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ELLMAN’S “WHY MAKING FAMILY LAW IS HARD”: Additional Reflections*

Robert J. Levy†

I.

Not the least of the pleasures of membership in this distinguished group invited to praise Ira Ellman was the opportunity it gave me to renew old and dear friendships with Arizona State faculty members and their spouses, to come back to the scene of my “adjunct visitor” gig last year, to see once again an effective dean whom I greatly admire. More important, the occasion allows me to praise publicly a scholar whose creative thinking, academic writing, legislative drafting and public performances as Reporter for the American Law Institute’s Principles of the Law of Family Dissolution I have long respected.

The scope and depth of Ira Ellman’s scholarship are more than impressive—they are astounding. As his speech this afternoon plainly demonstrates, he obviously knows well and understands—and of course uses effectively in his own scholarship—the principles and literature of demography, economics, and statistics, as well as their failings and occasional misuse. His applications of coordinate fields of social science, his great analytic powers, his drafting skills, his common sense and good will, have been obvious in everything he has touched. Indeed, as I said at a meeting of the Advisory Committee, the Institute’s Principles prove the elegance of his conceptual as well as his drafting skills.¹ His scholarship, as far as I know it, has always been unflinching; he has been willing politely to disagree with critics, refusing to succumb to political correctness.

His talk today exhibits these qualities. It ranges across many fields of family law with rare intelligence, ties lines of doctrine and inquiry into a

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* This essay is an extended and footnoted version of remarks delivered at the investiture of Professor Ira Ellman as the Willard H. Pedrick Distinguished Research Scholar at the Arizona State University College of Law on March 25, 2003.

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¹ See generally A.L.I., Principles of the Law of Family Dissolution: Analysis and Recommendations ch. 7 (2003) [hereinafter Principles]. I cannot pass on without emphasizing the careful drafting of the Principles’ “black letter” as well as the grace and intelligence of the Reporters’ comments. Each reading increases my knowledge of the subject matter as well as my admiration for the quality of the enterprise.
novel and interesting package, and explores in a challenging fashion questions most family law scholars would be happy to leave to jurisprudes.

I am not alone in drawing these conclusions—obviously not on this panel nor among academics generally. Consider only one of the evaluations of Ira I have received from other family law scholars:

Ira is a giant in the field of family law. He has had an important influence on the subject in three ways. First, he is a leading scholar of family law. His work over the course of his career has been innovative, provocative, and very influential. He is a major player, whose scholarship is read and much admired by other family law scholars. Second, he is the author of one of the most respected family law casebooks. Finally, through his work as Chief Reporter of the American Law Institute's Principles, he has shaped one of the most important and far-reaching reform projects in family law in the last generation . . . . My overall assessment of Ira's scholarship is that it is among the best in our field. As a colleague he is without peer—interesting, thoughtful and generous with his time.²

II.

Among other provocative challenges in Ira's talk today is this claim: specific legal rules can seldom adequately regulate, and contract analogies should not be permitted to govern, either the financial dynamics of marriages or the financial terms of spouses' divorces—at least in part because, as he indicates in a captivating phrase, marriages are not hamburgers.³ Committed couples' relationships grow and change over time, and the promises and exchanges are seldom if ever immediate or determinable in the fashion of a restaurant bill. The relationship itself is more important than the individual negotiations in which couples continually engage or the individual outcomes of those negotiations. As Ira expressed the matter: "The reciprocal nature of a successful marriage gives it a superficial resemblance to a bargained-for exchange, which makes it easy to think that this apparent exchange is the basis of the marriage's legal obligations. But we must remain clear about the difference."⁴ "If lovers have bargains, they are complex emotional bargains, and they themselves

⁴ Id.
may not easily identify the quids and quos.” How these insights are labeled—sociology, family systems or home economics—is unimportant; their essence describes our personal and familial experiences and understanding, not to mention our moral approval, of marriage and other “intimate associations.” These premises lead to a conceptual structure for the formulation of family law doctrine. Thus, to cite one example, “the law [] needs a rule for allocating finances at divorce,” but the rule cannot rely on using the particular parties’ understanding. Rather (if I may be permitted to simplify greatly a complex system), the rules should rely upon presumptions and should vary in accordance with the length of the parties’ relationship, their relative earning capacity when the relationship terminates, and the reasons for any gap in the parties’ earning capacities. Yet the rules should not be entirely inflexible—adjustments can be made. There should be “an escape hatch a court can rely upon in exceptional cases, after making appropriate findings.” These assumptions animate many of the Principles’ doctrinal formulas. They respond importantly to several decades of family law scholarship describing and criticizing the breadth of

5. Id.
6. Id. at 713.

The proposal would authorize judges to examine the course and history of a couple’s marriage and determine their financial situations immediately and for the future (if one spouse does not have cash currently to pay off the other) in accordance with the judge’s personal, discretionary evaluation of the relative contributions of the spouses to their present financial condition and professional status . . . . Anyone familiar with the course of American family law knows that judges have regularly used indeterminate doctrinal standards to incorporate ‘fault’ notions in the administration of divorce.

(footnotes omitted).

see also Jana B. Singer, Divorce Reform and Gender Justice, 67 N.C. L. Rev. 1103, 1119 (1989) (arguing for clear and simple rules to equalize spouses’ post-divorce income because judges are still predominantly male and the judicial system will reflect the society’s gender bias).
trial court freedom from rules and the more than occasional unconstrained misuse of that discretion.\(^8\)

The structural policy problem, one that has concerned a great many family law scholars in recent decades, is how to balance rule with discretion: To what extent should legislative doctrine turn away from reliance on judges’ understanding of and sensitivity to the facts of individual cases in order to protect divorcing couples from the dangers of judges’ exercise of largely unreviewable authority?\(^9\) And if, given the history of judicial family law doctrinal administration, it is appropriate to limit severely judicial case by case decisional freedom, what is the cost of such a policy to particular classes of litigants when the number of classes and the sizes of each will seldom if ever be known either to legislative or to judicial decision-makers? As a respectful tribute to Ira and to the Institute’s Principles, I would like to offer some tentative thoughts on one aspect of the subject this afternoon.

The context for my discussion is provided by an interesting recent prenuptial contract case that caught my attention. Prenuptial agreements, one of the ways in which couples can privately order their post-divorce financial affairs, are the doctrinal focus of chapter seven of the Principles. Consistent with the Reporters’ view, chapter seven offers “an approach to premarital agreements which tries to respect both the status and private-ordering aspects of marriage.”\(^10\) The discussion which follows is designed

\(^8\) For a collection of cases, see Levy, supra note 7, at 66 n.84; see also infra notes 39–41 and accompanying text.

\(^9\) The jurisprudential problem is hardly new or limited to family law, and it has been examined by a great many, justifiably famed scholars. I make no claim to originality for the general comments about the problem. For a classic analysis in a different family law context, see Carl E. Schneider, Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard, 89 MICH. L. REV. 2215 (1991); see also Levy, supra note 7. For an account of the dilemmas in the context of criminal sentencing, see Richard S. Frase, Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota, 2 CORNELL J.L. & PUB. POL’Y 279 (1993).

\(^10\) Brian H. Bix, Premarital Agreements in the ALI Principles of Family Dissolution, 8 DUKE J. GENDER L. & POL’Y 231, 231 (2001). My colleague Brian Bix’s excellent discussion describes and analyzes the Principles’ policies in a careful and thoughtful fashion and relates them to the perennial dispute between those who emphasize the “public status” aspect of marriage, leading to the position that the state should set the terms for marriages, and those who emphasize the “intimate relationship aspect” of marriage, leading to greater receptivity to parties’ private ordering. Id. Professor Bix’s analyses of Principles’ doctrines, which have substantially influenced my own thoughts on many of the issues, are clearly reflected in the following discussion. Another colleague, Judith T. Younger, has been a leading scholar in the field for many years. See generally, Judith T. Younger, Antenuptial Agreements, 28 WM. MITCHELL L. REV. 697 (2001); Judith T. Younger, Perspectives on Antenuptial Agreements: An Update, 9 J. AM. ACAD. MATRIM. LAW. 1 (1992).
more to articulate my own continuing questions about the chapter’s policies than to criticize (or even necessarily to disagree with) their work product.

III.

Consider the case of Manny and Carla. The couple began dating in 1980, shortly after Manny graduated from law school at the University of California, and was working toward his CPA accreditation at the Arthur Anderson accounting firm. Carla, a college graduate, was an executive in the music and entertainment industries. By 1981 the two were discussing marriage. Manny, troubled about a friend who had been “wronged in a divorce settlement and lost his house,” insisted that he would marry only under the following conditions:

1. Carla would always be employed;
2. Each party’s income and property would be treated as non-marital;
3. Each party would own a home to return to if the marriage were to fail;
4. Carla would never get fat.

Although these terms were never reduced to writing, Carla agreed to all of them. Manny and Carla were not especially wealthy—when they married almost five years later, shortly after Manny left Arthur Anderson to become an associate in a Seattle law firm, each was earning somewhere between $40,000 and $50,000 annually. Manny had accumulated a significant but not large amount of nonmarital property prior to the marriage.

Between 1981, when their discussion of marriage occurred and Manny declared his conditions, and 2000, when they separated, Manny and Carla continually affirmed their agreement through words and actions. The record reflects painstaking and meticulous effort to maintain separate finances and property. During their marriage Carla and Manny deposited their incomes into separate accounts which they used for their personal expenses and investments. In 1990, after the birth of their first child, they opened a joint checking account in order to handle certain agreed household expenses. Manny and Carla deposited a specified amount to the joint account, and they reimbursed their personal accounts from the joint account if they happened to use personal funds for household expenses. They

11. The case is cited, and my reasons for postponing its citation are provided infra note 39 and accompanying text. Quotations in the text are taken from the opinion and only first names of parties are used.
took turns managing that account. By 2000, when Manny and Carla separated, they had accumulated minimal community property in the form of joint accounts and jointly purchased possessions. They held numerous investment, bank, and retirement accounts as individuals, and the spouse who had created and contributed to those accounts was considered the sole owner and manager of the assets in those accounts. The primary beneficiaries of their individual accounts were the parties’ children, or alternatively, the estate of the spouse who funded them.

During their relationship, Manny purchased three houses as his separate property, securing financing separately in all instances by signing promissory notes or asking his sister to co-sign. The first house he bought was a duplex in Oakland, which he purchased in 1982 in order to fulfill the third condition of the prenuptial agreement. The latter two houses, both located in Seattle, served as the family’s primary residences. In accordance with the parties’ agreement, Manny treated these houses as his separate property by paying for maintenance, improvements and the down payment and mortgage with funds from his separate accounts.

After his move to Seattle, Manny’s economic circumstances improved sensationally. By 2000, when the two separated, Manny had become a partner in the law firm at which he was working, and was earning more than $1 million annually. Carla’s salary had remained the same. By 2001 when their divorce trial began and the validity of their oral prenuptial agreement was to be determined, Carla was what the Washington Court of Appeals later called “under-employed.” By the time the divorce was granted, Manny’s share of the spouses’ total property was $2.3 million; Carla’s share would have amounted to $600,000. Seeking unsuccessfully to settle the case without a judicial determination of the agreement’s validity, Manny offered Carla an additional $300,000 that their agreement would have allocated to him.\(^{12}\)

Because no state has yet adopted the financial provisions of the Principles,\(^ {13}\) it is difficult to predict how its absolute and presumptive rules and “escape hatches” would be interpreted in Manny and Carla’s case. But

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12. The Washington Court of Appeals never mentioned the children except in the fashion quoted in the text and in its findings respecting the allocation of child support—findings not relevant to the issue examined in this essay. But see infra note 41 and accompanying text. From the court’s remarks about the spouses’ administration of the financial aspects of child care, one could infer that the spouses shared parenting responsibilities.

13. West Virginia has adopted chapter two of Principles in its entirety. W. VA. CODE ANN. §§ 48-9-101 to -163, -201 to -209, -301 to -303, -401 to -403, -501 (Michie 2001); see also infra note 52.
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trying to apply chapter seven to this "hypothetical" may well shed light on both the rules and on the appropriate legal response to agreements like Manny and Carla's.

IV.

First, a short summary of chapter seven is in order. To be enforceable, a prenuptial agreement must fulfill both procedural and substantive fairness requirements. Section 7.04 states the procedural requisites. The agreement must "be in writing signed by both parties, . . . the party waiving rights [must] have an at least approximate knowledge of the other party's assets, and . . . the agreement [must] not have been the product of duress." Section 7.05, which imposes the substantive fairness requirement, focuses on the time of enforcement rather than the time of execution of the agreement and exchanges for the common commercial-law term "unconscionable" the phrase "when enforcement would work a substantial injustice." A party contesting enforcement of a prenuptial agreement on

15. Bix, supra note 10, at 236 (footnotes omitted from this and subsequent quotations). As Professor Bix points out, many of the procedural requirements are fairly standard pre-Principles, common law requirements, as well as requirements included in the UNIFORM PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (West 2001 & Supp. 2002), a product of the National Conference of Commissioners on Uniform State Laws. Bix, supra note 10, at 236 & n. 21. The Uniform Act differs from the Principles in a number of ways that need not concern us here. The Principles provide a rebuttable presumption of no duress if the agreement was signed more than thirty days prior to the marriage and each signatory was advised and had an opportunity to obtain independent counsel or, where one of the signatories did not have counsel, the agreement indicates in clear language the rights being waived. Id. at 236. Unlike most prior law and the provisions of the rules of civil procedure in most states, in the absence of compliance with these procedural requirements, Section 7.04 places the burden of proving absence of duress on the signatory seeking enforcement. Id. at 236–37.
16. Many of the states which adhere to still developing common-law doctrines determine enforceability at the time of enforcement, while some continue to look at fairness only at the time of execution. See Bix, supra note 10, at 237.
17. Id. In PRINCIPLES § 7.05 illus. 4, at 990–91 (2003), the Reporters indicate that a premarital agreement enforceable despite the "substantial injustice" strictures of section 7.05 might nonetheless be deemed "unconscionable" by reference to the general limitations on contracting (judged as of the time of contracting) imposed by common law or statutory "unconscionability" doctrine. See § 7.01 cmt. d, at 948:

Among the ordinary principles of contract law also applicable to the contracts addressed by this Chapter is the rule of § 208 of the Restatement Second, Contracts, allowing a court to decline to enforce a contract term that it finds "unconscionable at the time the contract is made." Courts have sometimes gone beyond this rule to deny enforcement, under the rubric of unconscionability, to a premarital agreement whose terms seem very unfair as of the time enforcement is sought, even though its terms were not
fairness grounds must prove initially the existence of one of three “triggering” events: “the passage of a significant amount of time; the birth or adoption of a child to a couple who ‘had no children in common’ at the time of the agreement; [or] a significant and unexpected change in circumstances.” Once one spouse proves one of these triggering events, the inquiry into “substantial injustice” includes traditional prenuptial agreement validity criteria but travels in new directions as well:

(3) The party claiming that enforcement of an agreement would work a substantial injustice has the burden of proof on that question. In deciding whether the agreement’s application to the parties’ circumstances at dissolution would work a substantial injustice, a court should consider all of the following:

(a) the magnitude of the disparity between the outcome under the agreement and the outcome under otherwise prevailing legal principles;

(b) for those marriages of limited duration in which it is practical to ascertain, the difference between the circumstances of the objecting party if the agreement is enforced, and that party’s likely circumstances had the marriage never taken place;

(c) whether the purpose of the agreement was to benefit or protect the interests of third parties (such as children from a prior relationship), whether that purpose is still relevant, and whether the agreement’s terms were reasonably designed to serve it;

(d) the impact of the agreement’s enforcement upon the children of the parties.

unconscionable as of the time of contracting . . . . Section 7.05 does not rely upon the doctrine of unconscionability, however, for which this Chapter adheres to the approach of the Restatement Second of Contracts.

To whatever extent the doctrine is general with unfixed boundaries (and the Reporters acknowledge that “[t]he legal conclusion of unconscionability is highly fact-specific,” id. cmt. c, at 948), judges’ discretion to enforce or refuse to enforce individual premarital agreements is expanded.

18. Bix, supra note 10, at 238 (footnotes omitted). The actual “unexpected change” language reads: “there has been a change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement the parties probably did not anticipate either the change, or its impact.” PRINCIPLES, § 7.05(2)(c), at 983.

19. PRINCIPLES, § 7.05(3) at 983.
How would these chapter seven enforcement requirements play out in Manny and Carla's case? Obviously, I cannot give certain answers, but I can do what any good lawyer should be able to do for a client—make ballpark predictions. As to the procedural requirements, there is no evidence that the agreement was obtained by duress, and the agreement was reached more than thirty days prior to the parties' wedding. There is no evidence that Carla was advised about or given a reasonable opportunity to retain counsel, and therefore Manny would bear the burden of proving duress. Yet trial judges might be influenced enough by Carla's consistent, nineteen-year-long, post-agreement behavior to be willing to conclude that she had waived even procedural rights of which she was not formally informed. But despite Carla's apparent knowledge of Manny's assets both when the agreement was reached and during the lengthy subsequent period before and during the marriage, and despite the parties' behavior for close to twenty years "affirming" the terms of the agreement, chapter seven would not permit enforcement. The agreement was not originally in writing and never reduced to writing. Section 7.04's writing requirement, unlike some of its other procedural provisions, is absolute.

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20. The language relating to the provision of or opportunity to retain counsel is complex. It suffices for our purposes that it would be difficult to argue that during the five years after the agreement and before the marriage that Carla did not have a "reasonable opportunity" to consult independent counsel. See PRINCIPLES, § 7.04 cmt. e, at 968–69. For an extensive and informative discussion of the intricacies and varieties of legislation and appellate decisions respecting legal advice as a criterion of premarital agreement enforceability, see id. at 978–79. The alternative to "assistance of independent legal counsel" within the meaning of section 7.04—that "the agreement states, in language easily understandable by an adult of ordinary intelligence with no legal training" the nature of the rights altered, the nature of the alteration, and notice "that the interests of the spouses . . . may be adverse"—could not be fulfilled because there was no written agreement. On the other hand, it is likely that Carla understood the agreement. Id. § 7.04(3)(c), at 960. See supra note 18 and accompanying text. For some idea of how constraining of prenuptial agreement negotiation the Reporters intended this requirement to be, see PRINCIPLES § 7.04 illus. 11 and 12 at 971–72. On the other hand, as to the disclosure of assets for purposes of compensatory payments limitations, the Reporters indicate that "a detailed disclosure" is not necessarily required. Id. § 7.04(5), at 961. "If no such statement [containing a list of assets, etc.] was provided, then one must examine the facts to determine whether the spouse against whom enforcement is sought 'knew, at least approximately, the moving party's assets and income . . . ." Id. cmt. g, at 973. That the parties' lengthy premarital relationship following the agreement and their lengthy marriage while affirming it would be deemed by a court in a Principles' state sufficient to obviate such formal requisites to enforcement of the agreement as legal advice is at least arguable.

21. The Reporters provide a sophisticated analysis of judicial approaches to the "duress" criterion in ordinary contract as well as in premarital contract litigation; and they point out the extent to which judicial refusals to find "voluntariness" in premarital contract cases are at least to some extent and in some cases a substitute for conclusions about fairness or "unconscionability." See PRINCIPLES, § 7.04 cmt. b, at 962–63.

22. The Reporters acknowledge that:
As to substantive fairness requirements (assuming, of course, that the absence of a writing could be overcome), the issues are more complex and difficult to predict. Certainly, more than one "trigger" has occurred in Manny and Carla's marriage: "more than a fixed number of years have passed" since the agreement, two children were born to the couple, and Many's considerably enhanced status and income, as well as Carla's reduced and inconsistent employment, might well be considered the occurrence of a "change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement the parties probably did not anticipate either the change, or its impact." 

While the law is generally clear that a writing is required to establish a premarital agreement, courts have occasionally held that the parties' conduct during their marriage negated an earlier written agreement . . . . One can perhaps understand these cases as an application of the rule that partial performance takes a contract out of the Statute of Frauds (the contract being one to modify the original agreement), or instead as an instance of an equitable doctrine (most plausibly, estoppel) serving its traditional purpose of providing relief from an injustice that would otherwise result from the application of technical legal rules. Nothing in this section bars the application of such equitable principles in the unusual case.

PRINCIPLES, § 7.04, cmt. a, at 974–75 (citation omitted). Are the Reporters suggesting that Manny's deal could be enforced on equitable principles, despite the writing requirement, because the agreement presents an "unusual case" due to the length of the parties' affirmation and continuing commitment to their oral agreement? See also infra note 33 and accompanying text. Professor Bix has suggested to me that, consistent with the policy underpinnings of the Statute of Frauds, the Reporters' comments could be construed as limited to behavioral "modifications" of a (perhaps unfair) written premarital agreement, not to behavior claimed to validate an otherwise invalid (because unwritten) agreement. It is true that the Reporters cite a case that involved a behavioral "rescission" of a written agreement, but the Reporters' comments quoted above follow an acknowledgment that these cases "involve more than a claim of an oral agreement to modify the earlier writing: They claim as well (or instead) that the parties have in fact conducted their lives differently, and over several years at least . . . ." Id. § 7.04 at 974; cf. id. § 7.05 cmt. a, at 984 ("Through one device or another, courts have often applied a judicially created rule of equity that they superimpose upon the statutory rules applicable to premarital agreements. This judicial gloss upon the statutory provisions governing premarital agreement is appropriate, where not explicitly barred by statute.").

23. The Reporters deem their inquiry into enforceability to be an aspect of what they call the "bargain principle"—that parties should be bound to honor agreements to which they truly consented at an earlier time. PRINCIPLES, § 7.05 cmt. a, at 984. "Yet the frequency with which courts have undertaken [fairness] review [of premarital agreements] is testimony to the fact that agreements about marriage are more likely than commercial agreements to involve special facts that test the limits of the bargain principle." Id.

24. Id. § 7.05(2)(a) at 983. As in many other PRINCIPLES' contexts, the text recommends that the "period [be] set in a uniform rule of statewide application," and suggests ten years as an appropriate period. Id. cmt. b, at 987.

25. Id. § 7.05(2)(c) at 983. Comment b and the illustrative cases imply that the Reporters intended the triggering clause to be interpreted liberally. Judges should err on the side of
Now consider the substantive standards for determining "substantial injustice" under the provisions of section 7.05. The third and fourth substantive fairness criteria would seem to cause no problem for Manny's enforcement of the agreement: the agreement was almost surely not designed to benefit third parties; and, assuming that either Manny or Carla would be willing or could be required to support the children, the impact of the agreement on the children would likely not preclude its enforcement.\(^\text{26}\) As to the third criterion, the "difference between the circumstances" standard,\(^\text{27}\) it seems clear both from the language as well as the Reporters' comments, that the phrase was intended to apply only to relatively short marriages, certainly to marriages that lasted less than the ten years contemplated by subsection (3)(b).\(^\text{28}\)

On the other hand, I would advise Carla that application of section 7.05(3)(a) could jeopardize the agreement—because the "disparity" of the financial "outcome" for Carla "under the agreement and the outcome under" the Principles and fairly standard equitable divorce property distribution law would be of a very large "magnitude."\(^\text{29}\) This disparity would sway judges even though the Principles instruct them only to "consider" its magnitude rather than be constrained by it.\(^\text{30}\) Under "prevailing" principles Carla could expect fifty percent of the parties' property rather than the eighteen percent she would receive as a result of the agreement; the fact that she would receive $600,000 of her separate property goes only so far to change the "magnitude of the disparity." Manny, after all, is walking away from the marriage with $2.3 million in assets, a professional degree, and an annual income of more than $1 million; an offer of a $300,000 bonus to Carla would probably be considered an admission that the agreement did

\(\textit{Principles,} \text{ } \S 7.05(3)(a). \text{ See also infra note 45 and accompanying text.}\)

\(^\text{26}\). I am assuming, although the opinion does not report the fact, that Carla will be the children's post-divorce custodian. \textit{Principles,} \S 7.05 cmt. c, at 990, suggests, properly, that the custodian and children constitute a single economic unit and that unit could easily be hurt, despite substantial child support, by an agreement that significantly reduces financial assets otherwise available to the unit. In this case, however, Manny's income is so substantial, and his liability for support of the children so large, that I doubt that significant reduction of Carla's share of the marital estate would likely be deemed to work a substantial injustice solely to protect the children's financial interests. But that holding would obviously be the consequence of a discretionary call by the trial judge. \textit{See also infra} note 45 and accompanying text.

\(^\text{27}\). \textit{Principles,} \S 7.05(3)(b).

\(^\text{28}\). \textit{Id.} \S 7.05(3)(b); \textit{id.} cmt. d, at 993–94.

\(^\text{29}\). \textit{See Principles,} \S 7.05(3)(a).

\(^\text{30}\). \textit{Id.} But consider \textit{id.} section 7.05 cmt. c, at 991 ("Because the law governing the financial consequences of marital dissolution necessarily reflects a judgment about what is fair in the usual case, it provides an appropriate standard against which to examine an agreement.").
not take adequate care of her.\textsuperscript{31} Carla walks away with no greater talent or accomplishments than she had achieved when the couple married, despite the $600,000 in assets she would receive, with the continuing burden of restricted opportunities for career advancement to which all middle-aged, middle class women are subject.\textsuperscript{32} The Washington Court of Appeals makes no mention of Carla’s weight; but that term in the agreement might dispose a divorce court judge to assess the consequences of the agreement’s provisions more harshly against Manny than might otherwise be the case!

V.

Applying section 7.04’s writing requirement to Carla and Manny’s case raises troubling questions for those who tend to focus largely on the accomplishment of individualized justice. Carla acknowledged the agreement and the parties clearly lived in strict accordance with it through fourteen years of marriage and while raising two children. If the purpose of the writing requirement is evidentiary—to require clear proof because of the likelihood of false claims when marital love has disappeared—why should

\textsuperscript{31} Such an offer of settlement would probably not be admissible to prove that the contract was unfair, see WASH. R. EVID. 408, but the judge in a court trial (and the appellate court if the trial judge held the agreement to be valid) would be aware of the offer.

\textsuperscript{32} Commenting on section 7.05(3)(c)’s criterion concerning benefit to or protection of third parties, the Reporters assert that “whether enforcement would create a substantial injustice rendering the agreement unenforceable depends upon the facts of the [individual] case. As a general matter, however, the more one-sided the contract’s provisions, the more likely that, at the time of [the] divorce, its enforcement would yield a substantial injustice.” Id. § 7.05 cmt. e, at 995. Whether this suggestion was intended to apply to all the criteria of subsection (3) or only to subsection (3)(c) is not clear. The subsection’s introductory language (“a court should consider”), id. § 7.05(3), see supra note 16 and accompanying text, as well as the illustrative cases, suggests that the Reporters believe that section 7.05(3) gives trial judges fairly wide discretion in giving meaning to the phrase “substantial injustice” in varied settings. See id. cmt. b, illus. 5–11, at 991–96; see also id. § 7.05 cmt. e, at 996 (when a judge concludes that an agreement would work a substantial injustice to the weaker spouse because of an undue reduction in what would otherwise be the wife’s total financial situation, the court “may decide, however, that enforcement of the property term in the agreement, but not the term regarding [denial of] compensatory payments, would yield a result that is not unjust.”). This statement suggests that trial judges have discretion to reform premarital agreements deemed unenforceable because of “substantial injustice.” On the other side, but similarly productive of discretionary judgments, “[a] contract that makes reasonable provision[s] for the financially weaker spouse will not yield a substantial injustice simply because its terms are much less generous than would arise under the governing law.” Id. § 7.05 cmt. e, at 995.

Mention should also be made of PRINCIPLES, section 7.05(5), the separate provision exempting agreements waiving specific financial provisions of PRINCIPLES (those authorizing “gradual recharacterization of separate property [to] marital property” over the term of the marriage—and therefore making the property subject to equitable distribution) from the procedural and substantive requirements of section 7.05. Id. § 7.05(5).
the provision apply to Manny and Carla’s situation? If the purpose of the requirement is precautionary—the agreement “may also increase [the] chance that both parties will give careful thought to any waiver of such rights”33—wouldn’t the passage of time before the marriage have been sufficient for adequate reflection? If the broader purpose of the writing rule is to prevent financial coercion just prior to marriage by the wealthier and psychologically more dominant party, shouldn’t lengthy and strict voluntary adherence to the agreement’s terms, no matter how unfair outsiders to the marriage might view them, change the legal response to the agreement? To put the matter differently, does the need to prevent false financial claims at divorce or to deter coercive premarital financial demands by a dominating spouse require invalidating even legitimate oral agreements that were not coercive? Would it not make more sense to make the writing requirement the subject of a rebuttable presumption, as the Principles do for the thirty-day prior to marriage requirement?34 All oral premarital financial agreements could not possibly be coercive and therefore “unjust or exploitative”;35 nor should the assumption be indulged that financially weaker spouses are “usually women”36 who need more than a priori or presumptive protection from scheming and/or dominating male spouses-to-be. On the other hand, specific, enforceable rules, are needed; they are usually designed to reinforce the wisest default position—and any rule will prohibit (or fail to validate) some practice, some behavior, or some agreement, that in a particular context most observers would consider it unjust to prohibit or unjust not to validate. This is, after all, the function of rules; and rules should be enforced.37 Whatever the just outcome might be, in Principles jurisdictions the legal outcome of Manny and Carla’s divorce is clear: because the agreement was not in writing, Carla gets more money.

VI.

Let’s return to the real (if unusual) world of Manny and Carla. The Washington Court of Appeals affirmed the trial court’s enforcement of the agreement.38 Because the Washington legislature had not adopted the

33. PRINCIPLES, § 7.04 cmt. a, at 961.
34. Professor Bix points out that the 30-day rule was absolute in earlier drafts but later converted to the rebuttable presumption category. Bix, supra note 10, at 236.
35. Id. at 235.
36. Id. at 241.
37. This is not the place for, nor am I a competent leader of, a discussion of jurisprudence. But there can be no dispute about the fact that the Carla and Manny case produces conflicting emotional and policy impulses.
Principles, a simple formula found in Washington precedent made the agreement enforceable:

The first prong of [former case law] asks whether the agreement made a fair and reasonable provision for the spouse not seeking enforcement. If the answer is yes, the agreement is valid. If the answer is no, the second prong asks whether there was full disclosure of the value and nature of the property involved and whether there was full knowledge and independent advice about each spouse's rights. The agreement, although oral and subject to the Statute of Frauds, was "enforceable under the part performance exception to the statute." The judicial consideration of Manny and Carla's premarital deal may have been colored by facts intentionally hidden earlier. Although the agreement's terms were apparently conceived and crafted by Manny, Carla was the party seeking enforcement twenty years later. Carla was the lawyer who became a wealthy million-dollar-a-year rainmaker in Seattle; it was Carla who bought the three houses to fulfill the deal. Manny, on the other hand, had dropped his career in the entertainment and hospitality industries, and eventually became increasingly dependent on Carla's income.

The trial court . . . found that Manny was voluntarily underemployed because he had not worked full-time hours from January 2000 through September 2001, the time of trial. After he was laid off from Eddie Bauer in 1999, Manny began working the early morning shift from 4 [a.m.] to 7 [p.m.] at UPS because it provided steady income and benefits. It also allowed him flexibility to pursue a career as a longshoreman and spend time with his children. The longshoring work was assigned on a daily basis at a dispatch hall, but because Manny lacked union

39. Id. at 531. I am over-simplifying. The court held that if this were the relevant test, the agreement would be deemed procedurally and substantively fair and therefore enforceable. But the Court ruled that this test, the one for agreements waiving a spouse's interest in an equitable distribution of marital property, was not applicable to premarital agreements by "two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit." Id.

40. Id. at 529. The Principles' section 7.04 writing requirement would trump both the statute of frauds and its part performance exception if the Principles had been in effect in Washington. But see Principles § 7.04 cmt. a, at 974–75; supra note 19 and accompanying text; infra note 51 and accompanying text.
ADDITIONAL REFLECTIONS

membership and senior status, he worked only one to two shifts per week.\textsuperscript{41}

Obviously, as Ira observed, creating fairness rules to govern family law issues entails painful choices: "[a]ny rule clear enough to provide reasonably consistent and predictable judgments must be chosen from among alternatives with equal or nearly equal claims to being fair."\textsuperscript{42} But Manny and Carla's case presents an especially difficult choice. Although the \textit{Principles}' legislative language, comments and illustrations are all carefully gender neutral, it seems clear to me, relying on observations of commentators as well as my hunches as to the intentions of the Reporters, that the \textit{Principles} have been attuned to enhancing gender fairness.

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

To the extent that women are often on the receiving end of many or most of the more exploitative premarital agreements, the adoption of the \textit{Principles} for regulating premarital agreements would be a step, though perhaps only a small one, towards greater gender justice.\textsuperscript{43}

No surprise here—gender differences and the impact of those differences on fair legal governance of intimate relationships is an ineluctable element of life and administration of family law; the \textit{Principles}' emphasis on delineating anew the proper respective roles of status and contract in family dissolution is at least in part a product of our understanding of the nature of gender relationships today and a reaction to the legal treatment of gender differences in the immediate past.\textsuperscript{44} Indeed, there are scholars and others who believe that in determining the enforceability of prenuptial agreements, as well as in almost every other subject of family law doctrine, there

\begin{itemize}
  \item \textsuperscript{41} \textit{DewBerry}, 62 P.3d at 528. The court of appeals affirmed a child support order for Manny based upon an imputed income of $48,000, more than he currently made but less than his Eddie Bauer salary. \textit{Id} at 532.
  \item \textsuperscript{42} Ellman, supra note 3, at 707.
  \item \textsuperscript{43} Bix, supra note 10, at 241, 244. It should be noted that Professor Bix's article was part of a symposium on the \textit{Principles} organized by the Duke Journal of Gender Law and Policy. Emphasis in the articles in that publication on the \textit{Principles}' gender consequences is hardly surprising.
  \item \textsuperscript{44} See supra note 43 and accompanying text (citing Bix).
\end{itemize}
continues to be a need to “level the playing field” by bending the law more toward the protection of the interests of women. And we should acknowledge that judicial as well as our personal reactions to the hypothetical Manny-Carla financial situation might well have been inconsistent with the actual case holding—that is, if Manny were the rainmaker and Carla was trying to prevent enforcement, the agreement might not have withstood judicial scrutiny either under the common law or under the Principles. Many scholars and judges believe that family law decisions, especially trial court decisions, should be driven largely by individualized judgments of fairness, including gender fairness. However, good lawmaking, by legislators or judges, should not contemplate the differential enforcement of prenuptial agreements—either as a matter of law

45. See Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985); Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165, 1179–82 (1986); Martha Minow, Consider the Consequences, 84 Mich. L. Rev. 900, 908 (1986); Rhode & Minow, supra note 7; Singer, supra note 7; see also Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report, 15 Wm. Mitchell L. Rev. 829, 842–48 (1989) (complaining that the Minnesota Supreme Court’s decisions interpreting the maintenance statute would not allow adequate provision for economically dependent female divorcees. The Report failed to indicate that legislative modifications adopted four years previously and appellate decisions interpreting the modifications had improved the economic situation for divorcing dependent females). Asked why the legal changes were ignored, one member of the Task Force responded, “the Report is a political document.” Levy, supra note 7, at 75 n. 114. Note also law review articles calling for a judicial return to the “maternal presumption” in divorce-custody adjudication. See, e.g., Ramsay Laing Klaff, The Tender Years Doctrine: A Defense, 70 Cal. L. Rev. 335 (1982). Even some appellate opinions take this tack. See Young v. Hector, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1999) (adopting the Principles’ custody standard; the panel majority required an order replicating each parent’s pre-divorce time with child and assigned physical custody to stay-at-home, architect father rather than to large-firm-practicing-lawyer mother; full court withdrew panel decision and awarded custody to mother).

46. I am obviously not talking about the contract law notion that, because the contract was “drafted” by Manny, any ambiguities or doubts about enforceability should be resolved against his interests, either in my “hypothetical” tending to make the agreement’s unenforceable or in the actual case favoring the agreement’s enforcement.

47. Consider one trial judge’s candid admission of his decisional motives (an unwise admission, since he was reversed on appeal) in a case in which he awarded seventy-five percent of the marital property to the husband solely because the wife’s extramarital affair caused the breakdown of a twenty-six-year marriage: “I have done some research; and as much as I want to punish some people in a divorce, I find out that these appellate judges, who don’t try divorce cases, say that it’s just unfair.” Sparks v. Sparks, 485 N.W.2d 893, 902 (Mich. 1992); see also supra note 8 and accompanying text. I suspect that the Principles’ “escape hatches,” which have been criticized by Professor Westfall, see supra note 7, were included at least in part because of complaints from members of the Institute (perhaps even members of the Institute’s Council) who would have opted for considerably more trial judge discretion than the Reporters favored.
or as a matter of covert fact—depending upon the gender of the person seeking enforcement. It makes no sense to go back to the age of fictions.\textsuperscript{48} On the other hand, we all believe that differential decisionmaking is an expected, indeed an inevitable and occasionally healthy, aspect of common law method.

Needless to say, we cannot do without binding rules and the search for fair rules—rules that will by and large be followed—because they constrain otherwise objectionable judicial discretion and because they guide private negotiations.\textsuperscript{49} The \textit{Principles}' treatment of prenuptial agreements provides a host of specific directions to guide judges considering whether to enforce such agreements. Yet in light of all the "escape hatches" included overtly and covertly in both sections 7.04 and 7.05,\textsuperscript{50} one begins to wonder whether despite the apparent policy direction and actual complexity of the required exercise, the \textit{Principles} do much to make the law less discretionary. The writing requirement is the major (if not the sole) exception; as the actual Carla and Manny case suggests, the requirement may, if interpreted stringently (at least occasionally today and perhaps increasingly in the future), produce questionable results. To be sure, relevant evidence and validity factors for judicial consideration have been specified, but the decisional dynamic may not have been substantially constrained.\textsuperscript{51} Nonetheless, the specifications, while complex and indeterminate, serve an important function in clearly delineating the scope and detail of the scrutiny couples’ premarital negotiations deserve and require. It is possible that the \textit{Principles}' provisions, with all their "escape hatches," may turn out to be more conceptually useful and acceptable to trial judges exercising discretion in the interpretation and enforcement of prenuptial agreement issues than to legislators, and the windows the "escape hatches" provide for discretion may allow judges to temper the chapter’s policy direction as the "playing

\textsuperscript{48} See \textit{supra} note 19 and accompanying text.


\textsuperscript{50} Consider especially that \textit{Principles}, section 7.05(3), the substantive "substantial injustice" provisions, merely directs courts to "consider" the four criteria examined in the text and makes none of them absolute in the fashion of the writing requirement. \textit{See supra} note 34 and accompanying text; \textit{see also supra} note 49 and accompanying text.

\textsuperscript{51} See \textit{supra} notes 17, 22, 24, 33 and 48. The perpetuation of the standard contract "unconscionability" standard in \textit{Principles} section 7.01, even if it formally concerns only bargaining at the time of execution, adds substantially to and, I believe, encourages the exercise of extensive trial court discretion in prenuptial agreement cases.
field” levels. This possibility assumes, of course, that gender balance in the judiciary will increase or that male judges’ alleged sharing of society’s gender biases will change in tempo with changes in the nature or usual beneficiary of premarital agreements.

Legal rules, no matter how principled, labeled “model,” or “uniform,” or something else, may be relevant and/or reflective of social needs and mores only for a generation (if that long), for a period that reflects the world-view of the lawmakers. No matter how carefully lawmakers (legislators, the ALI, National Conference of Commissioners on Uniform State Laws, judges, and those like Ira and his Reporter colleagues who give direction to lawmakers’ endeavors) succeed in sheltering themselves from prevailing social norms, they will universalize their experience and their values, and those values may well not be those of the next generation. In 1970 the chairman of the Judiciary Committee of the Missouri Senate told a local scholar that he had excluded the no-fault property distribution rules from Missouri’s version of the Uniform Marriage and Divorce Act because they would have too seriously taxed Missouri’s criminal justice enforcement resources—too many Missouri husbands would rather kill their wives than share “their” property. And in 1972 the Executive Director of the American Law Institute told a member of the Institute’s Council that the Institute could not undertake a domestic relations project because too many members had religious objections to divorce.

Today, we have a brilliant Institute endeavor on a significant aspect of the topic, and we are close to national consensus on no-fault, equal division of marital property at divorce. That female rainmaker divorcers are now trying to enforce premarital agreements that disadvantage their economically less fortunate husbands (even if the terms were originally dictated by the husband and the circumstantial change was not anticipated) suggests that, to whatever extent the Principles’ premarital agreement

52. See Singer, supra note 7.
53. Reading these pages to help me avoid pitfalls, Brian Bix has suggested that it is at least possible that the Reporters may have been too successful in avoiding the imposition of their values in chapter seven of the Principles: by adding multiple “escape hatches” to avoid gender bias favoring women, the Reporters have succeeded in creating so discretionary a system that judges who do not favor a level “playing field” will be able to continue to validate unfair premarital agreements that are conceived and imposed by men. Cf. Simione v. Simione, 581 A.2d 162 (Pa. 1990) (holding that there is no need for substantive review for fairness at time of agreement’s enforcement if voluntary and adequate disclosure was made at execution).
54. This anecdote was reported to the author more than thirty years ago by a law professor who had advocated adoption of the Uniform Marriage and Divorce Act by the Missouri legislature.
55. Id.
restrictures were designed to "protect weaker partners [who are] usually women," they may soon, as law reform periods run, become obsolete.

Thirty years have passed between promulgation of the Uniform Marriage and Divorce Act and publication of the American Law Institute's Principles—and the two endeavors are very different in policy and in detail. Family law doctrines resisted legislative change for a very long time; they adapted (if at all) to modern values concerning family formation and dissolution (some would call them frailties) largely by means of a host of fictions conceived by lawyers and indulged by judges. Yet within thirty years, family law doctrines have been the subject of two radical reform efforts, the Uniform Marriage and Divorce Act and the ALI's Principles. Only eight states adopted the provisions of the Uniform Act—none of them adopted the provisions related to marriage—and, at least at the moment, only the West Virginia legislature has addressed the Principles, and only the chapter dealing with custody was enacted.

How should we understand this situation? Should reformers (those with real legislative clout, not wooly academics or "pointy-headed intellectuals" peddling their own nostrums) reexamine family law at least once every other decade, but expect that change will come, if at all, only as judges, responding to changing community values, adopt new rules (or fictions) "cherry-picked" from reform endeavors? This is not exactly a "glass-half-full" prescription. On the other hand, perhaps Manny and Carla's situation (in which an absolute writing requirement for prenuptial agreements would disadvantage a member of the class the rule was designed to protect) indicates that any legal response to what appear to be concurrent mores and values is fraught with more risks than reformers can usually contemplate.

I intend no firm objections to Principles doctrines in this presentation. Of this, though, we can be sure: the American Law Institute's Principles are

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56. See Bix, supra note 10, at 241.
57. Some of the difference, of course, can be explained by the different composition of the groups' memberships and how members are chosen, the great difference in the amount of autonomy given to Reporters by the two organizations, and the constituencies to which the two organizations respond. For a fuller description of the differences, see Robert Levy, Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings, 33 Fam. L.Q. 543, 554-55 (1999).
58. I have been told that at least one of the Advisors to the Principles, who consistently opposed provisions of the custody chapter because it discriminated against fathers, testified in favor of the chapter in West Virginia because its provisions were so much more acceptable than the extant West Virginia law, a version of the "Primary Caretaker" doctrine. The issues as they were debated in the drafting of the Uniform Marriage and Divorce Act, are reviewed in Levy, supra note 7 at 48-52.
59. It is possible that the Reporters may have contemplated waiver of the writing requirement through affirmation by behavior. See supra note 21.
first-rate—a magnificent accomplishment, for which the Institute, as well as all family law scholars, legislatures, and the public are greatly indebted to Ira and his reporter colleagues.