PREMARITAL AGREEMENTS IN THE ALI PRINCIPLES OF FAMILY DISSOLUTION

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I. INTRODUCTION

Marriage is a public status grounded on an intimate relationship. Those who emphasize the public status aspect have argued that the state, and the state alone, should set the terms for the marriage (including rules for entry, rules during the marriage, and the terms on which the marriage can be dissolved). Those who emphasize the intimate relationship aspect have been more receptive to the parties' private ordering of the terms of their marriage.

In recent decades there has been a moderate—but still marked—movement towards private ordering, exemplified by the greater enforceability of divorce-focused premarital agreements. The American Law Institute's *Principles of the Law of Family Dissolution*[1] offers an approach to premarital agreements which tries to respect both the status and private-ordering aspects of marriage. This commentary offers an overview of the *Principles*' approach, emphasizing the gender effects it might produce. Part I raises some preliminary assumptions and concerns for any inquiry about gender effects. Part II summarizes briefly the current law on premarital agreements, to give a baseline against which to judge in what ways and in which directions the *Principles* would change the law. Part III gives an overview of the *Principles*' objectives and gives a detailed look at the

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 7 (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000]. The section numbers in the Article reflect the numbers that will be used in the final, published version of the *Principles*—these vary somewhat from the section numbers used in Tentative Draft No. 4. The updated section numbering is based on an e-mail from Ira Mark Ellman, Chief Reporter, *Principles*, to the author, March 2, 2001. However, the quotations from the text of the *Principles*, its comments, and reporter's notes, are all from Tentative Draft No. 4. It is my understanding that the comments and reporter's notes may be revised and expanded before final publication.

The same chapter of the *Principles* that deals with the enforceability of premarital agreements also discusses the enforceability of separation agreements and marital agreements (agreements entered during the course of marriage, but *not* in contemplation of divorce). *See id.* § 7.01(1)(b) cmt. b. However, this commentary will focus exclusively on the topic of premarital agreements.

provisions that would have the most significant effects. Part IV offers some speculation about effects.

II. PRELIMINARY MATTERS

If one wants to speak of the gender effects of the premarital agreement sections of the *Principles* (or, indeed, any alternative rules regarding premarital agreements), one must begin with certain assumptions. Little useful data has been gathered regarding how many couples sign premarital agreements or the economic situation of the people who enter such agreements. However, that has never stopped media or scholarly commentators from offering broad generalizations regarding who uses premarital agreements and why.

The "folk wisdom" regarding premarital agreements is that most such agreements (though far from all of them) are entered by rich men to protect their assets from less well off women. This folk wisdom is largely supported by the reported cases (though no one supposes those cases to represent closely all such agreements, or even all such agreements that are litigated), and also indirectly by the demographics that show that men are disproportionately represented among the wealthiest citizens, and women disproportionately represented among the poorest.[2]

Of course, there are other paradigm stories regarding why parties enter premarital agreements (again, mostly derived from anecdotal evidence, including reported cases), for example: (1) agreements are entered into because one or both partners have children from a prior marriage and want to keep certain property (e.g., family heirlooms or a family business) "within the family," eventually to be passed on to the children of the prior marriage;[3] (2) the agreement is a way that the poorer partner can assure the richer partner that the poorer partner is entering the marriage (primarily) for love, not for money; and (3) agreements are entered because one party (usually the one who has, or expects to have, substantial assets) wishes to protect himself or herself from what is perceived, rightly or wrongly, as the unjust rules for division of property and spousal support at divorce. These other story-lines, especially the first one, may both carry a more sympathetic claim for enforcement of the agreement and raise fewer concerns about gender justice.

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2. For a comparable line of reasoning, leading to similar conclusions regarding the gender effects of enforcing premarital agreements, see Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 240-52 (1994).

The data of a gender difference in the high-income and low-income categories seems relatively clear. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, 469 tbl. 741, 473 tbl. 750, *available at* http://www.census.gov/prod/2001pubs/statab/sec14.pdf. Data on gender differences judged by high *wealth* seem harder to come by (and there is anecdotal evidence of greater female equality, or even predominance, at the oldest age brackets, as widows outlive their rich husbands—however, the possible prevalence of 95-year-old female millionaires may not be of great relevance in discussing the usual users of premarital agreements). Brod cites to Census data showing male predominance in the wealthiest categories (over $600,000 in assets), but the Census appears no longer to report gender-divided data in this category. *See* Brod, *supra* note 2, at 241 & n.51.

3. This purpose for premarital agreements is considered expressly at ALI PRINCIPLES 2000, *supra* note 1, § 7.07(3)(c) cmt. e.

One more assumption needs to be made before one can talk about the gender effects (or other effects) of the *Principles*—that the existence of the *Principles* will make a difference—in other words that they will affect legislators drafting domestic relation laws or judges deciding family law cases.[4] It is far too early to be confident about the influence of the *Principles*, not least because the *Principles* were only approved by the American Law Institute (ALI) in May 2000, and they still (at the time of this writing) have not been published in their final form. The evidence to date regarding adoption has been somewhat mixed, with some courts citing sections of the *Principles* to justify court decisions long before those sections had even been approved by the ALI, but many other courts and legislatures are not even mentioning the *Principles* when considering reform questions in areas covered by the *Principles*.

This commentary will work on the assumption that the *Principles* have been adopted (in some hypothetical jurisdiction) and have preempted all previous law in the relevant areas, and then will consider what effects such adoption might bring.

III. THE BASELINE

In considering how the *Principles* might change current law, one must start with an understanding of that law.[5] Regarding divorce-focused premarital agreements,[6] we are now long past the period where such agreements were presumptively unenforceable because they were considered contrary to public policy (the argument being either that such agreements modified the invariable terms of the marital status, or that they encouraged one of the spouses to file for divorce earlier than he or she might otherwise have done). Premarital agreements now appear to be enforceable, at least in some circumstances, in all American jurisdictions.[7] However, jurisdictions still vary significantly in their treatment of agreements.

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4. Here and throughout this commentary, when I am discussing the effects of the *Principles*, I am assuming their adoption (either by judicial decision, or by legislative codification) in their current form, without significant amendment, and the interpretation of provisions in line with their apparent meaning and purpose. While it is quite possible that things may develop contrary to those assumptions—that adoption of the *Principles* will be in modified form or only in part, or that their interpretation and application will be influenced by other state laws already in force—the task of speculation without the starting assumptions stated in this note is too daunting.

5. For good overviews of the current law, see Alexander Lindey & Louis I. Parley, Lindey and Parley on Separation Agreements and Antenuptial Contracts ch. 110 (2d ed. 1999); Brett R. Turner & Laura W. Morgan, Litigating Marital Contracts (forthcoming 2001).

6. People usually use the term "premarital agreement" to refer to agreements that purport to affect the parties' financial and property rights at divorce. Parties can also sign premarital agreements that purport to affect the parties' financial and property rights should one of them die before the other—for example, one party waiving his or her rights to inherit certain property should the other spouse die first. Such death-focused premarital agreements traditionally received more hospitable judicial treatment than divorce-focused agreements, and were enforced much earlier, because death-focused agreements did not "encourage divorce" as divorce-focused agreements appeared (to some) to do.

7. *See* ALI PRINCIPLES 2000, *supra* note 1, §§ 7.01 cmt. a, 7.02 cmt. a (contains an overview of this background in law and culture).

Under current law, there are significant constraints on the scope of premarital agreements.[8] Agreements are generally allowed to cover division of property and spousal support (alimony) at the time of divorce. Additionally, community property jurisdictions usually allow agreements between parties to treat property during the course of marriage under separate-property rules.[9] Beyond those categories, significant as they may be, existing law allows little and, within these categories, it imposes additional fairness-based restrictions, as will be discussed below. Parties cannot enter premarital agreements determining child custody, visitation, or child support levels upon divorce, they cannot agree to limit or expand the grounds for seeking divorce,[10] and they cannot control day-to-day behavior within the marriage.[11]

Roughly half of the jurisdictions have passed some version of the Uniform Premarital Agreement Act (UPAA).[12] The UPAA's standards lean towards the enforcement of premarital agreements; the only requirements for enforcement are that the agreement be in writing[13] and that it be entered into voluntarily.[14] A party challenging an agreement on the basis of its fairness can prevail only if he or she shows *both* that the agreement was unconscionable when entered into, *and* that the party did not have adequate notice of the other party's financial cir-

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8. Here, as elsewhere, when the article refers to what "can" be in an agreement, the reference is to *what can be enforced*. There is no sanction for including terms that cannot be enforced in the courts, and there may be circumstances where working out the agreement of certain terms (e.g., the division of roles in the daily life of the marriage) may be helpful, even where such agreements are understood to be legally unenforceable. *See* LENORE J. WEITZMAN, THE MARRIAGE CONTRACT 227-54 (1981) (arguing for the merits of "intimate contracts").

9. These agreements are often understood as extending not only to the property acquired, but also the debts accumulated during the marriage (which would otherwise have been treated as a "community debt"). *See, e.g.*, Schlaefer v. Fin. Mgmt. Serv., Inc., 996 P.2d 745, 748 (Ariz. Ct. App. 2000).

Some jurisdictions have also recognized arbitration provisions, requiring recourse to arbitration to resolve disputes regarding the interpretation and application of the agreements. *See, e.g.*, WIS. STAT. ANN. § 766.58 (10) (West 2000); *see also* DeLorean v. DeLorean, 511 A.2d 1257, 1262-64 (N.J. Super. Ct. Ch. Div. 1986) (upholding an arbitrator's decision regarding the validity of the premarital agreement, though this recourse to arbitration seemed not to have been required by the terms of the agreement).

10. Covenant Marriage, discussed *infra* note 68, is not, technically speaking, an exception. Covenant Marriage is a state-authorized choice among marital regimes, one option entailing a more limited access to divorce than the other. The states which have Covenant Marriage laws (Louisiana and Arizona) have not, to date, recognized *private* agreements further restricting, or expanding, the grounds for divorce.

11. Though it should be noted that married partners can enter standard commercial agreements, enforcement may have to overcome a presumption that agreements between intimates were not intended for legal enforcement, and some payments for services may be considered unenforceable as contrary to public policy because the payments are connected to duties the spouses owe one another. *See, e.g.*, Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 18 (1993).

12. Currently 25 states and the District of Columbia have passed some version of the UPAA. *See* UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (West 1987 & Supp. 2000) [herinafter UPAA].

13. *See id.* § 2.

14. *See id.* § 6(a)(1); *see also In re* Marriage of Bonds, 5 P.3d 815, 822-37 (Cal. 2000) (discussing the UPAA standard of "voluntariness").

cumstances.[15] The UPAA also places some limits on the enforceability of provisions waiving the right to spousal support.[16]

Prior to the UPAA, the general approach had been to enforce only those premarital agreements that were generally fair, both procedurally and substantively. The UPAA leans more strongly towards the enforcement of premarital agreements, as it has few of the fairness protections of pre-UPAA law—though it is important to note that some jurisdictions which have adopted the UPAA have done so in a modified form, adding protections to bring the codified version of the UPAA more in line with the jurisdiction's prior case law.[17]

IV. OBJECTIVES AND STANDARDS

The basic purpose of the *Principles* in their regulation of premarital agreements is to serve two objectives that are often in tension: (1) allowing parties to be able to rely on (the enforceability of) agreements; and (2) preventing the enforcement of (and deterring the writing of) unjust or exploitative agreements.

The Reporters characterize the *Principles* as taking a middle position on premarital agreements:

> This Chapter takes a position between the English rule that premarital contracts are not binding, and the recent statements of some American courts that these contracts should be enforced as ordinary business contracts. This intermediate position is in fact consistent with the actual practice of many, if not most, American courts.[18]

As will be discussed, while on many matters the *Principles* may seem to be largely "restating" the law on premarital agreements, with minor clarifications and improvements, there are other areas where the changes the *Principles* suggest may significantly affect how such agreements are written and enforced. The most important new ideas within the *Principles* occur in a few provisions—Sections 7.04, 7.05, and 7.08[19]—which will be discussed in turn.

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15. UPAA, *supra* note 12, § 6(a)(2)(i)-(iii). Adequate notice could come from a reasonable disclosure by the other partner or by prior knowledge, and the UPAA also provides for waiver of the right to disclosure. *Id.* When the UPAA holds that unconscionability alone is not a sufficient basis for invalidating a premarital agreement, it seems, on this point anyway, to create a *greater* presumption for enforceability of premarital agreements than Contract Law sets for conventional commercial agreements.

16. "If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, 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).

17. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-36g (West. Supp. 2000) (modifying the UPAA to refuse enforcement on the basis of unconscionability at the time of execution *or* the time of enforcement, insufficient disclosure, *or* an insufficient opportunity to consult with independent counsel).

18. ALI PRINCIPLES 2000, *supra* note 1, § 7.02 cmt. a.

19. Regarding other sections not discussed in the main text: Section 7.01 deals with definitions and scope; Section 7.02 states the general objectives of the Chapter; Section 7.03, "General Provisions" primarily discusses the legal effects of enforceable and unenforceable provisions in an agreement; Sections 7.06 and 7.07 limit the powers of agreements to affect child support and child custody; and the sections from 7.09 on deal with separation agreements.

A. Section 7.04: "Procedural Requirements"

Section 7.04 sets forth a series of procedural requirements for the enforcement of premarital agreements.[20] A number of the provisions merely repeat standard requirements in most jurisdictions, for example, that the agreement be in writing signed by both parties,[21] that the party waiving rights have an at least approximate knowledge of the other party's assets,[22] and that the agreement not have been the product of duress.[23]

Regarding duress, the *Principles* create a "rebuttable presumption" of consent and the absence of duress where certain criteria are met: (1) the agreements were entered into at least 30 days before the marriage; (2) each party was advised to obtain independent counsel and had a reasonable opportunity to do so;[24] *and* 3) for agreements where one of the parties did not have independent counsel, the agreement states in clear language the rights being waived and the fact that the interests of the parties may be adverse.[25] Few jurisdictions have, to date, made any of these criteria an *absolute* requirement for enforcement, but many have cited these factors in their all-things-considered judgments regarding enforcement (under rubrics of "voluntariness," "duress," "reasonableness," or "unconscionability").[26] Under existing law, some courts have felt free to speak of duress where agreements were presented to partners on the eve of marriage, but other courts have been reluctant to do so.[27] Earlier drafts of the *Principles* made the waiting period into an absolute rule; the current more flexible language of "rebuttable presumption" seems to be an improvement, keeping in mind the wide variety of fact situations presented in real practice.

While creating a "rebuttable presumption" of consent and no-duress for agreements that comply with Section 7.04's procedural criteria might be only a modest modification or clarification of existing law, the effect of the section for those who do not comply involves a far more substantial change in the law. The *Principles* place the burden of proving the absence of duress (and the presence of consent) on the party seeking enforcement.[28] Under normal contract principles (which have also been followed, consistently, in premarital agreement cases), duress (or lack of consent) would be raised as an affirmative defense by the

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20. Many of the provisions of Section 7.04 apply equally to premarital, marital, and separation agreements, but, of course, only the application to premarital agreements will be discussed in the text.

21. ALI PRINCIPLES 2000, *supra* note 1, § 7.04(1); *cf.* UPAA, *supra* note 12, § 2.

22. ALI PRINCIPLES 2000, *supra* note 1, § 7.04(5); *cf.* Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990) (maintaining a requirement of full disclosure in the course of what is generally considered the most pro-enforcement decision on premarital agreements).

23. ALI PRINCIPLES 2000, *supra* note 1, § 7.04(2).

24. The comments clarify that satisfaction of the "reasonable opportunity" test may in some cases entail the richer partner offering to pay the costs of the attorney the other partner consults. ALI PRINCIPLES 2000, *supra* note 1, § 7.04 cmt. e.

25. *Id.* § 7.04(3). Section 7.04(5) also conditions enforceability of agreements on the parties having known, "at least approximately," the assets and income of the other party. For the most part, this is not a change in the current law.

26. *Id.* § 7.04 cmts. c-f., reporter's notes.

27. *Id.* § 7.04 cmt. d., reporter's notes.

28. *See* ALI PRINCIPLES 2000, *supra* note 1, § 7.04(2) ("A party seeking to enforce an agreement must show that the other party's consent . . . [was] not obtained under duress.").

party seeking to avoid enforcement, and the burden of proof would fall on that party—it is not the duty of the party seeking to enforce an agreement to prove the *absence* of duress.[29] The Reporters justify the change made by the *Principles* by the fact that parties "entering a family relationship have expectations about their future partner that may disarm their capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating other kinds of contracts."[30] Additionally, the hope and expectation is that shifting the burden will "[decide] cases at the margins differently, and [caution] the stronger party against overreaching . . . ."[31]

B. Section 7.05: "When Enforcement Would Work a Substantial Injustice"

Many jurisdictions already judge premarital agreements by their fairness at the time of enforcement, while other jurisdictions look only to fairness at the time of execution. A few jurisdictions evaluate fairness at both times. In most such cases, fairness is judged on an amorphous, "all things considered" basis, offering little guidance as to when agreements would be enforced or not enforced. The *Principles* opts for a substantive fairness examination focused on the time of enforcement. Section 7.05 basically tries to codify, and create some guidance for, an "unconscionable, at the time of enforcement" basis for refusing enforcement for some premarital agreements[32] (though the Reporters prefer the expression "work a substantial injustice" to "unconscionable").[33]

As the Reporters note, judging unconscionability *at the time of enforcement* (along with or instead of evaluating the agreement according to the conditions at the time of execution) is contrary to standard contract principles, though it is relatively common in the case law of premarital agreements.[34] The justification for this modified unconscionability analysis is the same as that for the additional procedural protections of Section 7.04—suspicion that the combination of bounded rationality and love undermine parties' abilities to protect themselves effectively, and a public policy concern for protecting innocent third parties (especially the couples' children, but also, occasionally, the public purse).[35]

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29. *See id.* § 7.04 cmt. b; *see also* E. ALLAN FARNSWORTH, CONTRACTS § 4.19, at 272 (3d ed. 1999).

30. ALI PRINCIPLES 2000, *supra* note 1, § 7.02 cmt. c. A similar point is made in Section 7.04 cmt. b. That comment adds that the changed burden of proof regarding duress might also be justified because "[i]t is appropriate for the law to apply a more demanding standard of contractual consent to an agreement waiving established legal rights than it applies to an agreement that does not displace otherwise applicable public policies." *Id.* §§ 7.02 cmt. c, 7.04 cmt. c. *See generally* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 193-200 (1998) (discusses "bounded rationality" and premarital agreements).

31. ALI PRINCIPLES 2000, *supra* note 1, § 7.04 cmt. b.

32. *Id.* § 7.05, cmt. a, reporter's notes.

33. The section expressly excludes from its own coverage "agreement[s] to waive the application of § 4.18 of these Principles (providing for the gradual recharacterization of separate property as marital property) . . . ." *Id.* § 7.05(4).

34. *See id.* §§ 7.01 cmt. c, 7.05 cmts. a-b. *See, e.g.*, U.C.C. § 2-302 1978; RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (discusses the standards for unconscionability within conventional contract law).

35. *See* ALI PRINCIPLES 2000, *supra* note 1, § 7.05 cmts. a-c. There is one quibble with part of the analysis: the Reporters note that in contrast to normal commercial agreements, which have terms of

In any event, the factors the *Principles* list for its "substantial injustice" analysis are similar to those most courts have considered, or would consider, in determining whether to deny enforcement of a contract on fairness grounds. The Reporters sought a way to maintain some supervision regarding fairness without undermining too much the interest in contractual autonomy and the ability to rely on agreements entered:

> [The *Principles* differentiate] between the circumstances in which contracts should be enforced and those in which they should not be enforced, in a manner that is clear in its rules and rationales, is not burdensome for courts to administer, and gives the parties fair notice, allowing them to contract accordingly.[36]

The analysis under this section comes in two stages: (1) determining whether a threshold triggering event has occurred; and (2) (if one has) determining whether enforcement would work a substantial injustice. The triggering events the *Principles* discuss are: the passage of a significant amount of time;[37] the birth or adoption of a child to a couple who "had no children in common" at the time of the agreement;[38] and a significant and unexpected change in circumstances.[39] While at least one of these events must have occurred to justify a court's consideration of whether the agreement "work[s] a substantial injustice," the event only justifies the inquiry, it does not determine the result.[40] For the inquiry about "substantial injustice" itself, the *Principles* suggest consideration of how big a difference enforcement of the agreement will make, and the impact of enforcement or non-enforcement on third parties (including the couple's children).[41] Additionally, the courts are directed to some traditional factors in the evaluation of premarital agreements, including whether enforcement of the

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immediate relevance as well as, potentially, terms that may not have effects until many years from now, premarital agreements usually have no terms of immediate effect, but only terms that have effect in the distant future (after divorce). *Id.* § 7.05 cmt. b. This, however, strikes me as a reason for *greater* rationality (and therefore a better argument for enforcement) for premarital agreements, not an argument for *less* rationality. Compared to an employment agreement, where a potential employee is much more focused on current benefits than on a restrictive covenant that will come into force only on termination, here a contracting party has nothing to distract him or her from the rights being waived in the agreement. There is, of course, a sense that the marriage itself is the main benefit, distracting the partner from the rights being waived in the contract, but that is really a separate point, already taken into account in the discussion of bounded rationality. This quibble aside, I generally agree with the analysis and conclusions the Reporters offer.

36. ALI PRINCIPLES 2000, *supra* note 1, § 7.02 cmt. a. This same comment goes on to offer a good brief summary of the justifications for allowing and enforcing premarital agreements. *See id.*

37. The *Principles* suggest that the adopting state set a uniform time threshold. *Id.* § 7.05(2)(a). The Reporter's offer, by way of suggestion, a period of 10 years. *Id.* § 7.05 cmt. b.

38. The Reporters write: "Even childless parties who anticipate having children are often unable to anticipate the impact that children will have on their values and life plans. Once they are parents, the effect of the terms they earlier agreed upon are therefore likely to seem quite different than they expected when childless." *Id.*

39. *Id.* § 7.05(2). The standard for "unanticipated" changes is to be an objective, not a subjective one. ALI PRINCIPLES 2000, *supra* note 1, § 7.05 cmt. b.

40. The relevant language is that "The court *should consider* whether enforcement of an agreement would work a substantial injustice *if, and only if,* the party resisting its enforcement shows [one of the three factors]." *Id.* § 7.05(2) (emphasis added).

41. *Id.* § 7.05(3)(a) & (d).

agreement would leave one party significantly worse off,[42] and, where this had been the agreement's original purpose, whether the agreement protects the interests of third parties (e.g., children from a prior marriage).[43]

The comments and illustrations make clear that where the agreement makes "reasonable provision" for the financially weaker spouse, the fact that this spouse will receive substantially less under the agreement than he or she would under the normal divorce rules is *not*, by itself, a basis for concluding that the agreement "works a substantial injustice" and therefore should not be enforced.[44]

C. Section 7.08: "Other Limitations on an Agreement's Terms"

Section 7.08 holds that an agreement which seeks to "[limit] or [enlarge] the grounds for divorce otherwise available under state law" will be unenforceable.[45] The subject of this section would be, for example, agreements by which the partners bound themselves not to seek divorce except on the basis of marital misbehavior ("fault") or with the consent of the other spouse.[46] While the *Principles*' position does not change current law (at least scholars' near-consensus view of what the current law is—it is important to note that there has been little case law on the subject), it was taken despite support from some scholars[47] (and a few members of the *Principles*' consultative committee[48]) to allow such agreements.[49]

The *Principles*' position is that while a state may itself authorize contractual choice, until it does, such agreements should not be enforced. The Reporters' justification is as follows:

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42. The *Principles*' actual language is simultaneously more general and more precise: "the court should consider . . . when practical and relevant, the circumstances of the party claiming that enforcement of the agreement would work a substantial injustice, if the agreement is enforced, as compared to that party's likely circumstances had the marriage never taken place." *Id.* § 7.05(3)(b); *cf.* UPAA, *supra* note 12, § 6(b) (authorizing courts to deny enforcement of terms waiving or limiting spousal support, if the spouse in question might be eligible for public assistance without the support).

43. ALI PRINCIPLES 2000, *supra* note 1, § 7.05(3)(c). The section adds that the court should consider "whether the agreement's terms were reasonably designed to serve [that purpose]." *Id.*

44. *See id.* § 7.05 cmt. e, illus. 7.

45. *Id.* § 7.08(1). The section also prohibits agreements that "would require or forbid a court to evaluate marital conduct in allocating marital property or awarding compensatory payments, except as the term incorporates principles of state law which so provide." *Id.* § 7.08(2). Also prohibited are agreements that "[penalize] the party who initiates the legal action leading to a decree of divorce or legal separation" *Id.* § 7.08(3).

46. Under current law and practice in the vast majority of jurisdictions, divorce can be obtained without the consent of one's spouse.

47. *Id.* § 7.08, cmt. a, reporter's notes (recognizing the existence of such views).

48. It should be noted that there was apparently little support for a different position from the more influential inner group of Advisers, and neither was the matter contested at the Annual Meeting of ALI Members where the *Principles* were discussed and approved.

49. The author was among those who urged the *Principles* to take a more agnostic position on these sorts of agreements, not because the case for the value of such agreements had been clearly made out, but mostly because the case *against* such agreements had also not been clearly made out, and further development of the case law and the academic literature should have been allowed before the ALI took a position one way or the other.

> Modern no-fault divorce laws reflect, among other things, a policy of limiting the role of legal institutions in monitoring and policing the details of intimate relationships, and it would defeat that purpose if parties were permitted, by their own agreement, to require courts to decide if either of them was at fault for their relationship's decline.[50]

Of course, under the terms of Section 7.08, it would also be the case that a state that *only* recognized fault grounds would not enforce an agreement that purported to allow the parties to divorce on no-fault grounds.

V. EFFECTS

The *Principles* would likely have a significant effect on the enforceability of premarital agreements, though the direction of the effect will obviously depend on the starting point--the jurisdiction's approach to enforcement prior to adoption of the *Principles*.[51]

First, the *Principles* make it more likely (in comparison to the law of most jurisdictions) that courts will refuse enforcement to agreements entered into under duress of various kinds. It is likely that agreements entered into under less coercive circumstances will be, relatively speaking, fairer to the parties.

As the anecdotal evidence seems to indicate, when one party is coerced into signing an agreement (e.g., when agreements are presented for signing on the eve of marriage with the threat that the marriage would not go ahead without the agreement's being signed), it is usually the man coercing the woman. Thus, voiding the legal effects of such coercion would seem to work for the benefit of women.

Second, the somewhat greater certainty the *Principles* might bring to the enforcement of premarital agreements (for those parties well-counseled enough to write agreements that fall within the *Principles*' strictures) *might* mean that more couples would sign such agreements. While it would go too far to say that the *Principles* would create general certainty, or "safe harbors" for enforceability,[52] the *Principles* does move, at least a little, in that direction.[53] Therefore, in the circumstances in which a richer partner would only marry a poorer partner where the poorer partner waived legal rights *and* the agreement waiving rights was (probably) enforceable, the *Principles* would likely lead to marriage more often than the more uncertain rules prevailing in most jurisdictions.[54] One might ask: is it a good thing rather than a bad thing that these marriages go ahead?

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50. ALI PRINCIPLES 2000, *supra* note 1, § 7.08 cmt. a.

51. It will also, of course, depend on the ability of the lawyers within the jurisdiction to adapt to the new laws, and to counsel their clients effectively.

52. Even a well-counseled and generally fair premarital agreement might end up becoming unenforceable due to unanticipated events and the application of Section 7.05.

53. *See, e.g.*, ALI PRINCIPLES 2000, *supra* note 1, § 7.04 cmt. d ("Compliance with this 30-day rule, and the other requirements of Paragraph (3), will allow parties more confidence in the enforceability of their agreement.").

54. As Katharine Silbaugh has suggested to me, it is possible that a greater enforceability of agreements might "lose" marriages as well as "gain" them: 1) some weaker parties might have married under the old regime *because* of the uncertainty of the enforceability of the agreements they entered; they were optimistically hoping for non-enforceability, a hope that may be harder to maintain under the ALI regime; and 2) if the ALI regime emboldens some stronger parties to seek an agree-

This is, to put the matter mildly, a highly complicated and controversial topic. On one hand, it is usually a good thing to allow individuals more choices, and to allow competent adults to structure their relationships (commercial and non-commercial) as they see fit. That said, the fact that the weaker parties (by our assumption, usually women) in these situations in some sense have "chosen" to enter a premarital agreement, that they in a sense "prefer" marriage with an agreement to no marriage at all, need not be the end of the analysis. Not all choices are intrinsically good.[55] The moral significance of the choice depends on the alternatives available.[56] Some commentators have argued that if marriages are discouraged by not enforcing one-sided agreements, the loss of these marriages is no loss either to society or to the parties.[57] While I do not entirely endorse this position (I think there can be value even to those marriages entered in the shadow of dubious premarital agreements), it is one that must be considered seriously.

In any event, the safeguards in the *Principles*—both the procedural protections of Section 7.04 and the "substantial injustice" standards of Section 7.05—seem to protect weaker partners (under our assumptions, usually women) from the *worst* possible consequences of unwise choices.

A third effect might be more subtle—the lost opportunity to recognize premarital agreements in which partners increased their commitment to the marriage by, for example, limiting the circumstances and procedures under which divorce could be sought. As current law seems equally antagonistic to these kinds of agreements, there would be no gender effects to adopting the *Principles*. However, I refer to this topic as a lost opportunity because a number of commentators have argued that agreements which increase the bindingness of marriage would protect the interests of women and children.[58] Their argument is drawn along the following lines: 1) anything that decreases the chances of divorce is in the interests of children, because they are the ones most likely to suffer from divorce;[59] 2) wives are far more likely than husbands to invest in the

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ment who otherwise would not, the process of seeking a one-sided agreement could enrage the weaker party or in some other way scare that party away from getting married to the one seeking the agreement. Also, if the second category—those emboldened to seek a premarital agreement who would not have done so under the old regime—includes parties who would have been willing to marry with or without the agreement, the result of the ALI regime might be more marriages contracted on unfair terms, a "loss" to be set against whatever "gain" there was from an increased *number* of marriages.

55. *See, e.g.*, Jennifer Gerarda Brown, *The "Sophie's Choice" Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENVER U. L. REV. 1255 (1998).

56. *Cf.* MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 276-98 (1999) (arguing that in discussing prostitution, surrogacy and like issues, the emphasis should be on the autonomy—the choices available—and dignity of the individuals, and not on the allegedly degrading nature of the work).

57. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 140-42 (1998).

58. *But see* Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998); Elizabeth S. Scott & Robert E. Scott, *A Contractual Theory of Marriage, in* THE FALL AND RISE OF FREEDOM OF CONTRACT 201-44 (F. H. Buckley ed., 1999). *See, e.g.*, James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875 (2000) (contains a view skeptical of the value of such agreements).

59. This is, of course, a very controversial claim, and its evaluation is far beyond the scope of this commentary. *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND

relationship and the family, investments that are not transferable upon divorce and are unlikely to be properly compensated upon divorce;[60] and 3) since women are more likely than men to become the primary custodial parent after divorce, the impoverishment of women upon divorce also harms children.[61]

One needs to be careful in discussing this area. If one's justification for enforcing agreements that bind spouses more tightly to their marriages is that the existing divorce laws harm women and children, one must be able to explain the fact that women are currently far more likely than men to file for divorce.[62] The phenomenon of the predominance of women filers seems to be based on wives' exploitation (or perception of exploitation) within marriage, combined with the increased opportunity that filing for divorce creates to obtain one good they often badly want—sole or primary custody of the children.[63] Additionally, despite the likely prominence of wives' perception of exploitation, women are less likely than men to use a "fault" rather than a "no-fault" ground when filing, creating doubt about whether repealing no-fault grounds, or allowing premarital agreements restricting filing to fault grounds, would be in the interest of women.[64] The reason women might want to avoid "fault only" regimes (despite their frequently wanting out of marriages for fault-like reasons) is that there is always a difference between the defects one can observe and those that one can confidently predict will be provable to a potentially skeptical factfinder.[65] A spouse's emotional cruelty may be a paradigmatic example of an observable defect that is not necessarily verifiable.

One more issue should be raised regarding Section 7.08:[66] it might have the effect, if not the purpose,[67] of undermining the Covenant Marriage laws now in force in Louisiana, Arizona and Arkansas.[68] The issue potentially arises from

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ECONOMICS OF THE FAMILY 173-77 (2000); JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 111-22 (2000) (contains a summary of some of the recent social science work); *see also* JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) (a widely discussed book supporting the claim, though one that has been treated skeptically within social science circles).

60. *See, e.g.*, ALLEN M. PARKMAN, GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY (2000); *cf.* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989) (suggesting a more equitable approach to spousal support decisions).

61. Of course, one of the purposes of the *other* chapters of the *Principles* is to prevent the property division, spousal support, and child support decisions from being as inequitable as they seem to be at present.

62. *See* Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126 (2000).

63. *Id.* at 130-39.

64. *Id.* at 158-60.

65. *Cf.* Avery Wiener Katz, *Informality as a Bilateral Assurance Mechanism: Comments on Ronald Mann's 'The Role of Letters of Credit in Payment Transactions'*, 98 MICH. L. REV. 2554, 2564-65 (2000) (discussing the observable/verifiable distinction in the context of letters of credit).

66. I am grateful to Lynn Wardle for this point.

67. ALI PRINCIPLES 2000, *supra* note 1, § 7.08, cmt. a, reporter's notes (notes the existence of Covenant Marriage laws without significant further comment and without any indication that Section 7.08 was intended to affect their enforceability in other jurisdictions).

68. ARIZ. REV. STAT. §§ 25-901 – 25-906 (2000); LA. REV. STAT. ANN. §§ 9:272, 9:275.1 (West 2000); 2001 Ark. Acts § 1486. Covenant Marriage laws give couples about to marry the choice to enter into a form of marriage in which premarital and pre-divorce counseling is mandatory, and in which cer-

situations where a couple marry under such a law, but one of the partners later seeks a no-fault divorce (in contravention of the Covenant Marriage rules) in another state. While the Covenant Marriage laws of one state have no power to bind the courts in another jurisdiction, and the general choice of law principle is that each forum will apply its own divorce rules to cases properly before it,[69] some commentators have argued that a Covenant Marriage might also have binding *contractual* force that would allow a breach of contract suit for damages should one party seek a divorce in a way that does not conform to the requirements of the Covenant Marriage laws.[70] To whatever extent that Covenant Marriage creates a contractual cause of action in another state (and the matter is, of course, far from clear), Section 7.08 *might* be thought to block that cause of action. When asked about this matter, the Chief Reporter for the *Principles* stated that the right to bring a claim based on Covenant Marriage in another state was "a choice of law matter on which the *Principles* do not speak."[71]

VI. CONCLUSION

At the beginning of the article, I indicated that the *Principles* take a position in between emphasizing the status aspect of marriage and the private ordering aspect. It would perhaps be more precise to say that the *Principles* emphasize both the value of private agreement and the unwaivable nature of certain obligations, with the first value occasionally having to bow to the second.[72] Under the *Principles*, premarital agreements are to be enforced to the extent that they are procedurally fair *and* do not impinge on the obligations that marital partners owe one another—both during and after marriage.

The effects of adopting the *Principles*' approach to premarital agreements are not easy to discern. At the formation stage, the *Principles*' standards would strongly encourage dealings which were procedurally more fair. At the enforcement stage, the standards are somewhat more precise than the general fairness inquiry many jurisdictions now have, but the "substantial injustice" inquiry means that parties cannot claim anything like certainty at the time of execution that the agreement will be enforceable at the time of divorce. Therefore, while the adoption of the *Principles might* lead to greater use of agreements, the matter remains highly speculative.

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tain no-fault grounds for divorce would not be available. The laws also allows couples already married to "convert" their marriage to a Covenant Marriage.

69. *See, e.g.*, Russell J. Weintraub, Commentary on the Conflict of Laws § 5.2A, at 296 (4th ed. 2001).

70. *See, e.g.*, Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1117-20 (1999).

71. E-mail from Ira Mark Ellman, Chief Reporter, ALI PRINCIPLES, to the author (March 11, 2001).

72. Both attitudes are reflected in other Chapters of the *Principles*: on one hand, the express preference for voluntary agreements on custody matters in Chapter 2; and, on the other hand, the fact that one can be subjected to legal duties despite the absence of traditional status connections in Chapter 3 (imposing child support obligations on some individuals who would not otherwise qualify under state law as the child's legal parents) and Chapter 6 (imposing financial obligations in some circumstances based on non-marital cohabitation).

What can be said is that the *Principles* will block and deter some of the more egregious forms of procedural unfairness, which may in turn do much to avoid the enforcement of the more one-sided substantive terms. To the extent that women are often on the receiving end of many or most of the more exploitative premarital agreements, the adoption of the *Principles* for regulating premarital agreements would be a step, though perhaps only a small one, towards greater gender justice.