Family Agreements and Private Ordering

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Abstract: In family law private ordering, the state authorizes parties to arrange alterations of default status rules, but sets limits as to the nature and extent of the alterations. In the particular context of family agreements and religion, private ordering includes enforcement of *mahr* and *ketubah* agreements, the use of religious arbitrators for family disputes, and the enforcement of religious upbringing provisions in separation agreements. Law and economics scholarship explains and justifies the policy outcomes in some of these areas, while at other times suggesting reforms. Through its focus on relative institutional competence and subsidiarity, it can explain why some decisions might be best left to more local governments or to the parties themselves.

Keywords: *ketubah*, law and economics, *mahr*, private ordering, religious arbitration, subsidiarity

I. Introduction

Family relationships are primarily "status relationships"—that is, well-understood forms of legal relationships, whose terms are set by the government (and also by custom and tradition). Increasingly, however, governments are allowing parties to alter the terms of their domestic status relationships by contract or other types of private, voluntary arrangements. This chapter will explore some legal, moral, and policy aspects of such private ordering. The general focus will be on American law, and the particular doctrinal rules and case examples will be from that jurisdiction, but we suspect and hope that many of the ideas will have application beyond that country.[1]

In discussing family agreements and private ordering, some preliminary clarifications might be useful. Many people use "agreements" and "private ordering" in somewhat vague, even metaphorical ways, and this can easily confuse the analysis. At one level, references to "agreements" or "private ordering" may

[1] We are, of course, aware that American family law (and the American treatment of religion) is, on a number of topics, distinctive, *i.e.*, not representative of what goes on in other countries. However, as we do not have broad expertise on comparative family law or comparative religious law, we are confining our observations to the topics on which we can speak with greater confidence.

indicate the mundane point that couples[2] can agree to live a particular way, treat one another and children they care for in a certain way, deal with financial matters in a certain manner, trade off benefits and obligations, etc., and even if those choices are contrary to the local social norms, the government will usually not interfere.[3] This is domestic private ordering by agreement, in a simple and literal sense. But it is not, generally speaking, a matter of significant legal interest, at least as long as the law is not violated.

By contrast, discussions of "agreements" and "private ordering" often refer to arrangements that the parties hope or expect to be enforceable by the government, if and when one of the parties is no longer abiding by the agreed terms.[4] And it is this sense that is significant for our (and most) purposes. As noted, if parties privately arrange their affairs and never seek legal recourse for the violation of those arrangements, there is generally little further that needs to be said on the topic. It is only on those occasions where parties seek to invoke the power of the government that we need to think about what position government should take, and what powers it has granted, or should grant, private parties to use for enforcement. There are also occasions where set options are established by the government among which couples must choose, as with "covenant marriage," in those jurisdictions which recognize it.

A quick note on legal sources: sometimes the delegation of powers to individuals to enter binding agreements comes from the legislature, and sometimes from the courts or regulatory agencies. Similarly, the regulation and restriction of those powers can come from a variety of sources, and not always from the same source as the delegation (e.g., sometimes the legislature will authorize parties to enter agreements on some matter, and a court or regulatory agency will later add restrictions regarding the required procedures or limitations on what is permitted in the terms).

The source of the delegated powers is not especially important for the purposes of the present discussion. What is important is the sense that there is a shared responsibility between the government and individuals entering the agreements

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[2] This would also be true, of course, for polyamorous groups of more than two.

[3] In rare circumstance—particularly with polyamorous groups and, in a few locations, also with unmarried couples—there may be government constraints on what living situations are allowed due to restrictions created by local zoning regulations. See, e.g., Douglas A. Pinheiro, "Monogamy Zoning: Single-Family Zoning and the Exclusion of Polyamorous Relationship Groups," *University of Illinois Law Review* 2023: 279–307; cf. *West 49th Street, LLC v. O'Neill*, 77 Misc.3d 385 (N.Y. City Civ. Ct., 2022) (noneviction protection extended in principle to member of a polyamorous trio).

[4] As will be discussed, there are limits to what agreements and arrangements the state will enforce. In English law, in *Balfour v. Balfour* [1919] 2 KB 571, the court refused to enforce a spousal agreement on the basis of a presumption that spouses do not intend their agreements to be legally enforceable. There is no such presumption in American law (and, in any event, no general requirement in contract law of showing an intention to create legal relations), but, as will be discussed, there are particular doctrines that continue to constrain the enforcement of domestic agreements in the U.S.

regarding the validity and limits of those agreements. These legally enforceable arrangements are private ordering, in the straightforward sense that the contractual standards bind the parties only if they so choose, and only on the terms chosen. This is in contrast with the rules of, e.g., criminal law and tort law, which bind all parties, without having been chosen. At the same time, these private orderings are legally enforceable only when and to the extent that the government allows—an obvious point, to be sure, but still too often overlooked in discussions in this area.

In what follows, Section II will offer an overview of family agreements, focusing on doctrinal and general policy considerations, while Section III will add a Law and Economics perspective, before concluding.

II. Family Agreements

Often the agreements of interest in family law involve parties waiving legal rights they would otherwise have. (Our focus in this chapter is on United States law, and, in these discussions, the relevant law is generally the laws of individual American states. Most of American family law is set by the state law, not federal law.) Sometimes this is a waiver of a right to exclude—for example, under American family law and constitutional law, legal parents can exclude non-parents from interactions with a child,[5] but, at least in some states, this right can be waived, including through a co-parenting agreement.[6] At other times, the waiver of rights is part of the process of creating a more one-sided domestic arrangement: e.g., when, in a premarital agreement, a spouse-to-be waives his or her right upon divorce to alimony or to an equitable claim on the other spouse's property.[7] This typically occurs when one partner is unwilling to marry unless the financial terms are skewed in their favor.[8] In effect, the agreement becomes an exchange: one party agrees to get married in return for the other's waiver of certain financial rights.

While American family law is far more receptive to enforcing family agreements than it was, say, fifty years ago, there remain significant limits: including, in many

[5] See *Troxel v. Granville*, 530 U.S. 57 (2000).

[6] See, e.g., *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013). It is important to note that not all states allow non-parents to gain parental rights based on express or implicit agreement of the legal parent. See, e.g., *Russell v. Pasik*, 178 So.3d 55 (Fla. Dist. Ct. App. 2015). For a view skeptical of finding "tacit" coparenting agreements, see Gregg Strauss, *Reconstructing Parentage* (Cambridge University Press, 2025).

[7] A small number of states expressly prohibit the waiving of the right to alimony (spousal support). *See, e.g.*, *Iowa Code* § 596.5(2) ("The right of a spouse … to support shall not be adversely affected by a premarital agreement.").

[8] There are sometimes reasonable and charitable explanations for this: e.g., if a spouse wants to keep a family business in the family or certain family heirlooms with children from a former marriage. At other times, it may reflect one party's reluctance to marry. On occasion, it is a check against the possibility that the marriage is just "gold digging" by the other partner. But these sorts of agreements are also sometimes entered out of greed or a simple reluctance to share equally with a partner.

cases, procedures that need to be followed if the agreement is to be enforceable, substantive fairness review, and limitations on the acceptable topics and terms.[9] There are many potential government positions about agreements: from outright prohibition,[10] at one extreme, to complete laissez faire—the latter an extreme that has not been adopted even with standard commercial agreements between sophisticated business parties.[11] As noted, governments often create special procedural requirements or fairness oversight for family agreements, and they also create default rules and presumptions. Sometimes these constraints, preferences, and presumptions reflect an interest in protecting vulnerable contracting parties, and sometimes they are intended to protect the interests of third parties (in family agreements, usually children) or protecting the common good (as the state sees it). While it is true that there are also constraints on the substantive terms and formation process with conventional commercial contracts, the constraints on "freedom of contract" are greater and far more intrusive with domestic agreements.[12]

The implicit message of the government in its regulation of domestic (and other) agreements is that there are a range of options it will consider acceptable. Outside that range, where the options are, from the government's perspective, not acceptable, legal enforcement will not be available. And even within the acceptable range of arrangements, the government might still express a preference for some outcomes over others, a preference reflected by default terms of greater or lesser "stickiness."[13] And sometimes the limits in the range of acceptable alterations of the status terms go to a concern with protecting the meaning or significance of that status: e.g., that a marriage whose financial terms are too one-sided perhaps is no longer really a "marriage."[14]

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[9] For example, parties to a premarital, marital or separation agreement are generally not allowed to waive their children's right to child support, though parties can agree to levels of child support *more generous* than the default state law provides. *See, e.g*., Linda Ravdin, *Premarital Agreements: Drafting and Negotiation* (3rd ed., American Bar Association, 2023): 117, 127 (discussing premarital agreements).

[10] It is rare for the opposition to private ordering to go beyond non-enforcement, though Michigan for a while had a criminal ban, as well as a civil ban, on compensated surrogacy. See *Surrogate Parenting Act*, Act 199 of 1988, *Michigan Laws* §§ 722.851 to 722.863, repealed 2024, Act 24, Eff. Apr. 2, 2025. This ended with 2024 *Assisted Reproduction and Surrogacy Parentage Act* (which went into effect in 2025). *Michigan Laws* §§ 722.1701 to 722.1909.

[11] Under the rules of American contract law, even the contracts entered between two sophisticated parties may be unenforceable on the grounds of illegality, public policy, or unconscionability, as well as other (legal and equitable) doctrinal defenses.

[12] *See generally* Brian H. Bix, *Families by Agreement* (Cambridge University Press, 2023).

[13] This refers to the difficulty of altering the default—*e.g*., by the requirement of express language, additional formalities, presumptions against the alteration in case of ambiguity, etc. *See* B.H. McDonnell, "Sticky Defaults and Altering Rules in Corporate Law," *Southern Methodist University Law Review* 60 (2007): 383-440.

[14] See *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (Mass. 2002) (a premarital agreement will not be enforced if "its terms essentially vitiate the very status of marriage"); see also John Gardner, *From Personal Life to Private Law* (Oxford University Press, 2018): 44-46, for the concern that contractual alteration of the terms of a status can undermine the "fixed deontic content" of "special relationships."

On occasion, the government provides a range of options, among which couples must choose. This is the case in the three American states that allow couples to enter into, or (if already married) transfer into, a "covenant marriage," a more binding form of marriage.[15] And it is also the case in the (few) states that allow long-term cohabitating couples either to opt into, or opt out of, certain financial or other rights against one another.[16] Regarding a different sort of domestic status, parenthood, roughly half of the American states authorize, with judicial approval and judicial supervision, a legally enforceable agreement under which adopted children continue to have contact with their birth parents after the adoption has been completed (an "open adoption," containing a "contact agreement").[17]

Given the topic of the present volume, it is also worth considering the ways in which the American states take into account—or do not take into account—the interests of religious institutions. Some states allow parties to agree to arbitrate family law disputes,[18] and this may (expressly or implicitly) include the option to use religious arbitration panels.[19] The policy questions here become sharpest when the rules and principles from a particular religion vary sharply from the rules and principles that the courts would otherwise follow (e.g., regarding the principles of post-divorce property division or the standards by which child custody determinations are made). In general, courts are less deferential to the arbitrators in family law matters than they are in other (*e.g.*, commercial law) matters.[20]

Religion can be relevant to family agreements in other ways. First, American state courts differ on whether and how religious marriage contracts (e.g., Jewish *ketubah* contracts and *mahr* provisions in Islamic marriage contracts) will be enforced. Secondly, a few states are willing to enforce provisions in separation agreements regarding the religious upbringing of children, while many other states refuse to

[15] Under covenant marriage, the spouses or spouses-to-be agree to counseling before marriage (if they are not already married), counseling before divorce, and divorce based only on fault or an extended waiting period. See, e.g., *Louisiana Revised Statutes* §§ 9:272 to 9:276.
[16] See, e.g., *Colorado Revised Statutes* §§ 15-22-101 to 15-22-112.
[17] See, e.g., *Minnesota Statute* § 259.58. Under the law in almost all states, absent such an agreement, the birth parents would have no legal right to have any contact with the child they gave up for adoption; in those circumstances, any such contact would occur only by the choice of the adopting parents.
[18] See, e.g., *Fawzy v. Fawzy*, 973 A.2d 347 (N.J. 2009).
[19] See, e.g., *Avitzur v. Avitzur*, 58 N.Y.S.2d 572 (N.Y. 1983) (enforcing agreement to arbitrate postmarital disputes before a rabbinic tribunal). For some concerns about religious arbitration in the family law context based on experiences in Canada and Britain, along with suggestions for reform, see Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law," *Theoretical Inquiries in Law*, 9 (2008): 573–607. This is also to be distinguished from countries like Israel, where significant power in family law matters is delegated to religious courts, with only very limited review by the civil courts.
[20] See, e.g., *Fawzy v. Fawzy*, *supra* (imposing greater procedural requirements on arbitrators in child custody and parenting time matters to allow more significant judicial review of decisions).

enforce such provisions, concluding that enforcement would violate constitutional norms.[21]

On the topic of constitutional standards, the treatment of religious contracts, religion provisions, and religious arbitration are all complicated by the intricate rules that derive from the first amendment of the U.S. Constitution, regarding the freedom of religion and freedom from any government establishment of religion.[22] American courts have read that amendment as foreclosing legal standards which would "entangle" courts or other government bodies with religious institutions.[23] For example, in some cases where a party has relied on a *ketubah*, a Jewish marriage contract, to ask a court to order the other party to provide a religious divorce (in Orthodox Jewish law, a *get*), some (but not all) courts have responded that the first amendment precludes granting the order, in that it would require the court to evaluate conflicting expert testimony regarding the significance of religious obligations.[24]

There are also important interpretive issues in attempts to enforce religious agreements in court. Agreements whose meaning is well-established within a particular religious community, and perhaps also within another country's legal and social norms, may become less certain when the context varies, as when there is an Islamic marriage contract entered by a couple when they were living in a predominantly Islamic country, but enforcement is now sought in the United States where the couple now lives.[25] For example, in some cases, parties have argued that the *mahr* promise of payment upon (a certain type of) divorce should also be

[21] Compare *Perlstein v. Perlstein*, 76 A.D.2d 49, 53 (N.Y. A.D. 1980) ("That parents may contract to have their children brought up in observance of a certain religious lifestyle is well established in this state.") with *Breiner v. Breiner*, 2023 WL 7403480 (Conn. Super. Ct. 2023) (refusing to enforce religious upbringing provision, based on concern about entanglement with religion and also based on the vagueness of the terms).

[22] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therefore; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const., amend. I.

[23] *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Aspects of the *Lemon* test have been rejected or modified by later Supreme Court decisions, e.g., *American Legion v. American Humanist Association*, 588 U.S. 29, 32–33 (2019) (plurality opinion), but constitutional concern about government entanglement with religion remains.

[24] See, e.g., *Tilsen v. Benson*, 299 A.3d 1096 (Conn. 2023); accord, *Omid v. Ahmadi*, 2024 WL 1270296 (Conn. Super. Ct., 2024) (to the extent that interpretation of a *mahr* provision requires reference to Islamic religious principles, enforcement is precluded by the first amendment).

[25] See, e.g., *Parbeen v. Bari*, 337 So.3d 343 (Fla. Dist. Ct. App. 2022) (*mahr* agreement entered in Bangladesh held unenforceable under Florida's rules for premarital agreements); but cf. In re *Marriage of Goldman*, 554 N.E.2d 1016 (Ill. Ct. App. 1990) (based on the *ketubah* agreement ordering the husband to provide the *get*).

understood as a waiver of any other form of post-divorce financial compensation, even though the *mahr* provision contains no express reference to any such waiver.[26]

III. Perspectives from Law and Economics

Law and economics scholars approach legal questions with a distinctive focus on efficiency, incentives, and welfare maximization, and family law is no exception. Under this approach, the enforcement of private ordering in intimate relationships and family contexts is not merely a matter of autonomy or morality, but a question of how legal rules shape behavior and allocate risk within intimate relationships.[27]

The awareness that courts will enforce premarital or marital agreements can not only enable parties to enter into mutually beneficial bargains that align with their preferences,[28] but will also facilitate ex ante planning, by reducing uncertainty at the dissolution of marriage,[29] and will ultimately encourage parties to enter into relationships that they would otherwise avoid. Greater certainty about terms, even—or perhaps especially—when the agreed terms alter or make more precise the state-provided default terms, can make arrangements more attractive than they would otherwise be.

Law and economics scholars are not blind to the fact that family relationships are especially susceptible to opportunism and asymmetries in bargaining power. A spouse who (say) conditions marriage on a waiver of alimony may be exploiting superior leverage or information at a moment of emotional vulnerability,[30] and this can justify limitations on terms, procedural safeguards, or judicial oversight. And these are in fact what we see in the doctrinal rules regulating premarital agreements in most of the states.[31]

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[26] See Brian H. Bix, "Religious Family Agreements: Mahr, Ketubah, and Religious Upbringing Provisions in Recent U.S. Cases," *Journal of Law, Religion and State*, 10(2-3) (2022): 252–67 at 257–58.

[27] For a collection of reference contributions to the economics of family law, see Margaret F. Brinig, *From Contract to Covenant: Beyond the Law and Economics of the Family* (Harvard University Press, 2007); *see also* Lloyd R. Cohen and Joshua D. Wright (eds.), *Research Handbook on the Economics of Family Law* (Edward Elgar Publishing, 2011). For a survey of Richard Posner's contributions to family law and policy, see Ben Depoorter & Francesco Parisi, "Private Choices and Public Law Richard A. Posner's Contributions to Family Law and Policy," *Journal of Contemporary Health Law & Policy* 17 (2001): 403–27.

[28] See Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979): 950–97.

[29] See Elizabeth S. Scott & Robert E. Scott, "Marriage as a Relational Contract," *Virginia Law Review* 84 (1998): 1225–1332.

[30] See Michael J. Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1993).

[31] See, e.g., *Connecticut General Statutes* § 46b-36g(4) (party to premarital agreement can avoid enforcement if "not afforded a reasonable opportunity to consult with independent counsel"); *New Jersey Statutes* § 37:2-38(c)(1) (premarital agreement unenforceable if party was "not provided

Scholars in this tradition are equally attentive to the reality that individual preferences evolve over time, and that rigid enforcement of family agreements may, in some cases, hinder individuals from pursuing life goals that emerge later. In such contexts, law and economics does not advocate formalism for its own sake.[32] Rather, it supports the incorporation of procedural safeguards and substantive fairness review to limit strategic behavior and to reduce the risk of ex post inefficiency in intimate relationships.[33]

A critical factor in the law and economics evaluation of family agreements is the presence of externalities (negative effects on third parties).[34] Agreements between spouses may have significant externalities—most notably on children of the marriage, but also, in some cases, on society at large—and these spillover effects may justify legal oversight to ensure that such externalities are properly internalized.[35] From an economic standpoint, the state has a legitimate interest in safeguarding broader social values, such as equality before the law and social cohesion.[36] This interest may justify regulating certain family arrangements, declining to enforce private family agreements that are likely to generate large externalities, or hesitating before enforcing religious arbitration where the religious values differ significantly from generally accepted social values.

Finally, from a law and economics perspective, the question of how to set the boundaries of enforceable autonomy in family law is not merely a normative inquiry about individual rights or moral commitments. Rather, it is also an institutional design problem: Which level of government (federal? state? local?) and which type of decision-maker (legislature? court? administrative agency? the parties themselves?) is best positioned to determine the scope of permissible private ordering in intimate relationships? Law and economics scholars emphasize the comparative institutional question: whether courts, legislatures, or private actors

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full and fair disclosure of the earnings, property and financial obligations of the other party"); *Iowa Code* § 596.5(2) (premarital agreement cannot "adversely affect" spouse's right to support (alimony)).

[32] Scholars within the law and economics movement challenge the conventional approaches by examining how families operate beyond mere contractual frameworks. Among others, Margaret Brinig draws on insights from both economics and sociology, offering a comprehensive account of family relationships and the legal norms that shape them. See Brinig, *From Contract to Covenant*, *supra*.

[33] While private ordering can be efficient, the state's role in setting default rules and overseeing enforcement can serve as a low-cost mechanism for reducing negotiation failures and promoting equitable outcomes. Russell Korobkin, "A Positive Theory of Legal Negotiation," *Georgetown Law Journal* 88 (2000): 1789–1831, 1794.

[34] Technically, externalities can be either negative or positive, but in common usage, the term generally refers to *negative* effects. Francesco Parisi, *The Language of Law and Economics: A Dictionary* (Cambridge University Press, 2013), 81.

[35] See Robert C. Ellickson, "A Critique of Economic and Sociological Theories of Social Control," *Journal of Legal Studies* 16 (1987): 67–99.

[36] See Gillian K. Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System," *Michigan Law Review*, 98 (1997): 953–1006.

are best positioned to design and enforce family agreements.[37] European law and economics scholarship often frame this latter question as a subsidiarity question, which is in turn examined through comparative institutional analysis. The principle of subsidiarity suggests that regulatory authority should be allocated to the lowest level of governance capable of effectively addressing a given issue.[38] Applied to family law, this principle supports decision-making at a lower governmental level (in the United States, making family law a matter of state law rather than subject to a uniform federal law) for questions of autonomy, contract enforceability, and greater recognition of religious arbitration, and family agreements more generally. More local governments are often better positioned than a federal government or supranational unions to tailor family law rules that reflect the local social norms, religious identities, and family structures followed in their territory. The law and economics literature thus often advocates more local control over the definition and enforcement of family agreements, viewing subsidiarity as an essential tool for calibrating the legal boundaries of private autonomy in diverse and evolving family landscapes.

Decentralization in the production of family law fosters jurisdictional competition, which may enhance efficiency and responsiveness to the social needs of an evolving population. Different American states can experiment with varying degrees of enforceability for premarital agreements, parental waivers, and recognition of religious family arrangements and dispute resolution. Those jurisdictions that are best able to align their family law with parties' preferences will reduce litigation rates and attract residents[39] or serve as models for other jurisdictions.[40] Over time,

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[37] On the economic analysis of federalism generally, see Bruce H. Kobayashi & Larry E. Ribstein (eds.), *Economics of Federalism* (Edward Elgar Publishing, 2007) (two vols.).

[38] See Andreas Follesdal, *Subsidiarity* (Cambridge University Press, 2025); see also Emanuela Carbonara, Barabara Luppi & Francesco Parisi, "Self-Defeating Subsidiarity," *Review of Law and Economics* 5 (2009): 741–83; Emanuela Carbonara, Barabara Luppi & Francesco Parisi, "Subsidiarity for a Changing Union," in *Research Handbook on the Economics of European Union Law*, Thomas Eger & Hans-Bernd Schäfer (eds.), (Edward Elgar, 2012) 95–110.

[39] Individuals and couples may "vote with their feet" to move to a jurisdiction that better reflects their values and serves their interests, or at least to take advantage in the short term of another state's laws. Rules of interstate recognition can be crucial here. For example, in the United States, if one lives in a state whose legal regime does not support surrogacy arrangements, one can generally arrange for the surrogacy to occur and the child to be born in a state whose laws support and enforce surrogacy agreements, and when a couple returns to their home state, their parental rights over the child born to the surrogate in another state will be recognized. Some (non-American) jurisdictions are less amenable to such "work-arounds," as when a country that forbids surrogacy also criminalizes the use of surrogates in another country. Maia Davies, "Italy bans couples from travelling abroad for surrogacy," BBC News, Oct. 15, 2024, https://www.bbc.com/news/articles/c62rmv63069o (last accessed 14 November 2025).

[40] See Ann Laquer Estin, "Family Law Federalism: Divorce and the Constitution," *William & Mary Law Review* 36 (2000): 1399–1483; Margaret F. Brinig (ed.), *Economics of Family Law* (Edward Elgar Publishing, 2007). Law and economics scholars have assessed the advantages of decentralized family law in terms of jurisdictional competition, showing how family law variation across jurisdictions enables experimentation and responsiveness to changing norms. O'Hara & Ribstein argued that allowing choice of law in family arrangements can harness competition between legal systems to better match individual preferences. Erin A. O'Hara & Larry E. Ribstein, *The Law Market* (Oxford University Press, 2009).

such experimentation can yield more efficient legal frameworks through a form of regulatory evolution.[41] Moreover, local autonomy allows states to weigh differently the competing needs to enforce family agreements that reflect existing cultural or religious values with the policy goals of promoting equality between spouses and protecting vulnerable family members, particularly children or economically dependent spouses. Some jurisdictions may favor greater individual autonomy in crafting premarital or marital agreements,[42] while others will implement stricter fairness review and ex post oversight. Law and economics scholars often support this diversity acknowledging that in a diverse society it would be very hard to identify one-size-fits-all legal regimes, advocating a federalist or subsidiarity approach as a mechanism that will allow individuals to reveal information about social preferences and family structures.[43]

IV. Conclusion

In family law, as elsewhere, the law of enforceable agreements (contract rights) involves a combination of state regulation and private ordering. In the United States and in many other countries, governments are increasingly willing to allow (empower) parties to arrange alterations of default status rules. However, at the same time, the law generally sets limits on the nature and extent of the alterations and may require judicial supervision of the fairness of the terms, relative to the time the contract was entered or relative to the time of enforcement, or both. The intersection of these sorts of family agreements with religion include enforcement of *mahr* and *ketubah* agreements, the use of religious arbitrators for family disputes, and the occasional enforcement of religious upbringing provisions in separation agreements.

Law and economics scholarship explains and justifies the policy outcomes in some of these areas, while at other times suggesting reforms. Because of its strengths in focusing on relative institutional competence and subsidiarity, it can explain why some decisions might be best left to more local governments or to the parties themselves. And despite its reputation in some circles for explaining everything in

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[41] Federalism also mitigates the risk of central error: a uniform national rule may entrench suboptimal policies or impose a one-size-fits-all approach ill-suited to local variation in family practices. Particularly in matters touching on religion and culture—where enforcement of *mahr* agreements, religious arbitration, or parental rights may diverge dramatically across communities—federalist and subsidiarity approaches enhances the legitimacy and acceptability of legal outcomes. Cass R. Sunstein, "Social Norms and Social Roles," *Columbia Law Review*, 96 (1996): 903–68.

[42] Of course, what the text characterizes as "individual autonomy" others might criticize as the greater ability of more powerful parties to impose one-sided terms on weaker parties. And there are jurisdictions known for their greater willingness to endorse, or at least condone, more one-sided arrangements.

[43] See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1994).

economic or analogous terms, law and economics scholarship in fact has the resources to take into account and respond to matters like vulnerability, opportunism, and exploitation.

In general, the efforts to combine family status and private ordering, while adding in concerns about religious freedom, efficiency, and institutional competence, will inevitably, and unsurprisingly, lead to some indeterminacy and controversy in policy recommendations. Also, while many (not least Henry Sumner Maine, in his famous quote[44]) see the move from status to contract as a progressive one, some contemporary commentators have concluded that "treating family as a status … does a better job of protecting those left subordinates by tradition than would contract law."[45]

[44] Henry S. Maine, *Ancient Law* (Dorset Press, 1986) [1861] ch. 5, at 142: "we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*," (emphasis in original).

[45] Katharine K. Baker, "Family Law Exceptionalism Revisited," *Journal of the American Academy of Matrimonial Lawyers* 37 (2025): 395, 438.