgrowth of important doctrinal and jurisprudential developments that have occurred in a number of other areas. Among these important legal developments are (1) the migration from constitutional to family law of notions of individual privacy and autonomy; (2) the rejection of traditional gender roles and the push for formal gender equality; (3) the rise of law-and-economics analysis and the application of economic thinking to the family; and (4) the increased dissociation of law and morality in matters related to family relations.

This section is designed to explore the connections between the privatization of family law and these related doctrinal and theoretical developments. In undertaking such an exploration, I join other contemporary family law scholars in attempting to bridge the distance that has traditionally separated scholarship about the family from scholarship in other legal fields. Situating the privatization process in its larger legal and jurisprudential context also provides a useful vantage point from which to evaluate the privatization process, a task I turn to in Part III of this Article.

A. The Migration from Constitutional to Family Law of Notions of Individual Privacy and Decisional Autonomy

Concepts of individual privacy and decisional autonomy have long occupied a central place in American political and legal thought. Until recently, however, these notions played a relatively minor role in

the legal regime governing family relations. To the extent that the concepts of privacy and autonomy were deemed relevant to family matters, they were generally ascribed to the family as a unit, rather than to particular individuals within the family or to individual decisions about family structure. Thus, for example, the Supreme Court in the 1920s, held unconstitutional state laws that required parents to send their children to public schools and that prohibited parents from obtaining foreign language instruction for their children, on the ground that these laws impermissibly infringed upon the autonomy of parents to rear their children. Similarly, courts justified their refusal to intervene in intra-family disputes by invoking the image of the family as a private domain “into which the King’s writ does not run and to which his officers do not seek to be admitted.”

While this notion of family privacy insulated from public oversight certain sorts of decisions and activities that took place within families, it did not support private choices regarding the formation or dissolution of family relationships. Indeed, the traditional notion of family privacy may have reinforced public control over the definition and composition of families, since only certain sorts of intimate groupings were considered worthy of the degree of autonomy that the tradition provided. Moreover, an important component of this traditional view of family privacy was the law’s reluctance to enforce agreements between spouses or to adjudicate interspousal disputes. In this sense, the traditional notion of family privacy represented not a commitment to private ordering of family behavior, but rather the substitution of the family for the state as the relevant source of public norms.

312. As Professor Lee Teitelbaum, among others, has pointed out, the effect of the law’s adherence to notions of family privacy and autonomy was to confer or ratify the power of one family member over another. Lee E. Teitelbaum, Family History and Family Law, 1985 Wis. L. REV. 1135, 1174-79.
315. Balfour v. Balfour, 2 K.B. 571, 579 (1919) (refusing to enforce written agreement between spouses); see McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (refusing to enforce husband’s duty to support his wife during ongoing marriage).
In a series of opinions in the 1970s, the Supreme Court transformed the traditional notion of family privacy into a doctrine that focused directly on individual choice and that elevated to constitutionally protected status a wide range of individual decisions regarding marriage, parenthood and procreation. These individualized notions of privacy and autonomy found fertile soil in state-family relations, where they combined with the much older legal tradition of state noninterference in the family. Unlike this older legal tradition, however, the Supreme Court's modern privacy jurisprudence singles out the individual, rather than the family, as the appropriate unit of insulation from publicly created norms. The Supreme Court articulated this shift clearly in Eisenstadt v. Baird, in which it upheld the right of unmarried, as well as married, individuals to receive contraceptives:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

The Supreme Court's changing treatment of marriage illustrates the effect of this doctrinal shift from family privacy to decisional autonomy. One hundred years ago, in Maynard v. Hill, the Supreme Court cited both the public and the private importance of marriage as reasons for retaining a high degree of state control over the institution of marriage:


320. Eisenstadt, 405 U.S. at 453.

321. Maynard v. Hill, 125 U.S. 190 (1888). In Maynard, the Court rejected a constitutional challenge based on the prohibition against impairment of contracts to state legislation granting a divorce.
Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.\textsuperscript{322}

A century later, in \textit{Zablocki v. Redhail}, the Supreme Court invoked a strikingly similar characterization of marriage to affirm the existence of an individual right to marry and to hold that state requirements that significantly interfered with the exercise of this individual right were constitutionally suspect.\textsuperscript{323} Although both \textit{Maynard} and \textit{Zablocki} emphasize the fundamental importance of marriage, this importance has profoundly different implications in the two decisions. For the \textit{Maynard} Court, the importance of marriage to both individuals and society is precisely what justifies substantial public ordering of the marriage relationship. In \textit{Zablocki}, by contrast, the importance of marriage no longer counts as an appropriate reason for state involvement; instead, it becomes the linchpin for insulating private marriage choices from "interference" by the state. Moreover, although both \textit{Maynard} and \textit{Zablocki} emphasize the importance of marriage, the principal locus of that importance has clearly shifted. In \textit{Maynard}, the Court emphasizes the importance of marriage to society, noting its critical role in preserving morals and ensuring progress. In \textit{Zablocki}, by contrast, the Court highlights the importance of marriage to the individual and uses that importance to limit collective constraints on individual marriage decisions.

This shift in constitutional doctrine both reflects and has contributed to a broader legal and philosophical change in the perceived nature and purpose of marriage. At the time \textit{Maynard} was decided, and for at least a half century thereafter, the law characterized marriage as an important public institution that carried out vital societal functions. By 1977, when the Supreme Court decided \textit{Zablocki}, both the law and the larger society perceived marriage as essentially a private relationship, the main purpose of which was to promote individual happiness and personal

\textsuperscript{322} Id. at 205; see id. at 211-12 (characterizing marriage as "a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress") (quoting Adams v. Palmer, 51 Me. 481, 485 (1863)).

\textsuperscript{323} Zablocki v. Redhail, 434 U.S. 374, 383-87 (1977); see Robert D. Goodman, \textit{In Sickness or in Health: The Right To Marry and the Case of HIV Antibody Testing}, 38 DEPAUL L. REV. 87, 89 (1989). The Supreme Court first characterized the freedom to marry as a "vital personal right" in \textit{Loving v. Virginia}, 388 U.S. 1, 12 (1967), in which it held unconstitutional a Virginia law forbidding interracial marriages.
fulfillment. Consistent with this change in perception, Maynard is concerned primarily with safeguarding marriage as an institution, while Zablocki focuses on protecting the individual’s unfettered decision to marry.

The perceptual shift from marriage as a public institution to marriage as a private relationship leads naturally and perhaps inexorably to the increased private ordering of marriage and its dissolution. If the main purpose of marriage is to promote individual happiness, then it seems logical that individuals, and not the state, should decide how their marriage should be structured and under what conditions it should continue. Moreover, if the law protects marriage primarily to safeguard the opportunities it offers for individual happiness, then it is difficult to see why the law should not also protect other consensual intimate relationships that are likely to offer these same opportunities. Similarly, to the extent that the preferred legal status of marriage derives not from the social utility of marriage, but from its importance to the individuals involved, then it no longer seems legitimate for the state to privilege the decision to marry over the decision to enter into a functionally similar intimate relationship. Indeed, once the essence of marriage is recharacterized in this way, then extending to unmarried intimate partners the benefits traditionally reserved for married couples seems a natural extension of the marriage right, rather than a threat to it.

Viewing marriage primarily in terms of its potential for promoting individual happiness also implies that the law should grant individuals a high degree of freedom to end a marriage when they believe it is no longer achieving these ends. The doctrinal shift from family privacy to decisional autonomy is thus consistent with the rapid shift from fault-based to consensual divorce and ultimately to divorce at the option of either spouse. Although the Supreme Court has never held that there is a constitutional right to divorce, several commentators have suggested that the right to terminate an unsuccessful marriage, and thereby become eligible to remarry, is a necessary corollary of the constitutionally protected right to marry, recognized in cases such as Loving and

324. See Note, Interspousal Contracts: The Potential for Validation in Massachusetts, 9 Suffolk U. L. Rev. 185, 204-05 (1974); Hafen, The Family, supra note 311, at 898. See generally Habits of the Heart, supra note 310 (drawing on empirical research to describe how Americans over the past 50 years have shifted their view of marriage from a relatively permanent social institution to a temporary source of personal fulfillment).

325. See Karst, supra note 316, at 662.

326. See Truehart, supra note 44, at 97-98; Eblin, supra note 37, at 1086-87.
Zablocki. According to this reasoning, "[f]ault-oriented divorce structures are not only outmoded but also represent arrogant state intrusion into private areas of interpersonal decision making." The Supreme Court of Puerto Rico accepted just such an argument when it ruled in 1978 that the constitutional right of privacy recognized in the Puerto Rican Constitution required the territorial government to allow divorce by mutual consent without a waiting period.

Notions of privacy and decisional autonomy are also central to the arguments made by proponents of divorce and custody mediation. Indeed, proponents view mediation as superior to adjudication precisely because mediation is designed to return decisional autonomy to the divorcing parties. Similarly, mediation proponents often contrast the private, confidential nature of mediation with the destructive public exposure inherent in traditional adversary procedures.

Just as the doctrinal shift from family to individual privacy coheres with the transformation of marriage from public institution to private compact, so too has the Supreme Court’s emphasis on autonomous decision making about procreation contributed to a similar reconceptualization of the nature of parenthood. Traditionally, the laws governing the creation and transfer of parental rights emphasized the importance of parents to children and, more generally, the importance of parenting to society. Thus, the primary purpose of twentieth century American adoption law was to promote the welfare of children potentially eligible for adoption. Many of the requirements imposed on potential adoptive parents, such as the preplacement home study and the elaborate agency screening process, reflect this child protective purpose.

Over the past ten years, however, the law has increasingly viewed parenthood in terms of its potential for adult fulfillment. Recent trends in adoption law, including the increased acceptance of private adoption

327. See, e.g., Cathy J. Jones, The Rights To Marry and Divorce: A New Look At Some Unanswered Questions, 63 WASH. U. L.Q. 577, 626-33 (1985) (Supreme Court decisions support the argument that divorce is a fundamental right); Karst, supra note 316, at 671. ("To condition divorce on a showing of fault is to place an insuperable burden on some spouses, and thus, as in Zablocki itself, to interfere very significantly with such a spouse’s decision to associate with another person in marriage."); Donna J. Zenor, Note, Untying the Knot: The Course and Patterns of Divorce Reform, 57 CORNELL L. REV. 649, 652 (1972) ("A corollary of Loving’s constitutional right to marry... should necessarily be the right to terminate an unsuccessful marriage without unreasonable state delay, impediment, or moralism.").

328. Zenor, supra note 327, at 654.
330. See sources cited supra notes 294-95.
331. See sources cited supra notes 306-07.
332. See sources cited supra note 157.
and the rise of surrogate parenting, have focused not on child welfare, but on effectuating adult decisions to acquire children. This shift in orientation is reinforced by the widespread media attention and the vast amounts of financial resources devoted to the "infertility epidemic."  

333 As one scholar and reproductive technologies expert recently observed: "Infertile couples became the poster children of the 1980s." 334

Recent trends in child custody law similarly emphasize the importance of parenthood to adults. Many joint-custody statutes and related parenting proposals emphasize the "right" of both divorcing parents to close and continuing contact with their children, while paying little (or no) attention to the nurturing obligations of parents who do not reside with their children. 335 Efforts to use the legal system to enforce what are increasingly and revealingly termed the "access rights" of non-custodial parents to their children have also increased, with few, if any, parallel efforts to treat visitation by such parents as an enforceable legal obligation. 336 Also consistent with the shift from child welfare to child acquisition, Supreme Court decisions over the past fifteen years have emphasized the importance to adults of the decision to become (or to avoid becoming) a parent, rather than the importance of parenting and decisions about parenting to children and to society.

Moreover, just as the recharacterization of marriage as a vehicle for the pursuit of individual ends led naturally to the privatization of marriage and divorce, so too has the recasting of parenthood in terms of its

333. Despite a widespread perception that infertility is increasing rapidly in the United States, government figures show that the infertility rate has remained stable in recent years and, among married couples, has actually declined. See Research Refutes Perceived 'Infertility Epidemic', WASH. POST, Dec. 7, 1990, at A11. Although the absolute number of women and married couples with fertility problems has grown, this reflects an increase in the relevant population base, rather than an increase in the infertility rate. Id. A recent study by the National Center for Health Statistics suggests that the increased use of fertility services and the increased number of older, relatively affluent couples with fertility problems may help to account for the misperception that infertility is increasing or that it is more common than it actually is. Id.

334. ANDREWS, supra note 214, at 17.


importance to adults resulted in pressure for increased private ordering of the processes for creating and transferring parental rights. Advocates of private-placement adoption, for example, have successfully criticized agency practices for constraining the choices of unwed mothers, thus discouraging them from offering their children for adoption. Critics have also faulted agencies for setting unduly restrictive criteria for adoptive parents, thus unfairly limiting the opportunities to acquire a child. Advocates of free market adoption similarly defend their proposals as a means of increasing parenting opportunities; they argue, in particular, that for a relatively modest payment, many pregnant women might be induced to forgo abortion and instead place their babies up for adoption, thereby alleviating the undersupply of “desirable” infants for adoption.337

Advocates of surrogate motherhood are even more explicit about the child acquisition goals that surrogacy is designed to achieve. Well-known attorney and surrogacy broker Noel Keane explains that he decided to enter the surrogacy field because of a very strong and straightforward bias. I believe that children fulfill one’s self in a way that nothing else can ever equal . . . And since I believe so strongly in children myself, I feel that any qualified couple or individual who wants a child should be able to have one, as long as they are not breaking a law or harming anyone else.338

Surrogacy is thus touted as a solution to the “personal and social calamity” of infertility and as a response to “the vast unmet demand for adoptive children.”339 Because traditional adoption procedures can no longer satisfy the needs and desires of adults who wish to become parents, surrogate mothers are necessary to “provide another source of children for the infertile.”340

As a mechanism for acquiring children, surrogacy offers a number of advantages over more traditional forms of child transfer. As one leading surrogacy proponent explains: “There is a simple reason why people prefer finding a surrogate mother to adoption: the child will bear

338. KEANE, supra note 219, at 23.
340. KEANE, supra note 219, at 14; see id. at 12 (describing surrogate motherhood as “a powerful new option that may replace adoption as the major hope for the infertile”); see BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 74-81 (1989) (discussing surrogacy as a response to the desire of adults to own children).
the genetic imprint of the man." Surrogacy is also promoted as quicker and more efficient than adoption. "Through surrogate motherhood, a couple desiring a child need not wait an indefinite number of years for an adoptable baby, as generally happens at the present time."342

Given surrogacy's explicit focus on satisfying adult desires to become parents, it is not surprising that the Supreme Court's pronouncements on procreative decision making have figured prominently in the ongoing debate over surrogate parenting. A number of commentators have interpreted the Court's privacy decisions as establishing a constitutional right to noncoital procreation, which would include the use of commercial surrogates.343 The trial court in the Baby M. case, citing this analysis, held that the fundamental right to procreate, which flowed from the individual's right to privacy, encompassed the use of surrogates to create a family.344 The court suggested that a state prohibition on payments to surrogates, or a refusal to enforce surrogacy contracts, might "constitute an unconstitutional interference with procreative liberty since it would prevent childless couples from obtaining the means with which to have families."345

341. Keane, supra note 219, at 15. Keane quotes the explanation of one of his first surrogacy clients:

"Maybe it's egotistical, . . . but I want my own child. Adoption leaves me cold. I guess for some women, as long as they have a child, it's fine. But for me, it's like if I see my child do something, I need to know that he's really mine."

Id. at 29-30. Gestational surrogacy arrangements produce children who are genetically related to both members of the contracting couple, an aspect that proponents view as an important advantage of this type of surrogacy arrangement. See John A. Robertson, A Grandma's Surrogacy Could Be Liberating Step, NEWSDAY, (Nassau ed.), Oct. 24, 1991, at 119.


343. See, e.g., Carmel Shalev, Birth Power: The Case for Surrogacy (1989); John A. Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939, 956-57 (1986); Lizbeth A. Bitner, Womb For Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements, 90 DICK. L. REV. 227, 236-37 (1985) (woman has constitutional privacy right to become a surrogate); Phyllis Coleman, Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions, 50 TENN. L. REV. 71 (1982). See also Keane, supra note 219, at 19 ("Critics say the adoptive parents are 'buying half a baby' but I argue that the constitutional right to privacy overrides any state interest in preventing the legal payment of a fee from people who want to adopt through [artificial insemination] and the use of a surrogate mother.").


345. Id. at 1164 (citing Robertson, supra note 343).
Those opposed to the enforcement of surrogacy contracts also invoke the right to privacy; specifically, they argue that enforcement of a surrogacy contract, over the objection of the surrogate mother, violates that mother’s privacy-based right to the care and companionship of her child. The appearance of privacy-based claims on both sides of the surrogacy debate indicates that straight right-to-privacy arguments are often of limited help in resolving family law disputes. Unlike the typical privacy case, which pits a single rights-holder against the state, family law disputes, including surrogacy, commonly involve at least two rights-holders whose interests conflict. Where, as in the surrogacy context, both parties have plausible parenting claims, privacy doctrine alone cannot determine which of their protected interests should prevail. A constitutionally-based preference for private ordering of behavior, however, is significantly more dispositive: it suggests that we should honor the father’s contract-based claim over the mother’s status-based objections unless the particular agreement between them fails to satisfy applicable contract law standards of voluntariness and conscionability. Similarly, a conception of parenthood that focuses on effectuating adult intentions to acquire children suggests that the contacting father should prevail; after all, he intended to become a parent while the surrogate mother intended, at least initially, to relinquish her parental claims.

B. Gender Equality

The privatization of family law is also linked closely to the rejection of traditional gender roles and the law’s embrace of formal gender equality. Indeed, notions of both gender and racial equality have been important subthemes in many of the Supreme Court’s right-to-privacy


347. Carl E. Schneider, Surrogate Motherhood From The Perspective Of Family Law, 13 HARV. J.L. & PUB. POL. 125, 129 (1990); see Hafen, Individualism and Autonomy, supra note 319, at 28 (in family cases, in contrast to traditional civil liberties contexts, “the Constitution weighs one individual’s interest against another—or several other—individual’s interests.”). For another example of a recent family law dispute in which both parties raised constitutionally based privacy claims, see Davis v. Davis, 1990 Tenn. App. LEXIS 642 (Tenn. Ct. App. 1990), aff’d, 1992 Tenn. LEXIS 400 (Tenn. 1992) (dispute between divorced couple over control of frozen embryos created during marriage).

This concurrence is hardly a coincidence; honoring the decisional autonomy of those individuals and groups who have traditionally been disfavored by the law promises both to enhance personal freedom and promote equality goals. Substituting private for public control over the formation and structure of family relationships seems to offer a similar double benefit: it expands the opportunities for the exercise of personal choice while affirming the inherent equality of the sexes.

The rejection of traditional gender roles and the push for formal gender equality have played particularly important roles in facilitating the privatization of marriage and divorce. Because the state-imposed marriage contract both stereotyped and subordinated women, limitations on interspousal freedom to contract became identified with the perpetuation of inequality between the sexes. It thus made sense for advocates of gender equality to espouse increased contractual freedom in and around marriage as one way of avoiding the sexism of the state-imposed marriage rules. At the same time, enthusiasts of marital and nonmarital contracting were able to use gender equality arguments to support their calls for increased private ordering of intimate relationships.

Notions of formal gender equality also supported the privatization of divorce. Because the state-imposed marriage contract perpetuated women’s economic and sexual subordination, the shift from public to private ordering that characterized the no-fault divorce revolution seemed consistent with gender equality goals. No-fault divorce, at least in theory, offered women the opportunity to exit from a relationship that confined and subordinated them. Moreover, no-fault divorce provided an alternative to a fault-based divorce system that was itself rife with gender stereotypes and inequalities. Similarly, allowing couples to determine

351. See, e.g., Weitzman, supra note 48, at 227-31; Shultz, supra note 50, at 269-72. Gender equality notions also supported efforts to gain legal recognition of consensual alternatives to marriage, since such nonmarital relationships provided another way of avoiding the sex-based strictures of the traditional marriage contract.
352. In actuality, neither organized women’s groups nor concerns about gender equality played a central role in the early stages of no-fault divorce reform. See, e.g., Kay, supra note 129, at 55-56; Deborah Rhode & Martha Minow, Reforming The Questions, Questioning the Reforms: Feminist Perspectives On Divorce, in DIVORCE REFORM AT THE CROSSROADS, supra note 2, at 191, 195.
353. Under the fault-based system, the standards for judging marital misconduct reflected both the gender-based expectations of the traditional marriage contract and the
privately the financial consequences of divorce seemed consistent with gender equality goals, since the public rules that governed divorce-related financial allocations were predicated on the gendered terms of the traditional marriage contract.\footnote{Privatization of Family Law 1992:1443} Indeed, courts have routinely cited the emerging equality of women as an important reason for abandoning traditional restrictions on the enforceability of private agreements contemplating divorce.\footnote{Privatization of Family Law 1992:1443}

The contractual ordering of marriage and divorce is also linked to gender equality notions in another, more general, way. Proponents of private ordering have insisted that the process of contracting is “by its very nature, an egalitarian enterprise,” in that it requires the voluntary consent of two independent and autonomous parties.\footnote{Privatization of Family Law 1992:1443} Moreover, they have argued that the formality of contract—in particular its clear-cut delineation of rights and responsibilities—tends to reduce discretion and equalize power in relationships (such as marriage) that might otherwise be hierarchical.\footnote{Privatization of Family Law 1992:1443} These arguments led many policy-makers and commentators to accept uncritically the link between gender equality goals and the contractual ordering of marriage and divorce.\footnote{Privatization of Family Law 1992:1443}

The rise of formal notions of gender equality also helped quell objections to private ordering that were based on concerns about disparities in bargaining power, particularly between husbands and wives. Women’s legal equality, coupled with the increased economic opportunities that were (or would soon be) available to them, rendered problematic the argument that a system of private ordering would inevitably exploit double standard applied to men’s and women sexual activities. \textit{See generally Singer, supra} note 2, at 1110-11; \textit{Lawrence Stone, The Road to Divorce: England 1530-1987} (1990) (discussing sexual double standard in English divorce law).

\footnote{Privatization of Family Law 1992:1443} \textit{See, e.g., Orr v. Orr, 440 U.S. 268 (1979) (striking down as violative of equal protection Alabama statute that authorized the award of alimony to wives, but not to husbands).}


\footnote{Privatization of Family Law 1992:1443} \textit{Weitzman, supra} note 48, at 230. \textit{See Oldham, supra} note 146, at 760-61 (linking increased judicial acceptance of premarital agreements to the emergence of feminism and the increased labor force participation of married women).


\footnote{Privatization of Family Law 1992:1443} \textit{See Sharp, Fairness Standards, supra} note 140, at 1400-01 & nn.11 & 17 (citing examples).
women. Judges and policy makers insisted (sometimes gleefully) that women could not expect to have it both ways: women could not argue, on the one hand, that they were entitled to equal treatment on the job and, simultaneously, insist on special protection when it came to marriage and its dissolution. At least some proponents of private ordering reinforced the notion of such an either/or dilemma by suggesting that concerns about the exploitation of divorcing women themselves reflected inappropriate or outdated sex-based stereotypes.

Proponents of private adoption and surrogate motherhood have also employed arguments based on gender equality. Marjorie Schultz has argued powerfully for enforcement of surrogate parenting contracts as part of an intent-based approach to parenthood that relies heavily on gender equality concerns. She argues, in particular, that the law’s refusal to enforce private surrogacy contracts reinforces damaging stereotypes regarding the unpredictability of women’s intentions and decisions, the desirability of segregating women from the market, and the givenness of women’s biological destiny. Enforcement of commercial surrogacy contracts, by contrast, would promote greater gender equity by encouraging men’s choices to nurture children and by helping to offset the biological disadvantages men experience in accessing child-nurturing opportunities.

Lawyer and reproductive technologies expert Lori Andrews is even more emphatic about the positive link between contract surrogacy and gender equality. She argues that both the practice of surrogacy and the demand that surrogacy contracts be enforced is “a natural outgrowth of the women’s movement.” The same feminist gains that have allowed women to pursue educational and career opportunities previously reserved


360. See, e.g., MARLOW & SAUBER, supra note 279, at 42 (argument that law should judge the fairness of private divorce-related agreements “is grounded in the rather unflattering and infantilizing notion that women, like children, need the special protection of the law”). Cf. Richard A. Posner, The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood, J. CONTEMP. HEALTH L. & Pol’y, Spring 1989, at 21, 27 (“The idea that women who ‘sell’ . . . their reproductive capacity, like women who sell sexual favors, are ‘exploited’ patronizes women.”).

361. Intent-Based Parenthood, supra note 348, at 398.

362. Id. at 378-79. See also Robertson, supra note 341 (suggesting that surrogacy “may be another step in the liberation of women from their traditional procreative roles”); Louis M. Seidman, Baby M and the Problem of Unstable Preferences, 76 GEO. L.J. 1829, 1831 n.5 (1988) (suggesting that restricting the enforceability of surrogacy contracts may be inconsistent with a view of women as the moral and political equals of men).

363. Intent-Based Parenthood, supra note 348, at 303, 378.

364. ANDREWS, supra note 214, at 159.
for men have also meant that more women are postponing childbearing, and suffering the natural decline in fertility that comes with age. As a result, Andrews argues, "some of these women [find] that the chance for a child ha[s] slipped by them entirely and need[ ] to turn to a surrogate mother." At the same time, Andrews claims, feminism has made it more likely that other women will feel comfortable being surrogates by teaching that not all women relate to pregnancies in the same way and by insisting that women have the absolute right to control their bodies.

To oppose surrogacy under these circumstances, Andrews argues, is tantamount to telling both women who want to become surrogates and the men who want to hire them that "biology is destiny"—a message that is fundamentally inconsistent with the equal treatment of the sexes.

Surrogacy proponents have also invoked gender equality notions to argue that since most states sanction "surrogate fatherhood" by allowing men to sell their sperm, a ban on surrogate motherhood constitutes unlawful discrimination based on sex. As one commentator put it: "Men and women who use their reproductive organs to provide services for infertile couples are similarly situated but not treated alike." Proponents also suggest that since the law permits women to procreate noncoitally through artificial insemination, equal protection principles require that men be permitted to do the same via the use of surrogate mothers. The New Jersey trial court in Baby M. relied in part on these gender equality arguments in upholding the validity of the surrogacy contract.

In language that parallels the feminist defense of surrogate parenting, proponents of divorce and custody mediation have justified their

365. Id.
366. Id.
367. Id.; see also Posner, supra note 360, at 28 (feminist criticisms of surrogacy "reinforce the anti-feminist stereotype summed up in the slogan, 'biology is destiny').
preference for joint custody after divorce by stressing the nurturing capacities and desires of fathers and by emphasizing changing gender roles within the family. Mediation advocates have also used arguments based on gender equality to counter fears that husbands would dominate wives during the mediation process. Additionally, a commitment to formal gender equality underlies the preference of at least some mediation theorists for “achieving the highest degree of financial independence of the former husband and wife at the earliest possible time.”

C. Economic Discourse and Law-and-Economics Analysis

The traditional view of the family emphasized its separateness and distinctiveness from other social institutions, particularly politics and the market. Because of this ideological separation, family law was not thought to be governed by the principles and ideologies that, beginning in the nineteenth century, increasingly came to govern other fields of law, such as contracts and torts. Chief among the ideologies thought inapplicable to family law was liberal economics, in particular the general theory that the public good would emerge from the self-interested activities of individuals. Instead, the values associated with a “successful” family—altruism, sympathy, mutualism—were precisely those that were viewed as incompatible with success in the economic sphere.
In light of this perceived dichotomy between the family and the market, it is not surprising that notions of individual choice traditionally played a much less prominent role in family law than they did in more market-oriented legal fields. The notion that the public good would emerge from a legal structure that accorded individuals a high degree of freedom to plan and structure their own transactions—central to nineteenth century economic thought—was deemed inapplicable to intra-family relations. Moreover, the customary and common law traditions on which family law rested did not derive from the premises of autonomy and self-interest "inherent in the natural rights doctrines that fueled the political and economic individualism of the nineteenth century." Indeed, only if family law carefully circumscribed the opportunities for individual choice and reduced the incentives for self-interested behavior would the family be able to serve its purpose of providing a "haven in a heartless world."

Starting in the 1960s, scholars in a number of disciplines began seriously to challenge the ideological and methodological separation between the family and the market. In particular, several influential social science theories challenged the notion that people do (or should) behave differently in family relationships than they do in more overtly economic settings. In the early 1960s, exchange theories in sociology asserted that all social interaction could profitably be analyzed as a series of exchange relationships. Economic analysis extended this insight by positing (or at least assuming) that human beings act rationally to maximize their satisfactions in all spheres of human life. This assertion paved the way for the application of economic analysis to all sorts of purportedly noneconomic activities, including family behavior, and to the legal doctrines governing that behavior.

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381. See, e.g., Richard A. Posner, The Economics of Justice 41-42 (1981) ("Particularly important to the approach of this book is . . . Bentham’s insistence that human beings act as rational maximizers of their satisfactions in all spheres of life, not just the narrowly economic . . . ."); Id. at 237 (suggesting that people behave as rationally in marriage, friendship and procreation as they do in traditional economic markets).

382. See, e.g., Gary S. Becker, The Economic Approach to Human Behavior (1976); Essays in Economics of the Family: Marriage, Children and Human Capital (Theodore W. Schultz ed., 1974); Posner, supra note 360. As one of
The application of economic analysis to behavior in and around the family has influenced the privatization of family law in several related ways. First, the economist's assumption that persons act rationally to maximize their interests in all spheres of life undermined the sharp distinction the law traditionally drew between the principles that should govern family relationships and those that should govern transactions outside the family. This meant, among other things, that those who objected to public constraints on family transactions could more legitimately draw on market analogies and on the law governing market transactions in critiquing those constraints and proposing reforms. The assumption that family members do and should act as rational maximizers in their dealings with each other also meant that restrictions on intra-family bargaining were vulnerable to charges of both paternalism and inefficiency.

Second, the legal economists' insistence that the pursuit of private self-interest generally served the public good eased both the need and the justification for the direct pursuit of societal goals via the legal doctrines governing the family. If deferring to the results of privately negotiated family bargains is likely to promote the overall good, then what is to be gained, as a general matter, by limiting the scope or substance of such private bargaining?

Third, the economist's endorsement of consumer sovereignty—the notion that the individual is the best judge of her own interests and desires—strongly implied that the legal doctrines governing the family, like the doctrines governing economic behavior, should maximize individuals' opportunities to pursue their interests by bargaining freely with other individuals. Moreover, the dual commitment to consumer

the founders of the "law and economics" movement put it recently: "Economics is not just about the exchange of objects. Labor economics, and more recently family or household economics, are important fields of economic inquiry even though they deal with the exchange of, and not merely between, human beings." Posner, supra note 160, at 61. For a recent attempt to construct and justify a theory of alimony primarily in economic terms, see Ira M. Ellman, The Theory of Alimony, 77 CAL. L. REV. 1 (1989).

383. See, e.g., Posner, supra note 381, at 2 ("If rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behavior, then the conceptual apparatus constructed by generations of economists to explain market behavior can be used to explain nonmarket behavior as well."); Mnookin, supra note 120, at 1019 (private ordering of divorce "is premised on the notion that divorce bargaining involves rational, self-interested individuals").

384. See Posner, supra note 160, at 60 ("According to one of the least controversial concepts in normative economics—Pareto superiority—a transaction that makes at least one person better off and no one worse off increases social welfare, and is therefore efficient. A voluntary exchange is such a transaction, since the parties would not make it if they did not think it would make both of them better off.").
sovereignty and the pursuit of self-interest in all spheres of life leads the legal economist to celebrate private markets as the ideal form of social interaction in both the family and the nonfamily realms. Government restrictions on family bargaining, for example by the imposition of mandatory marriage obligations or the prohibition of paid surrogacy contracts, are presumptively illegitimate and can be justified, if at all, only as a means of correcting market failure.385

This limited view of the legitimacy of public restraints on private ordering is reinforced by the legal economists' flattening (some would say obliteration) of the distinction between moral or ethical values and all other human desires. Economic analysis tends to lump these things together as simple preferences or tastes (as in a taste for altruism, for fidelity or for domestic violence) and denies the possibility of ranking or distinguishing among them, except by reference to the results of the market.386 Economic analysis thus renders extremely problematic what has traditionally been a central feature of family law—state-imposed restrictions on private ordering justified in the name of morality or public values. To be sure, economic analysis leaves intact other justifications for public constraints, for example, to correct for defects in the market or to promote efficiency where bargaining is costly or impossible, but these are not the sorts of justifications that have traditionally been offered in support of public ordering in family law.

Economic analysis, however, does more than deny any meaningful distinction between values and preferences; it also denies that we can talk meaningfully about our values, whether through law or other social institutions.387 Economic analysis thus privatizes the inquiry about human values by suggesting that value choices are wholly private questions and not the proper subject of shared conversation, whether through law or other public avenues.

Economic thinking also contributes to the privatization of family law in another, more subtle, way. The economists' model of all human interaction as a series of exchanges presupposes the existence of things (or resources), separate from the human actors, that are the subjects of these exchanges.388 Where the exchange occurs in the traditional market realm, the things being exchanged are likely to be material goods and money. When the exchange model is applied to the family arena, however, the things allegedly being exchanged—love, sexual services, the capacity to bear children—are much more intimately connected with one's

385. See generally Margaret J. Radin, supra note 158, at 1863-70.
387. Id. at 174-75.
388. See id. at 167.
identity and sense of self. Nonetheless, the economist is constrained to think of those things as objects that can be possessed and traded—no different, in principle, than cars or widgets. Economic analysis thus tends to erase the distinction our legal system has traditionally drawn between alienable objects and inalienable attributes of human personality. Moreover, in conceiving of all human attributes as “things” that can be sold or traded, the legal economist invites markets to fill the social universe. State attempts to limit market transactions in any sphere, including the family, become problematic; limits can be justified, if at all, only as a means of controlling externalities that prevent the market from working properly.

Economic analysis also denies the ability of law to shape our values, by virtue of its assumption of stable consumer preferences. According to the legal economist, individual preferences are fixed at least over the short and medium term. While legal rules can create incentives for individuals to act in certain ways, those rules cannot affect our values or other preferences. This undermines yet another common justification for public ordering of family law—the idea that law can perform an important educational or inspirational role by encouraging individuals to shape (or reshape) their values in ways society collectively thinks desirable.

389. Richard Posner, for example, finds it useful “[f]or heuristic purposes (only!) . . . to analogize the sale of babies to the sale of an ordinary good, such as an automobile or a television set.” Posner, supra note 160, at 64. Nobel prize winner Gary Becker, a leading economist of the family, similarly defines love as a “particular non-marketable household commodit[y].” Gary S. Becker, A Theory of Marriage: Part II, 82 J. Pol. Econ. 511, 512 (1974).

390. Radin, supra note 158, at 1880-81. See id. at 1905 (“Universal commodification undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self.”).

391. Id. at 1851; cf. Posner, supra note 360, at 31 (attributing judicial refusal to enforce surrogacy contracts to “the hostility to markets” characteristic of judges and other American intellectuals).

392. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (1983). See MINOW, supra note 359, at 162 (According to law and economics analysis, people’s wants and preference are “subjective and taken as givens—free from second-guessing by society.”).

393. See POLINSKY, supra note 392, at 10 (“For example, an individual’s evaluation of the desirability of cleaner air is assumed not to depend on whether the legal system establishes a right to clean air. This is known as the assumption of exogenous preferences.”); Posner, supra note 360, at 26-27 (“People are what they are; and what they are is the result of millions of years of evolution rather than of such minor cultural details as the precise scope of the market principle in a particular society.”).
D. Increased Dissociation of Law and Morality

In an insightful and provocative article several years ago, Carl Schneider suggested that many of the changes that have taken place in American family law over the past few decades can be understood as reflecting "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated." Schneider argued that these doctrinal changes have both reduced family law's reliance on moral considerations and transferred the authority to make moral decisions from the state to the individuals involved.

The increased dissociation of law and morality that Schneider documents is directly linked to the privatization of family law. As long as moral inquiry is central to legal discourse about the family, and as long as family law both reflects and attempts to implement our collective moral judgments, then the state has a legitimate and necessary role to play in regulating the formation and dissolution of family relationships. If family law is no longer charged with enforcing, or even announcing, moral norms, however, then it becomes far more difficult to justify public ordering of family behavior. To be sure, public ordering may still be appropriate if particular categories of private decisions are likely to result in tangible harm to the decision makers themselves or to others affected by the decisions. But since our legal system generally presumes that adults are capable of protecting themselves and that parents are willing and able to protect their children, the opportunities for public intervention on behalf of vulnerable or unrepresented third parties are likely to be limited.

Moreover, the increased dissociation of law and morality means that state involvement in family life is more likely to be reactive than aspirational; that is, it is more likely to be based on the need to protect endangered family members than on the desire to shape or transform

394. Schneider, Moral Discourse, supra note 318, at 1807-08. The instant Article originally grew out of a suggestion made by Schneider that these family law developments could also usefully be analyzed as a shift away from public standards to private ordering. See Schneider, Moral Discourse, supra note 318, at 1805.


396. Cf. Parham v. J.R., 442 U.S. 584 (1979) (rejecting the argument that the Constitution requires a hearing before parents can commit their children to state mental hospitals on the ground, inter alia, that the law has historically recognized "that natural bonds of affection lead parents to act in the best interests of their children").
behavior. It is also likely to occur only after a particular family has shown itself incapable of caring or providing for its most vulnerable members.

This link between the diminution of moral discourse and the increased appeal of private ordering is evident in each of the doctrinal areas discussed in Part I of this Article. The fault-based divorce system, for example, both reflected and sought to enforce society’s sense of the proper moral relations between husband and wife. The no-fault system, by contrast, generally eschews moral judgments and leaves to individual couples the moral choices about whether and under what circumstances to dissolve their relationship. In addition, the shift from fault-based to no-fault divorce, in conjunction with the demise of permanent alimony, represents a determination that the state should no longer attempt to enforce the moral standard of life-long mutual responsibility between spouses.

Modern standards for determining custody and visitation also de-emphasize the relevance of moral judgments, particularly judgments regarding sexual morality. In the past, a parent’s sexual behavior was considered highly relevant to her fitness as a parent; in many states, a parent who engaged in disfavored behavior, such as adultery or fornication, was presumptively unfit as a custodian. Today most states consider a parent’s sexual behavior relevant to determining custody only if the behavior directly affects the parent’s relationship with the child.

398. Schneider, Moral Discourse, supra note 318, at 1809.
399. Id.; see Hafen, The Family, supra note 311, at 879 (“Many contemporary decisions about divorce and alimony implicitly reject lifelong commitments of mutual responsibility between marriage partners, in part because of doubts that the social interest in marriage is as important as the individual interest.”).
401. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 147, 561 (1987) (“The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.”); CLARK, DOMESTIC RELATIONS II, supra note 18, at 804 (endorsing the “sensible and workable approach . . . taken by the authorities which hold that the parents' sexual relations are only relevant when they have a direct effect upon the care of the child or upon the parent-child relationship”). See generally Katheryn D. Katz, Majoritarian Morality and Parental Rights, 52 ALB. L. REV. 405, 440-69 (1988). In cases involving gay and lesbian parents, “the evolving majority rule” similarly requires that there be a nexus between the parent’s sexual behavior and harm to the child. Sharon Hammer, Family Law II: The Role of Sexual Preference in Custody Disputes, 1986 ANN. SURV. AM. L. 685, 689-90. Some courts, however, simply presume that a parent’s homosexuality will harm the child, while other courts require a showing of actual harm. Id. at 690.
There has been a similar shift away from basing custody decisions on other sorts of marital fault.\footnote{402} Considerations of morality and marital fault also play a much smaller role in determining the financial consequences of divorce than they did under the fault-based system. The Uniform Marriage and Divorce Act, for example, provides that decisions about both property division and spousal maintenance are to be made "without regard to marital misconduct."\footnote{403} A substantial number of states have followed the lead of the Uniform Act in precluding consideration of marital fault in the determination of divorce-related financial responsibilities.\footnote{404} Even in those states where fault is still relevant in dividing property or awarding support, it is only one of many relevant factors. Moreover, just as the shift from fault-based to no-fault divorce meant that the state would no longer attempt to enforce the moral standard of life-long spousal fidelity, the modern emphasis on the economic "rehabilitation" of financially dependent spouses explicitly rejects the notion of marriage as a permanent financial partnership.

The blurring of the legal line between marriage and other intimate relationships and the breakdown of marital status as a criteria for distributing public benefits also reflect the increased dissociation of moral judgments and family law rules. In approving the enforcement of cohabitation contracts that do not rest explicitly on meretricious sexual services, the Marvin court (and those that followed its lead) declared that moral qualms about a couple's sexual relationship are insufficient to preclude judicial enforcement of the couple's financial expectations.\footnote{405} Similarly, in condemning as unconstitutional the differential treatment of marital and nonmarital children, the Supreme Court expressly rejected moral condemnation as an appropriate justification for legal classification.\footnote{406}

\footnote{402. CLARK, DOMESTIC RELATIONS II, supra note 18, at 802 & n.47.}
\footnote{403. UNIF. MARRIAGE AND DIVORCE ACT §§ 307, 308(b), 9A U.L.A. at 238-39, 347-48 (1987). The prefatory note states that "[t]he Act’s elimination of fault notions extends to its treatment of maintenance and property division." Id. at 149.}
\footnote{404. According to a recent family law survey, only a minority of states consider fault relevant in awarding alimony, while a bare majority of states continue to permit courts to consider fault in distributing property. Doris Jonas Freed & Timothy B. Foster, Family Law in the Fifty States: An Overview, FAM. L.Q., Winter 1991, at 309, 343-44 tbl. v, 355-56 tbl. vii (1991). Moreover, recent cases suggest a trend away from fault-based property awards, even in those states that formally allow such awards. ELLMAN et al., supra note 109, at 253.}
\footnote{405. See Schneider, Moral Discourse, supra note 318, at 1814-15.}
The dissociation of law and morality has also facilitated the growing popularity of divorce and custody mediation. As its proponents acknowledge, mediation is not well suited to resolving disputes according to moral, or other normative, standards. Indeed, mediation theorists characterize as a significant shortcoming the legal system’s commitment to normative decision making, since such a normative commitment “limits the use of creative problem-solving.” Thus, when the allocation of post-divorce rights and responsibilities depended heavily on normative judgments about fault and relative parental fitness, mediation was neither useful nor popular. Only after the acceptance of no-fault divorce and the rise of the joint-custody paradigm made divorce a conflict to be managed within the family system, rather than a dispute to be resolved with reference to public norms, did mediation become a plausible alternative to adjudicative decision making.

The practice of mediation is also characterized by an aversion to moral discourse. Mediation is relentlessly forward looking; it actively avoids dredging up the past. Mediators make no attempt to assign blame or determine guilt, since they believe that these are inappropriate criteria for decision making related to divorce. Participants in mediation are similarly discouraged from focusing on each other’s past behavior, since such a focus is unlikely to enhance understanding or achieve consensus. Thus, both the acceptance of divorce mediation

407. See, e.g., Stephen K. Erickson, The Legal Dimension of Divorce Mediation, in DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 250, at 105, 106 (“Mediation says that what the legislators or courts have said should occur in divorce cases is less important than what the couple thinks is fair.”).


409. See Fineman, supra note 135, at 732-33, 744-45.

410. Shaffer, supra note 258, at 163, 176; see MARLOW & SAUBER, supra note 279, at 17 (purpose of mediated divorce agreements is to “help [couples] put the past behind them and to get on with the important business of their lives”); Erickson, supra note 407, at 107 (mediation frames questions about divorce issues “in mutual, future-oriented terms, in contrast to the adversarial system’s win-lose, past-oriented approach”); Hugh Melsaac, Court-Connected Mediation, CONCILIATION CTS. REV., Winter 1983, at 49, 53 (mediation is “focused on the future, not the past”).


412. See, e.g., Mary Tall Shattuck, Mandatory Mediation, in DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 250, at 191, 200 (“The mediator’s role is to move the parents toward solutions, and solutions are to be found in the present and future, not in the family’s past.”); Anthony J. Salius & Sally D. Maruzo, Mediation of Child-Custody and Visitation Disputes in a Court Setting, in DIVORCE MEDIATION:
in general and its success in any particular case depend on its ability to
dissociate moral from legal issues and to render moral discourse irrelevant
to the resolution of divorce-related conflict.

The trend toward the increased dissociation of law and morality may
be abating somewhat, at least as a matter of constitutional law. In *Bowers
v. Hardwick*, the Supreme Court rejected the argument that majority
sentiments about the morality of homosexuality were insufficient to
support a criminal prohibition on behavior engaged in by consenting
adults. More recently, in *Michael H. v. Gerald D.*, the Court drew
heavily on what it saw as the morality of conventional family structures
to uphold a California paternity presumption that precluded a biological
father from gaining legal recognition as a parent. While these decisions
indicate that the current Supreme Court majority may be willing to grant
states somewhat wider latitude in translating collective moral judgments
into family law commands, the evidence suggests that states may be
reluctant to accept the Court’s invitation. For example, less than a year
after the Court’s decision in *Michael H.*, California repealed the
conclusive paternity presumption that had barred the nonmarital father in
that case from asserting his parental rights. Similarly, the Court’s
decision in *Bowers* probably accelerated, rather than impeded, successful
state and municipal efforts to accord greater legal recognition to gay and
lesbian intimate relationships.

### III. Evaluation of the Privatization Process

As is true of private ordering in general, the privatization of family
law is neither a panacea nor an unmitigated disaster. Moreover, for
women in particular, the privatization of family law must be measured
against a traditional system of public ordering that both severely restricted

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*THEORY AND PRACTICE, supra* note 250, at 163, 173 (mediator acts to minimize
discussion of the past and direct the focus away from relationship issues that could not be
resolved during marriage); *Grillo, supra* note 277, at 1563-64 (“It is typical for mediators
to insist that parties waste no time complaining about past conduct of their spouse, eschew
blaming each other, and focus only on the future.”).

413. 478 U.S. 186 (1986).

414. 491 U.S. 110 (1989) (upholding statute conclusively presuming husband of
mother to be father of child, despite evidence of biological paternity and existence of
three-year relationship between biological father and child).

allows a presumed father who is not the child’s mother’s husband to move for blood
testing to establish paternity within two years of the child’s birth. It also authorizes a
court to award custody and visitation rights when the court finds, pursuant to such blood
testing, that a parent-child relationship exists and that the award would be in the child’s
women's options and systematically subordinated their interests. Yet privatization holds particular dangers as well, dangers that are often masked by the seemingly neutral rhetoric associated with private ordering. This section is designed to highlight those dangers, while acknowledging the potential benefits to both women and men of a family law regime that accords substantial deference to privately chosen norms and desires.

A. The Traditional System of Public Ordering

In order to understand the appeal of private ordering in family law, it is useful to highlight the disadvantages of the traditional system of public ordering. For purposes of this section, three disadvantages stand out. First, the publicly-ordered system was sexist in the sense that it stereotyped both women and men, and forced them to conform to narrow conceptions of female and male roles. The sex-based role allocations of the traditional marriage contract were perhaps the most salient example of such stereotyping. The traditional rules governing the financial consequences of divorce similarly reflected these gender-based stereotypes: Only wives were eligible to receive alimony while only husbands could be ordered to contribute financially to the support of their children.

Second, the publicly-ordered system of family law both created and perpetuated hierarchy, particularly the hierarchy of men over women. By assigning women a subordinate role within the family and by limiting their options outside of it, the traditional system of public ordering ensured both the sexual subordination of women and their economic dependence on men. The traditional system of family law also perpetuated the hierarchy of heterosexual over homosexual relationships by reserving marriage for heterosexual couples and by using marriage to determine eligibility for a wide range of privileges and benefits.

A third disadvantage of the traditional system of family law was that it reflected and reinforced the notions of racial and class superiority that permeated the legal system as a whole and society more generally. Many of the Supreme Court's early privacy decisions were directed against legislative enactments that reeked of racism and elitism. The anti-

416. See Orr v. Orr, 440 U.S. 268 (1979). In reality, only a small percentage of divorcing women ever were awarded alimony. See Singer, supra note 2, at 1106.
417. See CLARK, DOMESTIC RELATIONS II, supra note 18, at 259, 710.
418. See Jaff, supra note 28, at 236 ("The 'traditional' family is not just obsolete; it is also a bastion of male dominance, hierarchy, racism and sexual oppression. Marriage (and, so, the 'traditional family') has always meant women’s 'sexual availability at will' and women's economic dependence . . . .").
miscegination statute that the Court struck down in Loving v. Virginia—it entitled "An Act to Preserve Racial Integrity"—proscribed only inter-racial marriages involving white persons; it did not apply to other inter-racial unions. Although Loving was decided primarily on equal protection grounds, the Court's characterization of marriage as a "vital personal right[ ]" formed the basis for its subsequent recognition in Zablocki of a constitutionally-protected individual right to marry. Similarly, the Court first suggested that the Constitution afforded heightened protection to procreative choices in striking down a state statute that authorized the sterilization of certain categories of "habitual criminals" but explicitly excluded from its scope most types of regulatory and white-collar crime.

B. The Advantages of Privatization

1. PRIVATIZATION AS AN ALTERNATIVE TO TRADITIONAL FAMILY STRUCTURES

In light of these disadvantages, it should come as no surprise that one of the most important advantages of privatization is that it provides an alternative to the sexism and hierarchy of traditional family rules and structures. Marital and premarital contracting, for example, allows women and men to reject the sex-based role allocations of the state-imposed marriage contract in favor of a more egalitarian partnership. Similarly, the increased legal acceptance of consensual alternatives to marriage and the decreased use of marital status as the basis for allocating

419. 388 U.S. 1, 1-12 & n.11 (1967).
420. Id. at 12.
422. Skinner v. Oklahoma, 316 U.S. 535 (1942). The Oklahoma statute invalidated on equal protection grounds in Skinner defined "habitual criminals" subject to sterilization as persons who had been convicted two or more times of "felonies involving moral turpitude." Id. at 536 (quoting OKLA. STAT. ANN. tit. 57, § 173 (West 1935)). The statute explicitly excluded from its scope "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement or political offenses." Id. at 537 (quoting OKLA. STAT. ANN. tit. 57, § 195 (West 1935)). The defendant in Skinner had been convicted once of stealing chickens and twice of robbery. Id. at 537. Justice Douglas, writing for the majority, recognized the racial and class aspects of the case: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." Id. at 541; see id. (strict scrutiny of sterilization laws essential "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals").
public benefits and burdens allow individuals to choose other, less hierarchical, forms of intimacy without forfeiting important material and psychic benefits. In addition, increased judicial willingness to enforce cohabitation agreements enables couples who are unwilling or unable to marry to create legally enforceable financial commitments.

Moreover, while the publicly-ordered system of marriage and divorce tended to define women and men by virtue of their gender, privatization offers all persons the opportunity to define themselves without regard to gender, and to be treated as ungendered individuals, at least for formal legal purposes. More generally, privatization—with its emphasis on individual choice and decisional autonomy—provides a welcome antidote to the overly altruistic expectations that have historically defined appropriate behavior for women within the family. 423

2. RESPECT FOR DIVERSITY

A second benefit of private ordering is that it has the potential to respect and nurture diversity. Promoting diversity with respect to family relationships is of obvious general importance, but it may be particularly important to women for at least two reasons. First, women’s family-related activities have traditionally been central both to women’s perceptions of themselves and to society’s expectations of women. For this reason, state-imposed orthodoxies of family behavior are likely to constrain women in a particularly severe way. Moreover, the consequences of failing to conform to prevailing family norms have always been more severe for women than for men. 424 In large part, this is because society traditionally offered women few opportunities outside the family to achieve success or gain recognition. Thus, a woman who “failed” in her traditional role as wife and mother was likely to be dismissed as “not really a woman,” whereas a man who was “unsuccessful” at family life could more easily achieve recognition in other spheres. 425 For both of these reasons, women have a particular


424. See, e.g., Jaff, supra note 28, at 212-14 (discussing stigmatization of unmarried women). Of course, the consequences for men, particularly gay men, of failing to conform to traditional family norms have been severe as well.

425. Historically, marriage was thought to be “that state in which women’s character would be most fully developed”; some authors went so far as to claim that “marriage was the only true life for women.” Jaff, supra note 28, at 212 (quoting Lee V. Chambers-Schiller, Liberty, a Better Husband 15 (1984)). The words used to describe unmarried women reflect society’s negative view. Unmarried women are called
interest in fostering the respect for diversity in family relations that private ordering can offer.

Respecting diversity in family relations is also consistent with the feminist critique of objectivity and the skepticism shared by many feminists toward claims of universal or value-free knowledge. A major shared premise of feminist thought is that knowledge of the world is necessarily partial and is bound by both context and power. These insights caution against state attempts to impose a unitary family form or to define a particular family structure as ideal.

3. INCREASED DEGREE OF CONTROL

A third important benefit of privatization is that, at least for certain categories of people, it increases the degree of control that they can exercise over important aspects of their lives. Again, while legal structures that enhance individual control have obvious general appeal, they are likely to be particularly attractive to women. To a large extent, this is because women traditionally have been accorded little control over many aspects of their productive and reproductive lives. Moreover, because of the centrality to women's lives of reproduction and other family-related activities, women's lack of control in the family realm has severely affected their opportunities and well-being outside of, as well as within, the family.

"old maids" or "spinsters," while unmarried men are referred to as "eligible bachelors." Jaff, supra note 28, at 212. Similarly, women who are unable to have children are referred to as "barren;" no equivalent term exists for men.


428. Judgments about women's reproductive capacity and their "appropriate" role within the family have consistently been used as justifications for restricting their employment and other economic opportunities. See, e.g., Bradwell v. Illinois, 83 U.S.
Advocates of private ordering in several areas of family law have emphasized the link between privatization and control. Marjorie Shultz, for example, draws heavily on the benefits of control in advocating an intent-based approach to parenthood that would make private, bargained-for choices presumptively determinative of legal parenthood. Shultz argues, in particular, that people perform major and responsible tasks (like parenting) better when they exercise control over the assumption of those responsibilities. Advocates of independent and "preplanned" adoption similarly emphasize the increased element of control that private adoption arrangements (including surrogacy) accord both birth mothers and potential adoptive parents. Proponents of divorce and custody mediation sound a similar theme; they stress that mediation enables couples to maintain control of their post-divorce relationship, rather than surrendering that control to an arbitrary and uncaring judicial system.

The link between privatization and control, however, depends upon the assumption that the most important barriers to individual control are those imposed directly by the state, rather than those created or maintained by private concentrations of wealth or power. To the extent that individuals (or families) are deprived of control over their lives not by state-imposed restrictions, but by private concentrations of power, privatization is likely to exacerbate, rather than ameliorate, the problem. As Professor Erwin Chemerinsky has argued in a somewhat different context, private deprivation of basic freedoms can be just as harmful as

(16 Wall) 130, 141-42 (1872) (Bradley, J., concurring) (women's "paramount destiny" as wife and mother precludes her from adopting an independent career from that of her husband); Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (limitations on women's work hours justified by state's interest in the physical well-being of women "in order to preserve the strength and vigor of the race"); Goesaert v. Clery, 335 U.S. 464 (1948) ("grave social problems" that would be created by the presence of female bartenders justifies forbidding all women from tending bar; exception for wives and daughters of male bar owners supported by oversight assured by presence of male protector); Hoyt v. Florida, 368 U.S. 57, 62 (1961) (women's place, as "center of home and family life" justifies exclusion of women from jury pool). For a recent attempt by employers to use women's reproductive capacity to severely restrict their job opportunities, see UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (invalidating as illegal sex discrimination employer's "fetal protection policy" which excluded virtually all women of childbearing age from working at battery manufacturing plant). For a perceptive analysis of how restrictions on abortion have historically been used to enforce traditional gender roles and to circumscribe women's opportunities outside the family, see Reva Seigel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 280-346 (1992).

429. Intent-Based Parenthood, supra note 348, at 323.
430. Id.
431. See supra text accompanying notes 188-92.
432. See sources cited supra notes 294-98.
infringement by the government.\textsuperscript{433} Indeed, given the concentration of wealth and power in private hands, the need for protection from private deprivations may be greater than the need for protection from government infringement, particularly since democratic processes impose some accountability and limits on the government.\textsuperscript{434}

This analysis suggests that the privatization of family law is most likely to increase opportunities for individual control where the most salient barriers to that control have been barriers set up by the state. The state's traditional ordering of marriage and its refusal to recognize consensual alternatives to marriage may be one such example. Where, by contrast, the efforts of individuals to control their lives have been thwarted primarily by private concentrations of power, or by power inequalities within the family, the link between privatization and control becomes considerably more problematic. At best, a shift from public to private ordering in these areas is likely to enhance the control of some family members at the expense of others. Efforts to privatize the economic consequences of divorce and to remove divorce-related disputes from the judicial arena may well be examples of this phenomenon.

Focusing on the issue of control also helps to illuminate the debate between proponents and critics of commercial surrogacy. Surrogacy proponents tend to see government restrictions on reproductive transactions as among the most salient barriers to the exercise of procreative choice. The enforcement of private surrogacy agreements removes one such government barrier; it therefore enhances procreative control by enabling consenting individuals to give effect to their reproductive intentions.\textsuperscript{435} Opponents of surrogacy, by contrast, emphasize the distorting effect that private disparities in wealth and power have on the intentions expressed in private bargains, particularly bargains regarding reproduction and parenting.\textsuperscript{436} These scholars argue that legalizing contract surrogacy is likely ultimately to diminish the ability of poor women (as well as women in coercive family or social relationships)

\textsuperscript{433.} Erwin Chemerinsky, \textit{Rethinking State Action}, 80 NW. U. L. REV. 503, 510 (1985); see Mark V. Tushnet, Shelley v. Kraemer and Theories of Equality, 33 N.Y.L. SCH. L. REV. 383, 392 (1988) ("IIt is doubtful that one could defend the proposition that governments in the contemporary United States are in fact in a better position to inflict harm than private actors. ").

\textsuperscript{434.} Chemerinsky, \textit{supra} note 433, at 510-11.

\textsuperscript{435.} \textit{See} Intent-Based Parenthood, \textit{supra} note 348, at 373-95.

\textsuperscript{436.} \textit{See}, e.g., FIELD, \textit{supra} note 209, at 25-32; ROTHMAN, \textit{supra} note 340, at 229-45; Areen, \textit{supra} note 228, at 1750-55; Radin, \textit{supra} note 158, at 1930-31; Raymond, \textit{supra} note 248.
to control their reproductive lives, by inducing them to produce other people's babies.\textsuperscript{437}

4. PRIVATIZATION, CHOICE AND INDIVIDUAL AUTONOMY

Closely related to the idea of control are the notions of choice and individual autonomy. In our current political and legal culture, these notions have an almost mythical appeal. As one legal theorist recently noted:

Modern arguments for the moral grounds of democracy, for the legitimacy and moral worth of the free market, for the justification of criminal punishment, for the limitations upon paternalistic applications of state power, for the priority of individual rights over collective welfare, and even for the legitimacy of law itself all rest on a commitment to the virtues of individual autonomy and an antipathy toward authority. ... “Choice” and “autonomy” are becoming synonyms for “right” and “good” ... \textsuperscript{438}

Proponents of private ordering have generally assumed (and sometimes argued) that private ordering enhances choice and that enhancing choice promotes autonomy.\textsuperscript{439} But feminists and other scholars have questioned both of these assertions. As an initial matter, these critics have pointed out that current social and economic conditions make many people's family-related choices more illusory than real.\textsuperscript{440} An economically-dependent battered wife who fails to leave her abusive husband can hardly be said to have chosen freely to stay with him. A shift from public to private ordering does little to alter these social and economic constraints on choice; indeed, the antipathy to collective action that privatization entails is likely to exacerbate these impediments.

\textsuperscript{437} See, e.g., Raymond, supra note 248, at 9-11.
\textsuperscript{439} See, e.g., Mnookin, supra note 120, at 1018 (“The liberal ideal that individuals have fundamental rights, and should freely choose to make of their lives what they wish supports private ordering.”); Richard A. Posner, The Ethical Significance of Free Choice: A Reply To Professor West, 99 Harv. L. Rev. 1431 (1986).
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Even assuming the existence of social and economic conditions that would permit the exercise of meaningful choice, the complexities of our psychological nature render problematic any inherent link between expanding choice and enhancing individual autonomy. In particular, our deference to authority or our sense of social obligation may cause us to consent to arrangements that neither foster our autonomy nor enhance our well-being. To the extent that some of us participate in family transactions not because we think they will enhance our freedom or increase our welfare, but because they fulfill our desire for approval or our craving for authority, deference to privately chosen family norms may not necessarily enhance autonomy, even if it increases choice.

Recent scholarship has also cast doubt on the view—characteristic of much law and economics thinking—that people's preferences and choices exist independently of the legal system. This scholarship suggests instead that prevailing legal and social structures influence to a significant extent the preferences of individuals. Feminist scholarship has similarly emphasized the ways in which women's choices, in particular, have been shaped by gender ideology. Joan Williams, for example, argues that an updated version of the Victorian ideology of domesticity plays a central role in the "choices" of many women today to subordinate their careers for the sake of their families. As Kathryn Abrams has recently pointed out, one need not subscribe to a simplistic notion of "false consciousness" to acknowledge the influence of gender ideology on the family-related choices of women and men.

None of this is meant to suggest that expanding choice is necessarily unwise or that we should reject private ordering altogether because

441. See West, supra note 438; West, supra note 199; Raymond, supra note 248. Cf. Mnookin, supra note 120, at 1019-24 (discussing possibility that divorcing spouses may sometimes be temporarily incapable of making deliberative and well-informed choices).


444. Williams, supra note 443, at 830-31.

economic, social or psychological constraints may sometimes prevent us from choosing wisely. It does indicate, however, that choice should not be viewed as a moral trump and that the asserted link between privatization, choice and individual autonomy should serve to initiate, rather than preempt, the inquiry into the desirability of private ordering in family law.

C. Disadvantages of Privatization

1. EXACERBATION OF EXISTING GENDER INEQUALITIES

One of the most significant dangers of the privatization of family law is that it will exacerbate existing power inequalities. Because women, as a group, are less powerful than men in our society, and because family law is centrally involved both in shaping male-female relationships and resolving disputes between men and women, the effect of substituting private norms and private decisions for public ordering of family law should be of particular concern to women. In the section that follows, I will use mediation as a lens through which to examine the potential effects of private ordering on existing gender-based disparities in wealth and power. Although the analysis focuses on mediation—which privatizes the process of resolving family disputes—I believe the dangers it illuminates are relevant as well to the privatization of the substantive areas of family law.446

There is substantial reason to suspect that mediation is significantly more likely than adjudication (and lawyer-conducted negotiation) both to reflect and to reproduce power imbalances between the sexes.447 The

446. Frances Olsen has argued that the ideology of private ordering and the model of state nonintervention in the family has long masked the state’s support of the existing patriarchal family structure. Frances Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Reform 835 (1985). Similarly, Linda Gordon ties the state’s refusal to “intervene” in the family to concepts of male supremacy—the view of the family as man’s territory and intervention as challenge to that authority. Linda Gordon, Feminism and Social Control: The Care of Child Abuse and Neglect, in WHAT IS FEMINISM 63, 63-79 (Juliet Mitchell & Ann Oakley eds., 1988). Even Robert Mnookin, a strong supporter of private ordering in family law, recognizes that private divorce bargaining may disadvantage a spouse who “sees himself [sic] as lacking alternatives and as being dependent upon resources controlled by the other spouse.” Mnookin, supra note 120, at 1027, 1029-31.

447. Two recent articles, both published while this Article was in press, contain extensive analyses of the ways in which divorce mediation is likely to disempower women. See Grillo, supra note 277; Penelope E. Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 Buff. L. Rev. 441 (1992). Professor Grillo’s article focuses specifically on California’s mandatory mediation scheme, while Professor Bryan’s article discusses more generally the ways in which the rhetoric of divorce
substantive fairness of divorce mediation depends heavily on the ability of divorcing parties effectively to express and represent their own interests without the assistance of counsel.448 The available evidence suggests that husbands are often in a better position to do this than wives and that the nature of the mediation process is unlikely to alter this fact.449

The treatment of power in mediation literature is, at best, erratic.450 Some mediation proponents ignore entirely the question of power imbalances, while others acknowledge but dismiss it quickly, or characterize it as an insignificant issue.451 One recent mediation theorist, for example, dismisses as absolutely without merit the argument that a husband's financial sophistication and domination during marriage may leave a mediating couple in unequal bargaining positions or give the husband greater negotiating power than his wife.452 Even those theorists who do address power imbalances in mediation generally do so from an individualistic perspective that largely ignores the possibility of systemic gender inequalities.453 Mediation theorists also posit the existence of multiple sources and types of power, thus suggesting that while a husband may enjoy power in one area (such as finances or

mediation reinforces patriarchy. The critique of mediation presented here is consistent with much of the analysis in these two articles. See also Ellis, supra note 282, at 330 ("Sexist biases, when combined with a professionally enjoined neutral stance, may help produce mediation agreements which are a greater economic disaster for women than the negotiated agreements produced by lawyers, whose sexist biases may be muted by the economic and personal biases of the clients who pay them.").

448. Although concerns for adequate representation also arise in judicial proceedings, the matter is far more pressing in mediation because the process occurs in private without the presence of attorneys or court reporters, and without access to appellate review. Carol S. Bruch, And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States, 2 INT'L J.L. & FAM. 106, 120 (1988).

449. See Bryan, supra note 447, at 449-515; Ellis, supra note 282, at 329-33.

450. Shaffer, supra note 258, at 178.

451. See id. at 178 & nn.81-83.

452. MARLOW & SAUBER, supra note 279, at 104. These authors also dispute the conclusions of researchers who have found that women's standard of living declines dramatically as a result of divorce. See id. at 118-19.

453. See Shaffer, supra note 258, at 179-80. The recent critiques of mediation offered by Professors Grillo and Bryan represent an important exception to this perspective. See Grillo, supra note 277; Bryan, supra note 447; see also Diane Neumann, How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce, 9 MEDIATION Q. 227 (Spring 1992) (discussing mediator responses to male-female power differences).
decision making), this advantage is likely to be counterbalanced by the wife's superior power in another area (such as childcare).\textsuperscript{454}

Considerable disagreement also exists within the mediation community about whether, and how, a mediator should attempt to remedy power imbalances.\textsuperscript{455} Some mediation theorists suggest that mediators can employ a variety of techniques to empower and support the less powerful party and to disempower the more powerful spouse.\textsuperscript{456} "These suggestions share the premise that the mediator can recognize power disparities when they occur and intervene to lessen their impact."\textsuperscript{457} Even a mediator who is willing to address power imbalances, however, may not be able to compensate for the important, but often subtle, disparities in power and sophistication that characterize many male-female interactions.\textsuperscript{458} Studies of conversations between men and women who know each other suggest that masculine control of male-female dialogues through such techniques as monopolization of speaking time and the use of interruptions is so commonplace that even a trained mediator may not perceive the power imbalances it portends.\textsuperscript{459} Moreover, any attempt by a mediator to correct a perceived power imbalance compromises the mediator's claim to be merely a facilitator of the couple's decision-making process and increases the likelihood that the mediator's own values or prejudices will influence the mediation outcome.

Another equality-based problem with mediation stems from the ideal of impartiality espoused by many mediators and from their claim to

\textsuperscript{454} See, e.g., John Haynes, Power Balancing, in DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 250, at 277.

\textsuperscript{455} Compare, e.g., MARLOW \& SAUBER, supra note 279, at 103-19 (cautioning that mediators should be extremely wary about intervening to correct perceived power imbalances) with John Forrester \& David Stitzel, Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts, NEGOTIATION J., July 1989, at 251, 256 (activist mediators must dispense with neutrality in order to balance information and participation). See generally Bryan, supra note 447, at 498-515 (discussing mediator reluctance and ineffectiveness in remediying power disparities).

\textsuperscript{456} Grillo, supra note 277, at 1592. For example, the mediator might provide pertinent information, forbid discussion of certain issues or advise a party who seems to be at an economic disadvantage to see a financial-counselor.

\textsuperscript{457} Grillo, supra note 277, at 1592.

\textsuperscript{458} See, e.g., HILARY M. LIPS, WOMEN, MEN AND THE PSYCHOLOGY OF POWER 100-01 (1981) (men engage in verbal dominance more frequently than women); Pamela M. Fishman, Interaction: The Work Women Do, in LANGUAGE, GENDER \& SOCIETY 89-101 (Barrie Thorne et al. eds., 1983); Anne K. McCarrick et al., Gender Differences in Competition and Dominance During Married-Couples Group Therapy, 44 SOC. PSYCH. Q. 164, 164-65 (1981) (in marital context, husbands dominate conversation time and interrupt their wives far more frequently than their wives interrupt them).

\textsuperscript{459} Bruch, supra note 448, at 120; see Bryan, supra note 447, at 463-65.
provide only “neutral” information and advice during the mediation process. This claim seems based on the belief that solutions exist in the divorce context that are neutral, rather than gendered in their concept and their impact. Feminist critiques of objectivity and impartiality cast doubt on this “neutrality” claim. Moreover, given the disparate economic and parenting circumstances faced by many divorcing men on the one hand, and many divorcing women on the other, such “gender-neutral” divorce solutions are likely to be extremely rare. In addition, at least some research suggests that men and women in our culture may have different moral orientations and different perspectives on interpersonal responsibility that may be highly relevant to the questions couples face at divorce. If this is true, then no solution may exist which is inherently “neutral” or acceptable to both parties, and the subjective proclivities of mediators, both individually and as a group, may determine the substantive outcomes of mediation.

An example of this phenomenon may be the strong link between mediation and joint custody. Many mediators and mediation...
advocates are also strong proponents of joint custody, which they tend to refer to as "shared parenting" after divorce. Indeed, "[m]any mediators state unabashedly that they attempt to steer their clients toward joint custody, regardless of what the clients want." Although mediation proponents often present joint custody as an idea whose merit is beyond dispute, the costs and benefits of this notion may be very different for women as opposed to men. This is particularly likely where, as is still the case in most two-parent families, the mother has been the children's primary caretaker during marriage. She may perceive joint custody as a threat and as a devaluation of her activities during marriage, while the less-involved father may perceive it as a victory.

The problem is exacerbated by the fact that mediation theory generally dissolves out of focusing on a couple's past behavior, thus,

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with nonresidential parent); Stephen K. Erickson & Marilyn S. McKnight Erickson, Dan and Linda: A Typical Divorce Mediation, MEDIATION Q., Fall 1988, at 3, 5 (describing typical first mediation session during which author-mediators recommend that separating couple purchase book advocating joint custody).

465. See, e.g., BIENENFELD, supra note 279, at 42-43 ("When either or both parents are seeking exclusive or sole custody (with visitation rights for the other parent), I introduce the alternative of joint custody. . . . I consider it both natural, and beneficial for everyone, when parents share rights and responsibilities for the children."); JOHN M. HAYNES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS 34 (1981) (expressing belief that "parents should be encouraged to share in joint legal custody"); Evarts & Goodwin, supra note 297, at 292 n.11 (predicting that "mediation is likely to be the precursor for a more widespread and successful use of the joint custody concept"); Kuhn, supra note 262, at 745 ("[M]ediation provides a procedural forum that encourages joint custody agreements."); Russell M. Coombs, Noncourt-Connected Mediation and Counseling in Child-Custody Disputes, 17 FAM. L. Q. 469, 479-80 (1984). A number of mediation statutes also link mediation to shared custody after divorce. For example, the purpose of custody mediation under California's mandatory mediation statute is "to develop an agreement assuring the child or children's close and continuing contact with both parents." CAL. CIV. CODE § 4607(a) (West Supp. 1992). Similarly, the Louisiana statute authorizing court-ordered mediation of custody and visitation disputes lists as one of its stated purposes "to develop an agreement assuring the child or children's close continuing contact with both parents after the marriage is dissolved." LA. REV. STAT. ANN. § 9:352 (West Supp. 1989).

466. Grillo, supra note 277, at 1594; see Bryan, supra note 447, at 491 ("Divorce mediators have a strong bias in favor of joint custody."). Some mediators also tell parents that their refusal to agree to joint custody may result in a recommendation or an award of custody to the other spouse as the "friendlier" parent. Grillo, supra note 277, at 1594-95 & n.237; see Fineman, supra note 135, at 751-52 (when choosing between parents in custody disputes, helping professionals prefer parent who most freely allows child access to the other parent)

467. See generally Fineman, supra note 135, at 765-70.

468. See, e.g., Emery & Jackson, supra note 463, at 6 (characterizing as a "ground rule" of mediation that parents focus on the future, not the past); Grillo, supra note 277, at 1562-64 (mediators typically preclude parties from discussing past behavior).
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a mediator is likely to characterize as irrelevant or uncooperative a mother’s argument that she deserves sole custody because of her primary parenting role during marriage. This negative characterization not only weakens the mother’s position during mediation, but it may also damage her chances of gaining custody at trial, should the mediation fail.469 Similarly, a mediator may view as inappropriate or obstructionist a mother’s concern about a previously uninvolved father’s parenting skills.470 At best, a mediator is likely to respond to the mother’s concern by encouraging the parties to develop custody “solutions” that will enable the father to improve his parenting skills, rather than seeing his lack of skills and prior involvement as reasons to disfavor his custody claims.

It is also of concern, from a gender equality perspective, that mediation is touted most enthusiastically as a substitute for adjudication in precisely those areas—custody and visitation—where the prevailing legal standards are perceived to favor women.471 While virtually all court-connected mediation programs address custody issues, only half of such programs mediate child support issues, despite both the overwhelming importance of support to the well-being of children and the obvious connection between custody arrangements and child support.472 Even fewer mediation programs address the other financial aspects of

469. A number of states have enacted so-called “friendly parent” provisions which direct the court, in adjudicating custody claims, to give preference to the parent who is more likely to allow the child frequent and continuing contact with the other parent. See, e.g., CAL. CIV. CODE § 4600(b)(1) (West 1986) (court should consider, in awarding custody, “which parent is likely to allow the child or children frequent and continuing contact with the noncustodial parent”); IOWA CODE ANN. § 598.41 (1) (1985) (“court shall consider the denial by one parent of the child’s opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement”); MICH. STAT. ANN. § 25.312(6a) (Callaghan 1981); MONT. CODE ANN. § 40-4-223, 224 (1986); PA. STAT. ANN. tit. 23, § 5303(A) (1991). Under these provisions, one parent’s opposition to joint custody during mediation could be used to justify a sole custody award to the other parent. This danger is particularly acute in jurisdictions where mediators are permitted to make recommendations to the court. See Grillo, supra note 277, at 1598. For a critique of such “friendly parent” provisions, see Jana B. Singer & William L. Reynolds, A Dissent On Joint Custody, 47 MD. L. REV. 497, 517 (1988); Joanne Shulman & Valerie Pitt, Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children, 12 GOLDEN GATE L. REV. 539, 554-55 (1982).

470. See Bruch, supra note 448, at 119. For examples and discussion of this phenomenon, see Grillo, supra note 277, at 1562-64, 1568-69, 1594-97.


472. See Divorce Mediation in the States, supra note 253, at 22-23.
divorce (property division and spousal support) that are of particular concern to divorcing women. If mediation is such a desirable alternative, surely feminists are entitled to ask why it has largely failed to address those issues where women, rather than men, have the most reason to be dissatisfied with the results of our current adjudicative system.

Research on the reasons that divorcing men and women choose to mediate also raises concerns about the gendered impact of mediation. A study conducted by several leading researchers who are generally supportive of mediation found that women who prefer mediation to adjudication do so because they view it as less remote and impersonal than the court system, while men choose to mediate largely because they believe it will improve their chances of winning. There is also some evidence that fathers' rights groups favor mediation because they view mediators as more malleable and more sympathetic to their interests than either judges or attorneys.

Preliminary data also suggests that men may benefit more from mediation than women. A recent study comparing satisfaction levels among parents who mediated and litigated their custody disputes revealed that men who mediated were significantly more satisfied and significantly more likely to feel their rights had been protected than were men who participated in adversary proceedings. By contrast, women who

473. Many mediators and mediation theorists appear to have strong reservations about the desirability of post-divorce income sharing. They view the achievement of economic independence on the part of both spouses as an important substantive goal. See Linda K. Girdner, How People Process Disputes, in DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 250, at 45, 55; Erickson & Erickson, supra note 464, at 9; see also Grillo, supra note 277, at 1569 ("All too often mediators stress the need for women to become economically independent without taking into account the very real dollar differences between the male and female experience in the labor market."). But cf. Jessica Pearson, The Equity of Mediated Divorce Agreements, 9 MEDIATION Q. 179, 195-96 (Winter 1991) (reporting that neither mediation nor adjudicative decision making adequately protects divorcing women from prolonged and severe financial dislocation, and suggesting that post-divorce income disparities be addressed by fundamental societal and legal change).


475. See Fineman, supra note 135, at 758.

476. Emery & Jackson, supra note 463, at 12. But cf. Joan B. Kelly, Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes, MEDIATION Q., Summer 1989, at 71, 85-86 (study comparing adversarial divorce procedures with comprehensive private mediation found no gender differences in satisfaction levels; discrepancy may reflect private vs. court-connected setting and comprehensive vs. custody-focused nature of mediation).
mediated were less likely than women who resolved their disputes through adversary channels to feel that their rights had been protected and that they had achieved what they wanted.\textsuperscript{477} Women who mediated also reported higher levels of post-settlement depression than women who participated in adversary procedures.\textsuperscript{478}

Many women may also experience mediation differently than men. A recent law review article observes that “[w]omen who have been through mandatory mediation often describe it as an experience of sexual domination, comparing mandatory mediation to rape.”\textsuperscript{479} In explaining this perception, the author notes that because the stakes in court-ordered custody mediation are extremely high, and because “mandatory mediation is a forced engagement, ordinarily without attorneys or even friends, it may amount to a form of ‘psychic breaking and entering’ or, put another way, psychic rape.”\textsuperscript{480} Moreover, although mediation is purportedly designed in part to help participants avoid the trauma associated with judicial procedures, the face-to-face nature of mediation, combined with its apparent informality and uncertainty about the governing rules, may render the process particularly traumatic for women who have not made a voluntary and informed decision to participate.\textsuperscript{481}

Empirical data provide support for these perceptions. An analysis of two large mediation studies revealed that, compared to their male counterparts, women who participated in mediation were more likely to report that their ex-spouses pressured them into an agreement, that they never really felt comfortable expressing their feelings, that mediation was tense and unpleasant, that they felt angry during many of the mediation sessions and that the mediators were very directive and essentially dictated the terms of the agreement.\textsuperscript{482} Men, by contrast, were more apt than

\textsuperscript{477} Emery & Jackson, supra note 463, at 12-13. The authors explain this result is due to a temporary sense of vindication felt by women after winning in court, and hypothesize that the difference in rates of depression will disappear at longitudinal followup. Id. at 16. For a critique of this explanation, see Grillo, supra note 277, at 1578-79 (“A more accurate analysis may well be that all women are angry at divorce, but that the mediation process may require that anger to be suppressed (or at least not to be attended to) or to be directed against themselves, resulting in increased evidence of clinical depression.”).

\textsuperscript{478} Emery & Jackson, supra note 463, at 16.

\textsuperscript{479} Grillo, supra note 277, at 1605 & n.267. Grillo acknowledges that many women experience the adversary process in a similar way.

\textsuperscript{480} Id. at 1606 (quoting David L. Singer et al., Boundary Management in Psychological Work with Groups, in EXPLORING INDIVIDUAL AND ORGANIZATIONAL BOUNDARIES: A TAVISTOCK OPEN SYSTEMS APPROACH 21, 32 (W. Gordon Lawrence ed., 1979)).

\textsuperscript{481} Grillo, supra note 277, at 1606-07.

\textsuperscript{482} Pearson & Thoennes, Divorce Mediation, supra note 284, at 469. For an
women to report that they felt comfortable and relaxed during mediation. Men were more likely to report as disadvantages that they waited too long to get into mediation and that they spent too much time in mediation discussing the past.

Finally, at least one recent study suggests that mediation of divorce and separation issues may exacerbate wife abuse. Among women who reported being abused during their marriages, researchers found that those who participated in mediation were more likely to report post-separation abuse by their ex-partners than were women who relied on adversary procedures. Both the privateness of the mediation process and the centrality to mediation of the concept of self-help may help to explain this finding. The possibility of a correlation between divorce mediation and the continuation of marital violence has serious policy implications: studies indicate that violence and abuse are part of the history of a significant percentage of divorcing and separating women. Moreover, even if mediation rules permit (or require) abused parties to “opt out” of court-connected mediation, an abused spouse may have difficulty showing that she is entitled to such an exemption; to be relieved from participating in mediation, a woman must often come forward with more than her word.

excellent discussion of the ways in which the mediation process suppresses the expression of anger and the reasons why that suppression may be especially harmful to women experiencing divorce, see Grillo, supra note 277, at 1572-81. Grillo argues that the delegitimation of anger in divorce mediation may be especially damaging to Black women. Id. at 1579-81.

483. Pearson & Thoennes, Divorce Mediation, supra note 284, at 469.
484. Id.
485. See Ellis, supra note 282, at 328 (discussing study results). Other scholars have argued that mediation of wife abuse cases is likely to increase the risk of further abuse. See, e.g., Barbara Hart, Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation, 7 MEDIATION Q. 317 (Summer 1990); Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 HARV. WOMEN'S L.J. 57 (1984); Dianna R. Stallone, Decriminalization of Violence in the Home: Mediation in Wife Battering Cases, 2 LAW & INEQ. J. 493 (1984).
486. Ellis, supra note 282, at 328.
487. See id. at 336.
488. See Christine A. Littleton, Women's Experience and The Problem Of Transition: Perspectives on Male Battering of Women, 1989 U. CHI. LEGAL F. 23, 27-28 (while exact figures are difficult to obtain, 50% figure is one many experts subscribe to); Shattuck, supra note 412, at 191, 206 (domestic violence had occurred in 32% of families in court mediation sample); Linda K. Girdner, Custody Mediation in the United States: Empowerment or Social Control?, 3 CANADIAN J. WOMEN & L. 134, 138 n.19 (1988) (Canadian study shows physical violence given as reason for marital separation by 50-75% of women).
Thus, both empirical research and feminist analysis suggest that privatizing the procedures for resolving divorce and custody disputes may exacerbate, rather than ameliorate, existing gender-based power inequalities within the family. Moreover, the dangers that private dispute resolution poses for women may apply as well to the privatization of the substantive legal doctrines that govern the dissolution of marriage. The widespread availability of unilateral divorce, coupled with the notion that the state should not impose upon divorcing parties any continuing support responsibilities, obviously has different consequences, on average, for divorcing women than for men. This divergence may be particularly striking with respect to parents, since divorcing mothers are much more likely than their partners to have reduced their earning capacity in order to care for the couple’s children.490

More generally, concerns about gender equality suggest that we should be considerably more wary about the wisdom of private ordering when it comes to the dissolution of family relationships, than when it comes to their creation. This is true, in part, because membership and participation in a family often creates or exacerbates inequality. Parenthood, for example, necessarily entails a relationship of dependence and inequality between a child on the one hand, and an adult or adults, on the other. The process of parenting may also create or enhance economic and other inequalities between adult family members, particularly mothers and fathers.491 In light of these disparities, legal rules that grant unfettered discretion to private individuals to structure the process of marital dissolution or that place dissolution-related disputes outside the “shadow of the law” may end up empowering economically stronger family members at the cost of economically weaker ones in much the same way that the legal system’s traditional refusal to intervene in the affairs of an ongoing marriage reinforced the power of husbands over wives.


Another disadvantage of both private norm creation and private dispute resolution in family law is their potential to compromise the interests of third parties, particularly children. An increasing number of scholars have emphasized the detrimental effects of the private ordering of divorce on children.\textsuperscript{492} Substantial evidence suggests that the common divorce bargaining practice of a parent trading off financial claims for custody assurances has contributed both to inadequate child support agreements and to the impoverishment of children and their custodial parents after divorce.\textsuperscript{493} The broader the scope of private divorce bargaining, the greater the potential for such damaging trade-offs. The broad "best interest of the child" standard for determining custody, for example, encourages divorcing parents (and their lawyers) to bargain in ways that are particularly detrimental to children's financial interests.\textsuperscript{494} Similarly, the absence (until recently) of precise guidelines for determining child support contributed to the inadequacy of many privately negotiated child support arrangements.\textsuperscript{495}

Even the shift from public to private control of the decision to dissolve a marriage may be detrimental to children's interests. Recent studies suggest that the psychological effects of divorce on children are both more serious and more enduring than previously believed.\textsuperscript{496} At
a minimum, divorce involves significant stress and upheaval for children. “The adjustment of most children is disrupted substantially for a year or two after divorce; for some, the disruption continues to exert a harmful influence for many years.”497 Moreover, except in cases of extreme interparental conflict, little evidence supports the comforting assumption that divorce is better for children than a marriage in which one or both parents are unhappy.498 For many children, apparently, even a marriage in which parents are less than satisfied is better than a divorce.499

The private transfer of parental rights also threatens children’s interests. Advocates of independent adoption trumpet the ability of privately arranged child transfers to avoid many of the restrictions and bureaucratic hurdles imposed by adoption agencies. But jettisoning these safeguards may have disastrous consequences for children. For example, the absence of significant public controls on the private adoption process in New York may well have contributed to the 1987 death of nine-year-old Lisa Steinberg; Lisa died at the hands of her “adoptive father”—an attorney who retained custody of the child after agreeing to arrange a private adoption.500

Critics of surrogate-parenting contracts also point to the potentially damaging effects of surrogacy on the children who are conceived as a result of these contracts. Dean Judith Areen, for example, argues that surrogacy arrangements increase the risk that both biological parents will consider it acceptable to abandon less-than-perfect infants after they are born.501 The surrogate mother may consider it acceptable because that

497. Scott, supra note 492, at 29-30.
498. Id. at 37, 32-33.
499. This conclusion does not automatically lead to the endorsement of greater restrictions on divorce. Promoting the welfare of children is only one goal—albeit a very important one—of a just family law regime.
501. Areen, supra note 228, at 1746-48. There have been at least two cases in which parties to a surrogacy arrangement have initially disclaimed responsibility for a child born with medical problems. In 1984, Christopher Ray Stiver was born suffering from a strep infection and microcephaly, a congenital disorder usually associated with mental retardation. The contracting father refused to consent to medical treatment for the child and disclaimed parental responsibility. The results of paternity tests, revealed to the parties on the Phil Donahue television show, indicated that the husband of the surrogate mother was the genetic father of the child. Id. at 1747 & n.28. A 1986 case involved a woman who contracted to become a surrogate mother for her sister. The surrogate had a history of drug abuse that was not known to her family. At birth, the child tested positive for the HIV antibody. Both the surrogate mother and the contracting couple refused custody of the child. Id. at 1747 & n.29.
is precisely what the surrogacy contract encourages her to do; the father (and his spouse, if any) may do so because, as a purchaser, he is likely to feel that he has the right to reject "damaged goods." Critics have also raised concerns about the effects of both surrogacy and free market adoption on other children touched by the process, for example, the siblings or half-siblings of the child who is transferred or traded away.

Children's interests may also be threatened by the shift from public to private ordering of the process for resolving family disputes. Children are, quite literally, unrepresented third parties in divorce mediation, and none of the parties who do participate are directly responsible for safeguarding children's interests. Although some mediators view their role as encompassing some degree of child advocacy, others view such advocacy as both inconsistent with the neutrality required of a mediator and contrary to mediation's commitment to parental autonomy. More than one quarter of the mediators surveyed in a recent study, for example, indicated they would accept a custody agreement that cut the children off from their favorite grandparents even though the children were unhappy with the arrangement and the agreement had been arrived at through a

502. Id. at 1747-48.
503. See Jane M. Cohen, Posnerism, Pluralism, Pessimism, 67 B.U. L. Rev. 105 (1987). Even the most avid proponents of the private transfer of parental rights acknowledge the potential for third party harm:

The ordinary presumption of free-enterprise economics is no stronger than that free exchange will maximize the satisfaction of the people trading. . . . . There is no presumption that the satisfactions of the thing traded, in most instances a meaningless concept, are also maximized. If we treat the child as a member of the community whose aggregate welfare we are interested in maximizing, there is no justification for ignoring how the child's satisfactions may be affected by alternate methods of adoption.

Landes & Posner, supra note 197, at 342.

504. Compare, e.g., DONALD T. SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES 38 (1983) (mediator must be advocate for children) and Bishop, supra note 274, at 413 (mediator has a duty to promote children's best interests in the mediation process) with MARLOW & SAUBER, supra note 279, at 80-87 (family autonomy principles require that mediators not make judgments about children's needs or attempt to determine children's best interests) and Emery & Jackson, supra note 463, at 8 (including children's input in mediation is contrary to mediation's rationale of parental self-determination). Both the ABA Standards of Practice for Family Mediators and the Model Standards of Practice for Family and Divorce Mediation issued by the Association of Family and Conciliation Courts suggest that the mediator has a duty to ensure that participants consider the best interest of their children. See Bishop, supra note 274, at 417, 423. The ABA Standards also provide that "if the mediator believes that any proposed agreement of the parents does not protect the best interests of the children, the mediator has a duty to inform them of this belief and its basis." Id. at 417.
"bald-faced trade-off of access to the children for support payments."\textsuperscript{505} Most of these mediators rationalized their decision on the basis of the "family's right to autonomous judgment."\textsuperscript{506}

There is also considerable debate in the mediation literature about whether and how mediators should involve children in mediation.\textsuperscript{507} A 1983 survey of mediators found that fewer than fifty percent of the respondents met with children in their average mediation.\textsuperscript{508} A more recent survey of California mediators indicated that while most mediators believed that children above age four should have some input in the mediation process, fewer than twenty-five percent always sought the input of school-aged children and fewer than thirty percent always sought the input of adolescents.\textsuperscript{509} Moreover, while mediation has been touted as superior to adversary procedures for promoting the welfare of children affected by divorce, there is little credible evidence that it has fulfilled this promise.\textsuperscript{510}

One possibility for ameliorating the effects of privatization on children would be to consider a two-tiered family law regime. One tier, applicable to families with children, would allow only a limited degree of private ordering; the other tier, applicable to families without children and to family decisions not directly affecting children, would accord private ordering considerably broader scope. Under such a two-tiered regime, the decision of two (or more) adults to marry or to enter into a marriage-like intimate relationship would be accorded considerable deference; the government would have only limited authority to distinguish among such consensual intimate relationships in distributing public benefits and burdens, including employment-related benefits.


\textsuperscript{506} Paquin, supra note 505.

\textsuperscript{507} Id. at 72. See Emery & Jackson, supra note 463, at 8 (explaining why author-mediators “almost never include children in mediation”).

\textsuperscript{508} Pearson et al., supra note 270, at 15, 17.

\textsuperscript{509} Paquin, supra note 505, at 74-75.

\textsuperscript{510} See Grillo, supra note 277, at 1608-09 n.293. Research shows that children whose parents reach a settlement in mediation are no better adjusted following the divorce than children whose parents did not use mediation. Id. at 1608-09. See Kenneth Kressel, The Process of Divorce: How Professionals and Couples Negotiate Settlements 285-86 (1985). But cf. Barbara J. Bautz & Rose M. Hill, Mediating the Breakup: Do Children Win? 8 MEDIATION Q. 199 (Spring 1991) (asserting superiority of mediation for children, base on evidence that couples who mediated were more likely to choose joint custody, less likely to miss child support payments and more satisfied with their divorce agreement than couples who relied on adversary procedures).
Decisions to dissolve intimate relationships, however, might be subject to greater public scrutiny. In particular, both the procedures for obtaining a divorce and the deference accorded to private resolution of divorce-related issues would vary according to presence or absence of minor children. Several scholars have endorsed the notion of such a two-tiered marriage and divorce regime. Ten years ago, Judith Younger proposed the creation of a special legal status for married couples with minor children. Under Younger's proposal, couples with minor children would have to establish, in addition to the usual grounds for divorce, "that continuing the marriage would cause either or both spouses exceptional hardship and would harm their minor children more than the divorce." Moreover, in the event of a divorce, the court would have the power to order a continuation of the ex-spouse's economic partnership in order to safeguard the children's interests.

More recently, Elizabeth Scott has argued that both the long-term personal goals of most spouses and the broader social objective of protecting children support a scheme of mandatory legal rules that would make the divorce process more cumbersome for divorces involving minor children. Specifically, Scott recommends that parents of minor children be permitted to divorce only after a two-year separation period. She also advocates enhanced parental support obligations and property distribution schemes that are more protective of children's interests than our current property division rules. Counseling, mediation and mental health evaluation of the children might also be required before parents would be permitted to divorce. Along these same lines, Mary Ann Glendon has recently proposed that a "children first" principle govern all divorces where minor children are involved.

512. Id. at 90.
513. Id. at 91.
514. Scott, supra note 492, at 87-91.
515. Id. at 91.
516. Id.
517. Id.
518. GLENDON, supra note 492, at 94-103. A recent proposal by Britain's Law Commission endorses a similar "children first" approach. The Commission recommended that parents contemplating divorce "notify the courts of their intention and then spend at least nine months resolving crucial details of the divorce. Their first obligation would be to decide the future of their children before settling questions of property and maintenance. Only then could couples return to court for a divorce." Marilyn Gardner, Putting Children First—the New English Precedent, CHRISTIAN SCI. MONITOR, Mar. 30, 1990, at 14; see ELAINE C. KAMARCK & WILLIAM A. GALSTON, PUTING CHILDREN
Although no American jurisdiction currently applies different standards for granting a divorce where minor children are involved, other aspects of our current divorce system support the notion of at least a modified two-tiered family law regime. For example, although the law today generally accords spouses great latitude in structuring their post-divorce financial affairs, this latitude does not extend to agreements regarding child support or child custody. In theory, at least, parental agreements regarding the custody and support of children are subject to judicial scrutiny under a best-interest standard. Moreover, the recent adoption by all states of presumptive child support guidelines, as well as recent state and federal efforts to improve child support enforcement, appears to indicate a renewed public commitment to ensuring the financial well-being of children affected by parental separation. The adoption of presumptive child support guidelines also reduces considerably the permissible scope of private bargaining regarding the financial incidents of divorce.

Tying the acceptable scope of private ordering to the presence or absence of minor children also weakens the case for private transfers of parental rights, in both the adoption and surrogacy contexts. Since decisions about parental status necessarily implicate children's interests, such a two-tiered family law regime would accord little deference to private attempts to effectuate the transfer of parental rights and responsibilities. In the adoption context, this might mean, at a minimum, an increased public role in private-placement adoption, through such requirements as a preplacement home study or a prequalification procedure for potential adoptive parents. In the surrogacy context,
concerns about the effect of surrogacy on children, in conjunction with its potential to exploit women, suggest that the law should discourage contract surrogacy by refusing to enforce private surrogacy agreements and by resolving any resulting custody disputes within the framework of family law.\footnote{522}

Of course, there is no guarantee that a system of publicly imposed constraints on private transactions involving children will protect children any better than unrestricted private ordering. Many family law rules ostensibly adopted for child welfare purposes have, in fact, been motivated by less laudatory goals, or have proven misguided or counterproductive.\footnote{523} But insisting that legal rules affecting children include a significant public component at least allows us to focus directly and collectively on children's interests, rather than relying exclusively on disputing adults or on the invisible hand of the market to protect children's welfare.

3. THE EFFECT OF PRIVATIZATION ON FAMILY LAW REFORM

Another danger of privatization is its potential to dampen law reform efforts and to impede the growth of family law. This may be particularly disadvantageous to women, since feminists and other women's advocates have recently refocused their efforts on family law reform. Part of the impetus for this redoubling of efforts is the growing realization that our current, no-fault divorce regime has had devastating economic consequences for divorcing women and their children.\footnote{524} The initial enthusiasm for private ordering that accompanied the no-fault divorce revolution may well have diverted attention away from the economic consequences of divorce and impeded efforts to reform the legal doctrines that governed post-divorce financial allocations.\footnote{525} In addition, the perceived desirability of a "clean break" between divorcing spouses who were presumed both to value and to deserve post-divorce independence undermined efforts to insist publicly on substantial sharing of financial resources following marital dissolution.\footnote{526}

Privatizing the dispute

\footnote{522. See Areen, supra note 248, at 1752-53.}
\footnote{524. See sources cited supra note 2.}
\footnote{526. Cf. Kay, supra note 525, at 313-14 (emphasis of no-fault divorce on a clean financial break between spouses is inconsistent with treating graduate degrees as marital
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resolution process through divorce and custody mediation is likely further to stifle law reform efforts. Unlike adjudication, which develops and applies public norms, mediation does not result in the development or the application of public standards.\(^5\) There is, therefore, little ongoing public evaluation of the norms applied or the outcomes reached during divorce mediation. Nor are judges encouraged to review mediated divorce agreements, either for fairness or for compliance with prevailing legal standards.\(^5\) Indeed, statutes and rules governing mediation in a number of jurisdictions actively discourage judges from independently scrutinizing mediated agreements.\(^5\) Moreover, mediation, unlike adjudication, is conducted in private. If records are maintained, they are likely to be confidential.\(^5\) The closed and confidential nature of mediation insulates the process from public scrutiny and impedes external review and challenge.\(^5\)

An emphasis on private, contract-based solutions to family law problems may also truncate our ability to imagine alternative forms of public ordering. A passage in Marjorie Shultz's influential article advocating contractual ordering of marriage illustrates this danger.\(^5\) Shultz poses the following hypothetical: Suppose that a woman contemplating marriage agrees, in principle, to sex with her husband on demand; should such an agreement prevent her from later filing a rape

\(^{527}\) As one mediation proponent put it, in mediation "the family's own standards, rather than the judge's, are used to make the decision." Deis, supra note 263, at 163. See Evarts & Goodwin, supra note 297, at 527 ("Possessed of no precedential power and bound by no precedential history, mediation creates no opportunities for redress for the larger group.").


\(^{529}\) Maine's mediation statute, for example, provides that where the parents have agreed to an award of shared parental rights and responsibilities, the court shall make that award unless there is substantial evidence that it should not be ordered. McCrory, supra note 528, at 153. Court rules for mediation programs in several Oregon and Arizona counties similarly provide that, in order to preserve and promote the integrity of mediation, the court will endeavor to include in its order all reasonable agreements reached by the parties. Id.

\(^{530}\) See Lerman, supra note 485, at 90.

\(^{531}\) See Shaffer, supra note 258, at 167; Tomain & Lutz, supra note 278, at 7.

\(^{532}\) Marjorie M. Shultz, Contractual Ordering of Marriage: A New Model For State Policy, 70 CAL. L. REV. 204, 279 (1982).
claim against her husband? In her response, Shultz acknowledges that a strong argument can be made that private contract ought not to override the general criminal law; she asserts, however, that "the idea of enforceable private agreements concerning violent sexual conduct is less offensive than a state declaration that violent sexual conduct is automatically acceptable in marriage." This ranking of undesirables may well be correct, although I, for one, am not so sure. More important, however, is that Shultz's response appears to present publicly condoned and privately consented to marital violence as the only relevant options; it therefore begs the question of whether public solutions exist that are superior to either publicly sanctioned or privately authorized violence against women.

Privatization of family law may also impede law reform efforts by individuating women's grievances. This may be particularly true of mediation and other informal dispute-resolution mechanisms. By emphasizing the uniqueness of each divorcing couple's situation, mediation may encourage divorcing women who end up significantly poorer than their ex-husbands to believe that "this only happens to me" and may discourage them from looking outward for structural explanations for their plight. Similarly, the mediator's effort to validate each party's interests and to have each party understand (and possibly accept) the other's behavior may encourage divorcing women to blame themselves for whatever financial and parental disadvantages they suffer as a result of a mediated divorce. As the inheritors of a movement grounded on the insistence that "the personal is political," feminists should be particularly wary of legal developments that encourage this sort of individuation and depoliticalization of women's grievances. Privatization may also stymie efforts to reform family law doctrine by removing from judicial consideration cases and issues crucial for the development of the parameters of the law. This may be particularly true of mediation, which privatizes the method by which we resolve a

533. Id.
534. Id. at 280.
535. See PATEMAN, supra note 423, at 185.
536. See Richard L. Abel, The Contradictions of Informal Justice, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 291 (Richard L. Abel ed., 1982); Grillo, supra note 277, at 1561-62 (family systems perspective held by most mediators obscures issues of unequal social power and sex role socialization and isolates family relationships from outside social attitudes and forces).
particular category of legal disputes. But it is also likely to be true of
private ordering more generally, since entrusting entirely to private parties
the authority to create and enforce norms of family behavior reduces both
the opportunity and the perceived need for continuing public scrutiny of
those norms.

In a related context, Owen Fiss has argued that advocates of
alternative dispute resolution often err in reducing the social function of
the lawsuit to one of resolving private disputes. Those who
unqualifiedly support the privatization of family law may commit a
similar error by conceptualizing family law issues as affecting only those
individuals immediately involved in a family dispute. In fact, family law
has historically been one of the most powerful ways that we, as a society,
have defined our values and have articulated our aspirations for personal
relationships, particularly relationships between adults and children and
between women and men. Of course, not all of these historical
values are worth retaining. The legal rule that the husband was entitled
to choose the family domicile, for example, was more than a way of
resolving disputes relating to the marital residence; it was also one of
many legal building blocks that defined the "proper" (that is, hierarchical)
relationship between husbands and wives and, by analogy, between men
and women generally.

But the legal doctrines that govern family relations can send more
positive messages as well. For example, the common law doctrine of
necessaries and the husband's more general duty to support his wife and
children may have been one (albeit flawed) way of expressing society's
view that those with access to material wealth have obligations to share

Adjudication as a Private Good, 8 J. LEGAL STUD. 235 (1979) (private methods of dispute
resolution systematically underproduce precedents).

539. See, e.g., Czapanskiy, Volunteers and Draftees: The Struggle for Parental
between unmarried parents and their children reflect society's view of appropriate male
and female parenting); Teitlebaum & DuPaix, supra note 287, at 1116 ("As a social
matter, [divorce] proceedings define, at least initially, crucially important relationships
between parents and their children."); Reva Siegel, Reasoning from the Body: A Historical
Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV.
261 (1992) (current and former laws restricting access to abortion designed to ensure
women's performance of marital and maternal obligations). While there is no uniform
agreement that law is an effective tool of social engineering, there is a strong argument
that both legislation and judicial decisions influence societal behavior and attitudes.
Nanette K. Laughrey, Uniform Marital Property Act: A Renewed Commitment to the
American Family, 65 NEB. L. REV. 120, 141 (1986); see A. MYRDAL, NATION AND
FAMILY vi (1968) ("No government, however firm might be its wish, can avoid having
policies that profoundly influence family relationships. . . ").
that wealth with financially more vulnerable family members. Similarly, a requirement that spousal support (or other forms of income sharing) be used to compensate divorcing spouses who have reduced their economic opportunities in order to assume primary domestic responsibilities indicates that we value such domestic work and want it to continue. More generally, the law's advocacy of partnership and sharing principles at divorce, through such devices as the equitable distribution of marital property, sends a powerful signal about what we, as a society, consider desirable behavior in marriage.

Privatizing these matters implies, at best, that we are neutral about what sort of behavior goes on within families. At worst, when combined with the self-maximizing ideology of law and economics—an ideology that often accompanies private ordering—it privileges self-interested behavior over other forms of family interaction.

4. PRIVATIZATION AND THE PUBLIC/PRIVATE SPLIT

A related danger of privatization in family law is that it will reinforce the dichotomy our legal system has traditionally drawn between the private, domestic sphere, and the public sphere of politics and the market. One of the most salient features of this dichotomy is the view that family issues reside "naturally" in the private realm and, for that reason, are not appropriate subjects of state concern. Since the "naturally" private family realm encompasses many of the issues that centrally affect women's lives, the effect of the traditional public/private split has been to exclude from the public agenda many of women's most pressing concerns. The trend toward private ordering of family

540. See, e.g., Jane Rutheford, Duty in Divorce: Shared Income as a Path to Equality, 58 Fordham L. Rev. 539; Singer, supra note 2; Goldfarb, supra note 490.


542. Feminist scholars, particularly Frances Olsen, have identified two versions of the public/private split. One version separates government from the market. The other version separates the family from all forms of public life. Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983); see Minow, supra note 359, at 281 & n.52. In this Article, I am concerned with the version that separates the family from both politics and the market.

543. See Susan M. Okin, Justice, Gender, and the Family (1989) (arguing that both classical and modern political theory has largely ignored questions of justice within the family).

544. For example, the traditional view of the family as a private enclave insulated from public scrutiny has helped to obscure the multiple links between women's economic and political inequality and their caretaking roles within the family. See generally, Okin, supra note 543, at 8-10; Hochschild, supra note 491, at 249-56.
issues is likely to perpetuate this exclusion. For example, if the impoverishment of divorcing women is viewed primarily as the (unfortunate) result of private choices, made in a "naturally" private realm, then it may also seem natural for the government to ignore the problem or to characterize it as outside the scope of public responsibility. Similarly, if women's relinquishment of parental rights through contract surrogacy and free market adoption are seen as essentially matters of private choice, then policy makers are less likely to focus on the publicly-created and maintained conditions that lead women to "choose" these reproductive options.

Moreover, characterizing family issues as matters to be resolved by private individuals in an isolated private realm reinforces the view that the public has little interest in, and little reason to value, the caregiving and homemaking work that goes on within families. Since women have traditionally performed the bulk of this work—and, to a large extent, continue to do so—the devaluation of the work that goes on within families is particularly disadvantageous to women. Moreover, the devaluation of domestic work contributes to the marginalization of the behaviors and attitudes associated with that work, and to the conviction that these so-called feminine attitudes are incompatible with success in the public realms of politics and the market.

The notion of a natural demarcation between legitimate public issues and private domestic concerns—which the privatization of family law reinforces—also isolates the family from the workplace and obscures the connections between family and work. As a result, work-family conflicts tend to be characterized as private matters, and the inability to integrate work and family responsibilities is viewed as an individual

545. See Shaffer, supra note 258, at 166-67 ("Removing divorce from the public realm amounts to a 'reprivatization' of the family, allowing traditional patterns of inequality to flourish.").

546. See Dowd, supra note 426, at 481 & n.273.

547. See Barbara K. Rothman, The Meanings of Choice in Reproductive Technology, in TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD 23 (Rita Arditti et al. eds., 1984) (discussing the ways in which society structures reproductive choices); Cohen, supra note 503, at 172-73 (expressing concern that the endorsement of market structures to govern adoption will decrease the likelihood that public policy will respond to the problems of poor women who are the potential producers of babies).

548. Cf. Areen, supra note 423, at 1072-78 (contrasting the "justice" and "care" perspectives and suggesting that the care perspective be extended beyond the family into the public sphere).

failure, rather than as a structural or a societal problem.\textsuperscript{550} This view masks the fact that the American workplace is designed by and for workers with no significant family responsibilities.\textsuperscript{551} Caring for young children (and other dependent family members) is assumed to be the task of someone other than the full-time worker and that someone is usually female.\textsuperscript{552} The assumption that childcare and other family responsibilities are incompatible with "real" (that is, paid) work hurts both women and men. It hurts women by limiting their employment options and by disadvantaging them in the paid work force; it hurts men by characterizing fatherhood in purely economic terms and by discouraging men from assuming more active parenting and caregiving roles.\textsuperscript{553}

Even the structure of our judicial system reflects the notion that family issues and family disputes are not worthy of sustained public attention. The argument that divorce and custody issues are particularly well suited for mediation reflects, in part, a sense that our judicial system should be reserved for matters more important than domestic conflicts.\textsuperscript{554} Despite the fact that over half of all civil actions filed in the nation's trial courts are divorce cases,\textsuperscript{555} most commentators agree

\textsuperscript{550} Id. at 99.
\textsuperscript{551} See Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 822 (1989); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1221 (1989); Dowd, supra note 426, at 446.
\textsuperscript{552} Abrams, supra note 551, at 1221.
\textsuperscript{553} See Dowd, supra note 549, at 93, 113; Dowd, supra note 426, at 451-56.
\textsuperscript{554} The so-called "domestic relations" exception to federal diversity jurisdiction reflects a similar reluctance on the part of federal judges to adjudicate disputes concerning family matters. See, e.g., Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980) (reversing trial court's application of domestic relations exception to malicious prosecution suit and concluding that "[s]o long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart"); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (declining, under domestic relations exception, to entertain suit by law firm to recover fees earned in divorce litigation and expressing doubt "that the Supreme Court today would demand that federal judges waste their time exploring a thicket of state decisional law in a case such as this"); Thrower v. Cox, 425 F. Supp. 570, 573 (D.S.C. 1976) ("The field of domestic relations is so vexatious, time-consuming and specialized that virtually every state in the Union has established a separate system of family courts to prevent their own trial courts from being overburdened. As it has done consistently in the past, the federal court system should allow them that dubious honor exclusively."). See generally Barbara F. Wand, A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction, 30 Vill. L. Rev. 307, 385-86 (1985) (discussing judicial distaste for domestic relations disputes). The Supreme Court recently reaffirmed the existence of the domestic relations exception, as it applies to divorce and custody disputes. Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992).
\textsuperscript{555} Oldham, supra note 146, at 787.
that current court procedures are ill-suited for dealing with divorce and family disputes. While mediation proponents view these judicial shortcomings as persuasive justification for removing domestic cases from the judicial system, an equally logical solution would be to reform the judicial system itself so that it is more responsive to the family-oriented cases that make up the bulk of its work.

Indeed, a compelling argument can be made that the allocation of judicial and other legal resources to the resolution of divorce-related disputes is a particularly appropriate distributive choice. For many—if not most—disputants, divorce and its incidents are the only occasion on which they will come into contact with the law in its formal sense. Moreover, this contact is for most disputants an extremely important matter, with significant financial, emotional and symbolic consequences. “[D]ecisions about how resources are allocated at the time of divorce also have a significant impact on society; in particular, they profoundly affect the economic opportunities and material well-being of both this generation and the next.”

The practical consequences of a legal ideology that isolates the family from the public sphere and that devalues the work that goes on within families are also obvious at the national level. The United States is the only developed Western nation without an explicit national family policy. Perhaps as a result, we are virtually the only developed country without state-mandated maternity or parenting leave, or meaningful government support for families with children. We are also set apart from other Western democracies by our “relative lack of concern with assuring either public or, until very recently, private responsibility for the problems of dependency associated with changing patterns of family behavior.”

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556. Teitelbaum & DuPaix, supra note 287, at 1116.
557. Id.
558. Id. at 1116-17.
559. Singer, supra note 2, at 1103.
560. This does not mean that we do not have a national family policy. It means that our “family policy” is implicit, contained in the details of tax law, employment law, pension and insurance law, and social security law. Because it is implicit, it is largely unexamined, and its implications for family life are insufficiently aired and discussed. GLENDON, supra note 518, at 135.
561. GLENDON, supra note 492, at 135. The United States government lacks a counterpart to European cabinet ministers charged with responsibility for family affairs. Id.
562. Id. at 112; see CURRENT POPULATION REPS., SERIES P-70, NO. 23, FAMILY DISRUPTION AND ECONOMIC HARDSHIP: THE SHORT-RUN PICTURE FOR CHILDREN (1991) (detailing negative economic consequences for children who experience family disruption).
Moreover, although work and family issues have recently appeared on the public agenda, both the range and the depth of initiatives discussed have been extremely limited. President Bush's repeated veto of legislation that would have guaranteed employees of medium and large American companies up to twelve weeks of unpaid leave to care for newborn or sick children demonstrates the federal government's continued unwillingness to assume substantial public responsibility for issues relating to work and family. The privatization of family law legitimates this continued failure of public will and helps to ensure that both the family and the workplace will retain their traditional, gendered structures, to the detriment of both women and men.

5. PRIVATIZATION AND THE DEVELOPMENT OF SHARED VALUES

A number of scholars have criticized law-and-economics analysis on the grounds that it inappropriately fosters the market-like aspects of human behavior and stunts the growth of other, nonmarket values. Privatization is vulnerable to a related criticism. By keeping family issues off the public agenda and by encouraging reliance on decentralized private choices, the private ordering of family law may stunt the development, and indeed the discussion, of shared public values with respect to family behavior. As feminist and other scholars have pointed out, the way we talk about something affects the way that thing is, or becomes. "Rhetoric

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563. Parental leave legislation and child care proposals have been virtually the only topics of public debate. These two issues have evolved as separate policy initiatives and are rarely seen as elements of an integrated family policy. Thus, there has been little effort to calculate how child care needs would be affected by the availability and structure of leave policies or how the unavailability of child care might undermine the work force stability that parental leave policies are designed to ensure. See Nancy E. Dowd, Envisioning Work and Family: A Critical Perspective on International Models, 26 HARV. J. ON LEGIS. 311, 314-15 (1989).


is not just shaped by, but shapes, reality." To the extent that privatization encourages us to think and talk about family relationships in terms traditionally associated with private exchanges—terms like self-interested and wealth maximizing—our behavior may take on these characteristics. Moreover, privatization and its accompanying rhetoric may have a contagious quality. As one commentator has suggested, the advocates of contract surrogacy and free market adoption ask us today to privatize the production and allocation of healthy, white infants; tomorrow, we may be asked to consider privatizing the costs of care for children the market would reject. Surely, we should be at least cautious about endorsing a family law regime that would reduce activities as sensitive and as central to human existence as sexuality, parenting and being cared for, to matters of private exchange and efficient distribution.

D. Privatization as a Transition Strategy

The preceding analysis of the advantages and disadvantages of privatization suggests that the privatization of family law may be particularly valuable as a sort of transition strategy—a way of moving from an unjust and outdated system of public ordering to a system whose publicly-imposed constraints more accurately reflect social reality and more fairly allocate the benefits and burdens of family life. Such a conception would view private ordering not as an end in itself, but rather as a potentially useful stepping stone to imagining and implementing a more just form of public ordering. On this analysis, opportunities for private ordering would be evaluated, at least in part, according to their potential to contribute to the development and maintenance of such an alternative public vision.

Recent legislative and judicial efforts to allocate more fairly the economic consequences of divorce may illustrate the catalytic role that privatization can play in creating such alternative forms of public ordering. During the no-fault divorce revolution, many scholars and policy makers endorsed private ordering of the economic consequences of divorce as a way of eliminating the sex-based role allocations of the traditional marriage contract and acknowledging the legal equality of husbands and wives. But recent empirical studies have shown that the shift from public to private ordering of divorce may well have

568. Id.
569. See text accompanying notes supra 350-58.
contributed to the economic impoverishment of women and the children they continue to care for after divorce. In response to these studies, scholars have advocated, and courts and legislatures are beginning to adopt, new publicly-imposed standards for post-divorce financial awards—standards that are designed to recognize both spouses' investment in a marriage and to protect financially vulnerable spouses and children, without endorsing the gender-based stereotypes that characterized traditional alimony and property doctrine. The breakdown of gender stereotypes and the redefinition of marriage as a partnership of equals, both of which characterized the privatization of divorce, may well have been a necessary prerequisite to the development of these alternative public standards.

The legal recognition of privately ordered alternatives to marriage and the extension to these relationships of benefits traditionally reserved for married couples may provide another example of privatization serving as a catalyst for the development of alternative forms of public ordering. Claims for increased public recognition of domestic partnerships, for example, have forced legislators and other policy makers to articulate and defend the values traditionally associated with the marital family—values

570. See sources cited supra note 2.
571. See, e.g., Freed & Walker, supra note 146, at 319 (noting continued trend toward considering the value of one spouse's professional degree in awarding spousal maintenance and equitably distributing marital assets); Ralph J. Brown & Linda L.M. Viken, Recognition of Homemaker Career Opportunity Cost in Marital Dissolution Cases, 35 S.D. L. REV. 40 (1990); Joan M. Krauskoph, Uses and Abuses of Limited Duration Alimony, in ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE 65, 70-74 (1988) (discussing emerging appellate trend to curtail the abuse of short term alimony and to award indefinite alimony after lengthy marriages). A number of states have recently amended their divorce statutes to require courts, in awarding support and distributing property, to take into account the extent to which one spouse "has reduced his or her income or career opportunities for the benefit of the other spouse." ARIZ. REV. STAT. § 25-319(B)(7)(1987); see N.Y. DOM. REL. LAW § 236(B)(6)(a)(5) (1986) (in evaluating claim for spousal maintenance, court must consider any "reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment or career opportunities during marriage"); OR. REV. STAT. § 107.105(1)(d)(F) (1988). Legal scholars have also begun to develop new theories to support substantial post-divorce sharing of income. See, e.g., Ira M. Ellman, The Theory of Alimony, 77 CAL. L. REV. 3 (1989) (developing theory of alimony designed to encourage sharing behavior in marriage by requiring compensation, at divorce, for loss in earning capacity arising from such sharing behavior); June Carbone, Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman, 43 VAND. L. REV. 1463 (1990) (criticizing Ellman's analysis but endorsing restitution-based theory for divorce-related financial allocations as a way of affirming both spouses' obligations to contribute to the benefits that marriage makes possible); Rutheford, supra note 540; Singer, supra note 2, at 1117-21 (proposing investment partnership model of marriage to justify substantial post-divorce sharing of income).
such as providing stability, nurturance and a supportive environment for raising children. Focusing on these values, in turn, reveals the shortcomings of a publicly ordered legal regime that denies recognition to intimate relationships other than marriage that fulfill these same familial functions. According legal recognition to such privately chosen family forms thus becomes not merely a means of expanding the opportunities for private choice, but also a vehicle for better achieving the public values that we, as a society, have identified as important.

IV. CONCLUSION

A preference for private over public ordering has characterized the development of family law over the past quarter century. This preference has encompassed both the substantive legal doctrines governing family relations and the preferred procedures for resolving family disputes. The shift from public to private ordering cannot be understood or evaluated in isolation. This Article has therefore attempted to show how the privatization of family law has been influenced by—and has contributed to—related doctrinal and jurisprudential developments in a number of other legal fields. By highlighting the connections between these related legal developments and the privatization process, the Article has attempted both to situate the privatization of family law in its broader doctrinal and jurisprudential context and to underscore the connection between our legal vision of the family, and the rules and assumptions that govern other aspects of our legal culture.

In exploring the advantages and disadvantages of a more privatized family law regime, this Article has also highlighted the dangers of privatization—dangers that tend to be obscured by the neutral and self-affirming rhetoric associated with private ordering of behavior. It has done so not to advocate a return to some imagined golden age of family law, but rather to contribute to the search for legal doctrines and jurisprudential principles that recognize and affirm family relationships as both a haven for individual self-expression and a vehicle for expressing our most cherished public values.

572. See generally Treuthart, supra note 44; Brown, supra note 44.