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Democracy Broadly Understood

Privatized Pluralism: Branded Relationship Contracts as Non-Governmental Family Law

*Sean Hannon Williams**

Abstract

The current mechanisms to promote family law pluralism are woefully inadequate. Some scholars lament the inability of state legislatures to enact pluralism-enhancing family law reforms, and yet turn back to those same institutions in the hopes that, somehow, this time they will find the political will to pass radical family law reforms. Other scholars put their faith in private ordering as a pathway to family law pluralism, where individual couples navigate emotionally difficult conversations and pay expensive lawyers to draft terms that may ultimately be thwarted by judicial resistance to relationship contracts. This Article identifies a novel form of decentralized, non-governmental family law that can actually fulfill the pluralistic aspirations of other, failed, family law reform efforts. It envisions non-profits or other entities creating packages of family law embedded into stock relationship contracts like prenuptial or cohabitation agreements. Simply by identifying an entity that the couple trusts, they can quickly and easily opt into family law regimes that are far more likely to track their preferences than the default family law regimes provided by increasingly gerrymandered state legislatures. In addition to providing a novel pathway to family law pluralism, these branded relationship contracts generate a host of unique dialogic benefits and offer new mechanisms and new audiences for various family law reform projects.

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* F. Scott Baldwin Research Professor in Law, University of Texas School of Law. I am indebted to numerous people for helpful comments on this project. I owe a particularly large debt to the participants at the Family Law Scholars and Teachers Conference. I would also like to express special gratitude to Kerry Abrams, Ayelet Blecher-Prigat, Alexander Boni-Saenz, Claire Donohue, Marie-Amélie George, Cynthia Godsoe, Clare Huntington, Courtney Joslin, Elizabeth Katz, Laura Lane-Steele, Yvette Lindgren, Kaiponanea Matsumura, Rachel Rebouché, Clare Ryan, Emily Stolzenberg, Gregg Strauss, and the editors of the Harvard Law & Policy Review.

Introduction

Proponents of family law pluralism often lament state law's limited set of statuses for adults, which generally only include married and not married.[1] Currently, private ordering—through relationship contracts like prenups and cohabitation agreements—is the main pathway available to pursue the value of pluralism in family law.[2] This paper carves out a novel middle ground between private ordering and centralized legislative family law, each of which has significant shortcomings. It identifies a set of existing legal structures through which private entities can circumvent legislative logjams to create a form of decentralized, non-governmental family law.

Pluralism within family law seeks to expand the options people have for legal recognition of their relationships.[3] "A pluralistic approach to family law reflects a contemporary understanding of our society as a diverse and multicultural one, and of the family as central to the establishment of identity and meaning in private life. It is based on a commitment to inclusion and respect."[4] Pluralistic regimes can be contrasted with monolithic state control, where some people are channeled into limited and pre-defined relational categories, while others are wholly excluded from legal recognition.[5] Expanding access to marriage for same-sex and interracial couples are pluralistic victories.[6] So too are regimes like domestic partnerships that offer alternatives to marriage,[7] decriminalizating adultery, allowing no-fault divorce, and

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[1] *See, e.g.*, Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 Yale L.J. 1691, 1702-03 (2023); Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 Harv. J.L. & Gender 317, 323-77 (2016); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 Geo. L.J. 1881, 1886 (2012).

[2] *See infra* Part I.A.

[3] Aloni, *supra* note 1, at 319, 325 (defining pluralism and grounding it in autonomy and welfare).

[4] Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 Md. L. Rev. 540, 541 (2004).

[5] Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 Brook. L. Rev. 791, 825–26 (2010).

[6] Eskridge, *supra* note 1, at 1884, 1893-95.

[7] Although, as others have noted, these regimes often mimicked marriage. Aloni, *supra* note 1, at 326 n.44.

dismantling discrimination against children born out of wedlock.[8] Although family law pluralism is a foundationally important goal, the existing legal pathways to promote pluralism have important drawbacks.[9]

Relying on private ordering as a pathway to promote pluralism has serious limits. Very few people enter relationship contracts.[10] This is both because they are expensive to write, and even just mentioning a prenup sends a deeply unwelcome signal that you mistrust your fiancé.[11] Even when couples manage to write contracts, especially cohabitation agreements, courts often find ways to invalidate them.[12] Even if people could hire lawyers and write enforceable contracts, those agreements offer only the illusion of promoting pluralism. They might, instead, simply promote the power of one spouse over another, hence reducing the capacity of the other spouse to exercise meaningful choice over their governing family law regime.[13]

One common scholarly response to the limits of private ordering is to turn back toward centralized state law.[14] State legislatures might promote pluralism by enacting menu regimes. Under menu regimes, state statutes would provide a robust set of choices to couples. For example, a marriage license application might include three choices reflecting three different visions of marital property. There are serious unacknowledged flaws in menu regimes. The most ironic is that proponents of menu reforms begin by lamenting state legislatures' continual inaction and lack of imagination in crafting alternatives to marriage, and yet turn right back to those very same ineffectual and unimaginative state legislatures for a solution.

This paper introduces the concept of a branded relationship contract (BRC) as a novel tool to promote family law pluralism without relying on state legislatures, and without leaving people to negotiate their own agreements. At their most basic core, BRCs are stock prenups or cohabitation agreements written by entities—like the American Association of Retired Persons (AARP), the National Organization for Women (NOW), the Mississippi Low Income Child Care Initiative, or Lambda Legal—whose mission, at least in part, is to further the family-related interests of some sub population. To reach their full potential, this basic core must be packaged in a particular way. BRCs leverage the power of *branding* to quickly communicate a great deal of information to both couples and judges, and to offer identity-affirming associational opportunities. These features allow BRCs to significantly reduce the psychological and monetary barriers to entering contracts,

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[8] Eskridge, *supra* note 2, at 1893-95.

[9] Even the core commitment to pluralism is not without costs. For example, offering limited options might help channel people into family forms that are better for them (as paternalistically judged by the state) or that are better for the state itself by some normative yardstick. Carl E. Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495, 498, 501-02 (1992) (discussing family law's channeling function). Pluralism is in tension with channeling.

[10] *Id.*

[11] *See infra* Part I.A.

[12] *See infra* Part I.B.

[13] *See infra* Part I.C.

[14] *See infra* Part II.

mitigate the equality-undermining effects of disparities in private bargaining power, and overcome continued judicial resistance to family law contracting.

BRCs occupy a novel space between centralized state statutory family law and private ordering, and have significant advantages over each. Compared to private ordering, BRCs make it far easier to enter enforceable pluralism-enhancing relationship contracts. Simply by identifying an entity that they trust, people who wish to enter a relationship contract can quickly and easily identify a stock prenup or cohabitation agreement that it far likelier to reflect their preferences than the state's often-gerrymandered family law regime. The reputation of an entity that writes or endorses a BRC not only helps people quickly opt into useful relationship contracts, it also increases the likelihood that those contracts will be enforced. Even a judge who is hostile to cohabitation agreements—and many are—might hesitate before invalidating one that was endorsed by the AARP, the American Association of Matrimonial Lawyers (AAML), and the local county bar association. BRCs also provide a great deal of information and leverage to the partner with less bargaining power. This partner can ask: "Why do we need a specialized agreement, when we could just sign the NOW prenup with its very progressive terms on domestic violence?" As this question implies, the existence of reputable BRCs make it much more difficult to justify customized agreements that might merely reflect private power.

BRCs also have significant advantages over menu regimes. They avoid the central irony of looking to state legislatures to solve a problem caused by the historical inability of state legislatures to act. Even assuming that state legislatures found the political will to act, there are reasons to doubt that they could produce attractive menu options. What do they know about life at the intersection of poverty, race, and non-binary gender identities? Perhaps not much. Similarly, state legislators probably know very little about the challenges faced by older black lesbians living in Atlanta. But NOBLA—the National Organization of Black Lesbians on Aging, which focuses on supporting black lesbians over 40 and was started in Atlanta—knows *a lot* more.[15] BRCs leverage the significant informational advantages of these organizations.

BRCs also dispel a central tension that exists in all menu regimes. In order to promote pluralism, the relevant menu needs to contain a vastly large set of options to accommodate the increasing diversity of family forms and relationship preferences. Yet menu regimes must also limit the number and complexity of options so that couples can determine, without the help of expensive lawyers or sophisticated legal knowledge, which option fits their needs and preferences. The branded nature of BRCs gives couples the tools they need to quickly and easily identify BRCs, even in a world with many options. People who already know and respect an organization might rightly trust its cohabitation agreement to reflect their preferences and values. An atheist couple will not be distracted by various religious BRCs. A deeply religious couple might only consider prenups written or endorsed by one or more religious

[15] ZAMI NOBLA, https://www.zaminobla.org/about [https://perma.cc/R4Y9-M229] ("D[eeply rooted] in Atlanta, Georgia … ZAMI NOBLA … is a membership-based organization committed to building a base of power for Black lesbians over the age of 40… .").

authorities.[16] BRCs are therefore likely to produce *both* a better set of options *and* a set that is far easier for couples to navigate.

In addition to furthering family law pluralism in ways that neither private ordering nor menu regimes can, BRCs introduce a host of novel possibilities as well. For example, they can revitalize stalled reform efforts surrounding domestic violence, post majority child support, and spousal maintenance.[17] Consider the ALI's Principles of the Law of Family Dissolution (Principles).[18] The Principles were a comprehensive rethinking of a great deal of family law, which were endorsed by the ALI in 2000.[19] These reforms largely failed; they never got much traction among state legislatures.[20] Instead of using state legislatures as the mechanism for reform,[21] the ALI might at least add an additional pathway for progress: BRCs. The ALI could write a prenup or cohabitation agreement that included many of the reforms that it endorsed, but that were ignored by state legislatures. Much like ballot initiatives circumvent logjams in state legislatures, BRCs could circumvent whatever is preventing various reforms from being adopted. Overall, the ALI might obtain more influence if it paired the Principles—which were aimed at advising state legislators—with BRCs aimed at advising private parties. This would allow the ALI to pursue multiple pathways of influence at once.

BRCs can also alleviate some of the costs of gerrymandered family law and political polarization. State-level gerrymandering generally leads to the election of state legislators whose preferences are far more extreme than most of the state's citizens.[22] As gerrymandering increases in scope and effectiveness, substantive state family law may increasingly diverge from the preferences of many citizens. BRCs offer a partial solution. They allow couples to import communitarian family law values into neoliberal states and vice versa. They can also create productive dialogic benefits, which serve to educate state legislators about the preferences of their constituents.

This Article not only offers a novel pathway to promote family law pluralism, it furthers a larger scholarly project as well. In other work, I have sought to create a space for *alternative sources of family law.* The traditional view of family law is that it is a matter for the state legislature,[23] which generally

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[16] *See infra* Part IV.A.

[17] *See infra* Part III.D.

[18] Am. Law Inst. (ALI), Principles of the Law of Family Dissolution: Analysis and Recommendations (2002) [Principles].

[19] Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 Fam. L.Q. 573, 574 (2008).

[20] *Id.* at 576 ("[T]he Principles have not had the influence the ALI hoped for with legislators or courts—the two groups at which they are principally directed."); David Westfall, *Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property*, 27 Harv. J.L. & Pub. Pol'y 917, 960 (2004) ("The Principles are a failed effort at family law reform.").

[21] Clisham & Fretwell, *supra* note 19, at 575 ("[T]he Principles were directed largely to 'rule-makers,' state legislatures.").

[22] *See infra* Part III.B.

[23] Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 872 (2004) ("It is commonplace for courts and judges to assert that family law is, and always has been, entirely a matter of state government.").

delegates a great deal of discretion to trial court judges.[24] These are the two traditional sources of family law: state statutes and trial court discretion. But it is possible to imagine legal interventions that exist in between these poles. For example, in a previous article I explored the possibility of a form of local family law where *city ordinances* step in between state statutes and trial court judges to help shape judicial discretion.[25] I have also explored the possibility that *informal groups of local judges* could band together to develop and publish local norms.[26] Those norms, like city ordinances, would act in the space between state statutes and individual judges by guiding those judges as they exercise the discretion given to them by state statutes. This Article pursues a similar project, except that it intervenes between a different duality (legislation vs. private ordering) and significantly diversifies the sources of interstitial family law.

This Article proceeds in five Parts. Part I outlines the limits of private ordering, and how BRCs can overcome those limits. Part II discusses menu regimes, how BRCs dissolve a central tension within them, and how BRCs achieve the core goals of menu regimes better than the proposed regimes themselves. Part III catalogues a series of other novel benefits that BRCs could create, such as revitalizing stalled family law reforms and reducing the anti-democratic effects of gerrymandered family law. Importantly, the legal infrastructure for BRCs already exists, so there is no need to convince state legislatures or justices to adopt or promote any particular reform. The benefits of BRCs can begin to accrue now, regardless of whether state lawmakers recognize their benefits or not. Part IV addresses potential barriers that entities might face when creating BRCs. Part V addresses potential downsides to embracing BRCs. Part VI concludes.

I. Overcoming The limits of Contract

In theory, giving people the capacity to write customized relationship contracts would powerfully promote family law pluralism. For example, couples who are about to marry could customize their rights and obligations with regard to one another in a prenup.[27] They could extend those obligations or limit them.[28] Cohabitating couples, who live under a set of default rules

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[24] Sean Hannon Williams, *Divorce All the Way Down: Local Voice and Family Law's Democratic Deficit*, 98 B.U. L. Rev. 579, 588, 593 (2018) (discussing vast trial court discretion under existing statutory family law regimes, and scholarly proposals to reign it in); James Herbie DiFonzo, *Toward A Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. Rev. 923, 925 (2001) (describing the ALI Principles as largely responding to the problem of unbridled judicial discretion).

[25] Sean Hannon Williams, *Sex in the City*, 43 Fordham Urb. L.J. 1107, 1159-60 (2016).

[26] Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law*, 65 Drake L. Rev. 781, 803, 836 (2017).

[27] Sean Hannon Williams, *Postnuptial Agreements*, 2007 Wis. L. Rev. 827, 828 (2007) (providing an overview of prenups and postnups).

[28] *Id.* at 832-33. Similarly, married couples who did not sign a prenup might write a postnup when circumstances change such that the default family law rules no longer reflect their preferences. For example, after one spouse commits adultery, the prospect of divorce might become

that are hostile to obligations,[29] could use contracts to embrace them.[30] Nonromantic partners, too, might in theory be able to avail themselves of contractual obligations to form or foster familial relationships.[31] Overall, scholars have often turned to contract as a possible vehicle for respecting family law pluralism.[32]

Of course, this is all in theory. In practice there are a number of barriers to using contract as the primary mechanism to respect heterogeneity among families. Contracts cannot promote pluralism if no one signs them.[33] Although there is no reliable data on point, there is a consensus rooted in anecdotal data.[34] Very few couples sign prenups.[35] Very few cohabiting couples enter formal contracts to govern their relationships.[36] Why? Perhaps because the costs of doing so are prohibitive, both in terms of the emotional toll that the relevant conversations might take, and the monetary costs of hiring an attorney to draft an agreement.[37] Even if a couple managed to write a relationship contract, it is deeply unclear that it will promote pluralism. It might just reflect a private disparity in bargaining power and serve to elevate the family law vision of one member of the couple while thwarting the family law vision of the other. Regardless, judges have shown a curious resistance to relationship contracts, especially cohabitation agreements,[38] that makes private ordering particularly ill-suited to promote pluralism. BRCs avoid or substantially mitigate the impact of each of these barriers.

A. Making Contracting More Likely

BRCs can radically reduce the barriers that currently prevent most couples from entering prenups, postnups, cohabitation agreements, and other relationship contracts.[39] Normally, people who are considering asking their partner for a prenup or other relationship contract worry about the negative

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clearer. Accordingly, the other partner might want more financial security than the default divorce regime provides in order to give the marriage another try. *See id.* at 835-37.

[29] Albertina Antognini, *Nonmarital Contracts*, 73 Stan. L. Rev. 67, 77 (2021) ("[W]hile most courts acknowledge that 'the mere fact of nonmarital cohabitation does not destroy the parties' rights to recover from one another in accordance with their legitimate contractual rights and expectations,' they tend to enforce these contracts in only a narrow set of circumstances.").

[30] *Id.* at 72-73 (arguing that scholars assume contracts are the solution for unmarried couples and that the main problem is just one of uptake).

[31] Cahn, Huntington & Scott, *supra* note 1, at 1700, 1737 (discussing care contracts between adult children and their aging parents).

[32] Antognini, *supra* note 29, at 72, 144.

[33] *Id.* at 95 ("[T]he literature on nonmarriage typically assumes that entering into an express contract adequately protects the intent, and property rights, of the respective parties. The central problem the nonmarital literature currently formulates with respect to contracting is that unmarried couples just fail to enter into these types of agreements.").

[34] Cahn, Huntington & Scott, *supra* note 1, at 1736 n.207.

[35] *Id.* and accompanying text.

[36] Antognini, *supra* note 29, at 73, 147 ("[N]ot many [cohabiting] couples in fact enter into these agreements.").

[37] Cahn, Huntington & Scott, *supra* note 1, at 1736, 1732-33.

[38] *See infra* Part I.C.

[39] *See infra* note 62 and accompanying text for an example of a relationship contract including three members, and one that would not necessarily assume or require cohabitation.

signal it might create.[40] Asking for a prenup might signal that you think the relationship is doomed to fail.[41] Asking for a cohabitation contract might signal that you don't trust your partner to handle a break-up reasonably. These signaling problems reduce the likelihood that couples will ever even broach the subject of a relationship contract.[42] Older couples may face additional barriers. They might, ideally, want to plan for their or their partner's death. For example, they might ideally want some assurances that their partner's will leaves them property. They might also want their adult children, and not their partner, to make future medical decisions for them.[43] But contemplating one's death, or the death of one's partner, is difficult.[44] That is one reason why so many people die without a will. Together, negative signaling and discomfort with confronting the end of the relationship (through dissolution or death) severely limit the number of people who will write and sign relationship contracts.

Even if couples could overcome these barriers, negotiating and drafting an enforceable relationship contract is likely to cost a lot of money.[45] There are complex statutory barriers to prenups, and unwritten judicially-created barriers to cohabitation agreements.[46] Accordingly, writing an enforceable contract often requires hiring an attorney. Some states even require that couples consult an attorney for certain terms to be enforceable.[47] Many couples could not afford this luxury.

The problem is even deeper than emotional and monetary costs. Rampant and severe overoptimism pervades relationship-formation. Fiancés simply don't think that they will ever divorce. They will never ever ever ever split up, like ever.[48] Most fiancés, for example, believe that they will never divorce, that if they divorce their partner will be amicable and honorable, and that even

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[40] Williams, *supra* note 27, at 849.

[41] Heather Mahar, *Why are there so Few Prenuptial Agreements?* 2 (John M. Olin Center for L., Econ., & Bus., Harvard Law Sch., Discussion Paper No. 436, Sept. 2003), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf [https://perma.cc/WVB8-WA9X] ("Furthermore, signaling was apparent: 62% of respondents believed that requesting a prenuptial agreement indicates uncertainty about the success of the marriage. Regression analysis confirmed that … a fear of signaling make it less likely that an individual will ask his or her partner to sign a prenuptial agreement."); Lynsey K. Romo & Noah Czajkowsk, *An Examination of Redditors' Metaphorical Sensemaking of Prenuptial Agreements*, 43 J. Fam. & Econ. Issues 1, 2 (2022) ("The prenup taboo is reflected in popular press articles equating wanting a prenup as not wanting a marriage and as a sign of distrust, lack of commitment, and of a doomed relationship, especially for a first marriage.").

[42] Mahar, *supra* note 41, at 11 n.32.

[43] *See* Cahn, Huntington & Scott, *supra* note 1, at 1736.

[44] *See id.* at 1736 ("[M]any people are reluctant to confront their own mortality by creating health-care proxies or executing wills or advance medical directives.").

[45] Even a new start up—Hello Prenup!—charges $599 for a basic prenup. *About Us*, HelloPrenup, https://helloprenup.com/about-us/ [https://perma.cc/LQ75-SPPE]. This is likely cheaper than an attorney, but still a large expense for many people. This expense might also seem like a waste to most couples, who are severely overoptimistic. *See infra* Part I.A.2.

[46] Williams, *supra* note 27, at 839-45 (discussing various rules for prenups and postnups); Antognini, *supra* note 29, at 137 (discussing hidden judicial rules for enforcing cohabitation agreements)

[47] *See, e.g.*, Cal. Fam. Code § 1612(c) (denying enforcement of alimony waivers unless the party was represented by an attorney).

[48] *See* Taylor Swift, *We Are Never Ever Getting Back Together*, *on* Red (Taylor's Version) (Republic Records 2021).

if their partner is less-than-honorable the law will protect them.[49] People are wrong about all three of these predictions.[50] These erroneous beliefs make it appear that there is no reason to negotiate an agreement.

BRCs can significantly mitigate each of these costs. They do so in part through the power of brands. The traditional justification for brands (and for protecting them through trademark, for example) is that they communicate a great deal of information quickly and efficiently.[51] Products have many hidden attributes, such as the quality of the parts or the degree of quality control in a factory.[52] Branding aggregates all of that information into an easily recognizable mark with an accrued reputation.[53] Relatedly, brands build consumer trust.[54] They do so both because of the signals they provide about product quality, but also by facilitating the connection between the brand and various social identities.[55]

BRCs harness the power of brands to produce three core benefits. First, BRCs can reframe conversations about relationship agreements so that they signal a commitment to shared identities rather than signaling mutual distrust. Second, they can sidestep overoptimism by including terms that apply to intact-and-happy relationships. Third, they can substantially reduce the monetary and emotional costs of contracting, and they can do so far more effectively than other proposed reforms.[56]

1. From Negative Signaling to Positive Associational Opportunities

BRCs can increase contracting by reducing (although not eliminating) negative signaling. If an entity that the couple trusts recommends a specific prenup, then this provides some cover for the partner initiating the conversation. A fiancé who suggests that the parties consider the Marriage-is-Forever Prenup—which includes lifetime spousal maintenance—does not signal that they think the relationship is doomed. Rather, they signal that state law inadequately enforces their commitment. Similarly, NOW might write a BRC that deviates from the neoliberal family law of many states.[57] That BRC might also

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[49] Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 Notre Dame L. Rev. 733, 757-59 (2009).

[50] *Id.*

[51] Jeremy N. Sheff, *Biasing Brands*, 32 Cardozo L. Rev. 1245, 1254-56 (2011) (providing overview of law and economics account of trademarking brands).

[52] *Id.*

[53] *Id.* at 1262-63; Kevin Lane Keller, *Brand Synthesis: The Multidimensionality of Brand Knowledge*, 29 J. Consumer. Res. 595, 596 (2003) (describing multiple dimensions of knowledge that can be packaged into a single brand).

[54] Sheff, *supra* note 51, at 1262-63.

[55] Katya Assaf, *Brand Fetishism*, 43 Conn. L. Rev. 83, 92-96 (2010).

[56] There are echoes of each of these benefits in the various stock prenups that Jewish organizations have developed to incentivize husbands to grant their wives a religious divorce. These are perhaps the oldest and most common relationship agreements that could be characterized as BRCs. I will discuss them in the sections below.

[57] Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 Law & Contemp. Probs. 25, 25, 36 (2014) ("Neoliberalism permeates U.S. family law."). To a large extent, BRCs work within the neoliberal paradigm, which valorizes individual consent as a prerequisite to obligations and insists that people face

include robust spousal maintenance, at least for the person who sacrifices her career to care for children. When a fiancé in Austin, TX suggests the NOW prenup, they perhaps signal their distrust of *Texas* more than their distrust of *their partner*.

BRCs can also flip the standard narrative and make the signal positive, rather than just less negative. They can highlight positive joint identities of the couple.[58] A couple may want to belong to, or identify with, a certain group. Here, the signal might be focused on finding avenues to express solidarity with these organizations or groups. Signing the BRC becomes an expressive act against unjust laws, or an expressive act that solidifies the bond between the members of the couple, or signals their joint commitments to larger groups.

There are many plausible entities that might harness a couple's identity interests to promote BRCs. Donald Trump is probably narcissistic enough to write a MAGA prenup. And many people would want to sign it. Perhaps it would have neoliberal terms that mimicked the older title theory of divorce, where the person who earns the money in the market keeps that money.[59] Perhaps we might see a Bernie Sanders BRC emerge to offer a left-leaning alternative. More realistically, ActBlue could endorse a prenup for residents of red states that recreates the family laws of the median blue state.[60] Signing the

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the consequences of their actions. But BRCs can leverage this paradigm for progressive purposes like robust alimony regimes. *See, e.g.*, *id.* at 36 (identifying robust alimony regimes as a more progressive regime that moves away from neoliberalism, even if it is not a complete break from it). For more discussion of the vague term "neoliberalism" and its application to family law, see Deborah M. Weissman, *Who Needs the State?: We Do (Maybe)*, 101 N.C. L. Rev. 1261, 1264 n.65 (2023) and Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. Rev. 1983, 1989 (2018).

[58] Here, I am generally referring to identity's cultural and social dimensions. Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 Wis. J.L. Gender & Soc'y 73, 102–04 (2010) (discussing personal, political, social, and cultural identities).

[59] Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 124 (2004).

[60] This ActBlue prenup could accomplish this better than individuals could through choice of law clauses. It turns out to be quite difficult to import another state's divorce laws through simple choice of law clauses, which otherwise might allow people who can overcome the signaling problems of negotiating a relationship contract to opt into a blue state's laws. Generally, courts can refuse to enforce a choice of law provision if the "chosen state has no substantial relationship to the parties or the transaction" or if the law of the chosen state "would be contrary to a fundamental policy." Restatement (Second) of Conflict of Laws § 187 (1971); Matter of Marriage of S., 390 P.3d 127 (Kan. Ct. App. 2017) ("[O]ur courts will enforce a valid contractual choice of law provision so long as it does not violate a strong public policy of this state or the chosen state has no relationship at all with the parties or the transaction."). Although courts often find that this substantial relationship exists when the couple married and lived in the chosen state at the time of the wedding, it is far from clear that choice of law provisions will be enforceable when a couple simply likes the law of another state better. Matter of Marriage of S., 390 P.3d 127 (Kan. Ct. App. 2017) (enforcing choice of law provision in prenup because the couple were married and living in the chosen state when they signed the agreement); Lupien v. Lupien, 68 A.D.3d 1807, 1808, 1819 (NY 2009) (same); Reynolds v. Reynolds, 175 N.E.3d 611, 619 (Ohio 2021) (enforcing choice of law provision in prenup because the couple were married and owned land in the chosen state). States can also use their public policy to void choice of law provisions in the family law context. The Utah Supreme Court recently declined to respect a choice of law provision because it would have interfered with Utah's interest in equitably dividing property upon divorce. Dahl v. Dahl, P.3d 276, 289 (Utah 2015) ("Because Utah has a strong policy of equitable distribution of marital assets, we decline to enforce the Trust's choice-of-law provision on the grounds that doing so would deny the district court the ability to achieve an equitable division of the marital estate."). Even if courts are inclined to enforce choice of law provisions, they can contain many ambiguities that are traps for the unsophisticated. Peter M.

ActBlue prenup might become a source of pride and rebellion among progressive Texans.

Any existing non-profit can cultivate the associational value of their BRCs. Connecting Rainbows serves many non-traditional families, including offering resources for polyamorous families who are seeking legal recognition.[61] For one throuple, they created an LLC to essentially pool finances like the laws of marriage facilitate for more traditional couples.[62] This could easily be converted into a more generalized BRC, and people in polyamorous relationships might want to signal their commitment to each other, *and their commitment to equal respect more broadly*, by signing it.

Similarly, members of mega churches might desire to jointly signal their commitment to their faith by signing a branded church prenup. So, the members of the Lakewood Church, the largest mega church in the U.S., might welcome a discussion about signing the official Lakewood Church Prenup. Discussing this prenup would not signal that you distrust your spouse. Instead, it might signal your deeper commitment to your spouse than merely marrying under the default legal regime.[63]

There is some evidence of this positive associational benefit in the oldest and most common stock relationship contract in existence in the U.S. today. Under Jewish law, the husband must willingly grant his wife a religious divorce—a "get"—in order for her to remarry and have legitimate children.[64] The Rabbinical Council of America (RCA) has long understood that this gives husbands extraordinary power to extort money from wives upon a divorce. To solve this problem, the RCA developed a stock prenup in the 1980s that was amended in the 1990s and again in 2013.[65] For purposes of this section, the main clause in these prenups mandates that the husband pay his

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Walzer & Jennifer M. Riemer, *Premarital Agreements for Seniors*, 50 Fam. L.Q. 95, 99 (2016) ("[A]n improperly drafted choice-of-law provision can wreak havoc on the intentions of the parties."); Matter of Marriage of S., 390 P.3d 127 (Kan. Ct. App. 2017) (noting the ambiguity of "governed by Kansas Law" when Kansas law itself would apply Florida law because that land at issue was in Florida); Which law governs?, International Family Law Practice § 3:10 (Westlaw) ("Courts have often reached different results depending on whether they are considering the law that governs the *validity* of a prenuptial agreement, the law governing the *enforceability* of an agreement or the law governing the *construction* of the specific terms of an agreement.") (emphasis added). An ActBlue prenup could avoid choice of law clauses and instead use substantive contract terms that mimic, for example, the rules of marital property and spousal support in other states.

[61] Connecting Rainbows, https://connectingrainbows.org/ [https://perma.cc/MH9E-QPB9].

[62] *Legally Protecting Polyamorous Families in a Monogamous World*, Connecting Rainbows, https://connectingrainbows.org/legally-protecting-polyamorous-families-in-a-monogamous-world/ [https://perma.cc/2F39-KTHP].

[63] Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1955-60 (2000) (suggesting a marriage option with greater commitment in part to allow better signaling to others, including potential partners, about the strength of one's commitment); *Id.* at 1965 (arguing that any problems with greater commitments—such as those stemming from domestic violence—could be mitigated with contractual terms addressing those problems).

[64] Michael Broyde, *The Effectiveness of (Rabbinic) Prenuptial Agreements in Preventing Marital Captivity*, 18 ICon 944, 944 (2021).

[65] Rachel Levmore, *Rabbinic Responses in Favor of Prenuptial Agreements*, 42 Tradition 29, 31-35 (2009).

wife $150 per day for each day that passes without her receiving a get.[66] This gives husbands an incentive to grant the religious divorce. There is anecdotal evidence that many Orthodox Jewish couples sign a version of the RCA prenup.[67] Why do they do so? In part, for the associational benefits. "Many couples regard the signing of this agreement as an expression of concern for the Jewish nation."[68] Signing the prenup is seen as a "prosocial communal responsibility."[69] The Beth Din of America makes a similar set of arguments in favor of its prenup that tries to flip the standard narrative of negative signaling by invoking community interests:

> Even if you are sure that the plight of the agunah (a woman whose marriage is functionally over, but whose husband refuses to give her a Get) will never be your own, you should sign The Prenup as part of an effort to make The Prenup a standard part of every Jewish wedding. If our collective actions can bring that about, we will have played an important role in solving one of the great crises of Jewish life in modern times, and we will prevent other people from suffering.

Of course, there are many other reasons why couples sign this agreement, and I will discuss some of them in other sections.[70] Regardless, associational benefits appear to be at least one factor which can facilitate relationship contacting.

Overall, BRCs offer the possibility of reducing negative signaling and creating positive signaling. This will increase contracting. It also has the potential to benefit couples in other ways by facilitating the formation of joint identities and enhancing connections between the couple and larger groups of support.[71]

2. Sidestepping Overoptimism with Intact-and-Happy Terms

BRCs cannot make couples more realistic, but they can sidestep the problems that overoptimism causes. BRCs need not limit their terms to the regulation of divorce, dissolution, or death. They could, for example, mandate that some percentage of a wage earner's salary be deposited into a joint bank

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[66] Beth Din of America Prenup 1, https://res.cloudinary.com/orthodox-union/image/upload/v1683451917/prenup/forms%202023/Standard_Version_of_The_Prenup_5_23.pdf [https://perma.cc/GSC5-CXS7].

[67] Levmore, *supra* note 65, at 42; Personal Communication, Michael Broyde (July 18, 2023).

[68] Levmore, *supra* note 65, at 42.

[69] *See* Chana Maybrucha, Shlomo Weissmanb & Steven Pirutinsky, *Marital Outcomes and Consideration of Divorce Among Orthodox Jews After Signing a Religious Prenuptial Agreement to Facilitate Future Divorce*, 58 J. Divorce & Remarriage 276, 284 (2017) (suggesting this motivation).

[70] *See infra* Part IV.A (discussing institutional pressure); Part I.A.2 (discussing terms focused on intact marriages).

[71] The entities that create these branded relationship contracts can also, for better or worse, put direct pressure on couples to sign them. I'll discuss this possibility in the Potential Downsides section below.

account.[72] This would reinforce notions of sharing and focus on the positive gains of marriage as opposed to the potential losses of divorce.[73]

BRCs could also contain expressive terms that are not meant to be enforced, such as aspirational goals about retirement savings, co-parenting, or cost-sharing. Hence, a partner could open up a discussion of the prenup or cohabitation contract without talking about divorce, discord, or death at all. They could instead purport to mostly want the terms that apply to intact and happy relationships.

Under prevailing doctrine, many intact-and-happy terms will be unenforceable. Courts are resistant to intervening in intact relationships.[74] But some terms will be enforceable. For example, one intact-and-happy-relationship term might be that all separate property becomes marital property at the moment of marriage. This strongly signals trust and commitment.

Even merely aspirational terms can be useful for facilitating conversations about relationship contracts. These aspirational intact-and-happy-relationship terms might include precommitments to raise a child in a particular religion or to communicate regularly. These terms might entice even overly optimistic people to consider the contract, because these terms are relevant even for people who would never spit up.

Of course, unenforceable terms present some potential problems.[75] Couples who read the contract carefully before signing it—perhaps very few people[76]—may erroneously think that they are enforceable. Those people may not have agreed to its terms absent this erroneous assumption. Couples who read the terms once conflict arises might also erroneously think that the terms are enforceable. This is a problem if the state has made a substantive policy judgment that people should not be bound by these terms.[77] These concerns

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[72] Even if a court would hesitate to enforce this during an intact marriage, it would still create psychological pressure to open the joint account and deposit money into it. Regardless, the clause would help overly optimistic people see the potential usefulness of prenups even in the absence of any possibility of divorce.

[73] For a related idea, see Elizabeth F. Emens, *On Trust, Law, and Expecting the Worst, Intimate Lies and the Law by Jill Elaine Hasday*, 133 Harv. L. Rev. 1963, 2012 (2020) (advocating "prenup wrappers" which focus on the aspirations of marriage in part to counterbalance negative signals of prenups).

[74] Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 Ind. L.J. 1261, 1269-70 (2015).

[75] Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 Ala. L. Rev. 1031, 1058-59 (discussing how unenforceable terms in consumer contracts can trick consumers into giving up rights that the state does not allow them to waive).

[76] *Id.* at 1040 n.34 and accompanying text (discussing "mounting evidence that consumers do not read or pay attention to the fine print before making their purchasing decisions"); Pajak v. Pajak, 385 S.E.2d 384, 389 (W. Va. 1989) ("It appears from Mrs. Pajak's own testimony that she made no effort even to read the [prenuptial] agreement."); Marsh v. Marsh, 949 S.W.2d 734, 745 (Tex. App. 1997) ("Bill admitted he did not read the premarital agreement.").

[77] Crofford v. Adachi, 506 P.3d 182, 190 (Haw. 2022) (finding that an infidelity penalty was against public policy as instantiated in no-fault divorce); In re Marriage of Cooper, 769 N.W.2d 582, 586 (Iowa 2009) (invaliding infidelity penalties because "[w]e do not wish to create a bargaining environment where sexual fidelity or harmonious relationships are key variables"). States also refuse to enforce contract terms because of the institutional constraints of courts. For example, courts might refrain from considering fault because they fear courts have no institutional competence in these moral judgments. *See* Mani v. Mani, 869 A.2d 904, 916 (N.J. 2005) (allowing courts to consider fault only when it does not require translating a degree of fault into an amount of money—namely, when the fault is so egregious as to deny all alimony or when

might justify requiring the state to adopt guardrails for BRCs.[78] Perhaps the state could require that clearly unenforceable or potentially unenforceable terms be labeled in some way. This might not be difficult to enforce because entities are unlikely to push the relevant boundaries. Unlike consumer contracts, where companies gain by tricking customers,[79] entities that have an interest in serving a particular subpopulation probably don't want to mislead that subpopulation. In fact, the AARP, AAML, and other organizations have a strong interest in maintaining public trust. Again, unlike companies offering boilerplate contracts to consumers to maximize their profits, entities who author BRCs will have incentives to reduce rather than exacerbate the downsides of aspirational terms.

Because intact-and-happy terms can be bundled with terms that govern dissolution, and couples would be selecting a BRC from an entity that they trust, it is likely that even overly optimistic couples will opt into regimes that are more likely to fit their preferences than the state's default regime.

Again, evidence from the RCA prenup suggest that this or similar reframings could facilitate contracting. Rabbis frame the RCA prenup as furthering *the intact relationship*: "[W]hat [the prenup] contributes to the realization of the love is the creation of that sense of fairness and security."[80] The Beth Din of America makes a similar set of arguments in favor of its prenup that seem well-attuned to overoptimism by focusing on what the prenup expresses *now*:

> [Signing] is an opportunity for a couple, on the eve of their wedding, to demonstrate their respect for each other.
>
> … There is no better way to start off a marriage than to say to your partner: Even in the very worst circumstance, even if this union should end, Heaven forbid, I will not allow myself to act indecently toward you.

One version of the prenup authored by the Beth Din of America states that: "When a couple about to be married signs this Agreement, they thereby express their concern for each other's happiness."[81] This seems to be right;

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the fault is economic and can be measured by the amount of money wasted). Courts might also refrain from interpreting religious doctrine in a contract on first amendment grounds. *See, e.g.*, Light v. Light, 2012 WL 6743605, at *2-6 (Conn. Super. Ct. Dec. 6, 2012) (ultimately enforcing a religious prenup); Tilsen v. Benson, 2019 WL 6329065, at *6 (Conn. Super. Ct. Nov. 7, 2019) (refusing to enforce a particular prenup provision because "enforcement . . . would require the court to choose between competing interpretations of Jewish law."). These institutional constraint rationales for judicial restraint are *not* substantive decisions that parties should not be bound by these terms, but rather only that *courts* should not be the enforcement mechanism.

[78] Those guardrails are less necessary outside of BRCs, at least to the extent that people tend to hire attorneys to write relationship contracts. Those attorneys can then advise them about which terms are enforceable and which are not.

[79] *See* Furth-Matzkin, *supra* note 75, at 1058-59 (discussing leases).

[80] Levmore, *supra* note 65, at 43.

[81] Beth Din of America Prenup, California version 4, https://res.cloudinary.com/orthodox-union/image/upload/v1683451916/prenup/forms%202023/California_Version_of_The_Prenup_5_23.pdf [https://perma.cc/7X58-BR85].

couples that sign the prenup have higher marital satisfaction.[82] Regardless, framing relationship contracts as relevant to intact and happy relationships is likely to sidestep overoptimism and increase contracting, and it is something that entities that author BRCs can and do accomplish.

3. Reducing Monetary and Emotional Costs

Based on the discussion in the previous two sections, it should be reasonably clear how BRCs can reduce the monetary costs of contracting. It's far cheaper to identify an entity you trust and use their BRC than it is to hire an attorney. Hiring a lawyer is expensive. BRCs provide people with cheaper signals about which terms or contracts will fit their needs. Much like people might know that Nike sneakers are great trainers or that candidates for public office who share their political party are likely to share their values, BRCs allow people to make complex choices quickly and cheaply. This gives BRCs a significant edge over our current contracting regime.

BRCs can also mitigate some of the emotional costs of contracting. As mentioned above, people don't have to negotiate everything, they just have to agree on a trusted entity. This might be particularly useful when negotiating the contract terms would require confronting one's mortality. People may realize that they should write a will or nominate a preferred proxy decision maker who can make medical choices for them if they become incapacitated. But these are difficult things to ponder. They might, however, be built into the AARP cohabitation agreement, as least as options. One might imagine that agreement also including a line that designated a proxy decisionmaker, which by default would be the signatory's adult children, or an agreement that contained a short will that by default leaves everything to the signatory's adult children. Again, BRCs offer potentially useful pathways to get more people to adopt relatively-customized terms that are more likely to match their preferences than statewide defaults.

4. Leveraging Ignorance

Entities that write BRCs might educate people about the law. Generally, couples are woefully ignorant of family law.[83] If the AARP has an interest in promoting the welfare of seniors, then they have an interest in educating them about the legal regulations of second marriages and cohabitation. We might imagine that, at least sometimes, the AARP will be able to educate at least some people. Armed with this new knowledge of default family laws, people might then seek to alter those defaults or adjust their behavior in other ways.

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[82] Maybrucha, Weissmanb & Pirutinsky, *supra* note 69, at 283. Of course, this might be due to a selection effect.

[83] Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439, 441 (1993); *see also* Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. Chi. Legal F. 353, 370-71 (2004).

But this section focuses on instances where ignorance of the law is difficult to correct, and entities do not or cannot adequately inform people about the law.

The AARP can make a productive use of ignorance even if it cannot correct it. For-profit companies have already figured out how to take advantage of ignorance and fear.[84] Those same techniques can be used for good instead of evil. One might imagine a direct mailer that said in bold letters on the front:

> *Do you know YOUR state law on cohabitation? Why risk it? Download the AARP Silver Cohabitation Agreement right now! (Get it today and receive a free bluetooth speaker!)*

This ad turns ignorance from an impediment to contracting to an engine for contracting. Precisely because people now know they are ignorant, they will be motivated to protect themselves from these unknown laws.

5. Improving Fit between Preferences and Rules

BRCs promote pluralism because, as other sections have mentioned briefly, there is a correlation between the relationship terms that the couple would want (if they were fully informed) and the relationship terms in a BRC written by an entity that the couple trusts. The AARP's silver prenup is probably more consistent with the preferences of elderly people than default state law, which is geared toward younger families.[85] Importantly, those elderly people are likely to understand this. Similarly, people who belong to a particular religious faith might rightly conclude that the relevant religious prenup will better reflect their preferences than default state law.

Although this correlation is not always present, people can sensibly sort out the entities that are likely to share their family-related preferences from those that don't. Suppose Tara is a big fan of Star Trek (a Trekkie or perhaps a Trekker),[86] a bigger fan of Taylor Swift (a Swiftie), is thinking about a second marriage after her kids have grown, and is a member of a close knit religious community. Although Tara may have strong identity interests in associating with other Trekkies, it is unlikely that she will conclude that this identity correlates well with family law rules. So, even if some well-respected group of Trekkies wrote a prenup, it is unlikely that the Trekkie brand would hold much sway.[87] Although Tara is a huge Swiftie, she might be abjectly terrified

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[84] Barry Glassner, *Narrative Techniques of Fear Mongering*, 71 Soc. Res.: Int'l Q. 819, 819 (2004); Alan L. Shulman, *You Have Nothing to Sell but Fear Itself*, Ins. J. (Jan. 24, 2010), https://www.insurancejournal.com/magazines/mag-features/2010/01/24/159265.htm [https://perma.cc/RG8S-65QQ].

[85] Cahn, Huntington & Scott, *supra* note 1, at 1726.

[86] Roberta Pearson, *Bachies, Bardies, Trekkies, and Sherlockians*, *in* Fandom: Identities and Communities in a Mediated World 98, 98 (Janathan Gray et al. eds. 2007) (discussing the difference).

[87] Of course, if the couple wants the alien prenup discussed in one episode of Star Trek: Deep Space Nine, they would be welcome to adopt it. *Ferengi Love Songs*, Fandom Wiki, https://memory-alpha.fandom.com/wiki/Ferengi_Love_Songs_(episode) [https://perma.cc/8LS9-TRSX]. Alternatively, truly fanatical fans might want to sign a prenup like that signed

at the prospect of following Taylor's relationship advice, let alone signing on to her vision of a perfect prenup. In contrast to both of these identities, Tara may rightly conclude that the AARP cohabitation agreement and/or the prenup written by her church are likely to reflect her family law preferences far more closely.

Of course, the correlation will always be imperfect even when couples sensibly select BRCs. But the key question is whether the correlation between preferences and brand is stronger than the correlation between preferences *and the state's default family law*. In a world of people with heterogeneous values who are creating increasingly diverse family forms,[88] all within states that are increasingly gerrymandered,[89] the correlation between preferences and state defaults is likely to be small. Branding relationship contracts gives a diverse set of people the tools they need to simply and easily opt into a set of rules that, even if imperfect, are far more likely to track a greater number of their preferences to a greater degree.

B. Counterweights to Disparities in Bargaining Power

The section above assumed that couples would happily agree on a BRC. This section relaxes that assumption, and discusses the benefits of BRCs even if, or sometimes because, the members of a couple *disagree* about the best terms or the best BRC.

Erez Aloni identifies an irony within the theoretical claim that contracting promotes pluralism.[90] Aloni asks why we value pluralism.[91] He answers that family law pluralism is valuable when, and only when, it promotes autonomy and meaningful choice.[92] Instead of forcing everyone into one of two relational boxes (married or unmarried), family law pluralism offers the possibility that people will be able to choose regimes that more closely track their preferences, values, and needs. Aloni argues that, counterintuitively, using contracts to promote family law pluralism will have the effect of *limiting* meaningful choice.[93] Aloni points out that privatization will lead to family law rules (here, stemming from the terms of the contract) that favor the more powerful party.[94] Accordingly, efforts to promote pluralism through private contracting actually constrain choice for the less powerful member of a couple.[95] Put another way,

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by William Shatner, which reportedly waived all spousal support. *William Shatner goes where few Men have gone before … divorce No. 4*, Nat'l Post (Dec. 11, 2019), https://nationalpost.com/entertainment/celebrity/william-shatner-files-for-divorce-from-fourth-wife-citing-irreconcilable-differences [https://perma.cc/TH9D-UXE3].

[88] Tonya L. Brito, *Complex Kinship Networks in Fragile Families*, 85 Fordham L. Rev. 2567, 2577 (2017) ("Simple nuclear families no longer represent the typical American family. Instead, demographic studies show that family forms are varied and increasingly complex.").

[89] *See infra* Part III.B.

[90] Aloni, *supra* note 1, at 101.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 106.

[95] *Id.*

contacts respect only a thin version of autonomy, but policymakers should be concerned with a much thicker version that is imperiled, not furthered, by contractual freedom.[96]

BRCs do not fully eliminate this problem because they do not take contractual freedom away from couples. They are free to use a BRC, or tweak it, or to write a fully customized agreement. Nevertheless, BRCs substantially mitigate this problem.

1. Fairer Stock Terms

The terms in a BRC are likely to be fairer than privately negotiated terms. Stock BRCs would often be public documents.[97] Entities that promote terms that are widely viewed as unfair are likely to be called out for doing so.[98] Sunlight will tend to reduce unfair terms.[99]

BRCs also democratizes the inquiry into whether a particular term is unfair. Some states review prenups for substantive fairness.[100] In those states, courts are empowered to judge for themselves whether the terms of the agreement are fair (without regard to whether the couple themselves thought that those terms were fair at the time the contract was signed).[101] This embrace of judicial oversight might reflect Aloni's concerns. That is, one defense of substantive fairness review is that unfairness is a proxy for unequal bargaining power.[102] Contracts that are unfair are unlikely to promote thicker conceptions of autonomy, and hence should not be enforced in the name of pluralism. But judges have their own preconceptions and idiosyncrasies. Public commentary

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[96] *Id.* at 112, 144, 152; *see also* Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. Rev. 912, 914–15 (2019) ("[T]he dominant scholarly approach posits that the best way to protect family pluralism and choice in family form is to treat the partners like legal strangers rather than as spouses. … This Article contends that the conventional approach governing the economic rights of nonmarital families impedes rather than furthers a *robust* vision of choice.") (emphasis added); *cf.* Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Calif. L. Rev. 204, 232-33 (1982) (arguing for more marital contracting because it better respects pluralism despite the drawbacks created by differential bargaining power); 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, 207 (1998) ("Although there also are reasons to fear extreme procedural and substantive unfairness in these agreements, modern contract law has ample resources for protecting weaker parties from most, though probably not all, such instances of grave injustice.").

[97] This is not strictly speaking necessary, but it seems likely.

[98] *See* Rabea Benhalim, *Religious Courts in Secular Jurisdictions: How Jewish and Islamic Courts Adapt to Societal and Legal Norms*, 84 Brook. L. Rev. 745, 747 (2019) ("[R]eligious courts that serve religious minorities tend to adapt to their secular surrounding, rather than the other way around. They accommodate, by necessity, both the desires of litigants who, living in democratic societies, have come to expect [them] to preserve their secular civil rights, and the pressures of the secular courts on which they rely to enforce their decisions.").

[99] Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 185-90 (2014) (discussing how sophisticated intermediaries help consumers navigate complex products through, for example, rating products or calling public attention to objectionable boilerplate terms).

[100] Angela Marie Caulley, *Policing the Prenup: When Love at First Sight Deserves a Second Look*, 39 Women's Rts. L. Rep. 1, 20, 26-31 (2017).

[101] *Id.*

[102] *See id.* at 7, 14.

and debate about terms might paint a more accurate picture about how fair or unfair a term is, or how much disagreement there is about this value judgment.

2. Mitigating Informational Asymmetries

Even if unfair terms persist in some BRCs, there will likely be public commentary that will help the less sophisticated party avoid the worst contracts. Perhaps an entity like the AAML might review and rate BRCs. Perhaps the MAGA prenup will rate poorly, while the NOW cohabitation agreement will receive an "A+".[103] Regardless, the less sophisticated party will also have a host of stock contracts or terms available for counter proposals. One might imagine a less sophisticated party asking why the NOW prenup is not sufficient. In these ways, BRCs give less sophisticated parties more information, and greater standing to demand a reputable BRC.

3. Customization and Ambiguity Aversion

Although BRCs don't preclude customization, they will probably make it less likely. As discussed above, a partner with less bargaining power might reasonably say something like, "Let's just sign the NOW prenup, or at least use it as the basis, and customize only that portion that has to do with your real estate investments." This is a difficult proposition to rebut adequately.

There is a large literature on stock contracts in the business context.[104] The general finding is that companies stick to stock contract terms, and rarely customize them beyond the places in the contract where parties are meant to fill in an answer (such as price, delivery date, and checking a box about warranties).[105] The main theory to explain this lack of creativity is that companies worry that customization will send a negative signal.[106] If they try to customize the agreement, their partner will wonder what rights they are giving up, and whether they are being taken advantage of. This makes that partner less likely to enter the contract, and certainty makes it more costly to do so because they must have their lawyers analyze the proposed customizations. Put another way, customization introduces a great deal of ambiguity—ambiguity about whether the contract is fair, whether the partner is honest, and what risks one is taking by signing—and people are generally willing to forgo a lot to avoid ambiguity.[107]

These same dynamics may hinder customization in the realm of relationship contracts. A fiancé that refuses to sign the NOW Domestic Violence

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[103] Ben-Shahar & Schneider, *supra* note 99, at 190 (discussing rating agencies and their effect on consumer knowledge and behavior).

[104] *See* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 Fla. St. U. L. Rev. 651, 655-651 (2006) (canvasing some of the relevant research).

[105] *See id.*

[106] *See id.*

[107] *Id.* at 664-70 (discussing ambiguity-aversion); Sean Hannon Williams, *Probability Errors, in* The Oxford Handbook of Behavioral Economics and Law 335, 344 (Eyal Zamir & Doron Teichman eds., 2014).

Clause sends a risky signal.[108] An older cohabitant who refuses to use the AARP Silver Cohabitation Agreement might trigger suspicion. This dynamic will not prevent customization. People may either be very good at explaining why they need a fully customized agreement, or they may rely on their raw bargaining power to offer a take it or leave it agreement. Nonetheless, BRCs make fully customized agreements significantly more difficult to justify, if one party objects.

4. Information Forcing

The above sections often assumed that there was a disparity in bargaining power between the members of the couple. But BRCs have benefits even for couples of equal bargaining power who have deep disagreements about which entities they trust, or which terms they want. As mentioned above, a man who refuses to sign the NOW cohabitation agreement term on domestic violence provides potentially important information to his partner. Similarly, if one partner thinks it's obvious that they should sign the AARP Silver Prenup, and the other thinks it's equally obvious that they should sign the Lakewood Church Prenup, this provides useful information to both. It also helps motivate people to look into the differences between these two BRCs to see how different they are, and what terms they might agree to. Of course, these two people might discover that their concepts of marriage are quite different, and decide not to marry. This should be seen as an additional benefit to BRCs. They stimulate conversations that will lead to better matching, even if this means that some matches never happen.[109]

C. Counterweights to Judicial Resistance

Even when couples manage to write relationship contracts, judges may refuse to enforce them. This was a problem in the early days of prenups. Judges found that those early prenups were void for lack of consideration, or against public policy due to the sanctity of marriage.[110] These problems have been overcome in many states by legislation. For example, twenty-eight states

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[108] Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 Calif. L. Rev. 1479, 1489 (2001).

[109] Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making A Case for Mandatory Prenuptials*, 64 U. Colo. L. Rev. 1223, 1231 (1993) (advocating mandatory prenups in order to force couples to engage in difficult and potentially illuminating conversations before they marry); Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 Vand. L. Rev. 397, 399-400, 417-18 (1992) (making a similar argument: "Planning can promote confidence by revealing, and thus securing, the common needs and hopes of the couple. … Premarital negotiations may help some couples to avoid unhappy marriages by exposing their incompatibilities before they exchange vows.").

[110] *See* Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 Wake Forest L. Rev. 1037, 1047 (1993) (consideration); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229, 255 (1994) (protecting the institution of marriage).

have enacted a version of the Uniform Premarital Agreement Act[111], which is heavily pro-enforcement.[112] The Act eliminates any need for consideration and precludes courts from reviewing prenups for unconscionability in most cases.[113] But some of these same resistances have appeared again, this time in contracts attendant to cohabitation. This section will focus on cohabitation agreements, and patterns that appear when courts review them.

Albertina Antognini has exhaustingly combed through appellate cases on the enforceability of cohabitation agreements.[114] These courts often pay lip service to freedom of contract, affirming that cohabitating partners have the right to enter contracts with one another just like any other people.[115] However, Antognini found that courts routinely impose extra barriers to enforcing these contracts, especially for heterosexual couples.[116] They bend over backwards to find that there was no consideration,[117] or that the only consideration was engaging in a romantic relationship, which would render the agreement unenforceable.[118] Accordingly, even if a couple manages to overcome the cost and negative signaling involved in signing a contract attendant to a non-marital romantic relationship, courts might subconsciously channel their older resistance to prenups and refuse to enforce it.

BRCs can make it significantly harder for judges to resist cohabitation agreements.[119]

1. Expert Drafting

Some of the barriers that judges create can be avoided with good drafting. For example, some judges engage in searching inquiries into the adequacy of consideration.[120] If a judge finds that one party gave up a lot, and the other party did not, she may find that there was inadequate consideration. This is not the normal black-letter analysis of consideration. Normally, all that is required is that the parties trade non-illusory promises, and courts refrain from assessing the relative values of the promises.[121] In fact, in many cases, courts

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[111] *Premarital and Marital Agreements Act*, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?communitykey=2e456584-938e-4008-ba0c-bb6a1a544400 [https://perma.cc/7RTY-RW3F]

[112] *See* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. Legis. 127, 143 (1993).

[113] *See id.* at 143.

[114] *See* Antognini, *supra* note 29, at 77.

[115] *See id.* at 77-78.

[116] *Id.* at 77-78, 122.

[117] *See id.* at 108, 114.

[118] *See id.* at 111-13.

[119] Antognini offers some contract reforms but ultimately is pessimistic about the impact of contracting because so few people will enter contracts. *Id.* at 147. Accordingly, she opines about the possibility of imposing obligations through status rather than consent. *Id.* at 151. BRCs significantly undermine her pessimism.

[120] *See* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. Rev. 1, 29-30 (1996); *see, e.g.*, Bratton v. Bratton, 136 S.W.3d 595, 604 (Tenn. 2004).

[121] *See* Restatement (Second) of Contracts §71, §71 cmt. c, §77 cmt. a, §79 (Am. L. Inst. 1981).

bend over backward to find consideration.[122] A promise not to end a romantic relationship, or to consider reentering it in good faith, would be adequate consideration under the normal analysis.[123] Nonetheless, some judges bend the doctrine in the context of cohabitation agreements.[124] But good drafting can make this bending far more difficult. BRCs can make it clear that both parties are giving up difficult-to-value[125] future entitlements that are not related to domestic services. For example, the contract might stipulate that the poorer partner is giving up future rights. These might include rights to spousal support in the event that they move to a state that recognizes common law marriage, or rights to inherit upon the death of one partner.[126] The contract can stipulate that this poorer partner agrees to be subject to debts incurred by the wealthier partner on the same terms as if they were married, or agrees that all future income of both parties will be treated like marital property.[127] The harder it is to quantify the value of these monetary promises,[128] the harder it is for courts to confidently assume that the only consideration from the poorer partner was engaging in the romantic relationship. This makes it more difficult for courts to use consideration as a tool to invalidate BRCs, even if they can still do so with less-expertly-drafted agreements.

Consider an example. In *Williams v. Ormsby*, a couple entered into a written contract which specified the precise shares that the couple would own in a jointly owned house.[129] The contract was signed as part of an agreement to reconcile and resume the romantic relationship.[130] The court looked at the agreement within this context.[131] It first found that, monetarily, the contract only benefited the woman.[132] It therefore concluded that the bargain must have been a trade of money (here, an increased interest in the house) for the resumption of the relationship.[133] But resuming a romantic relationship, said the court, should not count as consideration.[134]

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[122] Perhaps most famously, see *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (NY 1917).

[123] *See* Williams, *supra* note 27, at 841.

[124] *See* Antognini, *supra* note 29, at 86; *see also* Williams, *supra* note 27, at 840-41 (discussing misuses of the doctrine of consideration in the assessment of postnuptial agreements).

[125] *Cf.* Restatement (Second) of Contracts § 71 cmt c.

[126] Bratton v. Bratton, 136 S.W.3d 595, 604 (Tenn. 2004) ("While we were unable to find adequate consideration to support the post-nuptial agreement in the case under submission, we can envision many scenarios where there would be adequate consideration. For example, there are many cases upholding post-nuptial agreements in which the parties mutually release claims to each other's property in the event of death.").

[127] *See, e.g.*, Cook v. Cook, 691 P.2d 664, 669 (Ariz. 1984) ("The record here shows that Rose may have agreed to contribute her earnings to a common pool and to hold the property acquired as an equal owner with Donald, and that Donald may have made the same promise. Such mutual promises are adequate consideration to support an enforceable contract.").

[128] BRCs could also swap non-monetary promises that would clearly constitute adequate consideration. One partner might promise to pray for the other's mother. *See* Pando by Pando v. Fernandez, 118 A.D.2d 474, 477 (N.Y. 1986) (describing contract to pray to a saint for help in selecting lottery numbers as consideration for splitting any subsequent lottery winnings).

[129] 966 N.E.2d 255, 257 (Ohio 2012).

[130] *See id.* at 262.

[131] *Id.* at 264-65.

[132] *Id.*

[133] *Id.*

[134] *Id.*

Notice how a well-written contract–like one produced by the AAML, for example–could make this logic much harder to endorse. This cohabitation contract might state that the couple would share all wages acquired in the future, and own all property acquired through those wages as tenants in common. This contract would entail a set of symmetrical promises. It would also make those promises difficult to value. Who knows what each might make in the future. The more difficult it is to value the promises, the less likely it is that a court can say that only one party received a monetary benefit. To make the contract even more difficult to attack on consideration grounds, it might include a clause that trades property, or converts various specified pieces of each person's existing property into joint property governed by a tenancy in common. These clauses make it clear that each person's promise has monetary stakes. When there are property or financial stakes on both sides, courts tend to enforce cohabitation agreements.[135]

The AAML cohabitation agreement could go further, to *explicitly* reject any romantic stakes and clarify that the obligations are rooted in contract not cohabitation.[136] The agreement could state that it is binding regardless of the romantic or co-residential status of the parties.[137] The obligations could be terminable at will, by either party, with one week's written notice, rather than on the termination of a romantic or co-residential relationship.

This AAML cohabitation agreement could also thwart a fact-based ground that courts use to invalidate agreements. Courts sometimes *reject that any contract was formed* (rather than refusing to enforce a contract that was formed) because the proffered services were provided *gratuitously*. If I mow a stranger's lawn, it is fair to assume that I was not doing it for fun, or as a gift. It is harder to make that conclusion when I mow my mother's lawn. Similarly, if I mow the lawn of the house I live in, a house owned by my partner, it is deeply unclear that I or my partner intended any type of bargain or exchange. The AAML contract can clarify whether certain services are gratuitous, and can explicitly identify services that are not.

Of course, none of this *guarantees* that courts will enforce cohabitation contracts. BRCs do not primarily aim to alter the deep seeded, hidden, logics that courts seem to apply to cohabitants, which have noticeably disturbing echoes of coverture—an ancient doctrine for subordinating women to the will of their husbands.[138] But they can insulate couples from those logics. They do so in two main ways. First, as discussed in this section, they cut off the doctrinal avenues that courts currently use to deny enforcement. This would force courts to confront more honestly whether they want to create a direct public

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[135] Antognini, *supra* note 29, at 128 (finding that when property or money is the focus of the contract, as opposed to domestic services, courts are more likely to enforce the contract).

[136] Frederico v. Sullivan, 2018 WL 1137582, at *9 (Conn. Super. Ct. Feb. 2, 2018) (holding that "contractually-based claims are permissible whereas cohabitation-based claims are not").

[137] Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) ("[W]e find that an agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration of sexual services. … The parties, represented by counsel, were well aware of this prohibition and took pains to assure that sexual services were not even mentioned in the agreement.").

[138] Antognini, *supra* note 29, at 74, 78.

policy exception to enforcing cohabitation contracts. Generally, they don't.[139] Quite the opposite; they say quite explicitly that couple should be able to contract.[140] Second, and relatedly, even if a court pondered explicitly making cohabitation contracts unenforceable as a matter of public policy, it might well hesitate to do so when the AAML and the local bar both endorse them. The next section fleshes out this second argument more fully.

2. Reputational Weight

Suppose that the AAML produced a stock cohabitation agreement that compensated stay-at-home-parents for their care work. It might be harder for a court to refuse to enforce such a document because it necessarily carries with it a weighty expert opinion that such contracts are enforceable under current law, and should be enforceable as a matter of public policy. Similarly, the Family Law Bar of a particular state, or a particular county, might write or endorse a BRC. Judges might be more hesitant to invalidate an agreement with this type of collective imprimatur.

Other forces—besides merely respecting expertise—might also make it difficult for judges to invalidate BRCs. Local judges, who might have been local attorneys before they were appointed or elected to the bench, might face an awkward dilemma. They might hear a case about the enforceability of a cohabitation agreement that was written by their former colleagues as a collective. There might be significant personal and reputational cost to invalidating this BRC.[141]

Fear of alienating voters might insulate other BRCs. An AARP-authored cohabitation contract would carry weight, in part based on the potentially large number of people who might sympathize with the AARP and also vote in local judicial elections. A judge facing reelection in a district with many seniors might hesitate before saying that the AARP cohabitation agreement—which, again, was vetted by teams of respected national lawyers—lacks consideration or is against public policy.

Of course, reputational weight might theoretically work *against* the enforceability of a BRC. A democratic judge in a deeply blue area might look askance at the MAGA prenup. Perhaps this judge will be less likely to enforce

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[139] *Id.* at 77.

[140] *Id.*

[141] Given judicial resistance to cohabitation agreements, introducing a pro-enforcement nudge will likely improve decisions. But there may be times when reputational weight is too powerful. Although many states refuse to conduct a fairness review of the substance of a prenup, some states allow judges to nullify prenup provisions that are not sufficiently "fair." J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 Duke J. Gender L. & Pol'y 83, 84-86 (2011). A judge might be less aggressive in policing the substantive fairness of BRCs written by their former colleagues in the local Bar Association. But perhaps not. Farness review is deeply fact dependent. A contract provision barring alimony can be fair for one couple (perhaps a couple where both have substantial assets or earning capacities) and unfair to another. This makes fairness review less susceptible to reputational effects of BRCs than structural features of the contract, like whether its subject matter violates public policy. Even if BRCs begin to affect fairness review inappropriately, the relevant state supreme court could exercise more oversight over those determinations, at least where local and personal connections seem to be biasing the judge.

it compared to a prenup with identical terms but without the partisan branding. But, as discussed in the next section, BRCs limit the power of individual trial court judges by harnessing the power of precedent. So, the proclivities of state supreme court justices, not trial court judges, will be more relevant. Cases at the state supreme court level are likely to be well briefed and salient to various media outlets; justices are likely to understand how their rulings will have potentially far ranging effects. These features are likely to mitigate bias.

3. The Weight of Precedent

Reputational weight will be reinforced by the weight of precedent. Consider a potentially popular BRC like the AARP Silver Cohabitation Agreement, or the NOW Anti-Domestic Violence Prenup. Once one judge holds that the agreement is enforceable, it becomes harder for the next judge to justify holding that it is unenforceable. After all, it's the same contract in both cases. Regardless of whether courts are tempted to use the doctrine of consideration or public policy to invalidate contracts, both moves become much harder to make when other courts have addressed the exact same contract, and found that it was enforceable.

Of course, judges could find that certain individualized circumstances justify not enforcing the contract, while other circumstances justify doing so. This is still a benefit over the status quo. It at least forces judges to be more explicit about their reasoning. Instead of vague pronouncements about consideration or public policy, they will have to differentiate their case on the facts and explain why those facts make an otherwise enforceable contract unenforceable.

II. Sidestepping the Limits of Legislative Menus

Many scholars have proposed family law regimes that better accommodate the diversity of family forms currently proliferating. One common proposal is for the government to develop a menu of options that couples could easily opt into.[142] Marriage and nonmarriage is a very short list of

[142] *See, e.g.*, Cahn, Huntington & Scott, *supra* note 1, at 1747 (proposing a menu system and arguing that these systems "can provide attractive alternatives to marriage, broadening options in a way that expands individual choice [and] promotes pluralism."); Mary Charlotte Y. Carroll, *When Marriage Is Too Much: Reviving the Registered Partnership in a Diverse Society*, 130 Yale L.J. 478, 517-19 (2020); Erez Aloni, *Registering Relationships*, 87 Tul. L. Rev. 573, 607-31 (2013); Eskridge, *supra* note 1, at 1889-90; Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 L. & Ineq. 345, 349 (2010); Stark, *supra* note 108, at 1526, 1528 (proposing a menu with three options, the third of which facilitates more customization); Bix, *supra* note 96, at 177-79 (briefly discussing menus as a middle path between status and private ordering); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 86 (1990) (suggesting, in brief, "a menu of standard-form terms"); *see also* Stake, *supra* note 109, at 399-400, 430 (arguing for mandatory divorce planning through customized prenups, but also proposing a set of pre-packaged legislative options); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract,* 73 Ind. L.J. 453, 465, 481-82, 495-96 (1998) (same, identifying covenant marriage as one possible option). Of course, not everyone agrees that menus would be a good thing. Polikoff, *supra* note 83, at 361 (2004) (discussing objections by Milton Regan).

options.[143] To provide more robust choice, a state might develop a set of potential regimes for marital property. One would be the default, but couples could alter it by simply checking a box and signing their application for a marriage license.[144] The goal of these reforms is to move away from one-size-fits-all family law statuses, while understanding that mandating fully customized prenups for every marriage is unrealistic.[145] Similarly, the state might create a menu of options for cohabitants, and perhaps also a menu of options for non-romantic dyadic relationships. For example, in a recent paper, Naomi Cahn, Clare Huntington and Elizabeth Scott argue that family law often ignores the needs and interests of older people.[146] Accordingly, they propose a menu of family law options that might offer older adults a set of better choices.[147] However, all menu regimes have a set of serious and often-unacknowledged flaws.

Menu-based reform proposals have three key flaws which scholars have not yet fully recognized. First, and most foundationally, these reforms assume that the government is the best entity to come up with the relevant menu. Second, they critique one-size-fits-all rules but then most of these reform proposals (but not all)[148] offer a *one-menu*-fits-all solution. These two flaws suggest that menu-based reforms—as currently envisioned—are severely limited in their capacity to promote family law pluralism. The third flaw with menu regimes is that they are unlikely to fulfil the "transformative potential" that some scholars hope for.[149]

The first flaw with menu regimes is that they look to the government for a solution that it is unlikely to be able to provide.[150] State legislatures are not the solution.[151] Many state legislatures are likely to be openly hostile to menu regimes, rather than to embrace them. In the aftermath of *Dobbs*, many state legislatures have enacted deeply conservative laws. They ban abortion, they ban gender-affirming care for children, and they pass laws that allow parents to ban books from local schools.[152] If presented with questions about how to

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[143] Cahn, Huntington & Scott, *supra* note 1, at 1732 ("[F]amily law generally offers only two starkly dichotomous options: marriage, with its attendant benefits and obligations, or cohabitation, with neither.").

[144] *Id.* at 1752 (implementing one of their menus through options on a marriage license).

[145] *But see* Zelig, *supra* note 109, at 1231 (advocating mandatory prenups).

[146] Cahn, Huntington & Scott, *supra* note 1, at 1726-28.

[147] Or, more accurately, two menus. One for those who are entering marriage, and one for those who are not entering marriage. *Id.* at 1745-46.

[148] *See id.*

[149] Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. Rev. L. & Soc. Change 291, 300 (2013).

[150] Eskridge, *supra* note 1, at 1979-80 ("[A] menu of different legal regimes for romantic relationships ought to be better than the marriage-monopoly regime … Importantly, this deliberative process ought to occur in state legislatures.").

[151] For example, many top-down efforts at family law reform fail because of legislative paralysis. Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 Law & Contemp. Probs. 69, 82-83 (2014); Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 Ariz. L. Rev. 137, 179-83 (2012) (discussing status quo bias and complexity as barriers to enacting new child support guidelines).

[152] Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 Seton Hall L. Rev. 1443, 1446 (2023).

recognize intimate partnerships, many of these conservative state legislatures would not hesitate to say that marriage is the only legitimate category. Even in more liberal states, it is unclear that there is any legislative will to produce menus.[153] Prior to *Obergefell*, some states developed alternatives to marriage like civil unions and domestic partnerships.[154] But even those states have now largely abandoned this effort to generate alternatives to marriage.[155]

Even if a state legislature dedicated effort to creating a menu, it is unlikely to produce a creative set of options. Many scholars praised statutory provisions that created civil unions, domestic partnerships, and other state-created alternatives to marriage.[156] But these were never particularly imaginative alternatives.[157] Legislators instead largely mimicked marriage.[158] Even covenant marriage—an option in three states—mostly mimics an older view of marriage as a lifelong commitment.[159] Despite this sustained lack of legislative imagination, many scholars have suggested that the legislature take up this task once again.[160] Even family law scholars—who state legislators might call upon for ideas—sometimes lack imagination. Like some legislatures, the ALI's Principles attempted to develop a domestic partnership statute.[161] Like those state legislatures, the ALI simply reincarnated marriage.[162] Given these failures of imagination, it is quite optimistic to think that state legislatures will be able to develop a robust set of menu options.

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[153] Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: The US Approach*, 44 Hous. J. Int'l L. 191, 216 (2022) ("No state legislature to date, however, has established a regime for cohabitants' economic rights. We are left primarily with judge-made law that is often difficult for nonlawyers to access or to fully understand.").

[154] Aloni, *supra* note 1, at 103.

[155] Holning Lau & Suzanne A. Kim, *Nonmarriage and Choice in South Africa and the United States*, 99 Wash. U. L. Rev. 1983, 1995–96 (2022) ("After *Obergefell*, five states discontinued their civil union registries instead of maintaining them as an alternative to marriage. Some private employers similarly stopped extending benefits to employees' domestic partners, requiring employees to marry their partners to receive benefits. The Illinois Supreme Court also invoked *Obergefell*'s glorification of marriage to support its decision not to recognize nonmarital cohabitation for the purposes of property distribution.").

[156] Aloni, *supra* note 1, at 103.

[157] *Id.* at 150.

[158] *Id.*; Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 Unbound: Harv. J. Legal Left 1, 19 (2010); Eskridge, *supra* note 1, at 1948; Atwood & Cahn, *supra* note 153, at 210-11.

[159] Jessica Pacwa, *Marriage and Divorce*, 24 Geo. J. Gender & L. 671, 688-89 (2023). Covenant marriage requires premarital counseling and makes divorce harder by requiring fault or a two-year separation, rather than allowing no-fault divorce without a waiting period. *See, e.g.*, Ark. Code Ann. § 9-11-808.

[160] *See supra* note 142 (discussing menu regimes).

[161] Principles § 6.03.

[162] *Id.*; Atwood & Cahn, *supra* note 153, at 195 ("The ALI Principles would effectively extend the marital remedies of equitable distribution of property and spousal support or alimony to cohabitants on the basis of status."). A novel, and criticized, aspect of the ALI's regime was that it imposed marriage-like rules on unmarried cohabitants by adopting an opt out regime rather than an opt in regime. *Id.* at 196; Erez Aloni, *Compulsory Conjugality*, 53 Conn. L. Rev. 55, 103 (2021) (criticizing opt-out regimes because couples simply do not know that they need to opt out, and hence cannot even claim to be consistent with the couple's tacit consent); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 Fam. L.Q. 309, 325, 331 (2008) (arguing against conscriptive regimes); Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. Rev. 1189, 1193, 1226-27 (2001) (critiquing opt out regimes because they supplant marriage). Regardless, it hewed far too close to marriage as an ideal given the diversity of family forms existing today.

Even if state legislatures could think imaginatively, they simply don't have the information they need. What do they know about life at the intersection of poverty, race, and non-binary gender identities? Perhaps not much.[163] Accordingly, state legislators who are trying their best to promote pluralism might nonetheless fail to produce a good set of options for young black lesbians in New York City, or elderly grandmothers living with their adult children and grandchildren in rural areas of Ohio. These different populations have different needs, and it is not clear that state legislatures will be able to understand those diverse needs.

The second flaw of many menu regimes is their implementation is in tension with their purpose. Even if state legislatures could create a set of appealing menu options, presenting a single menu of options to everyone violates one of two central rationales of these reforms. The first rationale behind menu reforms is that families are quite diverse today, and one-size-fits-all rules are inappropriate. So why offer one menu to all couples?[164] Doing so might not undermine the central premise of these reforms if the menu contained every desired term for every possible family form. That is, if the menu contained hundreds of options, then we might think that there is at least something for everyone. But this creates its own problems.

As the menu expands, it would violate the second rationale behind menu reforms.[165] Menu reforms assume, rightly, that providing a limited set of options would help overcome some of the barriers to writing fully customized agreements.[166] Couples have limited cognitive and emotional resources. They cannot enter fully customized contracts because they are overly optimistic, they worry about signaling, and they would need an expensive lawyer to explain the law so that they could make good decisions.[167] In short, these reforms move away from the old law and economics assumptions of full

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[163] Renuka Rayasam, Nolan D. McCaskill, Beatrice Jin & Allan James Vestal, *Why state legislatures are still very white — and very male*, Politico (Feb. 23, 2021), https://www.politico.com/interactives/2021/state-legislature-demographics/ [https://perma.cc/BL7X-R5QU] ("[M]ost state legislatures are lacking in diversity, with nearly every state failing to achieve racial and gender parity with their own population data. … The result is that in many states, the officials elected to legislative office don't look much like the people they represent — and don't necessarily focus on policies that matter to their voters."); Courtney Vinopal, *Even in States Where Legislators Earn More, Economic Diversity in the State House Remains Elusive*, Observer (Nov. 2, 2022) https://observer.com/2022/11/even-in-states-where-legislators-earn-more-economic-diversity-in-the-state-house-remains-elusive/ [https://perma.cc/DLA7-WMQD] ("Experts say working class people remain scant in state legislatures because campaigning has gotten more expensive, and serving in positions with term limits can be a gamble.").

[164] In their recent paper, Cahn, Huntington, and Scott do better, but still face this constraint. They propose one menu for older adults entering marriage, and another menu for older adults who don't want to marry. Cahn, Huntington & Scott, *supra* note 1, at 1745-46. But notice that both groups are likely quite diverse. Elderly gay men with no grandchildren and who still eschew the institution of marriage might want a different set of menu items than a grandmother who lives with her adult children and grandchildren.

[165] *Id.* at 1756 (discussing a similar tension). Not all scholars appreciate this tension. Rasmusen & Stake, *supra* note 142, at 495-96 (arguing for an expansive menu, but focusing only on creating more options, not on the problems of too many options).

[166] *See* Cahn, Huntington & Scott, *supra* note 1, at 1756.

[167] Aloni, *supra* note 1, at 343-44; Stake, *supra* note 108, at 436.

rationality and acknowledge the insights of behavioral law and economics about the limits of our cognitive and emotional resources.[168] But the limits that make customized contracting unlikely also make good choices unlikely, at least when the menu of options is not carefully curated and customized first. Consider a menu with 57 options. Well, now the couple needs an expensive lawyer to understand them, would have to expand massive amounts of energy sifting through them, would suffer from decision fatigue, choice overload, and a strong status quo bias which would most likely result in them simply sticking with the default rule.[169]

Menu reforms can only accomplish their goal if they offer desirable options and limit the number of options. This is a tricky combination to achieve when there are diverse families that want different things. This tension is recognized by some pro-menu reformers. For example, Cahn, Huntington, and Scott attempt to resolve this tension by offering multiple menus: one menu for older couples seeking to marry, and another menu for older couples seeking to cohabitate.[170] This is a step in the right direction. But as we recognize an increasing number of sub-populations in need of their own menu, it becomes increasingly likely that the state legislature will not have the information or motivation to create good menu options.

The third flaw of menu regimes concerns their transformative potential. Melissa Murray argued that early local experiments with domestic partnerships had at least some "transformative potential."[171] That is, they had the potential to create a paradigm shift away from marriage as the only way to recognize intimate partnerships.[172] This potential was lost when domestic partnerships devolved into mimicking marriage.[173] But all menu regimes are severely limited in their capacity to transform cultural scripts of the family and open up conversations about non-marital families. Any transformative potential is limited by the state's imagination, and the state's imprimatur. As discussed above, state legislatures lack imagination in this space.[174] They also lack the cultural capital required to inspire new societal understandings of the family.

BRCs avoid each of the three core flaws within menu regimes. They harness the knowledge of entities with more specialized information about diverse family forms, they dispel the internal tension within menu regimes, and they reorient their transformative potential from a top-down to a grassroots project.

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[168] For discussions of the intersection of family law and psychology, see generally Williams, *supra* note 49.

[169] On these various biases, see Sean Hannon Williams, *Advice*, 2021 Utah L. Rev. 385, 402-06 (2021).

[170] Cahn, Huntington & Scott, *supra* note 1, at 1752, 1756.

[171] Murray, *supra* note 149, at 300.

[172] *Id.* at 303.

[173] *Id.* at 300.

[174] Aloni, *supra* note 1, at 366.

A. Harnessing Specialized Knowledge to Create Better Menus

BRCs invite private entities to develop relationship contract terms based on their unique knowledge of the subpopulations that they are most concerned with. The government is unlikely to be able to identify and understand the diverse needs of evangelical Christian grandmothers seeking to re-partner, and south Texas farm hands. But more specialized entities can do so, and will be better at it.

One critique of the ALI's Principles was that it ignored the needs of low-income women.[175] The ALI proposed a conscriptive regime, where cohabitation would lead to marital-type obligations unless the couple opted out.[176] But some low-income women avoided marriage precisely because they wanted to avoid its financial risks.[177] For example, a mother already teetering on the precipice of poverty might be especially wary of a regime, like marriage, that made her liable for some of her partner's debts.

There are organizations that know a lot more about the needs of low-income mothers. The Mississippi Low Income Child Care Initiative was founded in response to the challenges that low income mothers in face in obtaining child care.[178] They are in a good position to understand what obligations, or lack of obligations, or asymmetrical obligations, might best serve low-income mothers and the children they care for.

Many other organizations can similarly convert their unique information into BRCs, or BRC terms, that will be far more useful than the options in a state sponsored menu. The United Farm Workers understands and sympathizes with the challenges of farm laborers more than state legislators.[179] The National Organization for Women, the Virginia Poverty Law Center, and Futures Without Violence, all might endorse BRC terms that seek to alleviate at least some of the barriers women face in exiting abusive relationships.[180] Although the AARP certainly has sway in state legislatures, they may have a hard time overcoming the myopic assumption that family law is for

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[175] Polikoff, *supra* note 83, at 368 (discussing a critique by Lynn Wardle).

[176] June Carbone & Naomi Cahn, *Nonmarriage*, 76 Md. L. Rev. 55, 66 (2016).

[177] *See id.* at 96–97 ("Low income women report concern about a commitment to a financially unreliable man; these women fear that such commitments may threaten the resources on which they depend to take care of themselves and their children.").

[178] *Our Mission*, Miss. Low Income Child Care Initiative, https://www.mschildcare.org/about/our-mission/ [https://perma.cc/6GCE-VBN3] ("Our advocacy grew out of our experience as a child care provider at Moore Community House in Biloxi, where we serve low-income working moms.").

[179] *Our Vision*, United Farm Workers, https://ufw.org/about-us/our-vision/ [https://perma.cc/7ELX-U97Q].

[180] *Our Issues*, Nat'l Org. for Women, https://now.org/about/our-issues/ [https://perma.cc/3WF7-7853] (identifying "Ending Violence Against Women" as one of its core missions); *What We Do*, Va. Poverty L. Ctr., https://vplc.org/what-we-do/ [https://perma.cc/JTY2-EQZH] (providing resources for "[v]ictims of domestic and sexual violence and those who represent them"); Futures Without Violence, https://www.futureswithoutviolence.org [https://perma.cc/5X7L-36QU] ("From domestic violence and child abuse, to bullying and sexual assault, our groundbreaking programs, policy development, and public action campaigns are designed to prevent and end violence against women and children around the world.").

young couples with children.[181] But they can write cohabitation agreements or prenups that track the needs of people with grown children entering second marriages or new cohabitation relationships. The AARP might do even better by co-sponsoring BRCs with more specialized groups, with even more specialized knowledge. For example, the AARP might join with National Indian Council on Aging[182] to write stock care contracts between elderly Native American grandparents and their adult children.

State sponsored menus are particularly ill-suited for promoting family law pluralism rooted in religion. The state is notably hesitant to get involved in endorsing religious doctrine.[183] But individual religious entities will have the information and motivation to design better terms for their members. Even if a couple never reads the content of the Rabbinical Council of America's prenup, it will likely fit the preferences of an Orthodox Jewish couple far better than default state law. Similarly, a Catholic prenup—and yes, the Catholic Church does accept some types of terms in prenups[184]—would also be far more likely to track the preferences of Catholic couples than the state's menu of options.[185]

Even for those scholars committed to government-sponsored menu regimes, BRCs offer a useful dialogic benefit. If governments keep track of which BRCs are popular, they can then begin to incorporate similar terms into

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[181] Cahn, Huntington & Scott, *supra* note 1, at 1726; *see also* Peter M. Walzer & Jennifer M. Riemer, *Premarital Agreements for Seniors*, 50 Fam. L.Q. 95, 96 (2016) ("Seniors have different priorities and goals in marriage than people marrying in their twenties and thirties.").

[182] *About Us*, Nat'l Indian Council on Aging, https://www.nicoa.org/about-us/ [https://perma.cc/UK5R-7PY3] ("The mission of NICOA is to advocate for improved comprehensive health, social services and economic well-being for American Indian and Alaska Native elders.").

[183] *See* Levmore, *supra* note 65.

[184] Mary Cushing Doherty, *Romantic Premarital Agreements: Solving the Planning Issues Without "The D Word"*, 29 J. Am. Acad. Matrim. Law. 35, 42 (2016) ("A typical example [of a Catholic prenup] addresses the interests of a widow who is already a parent that defines separate property to protect inheritance interests of each spouse's children."); Cheryl I. Foster, *When a Prenup and Religious Principles Collide*, Fam. Lawyer Mag. (Feb. 20, 2020), https://familylawyermagazine.com/articles/when-prenuptial-agreements-and-religious-principles-collide/#:~:text=Although%20there%20is%20no%20rule,such%20agreements%20for%20religious%20reasons [https://perma.cc/F24K-X79M]. The arch diocese of Pittsburgh asks that people who want to marry in the Catholic Church submit any potential prenups for review by church officials. The main (and significant) limitation on prenups under Catholic teachings is that couples cannot conditionally enter marriage. Their commitment must have no strings attached, at least when those strings concern planning for a divorce. But Catholic doctrine leaves room to make some plans for death. Consider a widow who meets and falls in love with a widower. They decide to get married. For this couple, a prenup might reserve part of the marital property to be inherited by the widow's adult children. This term does not undermine the full commitment to lifelong marriage. It simply ensures that these adult children get their natural right to the inheritance. Existing law might interfere with this right through a forced spousal share in the widow's estate. Here, the prenup is altering an aspect of the law that the church is agnostic about. Accordingly, this term might be acceptable under Catholic doctrine. But both the Pittsburgh diocese and the people it serves might benefit if, instead of reviewing each prenup individually, the diocese simply endorsed a prenup or a particular provision that could be included in a prenup.

[185] Pat McCloskey, *Catholics and Prenuptial Agreements, Ask a Franciscan* (May 9, 2020), https://www.franciscanmedia.org/ask-a-franciscan/catholics-and-prenuptial-agreements/ [https://perma.cc/Y7A6-5S8H].

their menu of options.[186] In this way, BRCs and government sponsored menus can coexist and provide useful feedback for one another.

B. Harnessing Trust to Improve Choice among Options and Increase Uptake

Under a menu-based reform, people would have to figure out which option best reflects their needs or values. As discussed above, this creates a tension within menu-based regimes. The more options provided, the more they respect pluralism, but the costlier it is for people to figure out which option is best for them. BRCs can avoid this central tension.

Numerous studies confirm that being confronted with a large range of options can lead to paralysis, doubt, poor decision-making, and regret.[187] This phenomenon of choice overload strongly suggests that larger menus will be counterproductive. Consider the most comprehensive family law menu option today: Colorado's Designated Beneficiary regime. It allows a couple to customize which of 15 obligations and rights they have.[188] Perhaps because of this detail, and the cognitive and emotional burdens of making these myriad choices, very few people have taken advantage of the Act.[189]

Despite this robust literature on choice overload, a recent study identified a simple way to eliminate it.[190] Label each option with a brand.[191] When consumers have this brand information, they did not experience choice overload.[192] Why? Because brands quickly communicate information that allows consumers to sift through many options by easily discarding some, and ranking others.

Branding relationship contracts is likely to have a similar salutary effect. Because BRCs reduce the costs of choosing among options, they can offer significantly more options without triggering choice overload. Instead of navigating a list of unfamiliar options on a marriage license, each couple can quite easily identify one or more entities that they tend to trust. This reduces the number of *plausible* options substantially. This, in turn, reduces the monetary

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[186] Stake argues for something similar. Stake, *supra* note 109, at 436. Although since he primarily envisions privately negotiated contracts (which do not have to be registered or recorded), legislatures would only discover the (potentially small) subset of clauses that are litigated and appealed such that they appear in databases like Westlaw. Publicly available BRCs are far more discoverable.

[187] Alexander Chernev, Ulf Böckenholt & Joseph Goodman, *Choice Overload: A Conceptual Review and Meta-Analysis*, 25 J. Consumer Psych. 333, 335 (2015); Raffaella Misuraca, et al., *The Role of the Brand on Choice Overload*, 18 Mind & Soc'y 57, 57-58 (2019).

[188] 3A Colo. Prac., Methods of Practice § 104:46 (Westlaw 6th ed. 2023); Colo. Rev. Stat. § 15-22-105(3) (2022).

[189] Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. Rev. 1013, 1018 (2018) ("Since Colorado created a designated beneficiary status in 2009 allowing two unmarried people to agree to provide one another with legal rights, benefits, and protections, only 672 couples in three populous counties registered as designated beneficiaries in comparison to the approximately 131,100 who married.").

[190] Misuraca et al., *supra* note 187, at 74.

[191] *Id.*

[192] *Id.*

and psychological barriers to contracting, hence increasing the number of people who choose to deviate from the state's default regimes.

In a world of BRCs, couples can simply look to the entities that they trust, and the terms or contracts that they endorse. An elderly couple might look to the AARP, and trust that the AARP Silver Cohabitation Agreement likely addresses their concerns and tracks their preferences. Of course, elderly couples themselves are a diverse bunch. An older lesbian couple in Georgia might trust the NOBLA prenup.[193] NOBLA stands for the National Organization of Black Lesbians on Aging.[194] It began in Atlanta, and still has deep roots in Georgia despite its now-national reach.[195] It is committed to building a base of power for Black Lesbians over the age of 40.[196] It centers service, advocacy, and community-action research.[197] It might also decide to write a prenup or cohabitation agreement. If so, its members might rightly trust that any such agreement would serve their needs better than any state-created menu option. Selecting an entity that you trust is far easier than developing an understanding of the default legal regime that applies to your family form, and choosing which customizations to adopt. In this way, BRCs can avoid many of the costs of offering numerous choices and dispel the central tension within existing menu regimes.[198]

C. Transformative Potential

Some scholars have argued that menus can help transform norms and understandings about the family.[199] As others have noted, most legislatures have failed to deliver menu options entirely, and those that have usually fail to deliver any creative ones with transformative potential.[200] But the problem is deeper; even sympathetic state legislatures who create menus with

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[193] ZAMI NOBLA, https://www.zaminobla.org/about [https://perma.cc/D6PK-ELBR].
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] Other proposals to mitigate this tension seem overly optimistic. Cahn, Huntington, and Scott envision that their menu would be advertised through public information campaigns: "To make older adults aware of the options for family formation, informational material can be available in physicians' offices, Social Security offices, senior centers, and other locations frequented by older adults. Information could also be distributed with Medicare forms and in periodicals that target older adults, such as AARP publications." Cahn, Huntington & Scott, *supra* note 1, at 1755–56. Similarly, Jeffrey Stake has argued that public information campaigns can help people understand the need to write a prenup, and the terms that might work for them: "The legislature itself should give guidance to both judges and fianc[é]es by incorporating illustrative examples as an appendix to the form. Lawyers might make presentations explaining the proposals and suggesting circumstances in which soon-to-be-married couples need a custom-tailored agreement. Consumer organizations and schools could focus educational programs on the statutory choices." Stake, *supra* note 109, at 436. But public education like this faces serious challenges, especially when people would have to understand the existing (complex) law and how their financial circumstances interact with that law.
[199] *See* Cahn, Huntington & Scott, *supra* note 1, at 1747, 1754 (discussing how this might be a bad thing in some cases, and a good thing in others); *see also* Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 Wm. & Mary L. Rev. 453, 494-504 (2019).
[200] *See, e.g.*, Aloni, *supra* note 1, at 326 n.44; Murray, *supra* note 149, at 300.

pluralism-promoting options are unlikely to have the cultural capital to infuse them with the meaning required to reshape societal norms.

Widening the meaning of family is a cultural project. Although legal reforms can influence culture and norms, grassroots norm entrepreneurs may be far more effective. This may be especially true for populations that already feel ignored by, and estranged from, state legislative bodies.[201] As mentioned above, state legislatures might know very little about black lesbian-led families in New York City or non-citizen migrant farm works in Georgia. Those families probably understand this; that is, they understand that state legislatures don't know or care about them. Communities who actively mistrust state legislatures are unlikely to find inspiration in menus designed by those state legislatures.[202] They might find significantly more inspiration in reform movements that they initiate that are rooted in their empowerment and their unique knowledge. This does not mean state law does not have a role to play. But it does mean that centralized top-down menu reforms are, at most, only one part of the transformative project, and perhaps not even a central part of that project.

III. Additional Benefits

BRCs generate a host of additional benefits. They are likely to have dialogic effects with wide-ranging benefits: those effects can help sort out those areas of family law where people are polarized from areas where there is cross-party agreement, they can highlight the democratic deficits of gerrymandered family law, and they can provide important information for responsive and responsible state legislatures. BRCs can also provide a new pathway for reformers and norm entrepreneurs to influence the rules that govern families on the ground. Perhaps most importantly, BRCs can have all of these effects right now, without having to wait for state actors to debate and adopt a specific reform.

A. Problematizing Polarization

BRC's capacity to bring different family law preferences to light might be useful for problematizing political polarization. We might imagine attempts by some elements within the Republican Party to make a Red Prenup that reflected more conservative values. But any such attempt might quickly fracture

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[201] *See* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263, 1263 (2016) (conducting interviews with people who had negative experiences with the criminal justice system and finding: "Injustices they perceive in the criminal system translate into the belief that the legal system as a whole is unjust and should be avoided. Second, . . . past negative experiences with a broad array of public institutions perceived as legal in nature caused respondents to feel lost and ashamed, leading them to avoid interaction with all legal institutions. Third, . . . respondents helped make sense of these troubling experiences by more generally portraying themselves as self-sufficient citizens who solve their own problems. Seeking help from the legal system might run counter to this self-portrayal.").

[202] This is in part why the early domestic partnership experiments had more promise; because they were enacted at the city level, which at least is likely to be more responsive to local populations.

in the face of counterpressures from different subgroups within the Republican Party. Evangelical Christians might want a prenup that approximated the idea that marriage is forever. This Marriage-is-Forever Prenup might include income sharing for life to signal that the couple is bound together for life. In contrast, neoliberal forces within the Republican Party might prefer a Free Market Prenup where all property is owned as separate property by the person who earned it in the marketplace. We might then see interesting patterns that beguile traditional political lines. NOW might find itself supporting a set of financial terms similar to the Marriage-is-Forever Prenup. Similarly, other left-leaning entities might find themselves agreeing with some aspects of the Free Market Prenup. This problematizes a vision of polarized family law,[203] and opens up potentially useful possibilities to build consensus around at least some aspects of family law.

B. Circumventing Gerrymandered Family Law

In contrast to the view in the previous section, some family law debates may closely track political divides. BRCs can help here as well.

Political polarization and state-level gerrymandering will generally lead to state legislatures that reflect only a subset of the state's citizens.[204] State family law may therefore increasingly diverge from the preferences of many citizens.[205] Consider Texas.[206] It has among the stingier alimony regimes in the nation.[207] When a wife quits her job to care for the children, state law essentially takes the position that this was her choice, and she will have to

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[203] For another attempt to combat a vision of family law as polarized along traditional political lines, see Clare Huntington, *Pragmatic Family Law*, 136 Harv. L. Rev. 1501, 1503-08 (2023) (highlighting areas of broad convergence in family law, and areas where disagreements do not fall along traditionally drawn partisan lines).

[204] *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1761–62 (2021) (discussing the way gerrymandering entrenches politicians who don't represent the majority of the citizens and how this lack of accountability promotes polarization and extremism); *see also* Rucho v. Common Cause, 139 S. Ct. 2484, 2494, (2019) (discussing the history and etymology of gerrymandering).

[205] *See* June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. Rev. 313, 335–38 (2010) (describing the effects of political polarization among party elites on family law policies surrounding abortion and same-sex marriage and how the resulting policies diverge from the preferences of the "rank and file.") Gerrymandering affects more mundane family law matters as well. For example, a majority of Americans who identify as democrats, independents, and republicans favor expanding funding for prekindergarten education. Yet, after North Carolina gerrymandered its districts, the resulting state legislature immediately began dismantling a host of programs targeted at helping children, including early childhood education. *See* Alex Tausanovitch, Steven Jessen-Howard, Jessica Yin & Justin Schweitzer, *How Partisan Gerrymandering Hurts Kids*, Ctr. for Am. Progress (May 28, 2020), https://www.americanprogress.org/article/partisan-gerrymandering-hurts-kids/ [https://perma.cc/2PR2-PQVS].

[206] *See Anatomy of the Texas Gerrymander: Here's how Texas Republicans crafted one of the most politically and racially skewed maps of this redistricting cycle* (Dec. 7, 2021), https://www.brennancenter.org/our-work/analysis-opinion/anatomy-texas-gerrymander [https://perma.cc/V52C-5TFY].

[207] *See* J. Thomas Oldham, *Everything Is Bigger in Texas, Except the Community Property Estate: Must Texas Remain A Divorce Haven for the Rich?*, 44 Fam. L.Q. 293, 293–94 (2010).

live with the long-term effects of that choice on her earning capacity.[208] Texas also robustly protects the separate property of wealthy spouses, and its appellate courts allow many forms of duress to go unchecked when reviewing prenups.[209] For example, some courts define duress narrowly to include only threats to carry out some illegal act.[210] It is not illegal to threaten to leave your pregnant fiancé and report her to the relevant authorities because she is an illegal immigrant. Therefore, a prenup signed under this pressure would be enforceable under Texas's version of the UPAA.[211]

Many citizens are likely to disagree with the value judgments embedded within state-level family laws. Consider Austin, a classic example of a blue dot in a red sea. People who move to Austin are radically disenfranchised by state gerrymandering. They may have preferences that significantly diverge from state law. Sometimes, relationship contracts can offer a tool to better align the relevant legal rules with the preferences of these individuals. We could also flip this example. California's Orange County is a red dot in a blue sea. The people who live there might vehemently disagree with the famous California case of *Marvin v. Marvin*, where the California Supreme Court held that cohabitants can obtain lifetime support from one another when they split up.[212] Similarly, they may disagree with the newly proposed Cohabitant's Economic Remedies Act, which imposes obligations on cohabitating couples without their consent, unless they use a relationship contract to opt out of those obligations.[213] Again, BRCs help solve these mismatches between law and preferences by harnessing entities to help inform citizens of state law, and to make it far easier for them to enter relationship contracts that are more aligned with their preferences.

Of course, BRCs cannot solve all of the problems that these mismatches create, but they can help. BRCs cannot alter criminal laws surrounding abortion. They cannot allow for no fault-divorce if Texas succeeds in eliminating it.[214] They cannot make Child Protective Services ignore trans affirming care.

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[208] *See* Tex. Fam. Code Ann. § 8.051(2)(b) (setting aside disability and domestic violence, allowing maintenance only for marriages of 10 years or more where the oblige cannot meet her "minimum reasonable needs"); Tex. Fam. Code Ann. § 8.054 (directing courts to "limit the duration of a maintenance order to the shortest reasonable period that allows the spouse seeking maintenance to earn sufficient income to provide for the spouse's minimum reasonable needs"); Randall B. Wilhite, O'Connor's Texas Family Law Handbook Ch. 3-D § 1 ("The purpose of spousal maintenance is to provide temporary and rehabilitative support.").

[209] *See id.* at 293–94, 310.

[210] *See* Matelski v. Matelski, 840 S.W.2d 124, 128–29 (Tex. App. 1992).

[211] *See* Osorno v. Osorno, 76 S.W.3d 509, 511 (Tex. App. 2002) ("In this case, aside from his moral duties [to his pregnant forty-year-old partner], Henry had no legal duty to marry Gloria. His threat to do something he had the legal right to do is insufficient to invalidate the premarital agreement."); *see also* Int. of A.M.H., No. 14-17-00908-CV, 2019 WL 4419195, at *7 (Tex. App. Sept. 17, 2019) ("Kathy seems to argue she signed the prenuptial agreement involuntarily and under duress because she would have had to return to Vietnam unmarried and pregnant unless she signed the agreement. However, for duress to be a contract defense, it must consist of a threat to do something the threatening party has no legal right to do."); Oldham, *supra* note 207, at 310 (discussing other Texas cases).

[212] *See* Marvin v. Marvin, 557 P.2d 106, 122–23 (Cal. 1976).

[213] Uniform Cohabitants' Economic Remedies Act, § 7 (Unif. Law Comm'n 2021).

[214] Kimberly Wehle, *The Coming Attack on an Essential Element of Women's Freedom*, Atlantic (Sept. 26, 2023), https://www.theatlantic.com/ideas/archive/2023/09/

But they can alter default family law rules on alimony, property division, and cohabitation. They can fortify child support in the face of legislative pressure to eliminate it when there is 50/50 custody.[215] They can fortify concepts of duress and fair dealing against legislative erosion. For example, they could incorporate customized definitions of duress so that locally elected trial court judges have more tools to police prenups,[216] and they could put the burden on the person seeking to enforce the relationship contract to prove the lack of duress.

C. Feedback for Lawmakers

BRCs could provide an important dialogic benefit for the state, regardless of whether BRCs exhibit consensus or widespread disagreement. Suppose many popular BRCs included transmutation. That is, they contained provisions that recognized the difference between separate property and marital property, but also dictated that separate property would convert (or "transmute") into marital property simply by the passage of time.[217] A legislature that previously rejected a transmutation statute might learn that many popular BRCs include it. Perhaps some of these BRCs would be written by entities that the governing party of that state would normally trust. For example, if the Moral Majority Prenup included transmutation, conservative legislators in Texas might take note. This might lead them to rethink their prior assumption that transmutation would be too radical a change from existing law.

Similar benefits flow from widespread variation in the content of BRCs. Here, it will be useful to draw upon scholarship about family law arbitration, even though a discussion of the overall merits of such arbitration is beyond the scope of this Article. E. Gary Spitko argues that "minority-culture arbitration"

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no-fault-divorce-laws-republicans-repeal/675371 [https://perma.cc/2ZMG-CC89] ("One of the more alarming steps taken in that direction came from the Texas Republican Party, whose 2022 platform called on the legislature to 'rescind unilateral no-fault divorce laws and support covenant marriage.'").

[215] Kathy Kinser, *Message from Foundation President*, Tex. L. Found. (accessed May 9, 2023), https://web.archive.org/web/20230509142607/https://www.texasfamilylawfoundation.com/?pg=messagefrompresident.

[216] They would do so by including provisions that customize the circumstances that nullify a clause. Those circumstances could include "wrongful threats," not just "illegal threats." This would allow local trial court judges to interpret the contract term "wrongful threat" in ways that might be much broader than state law's definition of duress. The BRC could also incorporate the definition of duress from states that routinely strike down prenups on duress-type grounds by requiring the "highest degree of good faith, candor and sincerity." *See* In re Estate of Hollett, 834 A.2d 348, 351 (N.H. 2003). To ensure that the enforcing court has experience with the relevant standard, a BRC could assert that the terms of the contract should be judged as if the parties were in a *fiduciary relationship* with one another, or as if the wealthier party were himself his wife's attorney when the contract was drafted, which would incorporate multiple overlapping fiduciary duties and impose a very stringent duty of good faith. *See* Izzo v. Izzo, No. 03-09-00395-CV, 2010 WL 1930179, at *7 (Tex. App. May 14, 2010) ("Significantly, the fiduciary duty John owed to Sharon in acting as her attorney and investment advisor is independent from the general fiduciary duty that he owed to Sharon as her spouse, a duty which this Court has previously held to be insufficient, standing alone, to raise a fact issue on involuntary execution of a marital property agreement.")

[217] *See* Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 Nw. U. L. Rev. 1623, 1641 (2008).

could create a productive dialogue with the majority.[218] He offers an example where a same-sex couple opts into arbitration that recognizes the interests of the non-biological functional parent more than current law.[219] He suggests that this would influence states' default rules by showing the viability of an alternate system.[220] Similarly, Shari Silverman argues that society would benefit from more engagement with the substantive law underlying religious arbitration; such engagement would facilitate reflection on different legal rules and the differing values that undergird them.[221]

BRCs accomplish this dialogue much better than one-off private arbitration agreements. It is highly unlikely that anyone will ever see private arbitration agreements. Why would they? They are simply private contracts that come to light only if someone attempts to get out of arbitration. Even then, the courts usually limit their inquiry to whether the agreement to arbitrate is binding, and would not have any interest or inclination to include in their public opinions any commentary on the novelty of the underlying rules that the arbitrator was supposed to use. BRCs, in contrast, would often be public documents promoted by influential entities. If the AARP prenup states that most local judges don't understand the plight of the elderly, and arbitration is necessary, then many people will hear this message. This has a much larger possibility of influencing default state law then one-off private arbitration agreements between any given couple.

D. A New Mechanism for Legal Reform

As discussed above, reformers who lament the inaction or hostility of state legislatures often turn to those very same state legislatures for change.[222] This is a radically incomplete strategy. BRCs offer a new and additional pathway for reform.

Consider the ALI's Principles. The Principles were a comprehensive rethinking of a great deal of family law. These reforms never got traction among state legislatures. Instead of using state legislatures as the mechanism for reform, the ALI might at least add an additional pathway for progress: BRCs. The ALI could write a prenup or cohabitation agreement that included many of the reforms that it endorsed. As discussed above, the ALI prenup might

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[218] E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 Wash. U. L.Q. 1065, 1083–84 (1999).

[219] *Id.*

[220] *Id.*

[221] Shai Silverman, *Before the Godly: Religious Arbitration and the U.S. Legal System*, 65 Drake L. Rev. 719, 761 (2017) (suggesting a dialogic benefit that U.S. law can get from more robust engagement with religious arbitration through, for example, engaging with whether religious arbitration awards violate public policy).

[222] For a slight change to this pattern, which nonetheless implicates some of the same problems, see Scott, *supra* note 142, at 73, 85 n.195 (discussing legal elites leading the charge to create and curate standard form prenups: "A bar association or American Law Institute committee might assume the task of formulating terms of standard-form contracts. Such a group is well situated to oversee the evolution of model standard-form provisions, proposing, monitoring, and amending terms as information accumulates over time about the use of precommitment agreements.").

include transmutation. No state has adopted transmutation. Under the ALI's version, each year some percentage of separate property morphs into marital property such that, after a 30 year marriage, all of the spouses' property is marital.[223] According to the ALI, this tracks the expectations of the spouses better than existing separate property regimes.[224] Transmutation is also quite popular. In one study, more than 40% of both US and Israeli subjects embraced some level of transmutation.[225] Much like ballot initiatives circumvent logjams in state legislatures, BRCs might circumvent whatever is preventing transmutation reforms from being adopted.

Overall, the ALI might obtain more influence if it paired the Principles—which are aimed at advising legislators—with stock BRCs or stock terms, which would be aimed at advising private parties. This would allow the ALI to pursue multiple pathways of influence at once.

Of course, the ALI is not the only entity interested in legal reform, and transmutation is not the only reform that BRCs might reinvigorate. The Uniform Law Commission's (ULC) goal is to harness its expertise to draft state laws that can promote uniformity. More specifically, it seeks to draft "well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[226] It has produced numerous uniform family laws.[227] But statutory state law is not the only pathway to uniformity. Uniform BRC terms and language, if adopted by various couples, could significantly further uniformity as well. A trial court judge is likely to view these terms with some respect, given their reputable source, and would be more likely to enforce them.[228] Regardless, precedents would build up about each term, which would help judges interpret them and help couples predict their effects. There would also be synergies from writing both uniform laws and stock terms in tandem. The Uniform Premarital Agreement Act, for example, contains

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[223] Of course, there are caveats that are not important to this illustration.

[224] Principles § 4.12 and comments.

[225] Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 La. L. Rev. 57, 82 (2011).

[226] *About Us*, Unif. L. Comm'n, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/N6YB-FJ5M].

[227] For example, it has promulgated the Uniform Premarital Agreement Act, the Unform Cohabitant's Economic Remedies Act, the Uniform Parentage Act, the Uniform Child Custody and Jurisdiction Act, and many others. *Current Acts*, Unif. L. Comm'n, https://www.uniformlaws.org/acts/catalog/current [https://perma.cc/BZK2-LLLY].

[228] *See* Gregory A. Elinson & Robert H. Sitkoff, *When A Statute Comes with A User Manual: Reconciling Textualism and Uniform Acts*, 71 Emory L.J. 1073, 1084, 1109 (2022) (describing the subject matter expertise of the ULC, the ways that expertise appeals to state legislators, and the ULC's "significant hand in shaping American law"); Lindsay Beaver, *The Uniform Deployed Parents Custody and Visitation Act*, 36 GPSolo 16, 19 (2019) ("Lawmakers and legislative drafters often appreciate uniform acts for offering thoughtful, pragmatic, and technically sound approaches to legislating a particular legal issue."); William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 Elon L. Rev. 39, 39–40 (2011) ("In the 117 years of its existence, the ULC has produced hundreds of uniform laws and forwarded them to the legislatures of its member jurisdictions for enactment, often with striking and sometimes with universal success. Its premier product, produced in partnership with the American Law Institute (ALI), is the Uniform Commercial Code (UCC), but the laws it promulgates extend far beyond the area of commercial law.3 Among the many other areas in which the ULC is active, and of particular importance to the subject of this article, is family law.").

guidance on which types of terms are enforceable and which are unenforceable.[229] This guidance would be much more useful—both to courts and couples—if it were paired with sample stock terms that were pre-vetted to be generally enforceable. These extra dimensions of uniformity would be especially useful in furthering the ULC's goals in the family law context because relationship contacts are interpreted in multiple courts with varying degrees of family law expertise, including specialized divorce courts, probate courts, bankruptcy courts, and tax courts.[230]

Below are brief illustrations of other potential BRCs that further other reform goals.

1. Post-majority Child Support

Most states do not require parents to pay for their child to attend college;[231] child support generally ends when the child graduates from high school. Even in states that allow courts to award so-called post-majority support, it is often limited. For example, several states require only that the noncustodial parent pay a portion of the costs of attending a public college.[232] Indiana further requires the student herself to cover 1/3 of the costs.[233] But in a world with an increasingly stratified workforce, there may be benefits to going to some private colleges.[234] There may also be benefits to allowing the student to concentrate on her studies rather than work during college to pay for 1/3 of her costs. Two parents who both went to Princeton may well want a prenup that requires each parent to pay for ½ of private college tuition and perhaps ½ of law school or medical school as well. This type of clause might be bundled into various BRCs, and with the expert drafting that BRCs could harness, they could avoid some of the pitfalls that occur when couples try to

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[229] Unif. Premarital Agreement Act § 3.

[230] Est. of Spizzirri v. Comm'r of Internal Revenue, No. 19124-19, 2023 WL 2257805, at *1-4 (T.C. Feb. 28, 2023) (discussing prenup in case heard by a probate court and a tax court); In re Talasazan, No. 1:16-AP-01119-MT, 2021 WL 5702690, at *20 (Bankr. C.D. Cal. Dec. 1, 2021), aff'd, No. 1:16-AP-01119-MT, 2022 WL 17410688 (B.A.P. 9th Cir. Dec. 2, 2022) (adjudicating the validity of a prenup in bankruptcy court); Ori Aronson, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. Ark. Little Rock L. Rev. 357, 366 (2000) (discussing generalist courts that also handle family law cases, and specialized family law courts).

[231] Leah duCharme, *The Cost of A Higher Education: Post-Minority Child Support in North Dakota*, 82 N.D. L. Rev. 235, 236 (2006) (noting that about half of states authorize courts to order post-majority support); Anna Stepien-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 Quinnipiac L. Rev. 359, 364 (2012) ("[M]ost states do not require children's post-majority support.").

[232] *See, e.g.*, In re Paternity of Pickett, 44 N.E.3d 756, 768 (Ind. Ct. App. 2015); Maureen McBriena & Patricia A. Kindregana, *Expenses of College Education*, 2 Mass. Prac., Family Law and Practice § 50:50 (Westlaw 4th ed. 2023).

[233] *Pickett*, 44 N.E.3d at 768.

[234] *At 30% of Colleges, More Than Half of Students Earn Less Than High School Graduates After 6 Years, Georgetown CEW Finds*, Geo. Univ. Ctr. on Educ. & Workforce, https://cew.georgetown.edu/wp-content/uploads/GeorgetownCEW_CollegeROI_PressRelease_2-15-22.pdf [https://perma.cc/ZC9H-4RG3] ("Private colleges that primarily offer bachelor's degrees lead the list of institutions that provide the highest returns on investment.").

draft their own college expense provisions.[235] We might imagine any number of child-focused nonprofits writing prenups, or prenup terms, that included post-majority support as well as enhanced child support for minor children.[236]

2. Domestic Violence

Several scholars have suggested various forms of domestic violence insurance.[237] One goal of these insurance reforms is to compensate victims and another is to deter intimate partner violence.[238] BRCs can serve these goals, *and they can do so better than the original reform proposals.*

Domestic violence insurance could work in multiple ways, but one example might be to bundle mandatory domestic violence insurance into automobile insurance.[239] Then, if an insured committed domestic violence, the victim could bring a claim against their insurance company.[240] One key limitation of this proposal is that it requires an insurance company to price and offer this insurance, and requires a state legislature to mandate it.[241]

BRCs can provide similar benefits, *and can do so now*, without convincing insurance companies to offer certain products and without convincing state legislatures to subsidize or mandate those products. The National Coalition Against Domestic Violence—which is "dedicated to supporting survivors and holding offenders accountable"[242]—might write or endorse a prenup containing penalty provisions that are triggered by intentional torts. Perhaps a showing of domestic violence would trigger lengthy spousal maintenance payments or a very skewed split of marital property. These maintenance provisions might be particularly important given that most couples have little marital property. These provisions could also lower the relevant burden of proof by, for example, triggering the obligation whenever credible evidence is presented rather than when that evidence rises to a preponderance standard. This would

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[235] *See, e.g.*, Mandel v. Mandel, 906 N.E.2d 1016, 1020 (Mass. App. 2009) (interpreting a clause in a divorce settlement mandating that "[t]he Husband and Wife shall each contribute 50% toward each child's college education expenses" to require the sharing of only *reasonable* college expenses, which might include only the price of a public college).

[236] For example, the NOW prenup might state that a husband's child support obligations would not be adversely affected if he has children with another woman after the divorce. Not all states follow this rule. *See* Rebecca Burton Garland, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 Hastings Const. L.Q. 881, 886–90 (1991) (discussing various approaches).

[237] *See, e.g.*, Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 Ariz. L. Rev. 957, 1021 (2020) (suggesting civil recourse insurance which would pay for an attorney to sue perpetrators for intentional torts).

[238] *Id.* at 1024 (suggesting that the biggest benefit of her proposal, besides providing access to a lawyer, would be general deterrence); Jennifer Wiggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121, 124–27 (2001) (discussing both compensation and deterrence rationales).

[239] Wiggins, *supra* note 238, at 152–53.

[240] *Id.*

[241] *Id.* at 153–70 (discussing various objections and issues with mandatory domestic violence insurance).

[242] Nat'l Coal. Against Domestic Violence, https://ncadv.org [https://perma.cc/46ZD-VYFS].

provide some compensation (at least during or after a divorce) and may have some deterrent effect.

BRCs could also promote deterrence by altering current bargaining power, rather than merely focusing on (potentially uncertain) ex post remedies. The Futures Without Violence cohabitation agreement[243] might mandate that a certain amount of money or a certain percentage of wages be deposited into the separate bank accounts of each spouse. Although courts often refuse to enforce the terms of a prenup until someone files for divorce,[244] a sophisticated entity could use BRCs to sidestep these limitations. By partnering with a bank and requiring the BRC to be filled out online or registered in some way, a BRC could include and automatically enact permissions to set up a new bank account for one partner, and authorize direct deposits from the other partner's employer. This may help ensure that the victim has access to a pot of money that she can use to escape imminent violence or avoid subtler efforts at coercive control.[245]

BRCs also have benefits even if insurance companies offer domestic violence insurance. Recently, Merle Weiner proposed insurance that would pay for a plaintiff's attorney so that she can pursue an intentional tort claim. This insurance would not be mandatory, but would require potential victims to actively seek it out and purchase it. Will potential victims do so? Probably not. People already have the power to write various domestic violence-related clauses into prenups, but they simply don't.[246] The same overoptimism that drives this failure to prepare will also seriously limit the uptake of Weiner's domestic violence insurance. BRCs could provide a powerful pathway to improve uptake. Weiner notes in passing that organizations like NOW might recommend or sponsor such insurance.[247] She opines that people might desire this insurance in part because it would be a "mark of honor among those who are feminist-minded."[248] BRCs would significantly increase uptake of these provisions and would also harness the forces of branding and signaling far more effectively. If NOW bundled this insurance provision into its BRC, far more people would adopt it. This is in part due to the muddled nature of the "mark of honor" that Weiner envisions. The signaling effect of domestic violence insurance is double edged. As Weiner suggests, it might signal that you are a good feminist. It might also signal that you don't trust your spouse,

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[243] Futures Without Violence, https://www.futureswithoutviolence.org/our-mission/ [https://perma.cc/K8PM-RRNF] ("For more than 30 years, FUTURES has been providing groundbreaking programs, policies, and campaigns that empower individuals and organizations working to end violence against women and children around the world.").

[244] Strauss, *supra* note 74, at 1269.

[245] Margo Lindauer, *"Please Stop Telling Her to Leave." Where Is the Money: Reclaiming Economic Power to Address Domestic Violence*, 39 Seattle U. L. Rev. 1263, 1264 (2016). These provisions could also significantly improve child welfare.

[246] Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 Or. L. Rev. 945, 1014 (2004) ("Even with prenuptial agreements utilized more frequently by prospective spouses, it is rare that counsel include provisions to address potential physical violence or economic harms.").

[247] Weiner, *supra* note 237, at 1048 ("[I]f organizations such as the American Association of University Women, National Women's Law Center, and the National Organization for Women became plan sponsors, demand among feminists might be very strong indeed.").

[248] *Id.* at 1047.

that your spouse is likely to abuse you, that you are likely to be abused, and that your taste in partners leaves much to be desired. The signal of signing a NOW prenup might not carry these negative connotations because the signal operates at a higher level of generality. Signing the NOW prenup signals that your commitments align with NOW, rather than align with any particular provision in the prenup.

Both Weiner's proposal and BRCs with domestic violence clauses each have their own costs and benefits. BRCs require the consent of both spouses. This ensures that the potential abuser knows that the insurance or penalty exists, and hence promotes deterrence. But it also might make it less likely that the potential abuser signs the BRC.[249] In contrast, a spouse could buy Weiner's insurance policy unilaterally, without her partner's knowledge. Overall, we do not have to choose one method of promoting this insurance. Both BRCs and insurance products might both provide useful pathways to deterring domestic violence and compensating victims, and together they may even have synergistic effects.

BRCs could also help reforms that are not focused on insurance. Several scholars have suggested that courts be more sensitive to domestic violence when interpreting and enforcing contracts.[250] For example, a prenup might be invalid if there was domestic violence when signed. BRCs allow these reformers to focus on the terms of the prenup itself, rather than solely on courts. A BRC might stipulate that a term is void, and other terms are triggered, if there is a corroborated allegation of domestic violence, even if it occurred years after the contract was signed and the violence would be difficult to prove by a preponderance of the evidence because it occurred in private.[251] Such terms could provide far more protection than common law doctrines like duress, and they do not require changing the law or educating judges to achieve these goals.

E. Existing Infrastructure for Non-Governmental Family Law

One incredibly important benefit of BRCs is that they require no legislative action. Everything that this Article has discussed is possible today, without any legal reform. Entities are free to advise their members to sign prenups and to offer stock prenup terms. Nothing stops entities from writing BRCs. Similarly, nothing stops couples from signing them. The legal infrastructure for non-governmental family law therefore already exists.

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[249] BRCs would therefore be most promising at addressing domestic violence issues that emerge after, or might potentially emerge after, a marriage or other formalization of the relationship. BRCs might be less helpful for relationships with other domestic violence trajectories, or relationships with early and consistent domestic violence issues.

[250] *See, e.g.*, Annie L. Zagha, *As Long As You Love Me: The Effects of Enforcing Prenuptial Agreements on Intimate Partner Violence*, 22 Cardozo J. Conflict Resol. 293, 297 (2021).

[251] *See* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 402 (2019) (arguing that "women survivors of domestic violence face a persistent skepticism regarding both their accounts of abuse and their recitations of harm").

IV. Potential Barriers

The largest barrier to BRCs was a lack of imagination. This Article solves the lack of imagination problem. Now, entities know that they can create BRCs. Will they? This Part explores other barriers to doing so. But the value of BRCs does not depend on having many entities author many BRCs, or on having this happen all at once. As long as a few entities begin to experiment with them, it is likely that at least some couples will benefit, and if so, BRCs are likely to increase in popularity, even if this increase is slow and inconsistent at first.

A. Marriage as a Private Matter

Although many older conceptions of marriage highlighted the couples' interconnection with the larger community, some newer conceptions downplay these connections.[252] Instead, today marriage is often seen as serving the private interests of the couple themselves.[253] If marriage and cohabitation are seen as private and personal matters, perhaps many entities will not think it is their place to write BRCs.

But even in a world where the dominant view of marriage is marriage-as-personal-fulfillment, many entities might write BRCs. The AARP is a prime example. As discussed throughout this Article, numerous other non-profits could similarly further their mission by writing and promoting their BRCs. Nonprofits committed to a host of goals—respecting functional families, eradicating domestic violence, giving children education opportunities, etc.—might all find BRCs a worthwhile endeavor.

B. Legal Liability

BRCs could potentially expose authoring entities to legal liability. Consider two possible sources for this liability. First, perhaps the state will become concerned that BRCs reflect an unlicensed practice of law. Second, perhaps a user of the BRC will sue claiming that it was faulty, or that the entity negligently misrepresented it in some way. Neither is likely to seriously impair the production of BRCs.

It is doubtful that providing a BRC would be considered the unlicensed practice of law. BRCs could be seen as analogous to self-help books that contain legal forms, which have been around for decades without generating controversy.[254] Such generalized communications to the public are not the

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[252] *See* June Carbone, *A Consumer Guide to Empirical Family Law*, 95 Notre Dame L. Rev. 1593, 1613–14 (2020).

[253] *See id.*

[254] *See* Benjamin H. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 Hofstra L. Rev. 541, 553–56 (2015) ("The lack of lawsuits is obviously not definitive evidence of safety, but it should be enough to give pause when lawyers make broad claims about the danger of online legal services.").

"practice of law," which usually requires providing individualized advice.[255] Yet another way of avoiding an unlicensed practice of law issue would be to have a licensed attorney review the BRC.[256] This is likely what entities would do, given that most entities that have an interest in writing BRCs would also have an interest in actually helping their members by providing them with enforceable and accurate BRCs.

Authoring entities might be sued by disgruntled BRC users, perhaps claiming that the entity was negligent in writing or marketing it. But this does not mean that entitles will not write BRCs. Entities expose themselves to liability all the time in order to further their missions. Lambda Legal, for example, potentially exposes itself to legal malpractice claims whenever it brings legal claims on behalf of same-sex couples who are being discriminated against.[257] NOW faces the risk of a countersuit when they sue anti-abortion groups.[258] Local churches can face liability for hosting cook-outs.[259] The Little League exposes itself to liability when it hosts the Little League World series, or when it operates its core mission of teaching kids how to play baseball.[260] Why do these entities find it worth it to face these possible costs? Because those costs are a small price to pay for helping further their overall missions, especially when there are ways to limit the relevant liability.[261]

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[255] *See* Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 Brook. L. Rev. 111, 131 (2017) ("UPL restrictions often prohibit a nonlawyer from giving legal advice to a particular individual, while allowing the same legal advice if conveyed to the general public."); *see also, e.g.*, Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978) (per curiam) (nonlawyers "may sell printed material purporting to explain legal practice and procedure to the public in general and . . . may sell sample legal forms"); Tex. Gov't Code Ann. § 81.101 ("[T]he 'practice of law' does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.").

[256] *See* Susan Saab Fortney, *Online Legal Document Providers and the Public Interest: Using A Certification Approach to Balance Access to Justice and Public Protection*, 72 Okla. L. Rev. 91, 101–02 (2019) (discussing settlements with LegalZoom that allowed it to avoid unlicensed practice of law issues by having an attorney review the relevant forms, and states that do not consider LegalZoom to be a provider of legal services).

[257] For a list of cases filed by Lambda Legal, see *Cases*, Lambda Legal, https://legacy.lambdalegal.org/ [https://perma.cc/2DKD-ASSU].

[258] *See, e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 14 (2006) ("In 1986, (pro-choice) respondents, believing that (pro-life) petitioners had tried to disrupt activities at health care clinics that perform abortions through violence and various other unlawful activities, brought this legal action, which sought damages and an injunction forbidding (pro-life) petitioners from engaging in such activities anywhere in the Nation.").

[259] *See, e.g.*, Gaines v. Krawczyk, 354 F. Supp. 2d 573, 576 (W.D. Pa. 2004) (concerning church liability when minor consumed alcohol at church cook-out and fell from church attic onto a pew).

[260] *Family sues Little League and bed company over bunk bed fall, head injury*, CBS News (Sept 20, 2022), https://www.cbsnews.com/philadelphia/news/easton-oliverson-family-little-league-lawsuit/ [https://perma.cc/HT9F-VDUZ]; Angel San Juan, *Lawsuit Alleges Little League International Failed to Enforce Rules to Protect Children in the Wake of Adam Isaacks' Case,* KDFM (June 2023), https://kfdm.com/news/local/lawsuit-alleges-little-league-international-failed-to-enforce-rules-to-protect-children-in-the-wake-of-adam-isaacks-case [https://perma.cc/2JYK-TKXM].

[261] Fortney, *supra* note 256, at 103–04 (2019) (discussing arbitration clauses and waivers of class actions as tools that limit exposure to liability for online legal form suppliers like LegalZoom).

V. Potential Downsides

Of course, BRCs carry risks as well. Because the legal infrastructure for BRCs already exists, there is no need to discuss these risks as objections to some reform effort. But we should keep some potential risks in mind as BRCs evolve, and begin to think about how those risks could be mitigated, if they manifest.[262] Those risks include the possibility that institutions—like religious organizations with close knit members—will pressure couples into signing their BRC or include terms in their BRC that serve the interests of the organization rather than the couple.

Before addressing these concerns, a clarification will help situate those discussions. BRCs are substantially more autonomy respecting, and contain many more limits, then a vision of family law pluralism that operates in some other countries. In India and Israel, for example, family law pluralism operates at the group level and along religious lines.[263] Christians citizens are governed by Christian family law, Hindu citizens are governed by Hindu family law, etc.[264] This respects pluralism at the group level, but does not respect intra-group pluralism or the autonomy of different members of those groups.[265] A system embracing BRCs, in contrast, would require couples to opt-in, and would likely give those couples a robust set of choices. This provides significant (albeit imperfect) protections for individual autonomy.

A. Institutional Pressure

One might worry about group pressure to sign a BRC. Perhaps a church or other religious community would write a BRC and pressure its members to sign it.[266]

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[262] Shultz, *supra* note 96, at 332 (arguing that guardrails should be developed slowly through common law adjudication); Scott, *supra* note 142, at 73, 85 (arguing the legislatures could and should define a set of circumstances that excuse prenup obligations); Stark, *supra* note 108, at 1522, 1534 (discussing possible legislative guardrails to menu regimes and marital contracting, including imposing a "maximum inequality allowed" rule).

[263] Redding, *supra* note 5, at 825–26.

[264] *See id.*; Natan Lerner, *Group Rights and Legal Pluralism*, 25 Emory Int'l L. Rev. 829, 846 (2011).

[265] *See* Shahar Lifshiz, *The Pluralistic Vision of Marriage*, *in* Marriage at the crossroads 260, 274-76 (Marsha Garrison, Elizabeth Scott eds. 2012) (critiquing legal systems where religions govern the family law matters of their members); Estin, *supra* note 4, at 551 (critiquing as illiberal systems that allow various religious communities to set family law for their members); Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 Wm. & Mary Bill Rts. J. 925, 950 (2010) (critiquing religious arbitration of family law issues: "Perhaps most problematic is the ceding of jurisdiction to religious bodies over family questions because the risks to vulnerable women and children are so great.").

[266] *See* Michael A. Helfand, *The Future of Religious Arbitration in the United States: Looking Through a Pluralist Lens*, *in* Oxford Legal Handbook on Global Legal Pluralism 901, 904 (Paul Schiff Berman ed., 2020) ("And while religious arbitration may ensure that members of faith communities can resolve disputes in accordance with shared religious rules and values, it also enables religious groups to pressure individuals to forego judicial dispute resolution, raising questions about whether the religious values manifested by such tribunals are truly shared by both parties.").

There are existing guardrails already built into the relationship contracting system that at least partially reduce this potential worry. Following the quite-sensible provisions in the UPAA, BRCs would not be able to determine child custody or reduce child support.[267] BRCs would be limited to the financial obligations of the adults in the relationship.[268] To the extent that one worries about duress, states have already decided how they police issues of duress in relationship contracts.[269] It is likely that judges could adapt these doctrines to account for group pressure as well. Currently courts are used to thinking about the relative bargaining power of one spouse compared to the other.[270] They are not as used to thinking about the bargaining power of the couple together, compared to the power of an external entity. But courts could take evidence of what threats were levied against the couple, and make a relatively familiar judgement about whether the entity exerted undue influence or whether the couple was under duress.[271]

The various Jewish organizations that advocate stock prenups to incentivize husbands to grant their wives religious divorces offer an interesting case study. The RCA requires couples to sign their prenup before one of their rabbis will officiate a wedding.[272] For Orthodox Jewish couples, this might be a significant inducement to sign. But importantly, those couples also have alternatives. The Beth Din of America merely recommends its prenup.[273] In fact, there have been many competing rabbi-endorsed prenups over the last few decades.[274]

B. Institutional Self-Dealing

Entitles might not only coerce couples into signing a BRC, they might also include terms that are in the interest of the entity, not the couple. For example, a church might insert a term that says: if the couple divorces, they agree to tithe 10% of their income to the church for the rest of their lives.

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[267] Unif. Premarital Agreement Act § 3(B) (Unif. Law Comm'n 1983); see also Conn. Gen. Stat. § 46b-36d(c) (2008); Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 Fam. L.Q. 313, 343 (2012) (noting the "long-standing consensus that premarital agreements may not bind a court on matters relating to children").

[268] UPAA § 3(a)(1-8).

[269] States differ on the precise contours of the relevant doctrine. *See* Atwood & Bix, *supra* note 267, at 339.

[270] *See, e.g.*, In re Est. of Hollett, 834 A.2d 348, 353 (N.H. 2003) (prenup); Pacelli v. Pacelli, 725 A.2d 56, 59 (N.J. App. Div. 1999) (postnup).

[271] To date, courts have generally upheld challenges to arbitration agreements on this basis, and BRCs might offer more opportunities to revisit these limited holdings. Helfand, *supra* note 266, at 926; Lieberman v. Lieberman, 566 N.Y.S.2d 490, 494 (N.Y Sup. Ct. 1991) (declining to vacate an agreement to arbitrate that was signed in the face of threats of ostracism from a tight knit religious community). Of course, in most cases, the couple will not stand united. If they did, they would simply void the prenup just before the divorce. But perhaps they stood united when they signed it, and were under duress. Then, later, those provisions turn out to heavily favor one party. The other party might then seek to invalidate the agreement on the basis of the church's duress. Alternatively, and as discussed in the next section on institutional self-dealing, the BRC might include a third party beneficiary clause that benefited the church, and could not be altered without its consent.

[272] Levmore, *supra* note 65, at 36.

[273] *Id.* at 37.

[274] *Id.* at 34-42.

This type of charitable promise would generally be enforceable by the third-party beneficiary—here the church.[275] Overly optimistic couples might ignore the importance of this term.

Today, the RCA prenup might arguably include elements that are primarily designed to benefit institutions rather than the couple. It bundles the get incentive with another provision: mandatory arbitration in front of the Beth Din, a religious tribunal.[276] Some have argued that this latter provision tends to harm women, and primarily serves the institutional interests of the Beth Din.[277] But not all rabbi-endorsed prenups require arbitration.[278] Within the modern Orthodox community, it is more common to sign only that part of the prenup that deals with the get.[279] The remainder of the issues of divorce are then handled by a secular court.[280] This perhaps shows that BRCs are a market of sorts—entities have to convince couples to adopt their relationship contract.[281] This competition helps ensure that couples have options, and these options provide at least some counterweight to institutional self-dealing.

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The above examples show that BRCs might sometimes require guardrails to prevent them from violating various public values. This is hardly new. Courts and legislatures have already crafted guardrails for contracts generally,[282] and for various types of relationship contracts more specifically.[283] They already police institutional self-dealing[284] and undue influence.[285]

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[275] 13 Williston on Contracts § 37:40 (Westlaw 4th ed. 2023).

[276] Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 Vt. L. Rev. 157, 166 (2012) (discussing the Beth Din).

[277] Susan Metzger Weiss, *Sign at Your Own Risk: The "RCA" Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement*, 6 Cardozo Women's L.J. 49, 63-66 (1999).

[278] *See* Broyde, *supra* note 64, at 956.

[279] *Id.*

[280] *Id.*

[281] *See also* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. Cal. L. Rev. 745, 747-48 (1995) (analogizing marriage law and corporate law, and advocating that people be able to "vote with their feet" by adopting different legal packages).

[282] *See, e.g.*, 28 Williston on Contracts § 71:6 (Westlaw 4th ed. 2023); Howard v. LM Gen. Ins. Co., 2023 WL 174821, at *2 (Mich. Ct. App. Jan. 12, 2023) (discussing statutory limitations on the content of insurance contracts).

[283] *See generally* UPAA § 3; Pacelli v. Pacelli, 725 A.2d 56, 58-60 (N.J. App. Div. 1999) (discussing different rules for regulating prenups, postnups, reconciliation agreements, and divorce settlements, some of which were judicially-created); Sarah Abramowicz, *Contractualizing Custody*, 83 Fordham L. Rev. 67, 149 (2014) (discussing the need for court oversight of contracts where there is domestic abuse); Wilson, *supra* note 265, at 948 ("Even jurisdictions most inclined to respect a couple's autonomy to privately order their marital affairs will strike an agreement that is coerced or involuntary.").

[284] Resol. Tr. Corp. v. Gibson, 829 F. Supp. 1110, 1115 (W.D. Mo. 1993) (holding that fiduciary duties are broader than just self-dealing); Michael v. F.D.I.C., 687 F.3d 337, 351 (7th Cir. 2012) (finding that self-dealing violated a fiduciary duty).

[285] Matter of Est. of Maheras, 897 P.2d 268, 274 (OK 1995) (discussing pastor's possible undue influence over content of a will, and shifting burden to the pastor to prove the lack of undue influence); Roberts-Douglas v. Meares, 624 A.2d 405, 421 (D.C. 1992), opinion modified on reh'g, 624 A.2d 431 (D.C. 1993) (discussing church's potential undue influence over gift).

They already determine the boundaries of acceptable rules in religious arbitration.[286] Although determining how future BRCs might push these boundaries and which responses are appropriate will be ongoing projects, courts already have a set of familiar tools that are likely to be quite useful in creating responsive guardrails.[287]

C. Displacing other Pluralistic Reforms

Sometimes reforms, even if they are ineffective at achieving their goal, sap legislative will to enact further, potentially more efficacious reforms.[288] For this to be a substantial problem in the context of BRCs, two conditions must be met. First, it must be the case that there would have been pluralism-promoting legislation absent BRCs. Second, BRCs would have to be worse on some metric than these other, hypothetical, pluralism-promoting reforms. At a high level of generality—where we ask whether BRCs undermine other reform efforts aimed at promoting family law pluralism—neither condition is likely to be met. As discussed above, legislatures have shown very little will to enact any pluralism-promoting reforms, and when they nominally do, they simply recreate marriage.

Even if we focus on narrower classes of reform possibilities, BRCs are unlikely to significantly displace legislative will. Consider, first, post-majority child support. There, the vulnerable person is not even a party to the BRC. The child would be a vulnerable to parental whim (jointly expressed in a BRC) regardless of whether BRCs were available that mandated post majority child support. If anything, the (hypothetical) fact that many parents chose to sign BRCs with post majority support provisions would increase the likelihood

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[286] Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. Rev. 1231, 1288-94 (2011) (discussing courts' use of public policy rationales to vacate religious arbitration awards); *Id.* at 1299 (proposing unconscionability to deal with religious arbitrations that devalue women's testimony); Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 Ohio St. J. on Disp. Resol. 337, 372 n.38 (2018) ("Courts generally claim a *parens patriae* responsibility to employ oversight and fact-finding to determine whether a child custody award issued by an arbitrator is in the child or children's best interests."); In re Marriage of Popack, 998 P.2d 464, 469 (Colo. App. 2000) (allowing arbitration of custody, but also requiring de novo review by a court if requested by either party); *see generally* Benjamin Shmueli, *Civil Actions for Acts that are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision Between Two Sets of Laws*, 46 Vand. J. Transnat'l L. 823 (2013) (discussing the tension between tort law and gender equality).

[287] *Accord* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1962 (2000) ("Although critics argue that covenant marriage (and restrictions on divorce generally) will trap women in abusive marriages, surely legal mechanisms could be constructed to protect against this risk.").

[288] *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 740 (2011) ("To the extent that protections must emerge from legislative and regulatory efforts, lawmakers who devised [ultimately ineffective] disclosure mandates may think their mission accomplished and avoid the onerous work of devising more imaginative, more effective alternatives."); Dale Kunkel et. al., *Solution or Smokescreen? Evaluating Industry Self-Regulation of Televised Food Marketing to Children*, 19 Comm. L. & Pol'y 263, 268 (2014).

that a legislature would find it reasonable and desirable to equalize[289] this form of support across parents.

Now consider domestic violence reforms, where the analysis is different but still suggests that BRCs will not sap legislative will. Many reforms—including domestic violence reforms—are designed to protect the vulnerable partner. Although BRCs can mitigate these vulnerabilities, it is unlikely that legislatures would mistake them for complete solutions. The most vulnerable people—here those in the most consistently controlling and violent relationships—will likely have the least realistic opportunity of signing or enforcing an anti-domestic violence BRC. To the extent that legislative action is motivated by the narratives of the most egregious cases and the most compelling victims, BRCs may not significantly reduce this source of legislative will. If this is right, then legislatures can simultaneously and rightly conclude that BRCs could substantially mitigate some domestic violence issues for some people, but an important space remains for legislative intervention.

VI. Conclusion

It is time for family law scholars to stop unrealistically hoping that the various sources of narrow hetero-normative family law—like judges whose decisions reflect the deep logic of coverture's subordination of women, or wealthy state legislators who cannot see beyond their own experience—will fundamentally alter their outlook and embrace radical family law reforms. If anything, the gaps between those in power and those who need family law reform will grow as state legislatures become more gerrymandered and politics becomes more polarized. Against this backdrop, there are significant advantages to decentralizing and privatizing the project of family law pluralism.

Thankfully, the legal infrastructure for non-governmental family law is already in place. All that needs to happen now is for some entity to begin experimenting with writing or endorsing BRCs. Given how effective BRCs could be in promoting different visions of family law, national advocacy organizations like the ALI, ULC, AARP, and NOW will likely have both the incentive and tools to craft attractive BRCs. More-specialized organizations—like the National Indian Council on Aging or Connecting Rainbows—can leverage their informational expertise to tailor family law for alterative families and peoples who are routinely ignored by state legislators. BRCs also harness the trust that couples have in these various entities to increase contracting, blunt the distorting effects of private bargaining power, and offer unique associational opportunities. Overall, BRCs offer a novel, powerful, and timely pathway to promote family law pluralism.

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[289] Taking child support as a guide, this obligation would likely be "equalized" only in terms of what percentage of family income should be dedicated to post majority child support. More radical equalization of opportunity—where a child's post-secondary educational opportunities do not depend on her family's income or wealth at all—would be significantly outside the current logic of child support.