Divorce Bargaining: The Limits on Private Ordering

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In an article published in the *Yale Law Journal*, I suggested an alternative perspective for family law scholars concerned with divorce. It emphasized negotiation, not adjudication; private ordering, not regulation. This change in emphasis seemed timely, if not overdue. Available evidence has long shown that the overwhelming majority of divorcing couples resolve the distributional questions concerning marital property, alimony, child support, and custody without bringing any contested issue to court for adjudication. Therefore, the primary impact of the legal system falls not on the small number of contested cases, but instead on the far greater number of divorcing couples outside the courtroom who bargain in the shadow of the law. Thus, my emphasis is on negotiation not adjudication.

Other evidence supported an emphasis on private ordering, not regulation. Since 1966, the American legal system has undergone a radical transformation that still continues. Before the no-fault revolution, divorce law attempted to restrict private ordering severely. The state asserted broad authority to define when divorce was appropriate, to structure the economic relationship of the spouses, and to regulate their relationship to their children. The pretense of regulation has largely disappeared. 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 themselves their postdissolution rights and responsibilities. Divorce no longer requires a judicial determination of a “marital offense.” With respect to spousal support and marital property, most states permit a couple to make binding and final agree-

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ments—i.e., not subject to later modification by a court. For those decisions that directly affect children—child support, custody, and visitation—parents lack the formal power to make their own law. American courts typically are required to "review" the parental arrangement, which later can be modified in light of substantial changes in circumstances. But absent a dispute, divorcing parents actually have the power to make their own deals. Typically, courts rubber-stamp separation agreements, even in cases involving children. Moreover, legislative changes approving joint custody and assorted appellate rulings increasingly acknowledge that the parties to a divorce should have a very broad latitude to decide for themselves by agreement the distributional questions posed by divorce. Indeed, the current interest in divorce mediation underlines the increasing emphasis on private ordering, for a mediator helps the parties reach a negotiated agreement but does not impose an outcome.

But is private ordering a good thing? This paper defends the proposition that it is, and that the primary goal of the state at the time of a divorce is to facilitate the process by which the parties themselves decide the consequences of the divorce. I should make clear from the outset that I am unwilling to defend the absurd proposition that the state should simply withdraw all resources from the dispute settlement process, and leave it to the divorcing spouses to work things out on their own, unassisted by any professional help or legal protection. To the contrary, my use of the term "private ordering" was never meant to imply either (1) that law and the legal system are unimportant; or (2) that no important social interests exist in how the process works or in the fairness of its outcomes. Consequently, an adequate defense of private ordering requires two prongs: first, a justification of why generally the legal system should permit (and indeed encourage) divorcing couples to work out their own arrangements; and second, a justification for imposing some limits on private ordering. When I began thinking about this article, I was confident that I could provide the first part—the general defense. But I was less confident that I could give reasons for limiting private ordering that would not in the process sabotage this defense.

Defining the limits of private ordering is obviously relevant both to policy makers and those involved professionally in divorce bargaining on a day-to-day basis. The issue arises in many different ways. Should mediators, for example, consider only whether a deal is made? To what extent should lawyers representing individual clients be prepared to "sign off" with respect
to an agreement that substantially differs from what a court would most likely impose? Should courts review divorce settlements, and if so, what principles should inform that review? Should the state permit divorcing couples to agree to an outcome that a court would not order? Under what circumstances should a party be able to object to the enforcement of an earlier agreement? When should persons not parties to the bargain (e.g., grandparents, children, the welfare department) be able to set aside an agreement, even if the parties to the bargain do not object?

My purpose here is neither to address these specific policy questions nor to specify the precise procedural and substantive rules that should constrain private ordering. Instead this article addresses what I see as the underlying question: should limits exist to private ordering at the time of divorce, and if so, why? I hope to answer this question in a way that provides a framework helpful to those concerned with policy.

The Article proceeds as follows. I first briefly present a general justification for private ordering. I then explore the reasons that limits are necessary. I argue that three justifications exist for limiting private ordering, each of which may warrant procedural or substantive safeguards. The first concerns the issue of capacity. Are divorcing spouses able to make deliberate and informed judgments necessary to decide whether a particular agreement is in their interests? The second concerns relative bargaining power. I will show how, even against a backdrop of just substantive entitlements and fair procedures, "one-sided" settlements can nevertheless result. The third concerns externalities, which arise because divorce bargains can often have important consequences for unrepresented third parties, most conspicuously the children. Using these three concepts—capacity, relative bargaining power, and externalities—I will provide a framework for understanding how one spouse can sometimes take advantage of the other and why some divorce bargains are reached that may not warrant enforcement. In short, I hope to provide a theory that in essence justifies a presumption that favors private ordering, while also providing guidance about the reasons some safeguards are appropriate.

I. THE ADVANTAGES OF PRIVATE ORDERING

Let me begin with the arguments to support the presumption in favor of private ordering. The core justification is rooted in
notions of human liberty. The liberal ideal that individuals have fundamental rights, and should freely choose to make of their lives what they wish supports private ordering. In Charles Fried's words, a regime of law that "respects the dispositions individuals make of their rights, carries to its logical conclusion the liberal premise that individuals have rights." Professor Fried has eloquently defended on a nonutilitarian basis the principle that "persons may impose on themselves [through contracts] obligations where none existed before." He argues that "the capacity to form true and rational judgments and act on them is the heart of moral personality and the basis of a person's claim to respect as a moral being." Thus, as a general proposition, enforcement of agreements made at the time of divorce give expression to a "free man's rational decision about how to dispose of what is his, how to bind himself."

Private ordering is also justified on grounds of efficiency. Ordinarily, the parties themselves are in the best position to evaluate the comparative advantages of alternative arrangements. Each spouse, in the words of John Stuart Mill, "is the person most interested in his own well-being . . . with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else." Through negotiations, opportunities exist for making both spouses better off than either would be if a court or some third party simply imposed a result. A consensual solution, by definition, more likely conforms with the preferences of each spouse than would a result imposed by a court. Parental preferences often vary with regard to money and child-rearing responsibilities. Through negotia-

3. Id. at 1.
4. Id. at 78.
5. Id.
6. I use efficiency here in the economic sense of Pareto efficiency. Such efficiency requires an outcome where neither party can be made better off without making the other contracting party worse off.
8. Note, however, that divorce itself no longer requires the consent of both spouses. Situations arise, of course, where one spouse may not want a divorce, while the other does. No-fault divorce laws now permit one spouse unilaterally to create a ground for dissolution. See Mnookin & Kornhauser, supra note 1, at 954.
tions, a greater likelihood exists that divorcing spouses can divide money and child-rearing responsibilities to reflect their own individual preferences.

Finally, obvious and substantial savings occur when a couple can resolve the distributional consequences of divorce without resort to formal adjudication. The financial cost of litigation, both private and public, lessens. A negotiated settlement allows the parties to avoid the pain of the formal adversarial proceedings and the risks and uncertainties of litigation, which may involve all-or-nothing consequences. Given the substantial delays that often characterize contested judicial proceedings, agreement often saves time and allows each spouse to proceed with his or her life. In short, against a backdrop of fair standards in the shadow of which a couple bargains, divorcing couples should have very broad powers to make their own arrangements. Additionally, significant limitations are inconsistent with the premises of no-fault divorce. The state should encourage parties to settle the distributional consequences of divorce for themselves. The state should also provide an efficient and fair mechanism for enforcing such agreements and for settling disputes when the parties are unable to agree.

II. JUSTIFICATIONS FOR LIMITATIONS ON PRIVATE ORDERING

A. Capacity

On an abstract level, I find the general defense of private ordering both appealing and persuasive. But it is premised on the notion that divorce bargaining involves rational, self-interested individuals—that the average adult has the intelligence and experience to make a well-informed judgment concerning the desirability of entering into a particular divorce settlement. Given the tasks facing an individual at the time of divorce, and the characteristics of the relationship between divorcing spouses, there are reasons to fear that this may not always be the case.

Informed bargaining requires a divorcing spouse to assess his or her own preferences concerning alternative arrangements. Radical changes in life circumstances complicate such assessments. Within a short period of time, separation and divorce often subject spouses to the stresses of many changes. “[S]pouses need to adjust to new living arrangements, new jobs, new financial burdens, new patterns of parenting, and new con-
ditions of social and sexual life." It may be particularly difficult for a parent to assess custodial alternatives. The past will supply a very incomplete guide to the future. Preferences may stem from past experiences in which child-rearing tasks were performed in an ongoing two-parent family, and dissolution or divorce inevitably alters this division of responsibilities. Child-rearing may now have new advantages or disadvantages for the parents' own needs. A parent interested in dating may find the child an intrusion in a way that the child never was during marriage. Because children and parents both change, and changes occur unpredictably, projecting parental preferences for custody into the future presents a formidable task. Nevertheless, most parents have some self-awareness, however imperfect, and no third party (such as a judge) is likely to have better information about a parent's tastes, present or future.

Separation often brings in its wake psychological turmoil and substantial emotional distress that can make deliberative and well-informed judgments unlikely. It can arouse "feelings about the (former) spouse, such as love, hate, bitterness, guilt, anger, envy, concern, and attachment; feelings about the marriage, such as regret, disappointment, bitterness, sadness, and failure; and more general feelings such as failure, depression, euphoria, relief, guilt, lowered self-esteem, and lowered self-confidence." Isolini Ricci has suggested that for many individuals "the emotions of ending a marriage" characteristically go through five stages during a two or three year period. She claims that during the first three stages, an otherwise competent person may occasionally have seriously impaired judgment. She suggests that the pre-separation stage is often marked by "anxiety, depression, hostility, and recurring illness." The separation stage can bring with it three dangerous side effects: "poor judgment; accident and illness-proneness, poor reflex action; and depression." The third stage, which follows the separation, arouses strong emotions that are "both natural and nasty." "Emotional roller-coasters are


10. Spanier & Casto, Adjustment to Separation and Divorce: A Qualitative Analysis, in Divorce and Separation, supra note 9, at 213.

11. I. Ricci, Mom's House/Dad's House 70 (1980). According to Ricci, these stages are: (1) the period just before the actual separation—the beginning of a crisis period; (2) the time of separation—a crisis period; (3) the eruption of strong emotions—a crisis period; (4) the adult adolescence of testing new roles and new identity; and (5) the more mature identity and a new lifestyle.
common at this stage, causing many people to feel permanent emotional instability.” According to Ricci, “this is the worst possible time to make any permanent decisions—especially legal ones. Thinking and believing the worst about each other is one of the chief hazards of this stage, and such thoughts, exaggerated and extended, can lead to serious complications.”

Such emotional turmoil may prevent for a time any negotiated settlement. Or it may lead to a settlement that a party later regrets.

Frequently, the partner who wishes to end the marriage feels guilt at abandoning the spouse. Once the initiator finally broaches the topic of divorce, continued guilt, combined with the equally strong desire to leave, may produce a virulent form of the “settlement at any cost” mentality. At the same time, the spouse who wishes to keep the marriage may escalate demands, motivated by feelings of humiliation and anger, combined with prospects of a bleak and unchosen future. Unreasonable demands may also be a means to prolong the marriage and ultimately prevent the marital breakup.

An opposite pattern was also noted by several of our respondents: guilt in the initiator may be expressed as anger directed at the non-initiator, in whom feelings of diminished self-worth may inhibit the ability to bargain constructively, or produce an abject acceptance of almost any terms. A settlement may thus be quickly arrived at whose inequitable and unworkable nature may not be apparent until several years and several court fights later.

Some might think that the stresses and emotional turmoil of separation and divorce undermine the essential premise of private ordering—individuals’ capacity to make deliberate judgments. I disagree. For most persons the emotional upheaval is transitory, and the stresses are an inevitable consequence of having to make a new life. Temporary incapacity does not justify state paternalism for an extended period of time. Nonetheless, safeguards may be necessary, and the wooden application of the traditional contract defense of “incompetence,” which is ex-

12. The adversarial nature of our legal system can make matters worse by providing an outlet for these feelings. “Even the most conciliatory and mediative attorneys find it difficult to convince out-of-control clients that the legal process is not the appropriate arena for their intense feelings of fear, spite, or anger.” Id. at 75.
tremely limited, may provide insufficient protection. More recent contract scholarship suggests a theory that respects the ideal of individual autonomy and the efficiency of private ordering, and avoids the unfairness of bargains that exploit incapacity.

Professor Eisenberg recently suggested a concept of "transactional incapacity" to capture the notion that "an individual may be of average intelligence and yet may lack the aptitude, experience, or judgmental ability to make a deliberative and well-informed judgment concerning the desirability of entering into a given complex transaction." Eisenberg's concern was with situations where one party exploits the other party's incapacity to deal with a complex transaction, "by inducing . . . a bargain that a person who had capacity to deal with the transactions probably would not make." In such circumstances, Eisenberg suggests that neither fairness nor efficiency support application of the principle that courts should support a private bargain to its full extent. Unfairness arises because it violates conventional moral standards "to make a bargain on unfair terms by exploiting . . . incapacity." Moreover, "[t]he maxim that a promisor is the best judge of his own utility can have little application: by hypothesis, the promisor is not able to make a well-informed judgment concerning the transaction."

Although Professor Eisenberg's concern was with the complexity of a particular transaction, and my concern is with a party's temporarily diminished capacity because of his or her emotional state, the concept of "transactional incapacity" can be applied by way of analogy. When one spouse knows or has reason to know of the diminished capacity of the other spouse, and exploits this incapability, a court should refuse to enforce the agreement. Proof of exploitation, however, is essential. And a critical question is how one tests for exploitation. I would require a showing that the terms of the agreement considered as a whole fall outside the range of what would have been acceptable to a competent person at the time of the settlement.

14. Ordinary contract principles would require extreme impairment of cognitive capacity before allowing a defense of incompetence. Incompetence traditionally required a showing that a party has childlike abilities, or is mentally disabled in a severe way. See 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 256 (1959).
16. Id. at 764.
17. Id. at 765.
18. This test would permit the reviewing court to take into account the possible transaction costs. A fully competent spouse might accept less than the expected value of
viding a remedy only if a spouse exploited the other spouse’s incapacity by securing an unusually one-sided bargain, this test will not create uncertainty in most cases. Many divorced spouses may in retrospect think that they unwisely accepted some provision, and some might successfully show a lack of deliberative judgment, but few will successfully show that the settlement as a whole would have been unacceptable to a competent person. Any additional uncertainty created for parties making “out of the ordinary” deals may not constitute a bad thing. Moreover, I would create a presumption against the application of this diminished capacity doctrine in any cases where the party making the claim was represented by counsel. Indeed, as Eisenberg suggests, “[i]f a party who has been urged, fairly and in good faith, to seek advice, fails to do so, the doctrine of transactional incapacity would normally not apply, because the element of exploitation would be lacking” [at least where the party has sufficient capacity] “to understand the importance of getting advice.”

A second prophylactic to guard against transitory diminished capacity would involve a “cooling-off” period, during which either party would be free to rescind a settlement agreement. In a commercial context, this period is often very short—typically three days. In the divorce context, I would make it considerably longer—perhaps thirty to sixty days. Like any safeguard, a cooling-off period has costs. Some agreements may come apart even though they involve no exploitation whatsoever, simply because of ambivalence or a change of heart. Moreover, a party may strategically use the cooling-off period. A tentative agreement may be reached, only to be later rescinded, in order to wear an opponent down. Nonetheless, it seems appropriate to have a fixed, reasonable “boundary line” as a rough estimate of the time within which the “transitory state of acquiescence” induced by guilt or anxiety might be expected to lapse. In cases where both parties have assigned counsel, it might be possible to have a shorter period. In any event, a cooling-off period might well

19. If independent counsel “signed off,” a court should refrain from subsequent intervention to rescind. Perhaps the injured party should have a malpractice claim against the lawyer in an extreme case.

20. Eisenberg, supra note 15, at 770 n.78.

21. Eisenberg discusses the case of “unfair persuasion” which he defines to mean “the use of bargaining methods that seriously impair the free and competent exercise of judgment and produce a state of acquiescence that the promisee knows or should know is likely to be highly transitory.” Id at 733-74. Under traditional contract rules, “undue influence” was a ground of rescission, but it required a pre-existing relationship between
obviate the need for much substantive regulation by courts on the ground of transactional incapacity.

B. Unequal Bargaining Power

A second possible justification for imposing limits on private ordering lies in a simple idea. In negotiations between two competent adults, if great disparity in bargaining power exists, some bargains may arise that are unconscionably one-sided. The notion of bargaining power has intuitive appeal, but defies easy definition. Moreover, to speak of "unequal" bargaining power implies that one can know when parties have "equal" bargaining power. Without a complete theory of negotiations, it is hard to give precise substantive content to the notion of bargaining power, much less precisely define or measure "relative bargaining power." Nonetheless, by briefly analyzing the five elements of the bargaining model I described in an earlier article, it is possible to suggest why one divorcing spouse may be seen as having greater ability to bring about an outcome favorable to himself or herself.

First, bargaining is influenced by the partners’ respective legal endowments. The legal rules governing marital property, alimony, child support, and custody give each spouse certain claims based on what each would get if the case goes to trial. In other words, the outcome the law will impose if no agreement is

the parties where "one party is under the domination of another or by virtue of the relationship between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare." See RESTATEMENT (FIRST) OF CONTRACTS § 497 (1932). The commentary suggests that the relationship of husband and wife might ordinarily fall within this rule, but that it would depend on a question of fact whether "the relationship in a particular case is such as to give one party dominance over the other, or put him in a position where words of persuasion have undue weight." Query whether the relationship between a divorcing husband and wife would often justify a party's belief that "the other party will not act in a manner inconsistent with his welfare." See Auclair v. Auclair, 72 Cal. App. 2d 791, 165 P.2d 527 (1946) (finding that husband and wife have fiduciary obligations as a matter of law). In all events, Eisenberg suggests a doctrine of "unfair persuasion" that should be applied irrespective of the prior relationship between the parties, but "only where the promisee creates and exploits a state of acquiescence that he knows or should know is only transitory." Eisenberg, supra note 15, at 777. He supports a "cooling-off" period within which the transitory state of acquiescence can normally be expected to disappear. Id. at 776-77.

22. Temporary incapacity is arguably a special case of unequal bargaining power. If one party is competent and the other is not, it would certainly seem that they have unequal bargaining power. There are nonetheless distinct problems with this because it is certainly possible that the two parties might each be entirely competent and capable of exercising deliberative judgment, where one would nonetheless conclude that they had very disproportionate bargaining power.
reached gives each parent certain bargaining chips—an endowment of sorts. These endowments themselves can create unequal bargaining power. For example, other things being equal, in a state where a tender years presumption exists in favor of maternal custody, a mother who wants primary custody has considerably more bargaining power relative to the father than she would in a state with a sex-neutral “best interest” standard. A new law creating a presumption against spousal support, on the other hand, would reduce the bargaining endowment of women as a class. To the extent that negotiated settlements simply reflect differences in bargaining power based on the legal rules themselves, no justification arises for a claim of unfairness in an individual case. Instead, the state should consider changing the legal endowments.

Second, bargaining is very much influenced by each party's preferences, i.e., how each party subjectively evaluates alternative outcomes. These preferences are not simply matters of taste. A party's economic resources and life circumstances mold them. The parties' relative bargaining power depends on how each spouse subjectively evaluates the outcome a court would impose. Consider, for example, the differences between the following two cases, each in a state where custody law provides for joint custody. If both the mother and father are indifferent to whether they have primary custody or joint custody, the perceived endowments of the two parties are comparable. Now, consider a case where the father likes joint custody better than his having sole custody. The mother, on the other hand, has a strong preference for her own sole custody over joint custody. In such circumstances, if the father knows the mother's preferences, he might be seen as having greater bargaining power than the mother because he could force on the mother his preferred outcome (joint custody) and thus could require her to compensate him somehow if he is to accept some other arrangement. The relationship of each party's preferences to outcome is explored further below.

A third element that affects bargaining concerns uncertainty, and the parties' attitudes towards risk. Often the outcome in court is far from certain, and the parties are negotiating against a backdrop clouded by substantial uncertainty. Because the parties may have different risk preferences, this uncertainty can differentially affect the two spouses. If substantial variance exists among the possible court-imposed outcomes, the relatively more risk-averse party is comparatively disadvantaged.

A fourth element that affects bargaining relates to the differ-
ential ability to withstand the transaction costs—both emotional and economic—involves in negotiations. A party who has no immediate need for settlement, enjoys negotiations, and has plenty of resources to pay a lawyer, has an obvious advantage over an impatient opponent who hates negotiations, and cannot afford to wait.

A fifth element concerns the bargaining process itself, and strategic behavior. In divorce bargaining, the spouses may not know each other's true preferences. Negotiations often involve attempts by each side to discern the other side's true preferences, while making credible claims about their own preferences and their intentions if a particular proposal is not accepted. "Bargainers bluff, argue for their positions, attempt to deceive or manipulate each other, and make power plays to gain advantage." Some people are more skilled negotiators than others. They are better at manipulating information and managing impressions. They have a more refined sense of tactical action. These differences can create inequalities in negotiations.

In short, negotiated outcomes depend in part on how each spouse evaluates the consequences of what will happen absent an agreement. Those evaluations are affected by both subjective and objective elements. This, in turn, depends not simply upon the legal endowments, but on each party's subjective evaluation of the outcome absent a negotiated agreement, and the probable transaction costs of a court-imposed resolution. I am skeptical about our ability to identify when parties have equal bargaining

23. S. BACHARACH & E. LAWLER, BARGAINING: POWER, TACTICS, AND OUTCOMES 42 (1981). Bacharach and Lawler suggest that "[t]he task of a bargaining party is to convince its opponent that it controls resources, that the opponent needs the resources, and that it is willing to use power. These manipulative actions ultimately determine a party's bargaining power." Id. at 51. They believe "punitive tactics are central to bargaining as power itself . . . punitive tactics relate to the ability of one party to impose costs on the other party." Id. Some commentators have suggested a distinction between bargaining to give the other side as little as possible, and bargaining to get as much as possible for oneself. A mediator, according to some commentators, can encourage people to avoid spite and bargain for gains. The difficulty is that in the strategic game it is often possible to get more for oneself by making a credible threat to harm the other side. One reason I like mediation is because it tends to dampen strategic behavior.

24. Bacharach and Lawler suggest that

analysis of bargaining power . . . requires a framework that (1) identifies the multiple dimensions constituting each party's potential bargaining power, (2) identifies the major types of bargaining tactics, (3) shows how the dimensions of bargaining power affect tactical action, (4) shows how tactical action can alter bargaining power, (5) examines the conditions under which given tactics affect the bargaining outcomes, and (6) examines how outcomes at any given time affect potential power at later time.

Id. at 47.
power. Nevertheless, to the extent that one spouse sees himself as lacking alternatives and as being dependent upon resources controlled by the other spouse, he might be said to be disad-\n\ntaged compared to his situation if he had better alternatives.

The following examples illustrate these notions, and suggest why, even against a backdrop of "fair" legal endowments, some negotiated outcomes will seem very one-sided.

Case 1 The Problem of Idiosyncratic Tastes—H and W, who are divorcing, have as their only assets $30,000 cash and an eighteenth-century French tapestry that cost $5,000 ten years ago and today has a fair market value of $10,000. In states with community property, a court must divide such property equally according to its fair market value. With an indivisible tangible asset such as a tapestry, the court has discretion to award it to either party, compensating the other with other assets, or to order it sold and the proceeds divided.

Suppose this particular tapestry has great sentimental value to H; he would, if necessary, pay $30,000 to keep it, even though he knows it has a fair market value of $10,000. If W knew this, then through hard bargaining she might end up with the $30,000 cash, while H received only the tapestry. In such circumstances, H might resent that he had to "pay" $15,000 (his half of the community's $30,000 cash) to buy W's half of the tapestry. Nonetheless, he might prefer this negotiated outcome to the risks of litigation if he thought substantial chance existed that the court would award the tapestry to W and she would not re-\n\nsell it to him. This example demonstrates how private ordering can lead to "one-sided" outcomes because the parties' preferences differ, even though the legal rule (here community property) treats the parties as equals. In essence, because the husband has idiosyncratic tastes, and attaches a higher-than-market value to this particular tapestry, what the parties bargain over is how to divide this surplus.

This example illustrates a more general characteristic of divorce bargaining. In many respects, it resembles a bilateral monopoly. In ordinary market transactions, one buyer does not have to do business with any particular seller because there are many others with whom to do business. In divorce, the spouses must negotiate with one another, unless one or both simply accept the consequences—both legal and practical—of the non-co-operative solution where the court settles the dispute. Like a monopolist selling to a monopsonist, the two spouses (or their representatives) are locked in a dyadic relationship that they cannot easily avoid. One way or another, the distributional ques-
tions concerning marital property, spousal support, child support and custody must be resolved.

What consequences result from this bilateral monopoly? First, opportunities often exist for both parties to gain through a negotiated resolution. Second, frequently one spouse may "take advantage" of the other spouse's preferences. Indeed, economic theory suggests that while the range of possible efficient exchanges can be specified, the actual bargain struck within the range eludes predetermination because of possible strategic interaction. In this example, an efficient outcome requires that H get the tapestry, but the range of efficient outcomes might also give him anywhere from $0 to $10,000 cash in addition. The outcome depends not only on the preferences of each party, but on each party's knowledge of the other's preferences and how the parties play the game.

This last point can be illustrated using the same tapestry example. Suppose a judge were to resolve the dispute by requiring one spouse to cut the cake (i.e., divide the property into two piles), and then having the other spouse choose the slice he or she prefers (i.e., picking a preferred pile). Assume H values the tapestry at $30,000, and W values it at $10,000. If the parties know each other's preferences, and no recontracting between the spouses can occur after the division, then the amount H pays for the tapestry will depend upon who gets to slice the cake. W could presumably put the tapestry and $1 in one pile, and $29,999 in the other pile. W would know that H would choose the tapestry and $1, because H values that pile at $30,001 and the other at $29,999. In essence, W could thus capture all the surplus. If H were dividing, on the other hand, he could create one pile with the tapestry and $9,999, and a second pile with $20,001 cash. He would know that the wife would choose the second pile, and as a consequence he would have "bought" the wife's half of the tapestry for only $1 more than its fair market value. Thus, he would have captured the surplus for himself.

Where each spouse is ignorant of the other's preference, the

25. There is interesting literature about the problem of dividing an object (such as a cake) among a finite number of people so that each is satisfied that he has received a fair share, although each may have a different opinion about which part of the cake is most valuable. See Steinhaus, Sur la division pragmatique, 17 ECONOMETRICA (supplement) 315-19 (1949); Dubins & Spanier, How to Cut a Cake Fairly, 68 AM. MATHEMATICAL (1961). For valuation disputes in divorce, one commentator has suggested a process in which one party proposes a value, and then allows the court to award the object to either party at the value placed on it. C. Markey, California Family Law, 24, 45; see also King, Guidelines for Domestic Relations Cases 10 (San Francisco Super: Ct. 1977) (suggesting a modified bidding arrangement where divorcing parties cannot agree on value).
situation becomes more complicated. Under these circumstances, the one who cuts the cake suffers a disadvantage. For example, if W is completely ignorant of H's preferences and assumes that his preferences resemble hers, then the only way she can guarantee herself one-half the value of the property is by dividing the property into two parts that by her preferences are of equal value. Presumably one pile would contain the tapestry and $10,000 while the other pile would contain $20,000. In this way, no matter which pile H chooses, she will guarantee herself the equivalent of $20,000. With any other division, she risks ending up with less than half the fair market value if H's preferences are the same as her own. For H, on the other hand, to guarantee himself the value of the property (by his own preferences), he must place the tapestry in one pile, and $30,000 in the other. Only with this division is he indifferent about which choice W makes. With any less extreme split, he risks ending up with less than half the value (by his preferences) if W's preferences are the same as his own.

Is it fair for W to be able to "exploit" H's idiosyncratic preferences by more than fair market value for her undivided interest in the tapestry? This normative issue does not seem clear. H might claim that ordinarily in a market economy a person enjoys any surplus value over market value generated by his own preferences. Accordingly, H might claim that if W attaches no special value to the tapestry, H should receive the entire surplus. W, on the other hand, might claim that she owns one-half the tapestry, and as owner may sell it for whatever price she can get. Surely, if H and W were strangers, W would have the right to refuse to sell the tapestry unless H paid $30,000 for it.

Case 2 Economic Inequalities and Urgent Need—Consider now a second example, which I find more troubling, of one-sided agreements with "fair" legal endowments. H has substantial separate property and a high income. W has neither. Their only community asset consists of a house that H and W own outright. The housing market is currently depressed, and very few houses are selling. Realtors believe that they can sell the house within six months for between $150,000 and $180,000, provided the sellers would accept a $100,000 ten-year mortgage at 12 percent interest, which falls below the present market rate of 14 percent. H and W could sell this mortgage for $65,000, making the net present value of the house between $115,000 and $145,000.

H knows that W is very short of funds and eager to move to a new city where she wishes to buy a condominium and start anew. Both H and W recognize that without a negotiated settle-
ment a year would pass before a court would require the home to be put on the market. When W asks H to buy out her interest in the home, H offers W $40,000 on a take-it-or-leave-it basis, saying that he would just as soon continue to own the house with W. W reluctantly accepts, because she believes that if she does not sell to H now, two years may pass before she can force the sale of the house, and get her equity out by reselling her share of the mortgage that is taken back. H and W both know that one-half of the present value of the expected sale price (taking account of the mortgage) exceeds $40,000, but no market exists for undivided one-half interests in residential real estate. If H doesn’t buy her one-half interest, W must wait until a judge forces a sale of the house. Unlike the first case, where H decided to buy his wife’s share of the tapestry at a price above the fair market value, in this case W has decided to sell for less than the fair market value in order to avoid the delays and inconvenience of an adjudicated result.

Does this case represent one in which W accepted an “unfair price” because H exploited W’s distress? Professor Eisenberg has suggested that in circumstances where one party “is in a state of necessity that effectively compels [her] to enter into a bargain with any terms [she] can get . . . [n]either fairness nor efficiency, the two major props of the bargain principle,” support enforcement of the deal.26 Eisenberg gives as an example an injured traveler stranded in the desert who must bargain with a geologist to save his life. In Eisenberg’s example, the traveler bargains for his life; here W bargains for the opportunity to start a new life sooner.

What is the appropriate remedy in such a case? If there is a preliminary review of this agreement by a court, should it be rejected by the court? Even if the wife is not objecting? After H has paid W, should she later be able to rescind the agreement? Should W be able to argue that H received unjust enrichment, and that she was entitled to the difference between what she actually received, and what was reasonably and justly due?

In cases like this, the problem of exploitation arises not because of W’s ignorance. To the contrary, her consent to this agreement is real. As Professor Dawson pointed out in his seminal article many years ago, “the more unpleasant the alternative, the more real the consent to a course which would avoid it.”27 The underlying issue concerns in part the question of what

pressures a party can legitimately apply in bargaining, and how and whether the state should regulate the manner in which such pressures are exercised. No controversy would exist if W had shown that she accepted $40,000 because of physical threats by H. The doctrine of "duress" has traditionally permitted a defense to the enforcement of a contract through threats of illegal conduct. In this case, however, H's conduct was not illegal. Nonetheless, H plainly took advantage of W's desire to sell quickly. One's appraisal of the morality of H's conduct might depend on an evaluation of whether he was somehow responsible for W's urgent need. In the first case, W was not in any sense responsible for H's preference for French tapestry. In this case, however, we may wish to treat H as responsible for W's distress.

While I am reluctant to allow a court to evaluate the fairness of financial settlements in divorce bargains, the second case deeply troubles me. The various doctrines of contract law clearly permit intervention in egregious cases where inequality in bargaining power has unjustly enriched one spouse. The underlying philosophical and jurisprudential issues remain difficult, but they do not, in my view, undermine the general reasons to favor private ordering, any more than the doctrines of duress or unconscionability undermine all of contract law. A variety of legal mechanisms exist to change the results of unfair divorce bargains. For example, the alteration of bargaining endowments and the use of ex post review can serve to prevent unjust enrichment brought about by morally unacceptable conduct.

C. Externalities—Third Party Effects

Third party effects provide the last set of reasons that justify limiting private ordering. A legal system that gives divorcing couples freedom to determine for themselves their postdissolution rights and responsibilities may lead to settlements that reflect the spouses' interests. But negotiated agreements can also have important consequences for third parties, and affect social interests that private negotiations fail to consider adequately. The economists' idea of "externalities"—the notion that in some circumstances market prices that affect the behavior of buyers and sellers will not adequately reflect the full range of social costs—has application here. In negotiating divorce settlements, the spouses may make decisions that have consequences for

(1947).
third parties which, if taken into account, would suggest some more socially desirable settlement.

A divorce settlement may affect any number of interests not taken into account in the spouses’ negotiations. The state’s fiscal interests can be affected, for example. The economic terms of the bargain between the two spouses may substantially affect the odds that a custodial parent will later require public transfer payments.\(^{28}\) The most important third party effects concern the children, although externalities can exist with respect to other family members as well.\(^{29}\) At a conceptual level, one can easily see how a negotiated settlement may reflect parental preferences but not the child’s desires or needs. From the perspective of spouses who negotiate their own settlements, marital property, alimony, and child support issues all basically present problems of money, and distinctions among them become very blurred. Each translates into present dollar values.\(^{30}\) Moreover, custodial arrangements can often be divided in a wide variety of ways. From a bargaining perspective, the money and custody issues inextricably link together.\(^{31}\) Negotiated settlements will certainly reflect parental preferences with regard to these money and custody issues. Generally, self-interested judgments will not solely determine these preferences. One hopes that parental preferences reflect a desire for their children’s happiness and well-being, quite apart from any parental advantage. Nevertheless, some parents may engage in divorce bargaining on the basis of preferences that narrowly reflect their selfish interests, and ignore their children’s needs. For example, a father may threaten a custody fight over the child, not because he wants custody, but

28. For example, a mother might decide to forego all alimony and child support payments from the child’s father in order to avoid any future relationship with him. If the father’s resources were small, this decision might “cost” the mother and child very little or nothing, if public assistance payments make up the difference. Nonetheless, if the welfare system is premised on the private support obligation, the mother’s decision (if it were binding on the state’s power to claim reimbursement from the father) would have obvious effects on the public fisc. Indeed in this example, a solution that largely respects the private agreement is possible. The economic agreement made by the spouses can be effective inter se but can be treated as having no effect on the state’s right to collect child support from the father.

29. For example, visitation and custody agreements may reflect the parents’ interests, but not those of grandparents and other family members.

30. See Mnookin & Kornhauser, supra note 1, at 959-63. Although there are differences among the three elements with respect to termination and enforcement risks, the value of different bundles of the three elements can be compared. See id.

31. Two reasons exist. First, over some range of alternatives, each parent may be willing to exchange custodial rights and obligations for income or wealth. Second, parents may tie support duties to custodial prerogatives as a means of enforcing their rights without resort to court. See id. at 963-66.
because he wants to push his wife into accepting less support, even though this will have a detrimental effect on the child. A custodial parent, eager to escape an unhappy marriage, may offer to settle for a small amount in order to sever relations soon. A custodial parent may negotiate to eliminate largely the child’s contact with the other parent, not because of the child’s wants or needs, but because the custodial parent despises his ex-spouse and wants nothing more to do with her.

Concerns about the effects of divorce on children underlie many of the formal limitations on private ordering, e.g., the requirement of court review of private agreements relating to custody and child support; the legal rules prohibiting parents from making nonmodifiable and binding agreements concerning these elements. In addition, the potential conflict of interest between divorcing parents and their children has led many to advocate the appointment of counsel for children, so that the children’s interests can be directly represented in divorce proceedings.

Over the years, numerous commentators have expressed the fear that courts rubber-stamp custodial arrangements in uncontested divorces, and that this proves harmful for children. In 1968, for example, Judge Justine Polier complained:

In the vast proportion of cases where divorce is not contested, the question of the welfare of children, in terms of which parent has more to offer to their healthy development, is not considered by the court . . . . Divorce is granted, and the children automatically go to the plaintiff, as benefits and burdens go with the land that is sold. The pre-divorce agreement between the parties may or may not reflect concern for the welfare of the children. The primary interest of one party in escaping the marriage, or financial considerations unrelated to the soundness of the custody or visitation agreements, control the disposition of the children. The mental health of the respective parents, past anti-social behavior, and their ability to be parents are not subjected to scrutiny.

I have written elsewhere on these issues, and I remain very
skeptical about the wisdom of assigning counsel for children in uncontested divorces, and the requirement of judicial review of negotiated settlements in all divorce cases involving children. These issues involve more than an assessment of the practical usefulness of various safeguards. They also relate to the fundamental issue of free choice: how should the power and responsibility to define what is in the interests of children be allocated at the time of divorce? Who decides on behalf of the child? To what extent should the child's parents possess the freedom to decide how to allocate the responsibility for their children following divorce?

When a divorce affects minor children, the state obviously has interests broader than simply dispute settlement. The state also has responsibility for child protection. To acknowledge this responsibility, however, is not to define its limits. Indeed, the critical questions concern the proper scope of the child-protection function at the time of divorce and the mechanisms that best perform this function.

I believe divorcing parents should maintain considerable freedom to decide custody matters—subject only to the same minimum standards for protecting the child from neglect and abuse that the state imposes on all families. The actual determination of what is in fact in a child's best interests is ordinarily quite indeterminate. Such a determination requires predictions beyond the capacity of the behavioral sciences and involves imposition of values about which little consensus exists in our society. It is for this reason that I conclude that the basic question is who gets to decide on behalf of the child.

A negotiated resolution is desirable from the child's perspective for several reasons. First, a child's social and psychological relationships with both parents ordinarily continue after the divorce. A process that leads to agreement between the parents rather than one that necessarily has a winner and a loser better ensures a child's future relationship with each of his parents. Notions of child protection hardly justify general judicial suspicion of parental agreements; the state's interest in the child's well-being in fact implies a concomitant interest in facilitating parental agreement.

35. See Mnookin & Kornhauser, supra note 1, at 988-90.
36. Id. at 994-96.
37. See Mnookin, supra note 34, at 229, 232.
38. Id. at 255-62.
39. Id. at 258-61.
Second, the parents know more about their child than will the judge, because they have better access to information about the child’s circumstances and desires. Indeed, a custody decision privately negotiated by those responsible for the child’s care after the divorce seems much more likely than a judicial decision to match the parents’ capacities and desires with the child’s needs.

Parents, undoubtedly, occasionally make mistakes concerning custodial arrangements, but so do judges. More fundamentally (given the epistemological problems inherent in knowing what is best for a child), reason exists to doubt our capacity to know whether any given decision is a mistake. Therefore, the possibility that negotiated agreements fail to maximize the child’s welfare hardly serves as sufficient argument against a preference for private ordering. Moreover, because parents, not state officials, are primarily responsible for the day-to-day child-rearing decisions before and after divorce, parents, not judges, should have primary authority to agree on custodial arrangements. This means that courts should not second-guess parental agreements unless the narrow child-protection standard implicit in neglect laws demands judicial intervention. Nonetheless, the state has an important responsibility to inform parents concerning the child’s needs during and after divorce and an important interest in facilitating parental agreement. The law in action, which acknowledges substantial parental power, seems preferable to existing doctrine, which imposes substantial restrictions on the parents’ power to decide for themselves.

Because primary responsibility for child-rearing after divorce does and should remain with parents, a strong presumption should favor the parental agreement and limits on the use of coercive state power by judges or other professionals to force parents to act as the professional thinks best. On the other hand, I think the state has an important interest in encouraging parents to understand that the responsibility for their children extends beyond the divorce, that children are in many ways at risk during the divorcing process, and that in deciding about the child-rearing arrangements the parents have an important obligation to meet their children’s needs. Moreover, there is reason to think that by facilitating parental agreement, and helping the parents transform their old relationship into one in which they can now do business together with respect to the children’s future needs, the interests of the children are being served.
CONCLUSION

From a legal perspective, separation and divorce pose four distributitional issues, any of which may lead to a dispute between the spouses. These issues are: (a) How should the couple's property—the stock of existing wealth, separately or together—be divided? (b) What ongoing claim should each spouse have on the future earnings of the other? (c) What ongoing claims should a child have for his share of the earnings or wealth of each of his parents? (d) How should the responsibilities and opportunities of child-rearing be divided in the future? The legal system specifies both substantive rules (i.e., marital property law, alimony law, child support law, and custody and visitation law) and a set of procedures that seek to resolve these disputes.

I believe that the primary function of the legal system at the time of divorce is to facilitate private ordering—in other words, to provide a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities against a backdrop of fair rules and procedures. My general defense of private ordering depends on the ideal of individual autonomy and liberty and arguments based on efficiency and cost. At the beginning of this article, I emphasized that my defense of private ordering was not premised on an absence of important social interests in how the process works or in the fairness of the outcomes. The critical issues are ones of emphasis and degree: to what extent should the law permit and encourage divorcing couples to work out their own arrangements? Within what limits should parties make their own law by private agreement?

While I have not attempted to answer these questions with any precision, or to define with exactitude the precise limits of private ordering, I have suggested three justifications for limitations upon divorce settlements: (1) problems of capacity, which go to the issue of whether in a particular case one party has exploited the other party's inability to make a deliberative judgment; (2) problems in bargaining that may lead to unconscionable results, even if both parties are competent, and the legal endowments are generally considered fair; and (3) problems of externalities, where the concern lies with the impact of the negotiated agreement on persons not represented in the divorce bargaining process.

My framework certainly does not make previously intractable family law problems disappear. But it does suggest an important
intellectual agenda for those concerned with dispute settlement and divorce. How do the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples outside the courtroom? How do various procedural requirements affect the parties' behavior during the time they are resolving various distributional issues, and thereafter? What rules and procedures facilitate dispute settlement, and how do alternatives affect the future relationship of the former spouses to each other and to their children in subsequent years? In short, how do we best design rules and procedures that respect personal autonomy by facilitating private ordering, and ensure fairness by establishing appropriate safeguards against the risks that incapacity or third party effects may lead to unjust results?