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BARGAINING IN THE SHADOW OF LOVE: THE ENFORCEMENT OF PREMARITAL AGREEMENTS AND HOW WE THINK ABOUT MARRIAGE

BRIAN BIX*

INTRODUCTION

Premarital agreements¹ stand at a crossroads of many important topics: contract and family law, public interest and private ordering, feminism, and law and economics. The agreements give unique insights into all of these areas, bringing out issues and problems in a singularly clear way, e.g., how we think about marriage and relational contracts, and how the law should respond to limitations of rationality and to systematic inequalities. As will become clear, this topic is deceptively far-reaching: a proper consideration of the enforcement of premarital agreements touches upon issues as diverse as same-sex marriage, restrictive covenants, surrogacy agreements, and copyright law.

Past discussions of premarital agreements have tended to be either unduly pessimistic or unduly sanguine regarding the en-

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The title obviously plays off of Robert H. Mnookin and Lewis Kornhauser's classic article, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Apologies to Amy L. Wax, of whose parallel article title, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998), I was unaware until this Article was well along.

1. These agreements are also known as "prenuptial agreements" and "antenuptial agreements."

forcement of premarital agreements under traditional contract principles.² The pessimists think that enforcement of the agreements inevitably will lead to grave injustice;³ the optimists think that enforcement of these types of agreements must always increase social welfare, as this is the inevitable result of enforcing all voluntary choices.⁴ This Article challenges the views of the pessimists, arguing that the resources of current contract law can protect parties from most of the forms of unfairness that tend to result from premarital agreements, and still provide parties who have a good faith desire to order their own domestic lives with the necessary legal powers to do so. At the same time, this Article argues, relevant to the optimists' claims, that these sorts of agreements raise difficult questions regarding consent and rationality that the courts can and should consider.

Premarital agreements for many years were of interest to the rich and their lawyers,⁵ to a handful of academics, and to no one else. In recent years, they apparently have become more common—a trend reflected by, and probably also encouraged by, the attention these agreements command in the popular press.⁶

2. Compare Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 279 (1994) ("Lawmakers should recognize premarital agreements for what they are: contracts that violate societal norms against gender discrimination.") with Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 207-11, 216-23, 285-86, 288-91, 328-34 (1982) (viewing optimistically the private ordering of marriage, in particular premarital agreements relating to economic matters).

3. See, e.g., Brod, *supra* note 2, at 294 ("Premarital agreements have a disparate impact on women—and thereby discriminate against them.").

4. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 472 (1998) (assuming that enforcing agreements about marriage creates net gains in trades away from the default position, though noting that there may be distributional concerns about the division of those gains).

5. See, e.g., Jan Hoffman, *How They Keep It*, N.Y. TIMES, Nov. 19, 1995, Sunday Magazine, at 104 (reciting ten clauses from the premarital agreements of the very rich).

6. See, e.g., Lisa W. Foderaro, *Prenuptial Contracts Find New Popularity*, N.Y. TIMES, Aug. 21, 1997, at B5; Noreen Marcus, *For Love and Money Prenups; Marriage Contracts—No Longer Just for the Rich*, FT. LAUDERDALE SUN-SENTINEL, Sept. 28, 1997, at 1A, available in 1997 WL 11404515; Julie Salamon, *Popping the Pre-Nup Question*, NEW YORKER, Aug. 25-Sept. 1, 1997, at 70-79; cf. Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV.

Much academic discussion of premarital agreements has failed to consider the larger conceptual, doctrinal, and real-world context surrounding them, or has considered only one aspect of the larger context, e.g., gender inequality, while ignoring others.⁷ These narrow or partial discussions inevitably fail to see the whole problem, or to consider all of its complexities or all of its possibilities. They thus tend to come too quickly to extreme conclusions, for example, that courts always should enforce the agreements or that courts should place strict controls on them.⁸ It would be better to look at all of the facets that these various approaches explore, to illuminate better the whole picture, to get more than one view of the cathedral.⁹

This Article attempts to place the question of the enforcement of premarital agreements in three overlapping contexts. After Part I of the Article offers a brief overview of the legal status of premarital agreements, Part II evaluates the extent to which marriage itself is now or should become a contractual or near-contractual relationship. Part III reviews the approach the law does take, and, to the extent it is different, the approach it should take, to long-term ("relational") agreements. Part IV considers the problem of pervasive inequalities in society, in particular gender inequalities.

887, 890-97 (1997) (questioning "the assumption that only the rich, the selfish, or the mercenary" can benefit from premarital agreements). Note also that a premarital agreement form is available on a popular computer software program aimed at the general public, "Quicken Family Lawyer," by Parsons Technology.

7. See, e.g., Brod, *supra* note 2 (focusing on gender equality); Leah Guggenheimer, *A Modest Proposal: The Feminomics of Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147 (1996) (same).

8. See, e.g., Brod, *supra* note 2, at 282-95 (proposing restrictions on enforcement to ensure "economic justice"); Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 415-25 (1992) (arguing broadly for the enforceability of premarital agreements).

9. With deference and apologies to Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); cf. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 15-32 (1996) (arguing that "competing" conceptual theories can be seen as emphasizing different aspects of the same social practice).

I. ENFORCEMENT AND PERCEPTION

A. *Overview of Enforceability*

The legal attitude toward premarital agreements has changed markedly in the past thirty years, though it is far from clear whether this development reflects shifting attitudes toward the family, marriage, family law, contract law, or all of these.¹⁰ As state courts and legislatures continue to choose between differing approaches to the enforcement of premarital agreements, it is worth considering what may be at stake. Among the issues the inquiry most obviously raises are the general move from status to contract in the legal regulation of marriage, our attitudes toward marriage itself, problems of rationality in long-term agreements, and the complex intersection of family law and gender equality.

Premarital agreements are agreements parties enter into when they are about to marry.¹¹ In the standard, if somewhat archaic, formulation, the agreements are "in contemplation of marriage." They concern the rights of the parties during the marriage and/or upon the dissolution of the marriage by death or divorce.¹² In this Article, as in most of the relevant second-

10. See *infra* notes 17-58 and accompanying text.

11. That the parties are about to marry might be of importance doctrinally. If one party is giving up his or her legal rights, the only consideration for that sacrifice, as a matter of conventional common law, may be the agreement by the other party to enter the marriage. See *Matthews v. Matthews*, 162 S.E.2d 697, 698-99 (N.C. Ct. App. 1968) (refusing enforcement of an agreement entered during marriage due to lack of consideration). Alternatively, even without consideration, the promises in a premarital agreement might be enforceable as a matter of promissory estoppel. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Additionally, many states follow the Uniform Premarital Agreement Act (UPAA) view that premarital agreements are enforceable without consideration. See UNIF. PREMARITAL AGREEMENT ACT § 2, 9B U.L.A. 372 (1987). For more on the UPAA, see *infra* notes 34-38 and accompanying text.

12. Agreements entered into prior to marriage (or during marriage) attempting to set the terms of behavior *during* marriage usually are held not to be enforceable. See, e.g., *In re Marriage of Higgason*, 516 P.2d 289, 297 (Cal. 1973) (concerning medical care); *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App.) (addressing sexual intercourse), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976). But see Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1039 (1993) (arguing that courts should enforce such

ary literature and most of the reported decisions regarding premarital agreements, focus is placed upon agreements that include provisions relating to the rights of the parties upon divorce.¹³

The general view of premarital agreements derives in large part from their perceived purpose. One commentator has stated that "[t]he purpose and effect of most premarital agreements is to protect the wealth and earnings of an economically superior spouse from being shared with an economically inferior spouse."¹⁴ Though there does not seem to be substantial empirical study documenting the relative frequency of various kinds and purposes of premarital agreements,¹⁵ even if the one-sided agreements reflect only a small percentage of all premarital

agreements).

Additionally, as a general rule, courts will not enforce premarital agreements to the extent that they cover child custody, visitation, or child care payments. *See, e.g.,* *Edwardson v. Edwardson*, 798 S.W.2d 941, 946 (Ky. 1990); *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986); 2 STEPHEN W. SCHLISSEL ET AL., *SEPARATION AGREEMENTS AND MARITAL CONTRACTS* § 15A.02, at 311 & n.10 (2d ed. 1997).

13. As a matter of history and function, there are good reasons for treating death-focused and divorce-focused agreements together, or even giving most of the attention to death-focused agreements. Until recently, because death was a more common way for a marriage to end than divorce, agreements meant to keep wealth within a family certainly would focus on death as well as, if not to the exclusion of, divorce. The fact remains, however, that divorce-focused agreements have experienced a distinct legal treatment, and raise issues that death-focused agreements do not. *See infra* note 26 and accompanying text (noting the different ways Massachusetts courts have treated death-focused and divorce-focused agreements).

Premarital agreements of a different sort have a secure place in American legal history regarding the treatment of women in the nineteenth century. Though the traditional common-law rule had been that the husband gained control over all of the wife's property after marriage, in jurisdictions such as New York, equity would recognize and enforce premarital agreements by which the husband allowed his wife to control part or all of her property. This recognition, however, tended to benefit only wealthy women. *See* NORMA BASCH, *IN THE EYES OF THE LAW* 70-88, 109-11, 226-27 (1982).

14. Brod, *supra* note 2, at 234.

15. Brod cites the scarcity of empirical study in this area, and also notes that none of the work done purports to be systematic or statistically valid. *See id.* at 240 n.49. Brod supports some of her generalizations in part with information gathered from interviews with family law attorneys and specialists. *See id.* at 234 n.15, 238 n.41, 243 n.67. Allison Marston cites to estimates that "the number of prenuptial agreements tripled between 1978 and 1988 and has steadily increased ever since" and that approximately 5% of all marriages, and 20% of all remarriages, involve premarital agreements. Marston, *supra* note 6, at 891 (footnote omitted).

agreements, society still must decide how the legal system should treat those relative few. At the same time, the abuses of a few should not color the response to *all* premarital agreements. Other possible purposes of such agreements include: (1) ensuring that children from a prior marriage retain certain family wealth, despite possible claims by the new spouse; (2) assuring the economically weaker spouse-to-be that he or she will have adequate economic protection after divorce; (3) attempting to make any eventual divorce simpler and less contentious; and (4) assuring that certain family heirlooms or family wealth stay within a family upon divorce.¹⁶

Until the mid-1970s, most American courts held that premarital agreements and other contracts made "in contemplation of divorce" were unenforceable as against public policy. Courts reasoned that the agreements were void either (1) because they purported to alter the state-imposed terms of the status of marriage, which were not subject to individual alteration,¹⁷ or (2) because they tended to encourage divorce.¹⁸

16. See IRA MARK ELLMAN ET AL., *FAMILY LAW* 801 (3d ed. 1998) (listing financial protection of children from the prior marriage as "the usual explanation" for premarital agreements, while also mentioning the use of such agreements by wealthy people seeking to limit the financial claims of new spouses, even when no children from a prior marriage are involved); Sarah Ann Smith, *The Unique Agreements: Premarital and Marital Agreements, Their Impact upon Estate Planning, and Proposed Solutions to Problems Arising at Death*, 28 IDAHO L. REV. 833, 836-38 (1991-1992) (listing purposes for premarital agreements).

17. See, e.g., *Graham v. Graham*, 33 F. Supp. 936, 938-40 (E.D. Mich. 1940) (refusing to enforce an agreement by which the wife promised to make monthly payments to the husband if he would travel with her, and holding that this contract was void because it changed the "essential obligations of . . . marriage").

18. See RESTATEMENT (SECOND) OF CONTRACTS § 584. See generally *Norris v. Norris*, 174 N.W.2d 368, 369-70 (Iowa 1970) (citing cases; RESTATEMENT (FIRST) OF CONTRACTS § 584; 24 AM. JUR. 2D *Divorce and Separation* § 12, 942, 943; and Annotation, *Validity, Construction, and Effect of Provision in Antenuptial Contract Forfeiting Property Rights of Innocent Spouse on Separation or Filing of Divorce or Other Matrimonial Action*, 57 A.L.R.2d 942 (1958), for the unenforceability of such provisions).

Under English law, premarital agreements were, until recently, similarly put into the category of agreements that are void because contrary to public policy. The leading case regarding premarital agreements in England had been the 1853 decision in *Cartwright v. Cartwright*, 43 Eng. Rep. 385 (L.J. Ch. 1853). In *Cartwright*, the father of the husband-to-be conveyed certain property rights to the wife-to-be with a proviso that, should the couple separate for any reason, those rights would go to the

In fact, the most recent restatement of contract law continues to declare: "A promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy."¹⁹ The vast majority of courts, however, now treats premarital agreements as enforceable, at least in some circumstances.²⁰

husband. *See id.* at 385. The Lord Justices held the contract void as against public policy, because it gave an inducement to the parties to separate. *See id.* at 387-89. The Lord Justices were not persuaded by the argument that the agreement actually encouraged one party, the wife, to stay in the marriage; they thought it more significant that the other party, the husband, had an incentive to dissolve the bond. *See id.* Though *Cartwright* did not involve an agreement directly between a future husband and wife, it generally was accepted as applying to premarital agreements between the spouses-to-be. *See, e.g.*, 1 CHITTY ON CONTRACTS, § 16-063, at 811 & n.71 (A.G. Guest et al. eds., 27th ed. 1994); S.M. CRETNEY & J. M. MASSON, PRINCIPLES OF FAMILY LAW 447-48 (5th ed. 1990). Recent treatment of premarital agreements by the English courts appears to be far more accepting. Though there do not appear to be many decisions or commentaries that discuss the issue at length, the law appears to treat premarital agreements much as it does separation agreements: the court must take such agreements into account when making awards and granting property, but it is not bound by the agreements. *See N v. N* (Foreign Divorce: Financial Relief) [1997] 1 FLR 900, at 912-13 (High Court, Family Division) (premarital agreement); *Edgar v. Edgar* [1981] FLR 19 (Court of Appeal) (separation agreement).

In Israel, the law appears to treat both premarital agreements and separation agreements as presumptively enforced. However, such agreements only are enforceable if a court or registrar has determined that each party formed the agreement with "free consent" and with an understanding of the legal rights being waived. *See Spouses (Property Relations) Law, 1973, 27 L.S.I. 313* (1972-73).

19. RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1981).

In *Kovler v. Vagenheim*, 333 Mass. 252 (1955), the brothers of a woman, in consideration of a man's marrying the woman, had indemnified the man regarding any payments of alimony or child support that he might owe upon divorce. *See id.* at 252-53. The court held the contract valid and, in response to the argument that the agreement encouraged divorce, pointed out that (1) the contract was clearly "in aid of, not in derogation of, marriage," and (2) any influence it might exert to encourage separation or divorce would be "trifling." *Id.* at 254. One difference between this case and most modern cases, and a factor noted by the court in *Kovler*, was that the agreement did not impair the obligation to support—the agreement was not that no one could claim such payments, but only that if someone did claim them, a different source would pay them. *See id.*

20. Many commentators look to *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), as the turning point for states' treatment of premarital contracts. *See, e.g.*, Lewis Becker, *Premarital Agreements: An Overview*, in *PREMARITAL AND MARITAL CONTRACTS* 1, 6 (Edward L. Winer & Lewis Becker eds., 1993); Brod, *supra* note 2, at 264-65; *see also Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981) (describing *Posner* as the leading case). Though the court in *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960), also upheld a premarital contract that involved the waiver of alimony rights upon divorce, few other courts followed during that decade. Other important

Current applications of the *Restatement* rule seem to emphasize the "unreasonably" part rather than the "encourage . . . separation" part, with most courts concluding, if they reach the question at all, that premarital agreements do not encourage separation "unreasonably."²¹

Agreements in reported cases that one might characterize as "unreasonably encouraging divorce" still appear, but they are few and far between. One such agreement in California contained unusually generous terms; it promised the previously destitute spouse a house and at least half a million dollars upon divorce.²² Perhaps not surprisingly, the marriage ended after only seven months.²³ The wife sued for divorce, but the California Court of Appeals refused to enforce the agreement.²⁴ The court stated that the wife had been "encouraged by the very terms of the agreement to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract and the wife's right to the money and property."²⁵

early decisions include: *In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981); and *Unander v. Unander*, 506 P.2d 719 (Or. 1973).

21. RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1981). See, e.g., *Osborne*, 428 N.E.2d at 816 (citing RESTATEMENT (SECOND) OF CONTRACTS § 190 and noting that, while premarital agreements that meet fairness guidelines will generally be enforced, "certain contracts may so unreasonably encourage divorce as to be unenforceable on grounds of public policy").

22. See *In re Marriage of Noghrey*, 215 Cal. Rptr. 153, 154 (Cal. Ct. App. 1985). The agreement promised the wife, in the case of a divorce, "the house . . . [in] Sunnyvale, . . . [a]nd \$500,000.00 or one-half of my assets, whichever is greater." *Id.* There was a dispute among the parties as to whether the wife-to-be and her family forced the agreement upon the husband-to-be, or whether the husband-to-be offered the agreement as a sign of his good intentions. See *id.* at 156-57.

Noghrey predated California's adoption of the UPAA. See CAL. FAM. CODE §§ 1600-1617 (West 1994) (effective January 1986). The effect of the UPAA on *Noghrey* has yet to be determined. See *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872 n.4 (Cal. Ct. App. 1988) (applying *Noghrey* to a case with similar facts, while noting that the California UPAA did not apply because the agreement was entered into prior to 1986).

23. See *Noghrey*, 215 Cal. Rptr. at 154.

24. See *id.* at 155.

25. *Id.* at 156. The court added, "The prospect of receiving a house and a minimum of \$500,000 by obtaining the no-fault divorce available in California would menace the marriage of the best intentioned spouse." *Id.* at 157.

The public policy consideration also may explain why some courts historically treated death-focused premarital agreements somewhat differently. These are agreements that affect property division upon the death of one of the spouses. Courts treated these types of agreements with far less hostility than divorce-focused premarital agreements. Courts subjected the death-focused agreements to certain restrictions, but tended to enforce them at times when they refused to enforce divorce-focused agreements.²⁶ The doctrinal explanation was that death-focused premarital agreements did not give either party an incentive to divorce. One also might speculate that an attempt to keep a family heirloom or other family property within a family—apparently a common purpose of such agreements—is more sympathetic than a divorce-focused agreement, in which, paradigmatically, a richer prospective spouse asks a poorer prospective spouse to give up rights to all but a small part of the wealth and income of the richer prospective spouse.²⁷

In any event, in the 1970s and early 1980s, the public policy argument began to lose its persuasiveness, or at least became insufficiently weighty for making premarital agreements per se invalid.²⁸ Courts remained hesitant about enforcement, however, and they developed tests for evaluating the procedural fairness of the agreement—inquiring whether the parties disclosed their financial situations, whether any waiver of rights was accomplished with knowledge of the rights waived, and whether the parties consulted attorneys or at least had the opportunity to do so—and the substantive fairness of the agreement at the

26. Compare *Rosenberg v. Lipnick*, 377 Mass. 666, 666-67 (1979) (enforcing a death-focused premarital agreement) with *Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981) (holding for the first time in Massachusetts that divorce-focused premarital contracts would be enforceable).

27. See *Brod*, *supra* note 2, at 243.

28. Some might argue that the push toward writing and enforcing premarital agreements also came from another direction: the willingness of courts to award large sums to partners in long-term cohabitation relationships, under theories of express contract, implied contract, unjust enrichment, and the like. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 118 (Cal. 1976); *Watts v. Watts*, 405 N.W.2d 305 (Wis. 1987). Such awards meant that the rich could not assume that they could avoid having to give large portions of their property to their current domestic partners simply by not getting married. Marriage, but with a premarital agreement, became one obvious alternative.

time of signing and/or at the time of enforcement.²⁹ Most jurisdictions enforced only those premarital agreements that survived scrutiny of both their procedure and their substance.³⁰ Most of the jurisdictions applying these fairness requirements held premarital agreements to a higher standard than they held ordinary agreements under comparable protective doctrines of standard contract law such as unconscionability, misrepresentation, and duress.³¹ Until the early years of this decade, this was the majority approach to the enforcement of premarital agreements.³² The details of the standards varied, and continue to vary slightly from state to state,³³ but these slightly differing standards can be fruitfully characterized as variations on a single approach, which this Article refers to as "the fairness approach."

In 1983, the National Conference of Commissioners of Uniform State Laws approved the Uniform Premarital Agreement Act (UPAA), which has since been adopted by roughly half of the states.³⁴ At first glance, the provisions of the UPAA might ap-

29. See, e.g., *Button v. Button*, 388 N.W.2d 546, 550-51 (Wis. 1986); *DeLong v. DeLong*, No. WD 52726, 1998 Mo. App. LEXIS 69, at *36-*37 (Mo. Ct. App. Jan. 20, 1998).

30. See, e.g., *Osborne*, 428 N.E.2d at 814-17; *Gross v. Gross*, 464 N.E.2d 500, 506 (Ohio 1984).

31. See, e.g., *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (describing the standard approach to premarital agreements as having "embodied substantial departures from traditional rules of contract law," requiring a standard of reasonableness more exacting than the traditional defenses of "fraud, misrepresentation, [and] duress").

32. See ELLMAN ET AL., *supra* note 16, at 822-23 (discussing "the general trend"); LESLIE J. HARRIS ET AL., *FAMILY LAW* 694-95 (1996) (summarizing the standard "in most states").

33. Compare *Edwardson v. Edwardson*, 798 S.W.2d 941, 945 (Ky. 1990) (evaluating fairness relative to the time of enforcement) with *Button v. Button*, 388 N.W.2d 546, 551 (Wis. 1986) (holding that the fairness of terms are to be evaluated relative to the time of execution of the agreement).

34. See UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987). As of May 1998, 26 jurisdictions had adopted the UPAA. See *id.* at 78 (Supp. 1998) (listing jurisdictions). For a critical evaluation of the UPAA, see Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 129-30 (1993). The Uniform Marital Property Act, § 10, 9A U.L.A. 121 (1987), has similar provisions, but to date Wisconsin is the only state that has adopted it.

Premarital agreements are not covered at length in the current American Law

pear to implement the fairness approach described above. In fact, the UPAA is much less likely to justify invalidation of an agreement. Under the uniform act, an agreement will *not* be enforced under only one of two sets of circumstances: (1) if it is shown that there was a lack of voluntariness on the part of one of the parties (a conventional defense under contract law);³⁵ or (2) on the grounds that (a) the agreement was substantively unreasonable, i.e. "unconscionable," at the time of execution, *and* (b) the aggrieved party did not have adequate knowledge of the other party's financial position.³⁶ Additionally, the UPAA holds that if the enforcement of an agreement modifying or eliminating spousal support were to leave the party in question on public assistance, a court may modify the agreement to the extent necessary to maintain the party above the level of public assistance.³⁷ Although a party could prevent enforcement of an agreement under a fairness approach by showing *either* lack of full disclosure or extreme unfairness of terms, under the UPAA someone trying to prevent enforcement must show *both*.³⁸ In-

Institute drafts on *Principles of the Law of Family Dissolution: Analysis and Recommendations*, despite the fact that the "Proposed Final Draft" (Feb. 14, 1997) devotes an entire chapter to "Division of Property Upon Dissolution." Ira Mark Ellman, the Chief Reporter, has confirmed that premarital agreements were not part of the scope of the project, and that there is no general treatment of such agreements within the current drafts. E-mail from Ira Mark Ellman, Chief Reporter, *Principles of the Law of Family Dissolution*, to Brian Bix, Professor, Quinnipiac College School of Law (Jan. 30, 1998) (on file with author).

35. See UNIF. PREMARITAL AGREEMENT ACT, § 6(a)(1), 9B U.L.A. at 376.

36. The UPAA allows enforcement without financial disclosure when there has been waiver of the right to enforcement or when the party against whom enforcement is sought obtained or reasonably could have obtained the information from another source. Section 6(a)(2) of the UPAA holds that an agreement will not be enforceable if

the agreement was unconscionable when it was executed and, before execution of the agreement, [the party against whom enforcement is sought]:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Id. § 6(a)(2), 9B U.L.A. at 376.

37. See *id.* § 6(c), 9B U.L.A. at 376.

38. See Atwood, *supra* note 34, at 146 (explaining that, under the UPAA, "uncon-

deed, the UPAA approach appears to require a greater showing before invalidating an agreement than would conventional contract law. Under conventional contract standards, unconscionable terms are not enforceable, and a court also could invalidate an agreement for lack of disclosure if it found that the engaged individuals were in a fiduciary relationship.³⁹ Conventional contract analysis, unlike the UPAA, would not require *both* showings to hold the agreement unenforceable.

A third approach to premarital agreements does not treat them significantly differently from other agreements. In a 1990 case, *Simeone v. Simeone*,⁴⁰ the Pennsylvania Supreme Court changed its approach to reviewing premarital agreements, which had been in line with the fairness approach.⁴¹ The court in *Simeone* decided that the Pennsylvania courts no longer should inquire into whether the terms of the premarital agreement were fair or whether the parties had informed understandings of the rights they were surrendering. These contracts would offer

scionability alone is insufficient to nullify a premarital agreement. In this respect, the commissioners diverged not only from the common law of antenuptial agreements but also from general contract principles." (footnote omitted)).

Two matters of elaboration are relevant: first, some states have modified the UPAA in the process of adoption, making the adopted version less forgiving of unreasonable agreements. See, e.g., CONN. GEN. STAT. ANN. § 46b-36g (West 1998 Supp.). Under the Connecticut version of the UPAA, enforcement will be denied under any of the following situations: there was an absence of voluntariness; the agreement was unconscionable at the time of execution or the time of enforcement; there was no "fair and reasonable disclosure"; or there was no reasonable opportunity to consult independent counsel. See *id.* Second, there is some anecdotal evidence from practicing family lawyers that even when a state adopts the UPAA as written, family court judges sometimes will not enforce it on its terms—for example, refusing to enforce a one-sided agreement, even when there has been full disclosure. Also, a court has the option of reading the UPAA requirement of voluntariness broadly, thereby making the UPAA standard much stricter. See *infra* text accompanying notes 146-69 for a related discussion under the rubric of duress.

39. See *infra* note 54 and accompanying text.

40. 581 A.2d 162 (Pa. 1990). *Simeone* has been discussed in a variety of different ways over the years. See *Recent Developments—Family Law*, 104 HARV. L. REV. 1399, 1403-04 (1991) (using *Simeone* to support an approach to premarital agreements in which courts treat them like "liquidated damages" provisions); Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOY. L.A. L. REV. 225, 258-62 (1993) (suggesting that *Simeone* is a good case for teaching the influence on doctrine of views regarding gender differences).

41. See, e.g., *In re Estate of Geyer*, 533 A.2d 423, 428-29 (Pa. 1987).

only the same defenses available for conventional contract agreements, e.g., duress, unconscionability, and misrepresentation.⁴²

The facts of *Simeone* are worth summarizing, for they are representative of facts that often appear in reported decisions.⁴³ At the time of their 1975 marriage, Catherine Walsh Simeone was a 23-year-old nurse and Frederick Simeone was a 39-year-old neurosurgeon.⁴⁴ He had an income of approximately \$90,000 per year and assets worth approximately \$300,000, while she was unemployed.⁴⁵ On the eve of the wedding, his attorney presented her with a premarital agreement.⁴⁶ The agreement stated that she would be limited to "support payments of \$200 per week in the event of separation or divorce, subject to a maximum total payment of \$25,000."⁴⁷ The couple separated in 1982 and divorced in 1984.⁴⁸ By 1984, his payments to her had reached the \$25,000 maximum, and he ceased paying.⁴⁹ She then filed for alimony.⁵⁰ The master's report rejected the claim on the basis of the premarital agreement, and that report was affirmed on appeal by the Superior Court.⁵¹ The Pennsylvania Supreme Court, instead of evaluating the Superior Court's application of the principles of prior cases, chose to reexamine, and then to reform radically, those principles.⁵² The court argued that the fairness approach required by earlier decisions was grounded on paternalism, "a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter," and that a justification for such paternalistic beliefs no longer existed.⁵³ The court held that the same contractual principles that governed

42. See *Simeone*, 581 A.2d at 167. There also was a requirement of full and fair disclosure, as discussed *infra* note 54 and accompanying text.

43. Of course, this is not to say that they necessarily are representative of the usual fact situations of all premarital agreements, whether litigated or not.

44. See *Simeone*, 581 A.2d at 163.

45. See *id.*

46. See *id.*

47. *Id.* at 164.

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.* at 165.

53. *Id.*

other commercial contracts between fiduciaries were also to govern premarital agreements,⁵⁴ and that under those principles the premarital agreement in question was valid.⁵⁵

To summarize, divorce-focused premarital agreements regarding the division of property and spousal support are now enforceable in almost every state.⁵⁶ An almost even split among the jurisdictions exists on the procedural and substantive fairness elements of the agreements, with the slight majority probably willing to enforce with few or no requirements on those elements.⁵⁷ The remaining jurisdictions are more willing to invalidate or modify agreements that have problems of substantive or procedural fairness.⁵⁸

B. Premarital Agreements and How We Think About Marriage

Legal change is rarely simple, and unintended consequences are probably the rule rather than the exception. Changes to the regulation of an institution as central and pervasive as marriage are likely to have repercussions far beyond the change effected. An analysis Joseph Raz offered regarding same-sex marriage

54. The *Simeone* court noted that the parties in premarital agreements "do not quite deal at arm's length" but rather "stand in a relation of mutual confidence and trust," and therefore require a "full and fair" disclosure of financial resources "consistent with traditional principles of contract law." *Id.* at 167 (quoting *In re Estate of Kaufmann*, 171 A.2d 48, 51 n.8 (Pa. 1961)).

55. See *Simeone*, 581 A.2d at 165-66.

56. By most accounts, the last holdout against the enforceability of premarital agreements was Nebraska, which allowed such agreements but limited their enforcement. See *Busekist v. Busekist*, 398 N.W.2d 722, 725 (Neb. 1987) (holding that court not bound by terms of agreement and that the agreement was simply evidence as to what amount court should award); see also 2 SCHLISSEL ET AL., *supra* note 12, § 15A.02, at 311 n.7 (describing Nebraska as the last state to refuse full enforcement to such agreements). That Nebraska decision, however, may have been superseded by the adoption in that state of the UPAA. See NEB. REV. STAT. §§ 42-1001-42-1011 (1996) (effective March 1994). Schlissel notes Nebraska's adoption of the UPAA, but draws no significance from it. See 2 SCHLISSEL ET AL., *supra* note 12, at 487 app. II.

57. See *supra* note 34 and text accompanying notes 34-39 (stating that 26 jurisdictions have adopted the UPAA, which leans strongly toward enforcement); see also *supra* text accompanying notes 40-55 (summarizing *Simeone*, which set the strong pro-enforcement standard in Pennsylvania).

58. See notes 28-32 and accompanying text (summarizing the approach of jurisdictions, other than Pennsylvania, that have not adopted the UPAA and citing example cases).

exemplifies such repercussions: when homosexuals ask for the right to marry,⁵⁹ they are asking to participate in a particular social good that this society has to offer.⁶⁰ It also is the case, however, that at whatever point homosexuals are allowed to marry, that will change the social good; it will change the way we think about marriage.⁶¹ Perhaps then society will view marriage primarily or paradigmatically as a matter of the public commitment of intimate friends to each other, rather than a matter of the foundation for raising a family.⁶² How we then would think about marriage and about the myriad legal consequences of marriage might change in significant ways.⁶³

Those who opposed the Irish Referendum of 1995, which changed the Irish Constitution to allow divorce, raised a similar argument.⁶⁴ The "no" campaigners argued that the availability of divorce necessarily would change the nature of marriage, presumably for the worse, both for those who would marry subsequent to the change and for those who had married earlier.⁶⁵

59. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 49 (Haw. 1993).

60. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 23 (1994).

61. See *id.*

62. The argument, though, sometimes works the other way. Advocates for same-sex marriage frequently ground their arguments on the fact that many same-sex couples are raising biological, adopted, or foster children, and therefore should be given the same benefits and the same recognition as different-sex couples who are trying to raise a family. See generally Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. Rev. 841, 868 (1998) (noting that in the late 1980s, approximately three million gays and lesbians in the United States were parents, and between eight and ten million children were being raised in gay or lesbian households).

63. Some commentators argue that same-sex marriages will work to undermine gender roles within traditional marriages and related notions of patriarchy or male supremacy. See, e.g., Jordan Herman, Comment, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After Baehr v. Lewin*, 56 OHIO ST. L.J. 985, 998 (1995) ("[F]eminists recently adjudged in the gay rights movement a potential to break down the static and sexist definitions of marriage and family.").

64. The referendum took place on November 24, 1995, and was carried by a slim margin. See Christopher Price, Comment, *Finding Fault with Irish Divorce Law*, 19 LOY. L.A. INT'L & COMP. L.J. 669, 669 (1997). The referendum authorized legislation under which a court could grant a divorce if the couple had lived apart for four of the previous five years. See *id.* at 681-82 (presenting the text of the constitutional amendment). After a legal challenge to the referendum failed, the Family Law (Divorce) Act was published in June 1996. See *id.* at 680-83.

65. See John Finlay, *A Statement of the Case AGAINST the Proposed Amendment*

These examples indicate that, in considering legal reforms to premarital agreements, two separate considerations may be relevant: (1) the approach to the enforceability or review of premarital agreements that current views of marriage will support; and (2) how particular responses to the questions of the enforceability or review of these agreements will affect the way society thinks about marriage.⁶⁶

A few caveats are necessary before going further down this speculative trail. First, legal commentators must be careful and somewhat skeptical in referring to the equities of various kinds of agreements, the current "reality" about some institution, or the use of the law to reform that reality. The analysis naturally presupposes that they know far more about the social situation than they probably do.⁶⁷ This likely is the case with marriage and with premarital agreements, where empirical work on attitudes and practices is fairly sparse. To be sure, the argument from lack of empirical knowledge supports both action and restraint. The argument for restraint is straightforward: if one does not know the nature of the practice, one has little idea of whether one's "solutions" are needed, and even less notion of what effects one's reforms might have. On the side of action, one could argue that *because* there is so little information about the general "practice" of premarital agreements, it is almost hopeless to try to modify behavior directly through the law, and all

to Article 41.3.2 of the Constitution (visited Apr. 30, 1998) <<http://nis.rtc-tallaght.ie/sig/law.home/divorce2.html>> ("Divorce would change the legal basis of all marriages. The law would no longer define marriage as a lifelong commitment. This would undermine, destabilize and devalue marriage, contrary to the [Irish] constitutional guarantee by the State to protect the family and the instituon [sic] of marriage."). The Ad Hoc Commission on Referendum Information in 1995 supervised the preparation of this document, as well as the statement of the case "for" the amendment, also available at the same Internet site. *See id.*

66. It is important to distinguish two separate, if overlapping inquiries: the way certain legal rules may affect the way society *perceives* a practice or a social institution, and the way that the rules may affect the way society *acts* within that practice or institution (e.g., by creating incentives and disincentives for various actions).

67. Karen Gross made a similar comment regarding bankruptcy law: "As remarkable as it may seem to nonlawyers and many nonbankruptcy lawyers, we have developed a personal bankruptcy system based principally on who we imagine individual debtors and their creditors to be, while remaining remarkably ignorant about who they really are." Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1513 (1990) (footnote omitted).

one can reasonably hope to do is to make symbolic statements—for or against a certain view of marriage—with the mere possibility that such statements might have indirect and long-term effects on behavior. Agnostic on the real-world effects, one focuses on symbolic statements and chooses those that fit one's political morality.

Some might argue that the “normal,” deferential enforcement of premarital contracts reflects the “current reality” of marriage in some parts of America—that marriage is less a commitment for life, and more a kind of serial monogamy.⁶⁸ Assuming that this argument has merit, the question it raises is what vision of marriage, either actual or aspirational, is expressed when courts are willing to enforce such agreements, but with significant review of procedural and substantive fairness. It may be that here the court in *Simeone* was right, in that it is hard to justify the fairness approach except as a statement that these agreements often involve weaker parties that, as a class, require the protection of the courts.

The image of marriage that one might take from *Simeone* as well as from the UPAA approach to premarital agreements, which similarly creates a substantial presumption of enforceability, is one of an institution subject to substantial private ordering,⁶⁹ and one which people enter realizing that it may very well not be “until death,” with nearly as many marriages ending in failure as in success.⁷⁰

This leads back to the most basic question: How do we—as individuals—view marriage? And how should we—through the state, through law—view marriage? Some people have a tendency to deny that marriage is, or should be, about anything other than love or the desire to raise a family. Other people have a tendency to deny that marriage is about anything other than

68. See Schultz, *supra* note 2, at 249-50 (arguing for greater private ordering because of the “temporary” and “conditional” nature of modern marriage).

69. To clarify: With courts reluctant to interfere in what occurs on a day-to-day basis within intact families, there already is substantial de facto private ordering, in the sense that the partners come to some understanding as to how they will live together, and the state rarely intervenes. “Private ordering” in this context refers to the ability of a couple to enter into an agreement that the state is willing to enforce.

70. See Lynn A. Baker, *Promulgating the Marriage Contract*, 23 MICH. J.L. REFORM 217, 226 & n.34, 245 & n.101 (1990).

maximizing utility, or the like. The prosaic facts likely are: (1) that most marriages have, whether admitted or not, elements of each (e.g., that a partner can offer security may be part of his or her "romantic" allure); and (2) that the mixture of the romantic and the practical/economical likely will vary not only from generation to generation, but also at any given time from one marriage to the next, and even within a single marriage as the partners' perceptions, needs, and values evolve.⁷¹

That marriage might mean quite different things to quite different people may indicate that our laws should be similarly flexible;⁷² that is, couples should be able to choose from a "menu" of options, an argument considered in Section II.B.2.⁷³

II. FROM STATUS TO CONTRACT

The comment for which the legal historian Sir Henry Maine is most famous is: "We may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."⁷⁴ The idea is that while our rights and obligations once largely derived from our "status" as members of a class, caste, or ethnic group, or from a gender-defined role within an extended family, in modern times more and more of our legal rights and obligations are the result of private, voluntary agreements.⁷⁵

Most would consider the move from "status" to "contract" "a good thing." Few advocate a return to feudalism, with every man

71. See Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 798-801 (discussing the historical work of Lawrence Stone and the novels of Anthony Trollope to illustrate the way that the emphases on romantic matters or practical matters may change over time); see also ROBERT M. POLHEMUS, *EROTIC FAITH: BEING IN LOVE FROM JANE AUSTEN TO D.H. LAWRENCE* (1990) (discussing the treatment of love in important fiction, considering in passing the interweaving of practical concerns with romantic aspirations).

72. Eric Rasmusen & Jeffrey Evans Stake state this argument well in *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, *supra* note 4, at 460-64.

73. See *infra* notes 124-30 and accompanying text; 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) (offering an analogy between marriage law and corporate law, with the argument that people should be able to "vote with their feet" between alternative legal packages); Mary Anne Case & Paul G. Mahoney, *The Role of the State in Corporations and Marriage* 1-2, 18-20 (June 25, 1996) (unpublished manuscript, on file with author) (making a similar argument).

74. SIR HENRY SUMNER MAINE, *ANCIENT LAW* 165 (Dorset Press 1986) (1861).

75. See ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 45-46 (1989).

being stuck in the same socioeconomic group and profession as his father, and women rarely having choices of any kind. Still, some people take their enthusiasm for "contract" in stronger doses than others. Some, including self-described libertarians and many supporters of the law and economics movement, argue that, barring "market failure," allowing private parties to order their lives and their interactions as they see fit always will maximize individual autonomy and social welfare.⁷⁶ Most people, though, want the law to stop short of purely private ordering in all matters all of the time, whether because they think "market failure" is pervasive, or because they believe that there are social interests or interests in justice and fairness that occasionally or frequently trump autonomy and individual gain.⁷⁷

Even contract law has not made it all the way "to Contract," in the sense that there are aspects of agreements that parties may not agree to bypass or waive. For example, parties may not agree to impose large penalties—amounts far beyond those needed for compensation—in the case of nonperformance,⁷⁸ and they may not waive the duty to act in good faith.⁷⁹

76. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353-92 (1990) (discussing the basic precepts of economics and its strengths and weaknesses when applied to non-market behavior and, in particular, law). Cf. Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 991-1086 (1995) (offering a good overview of the strengths and weaknesses of economic analysis in its application to family law issues).

77. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996) (arguing that allowing the private ordering by the market will, in many areas, lead to important losses in dignity and equality); Estin, *supra* note 76, at 1016-22, 1036-52, 1074-87 (summarizing some of the shortcomings of economic analysis when applied to family law).

78. See RESTATEMENT (SECOND) OF CONTRACTS § 356 ("Liquidated Damages and Penalties"); U.C.C. § 2-718 (1989) ("Liquidation or Limitation of Damages; Deposits"). See generally Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 712-38 (1990) (arguing against the possibility or desirability of a morally neutral "freedom of contract" approach); Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 109-13 (1989) (arguing that the common law is inconsistent in the freedom it gives parties on substantive terms, in contrast to the restrictions on the ability to bargain around remedial rules). *But see* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1288-89 (7th Cir. 1985) (offering an economic argument for enforcing "penalty clauses" when there is no inequality of bargaining power).

79. See, e.g., U.C.C. § 1-102(3) (1989) ("[T]he obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agree-

Family law has not journeyed nearly as far toward complete private ordering as contract law, though it does reflect in many instances Maine's shift away from status rules.⁸⁰ First, marriage contains a much smaller set of rights and obligations than it once did. Most obviously, the states have removed the vast majority of stereotype-ridden, sex-based duties and obligations under which, for example, a husband had an obligation to support his wife, and the wife was obligated to follow the husband's choice of domicile.⁸¹ Second, no-fault divorce has given the par-

ment."). More precisely, the parties can agree to such provisions, and even voluntarily act in accordance with those agreements, but what the parties *cannot* do is get the state to enforce such agreements if one party to the agreement does not act in accordance with it.

80. For excellent discussions of the extent to which family law has moved "from status to contract," see CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW* 307-98 (1996) ("The Vow and the Covenant: The Contractualization of Family Law"); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446-70. This Article follows the unwritten requirement that, when discussing the contractual nature of marriage, *Maynard v. Hill*, 125 U.S. 190 (1888), must be cited and quoted:

[W]hile marriage is often termed by text writers and in decisions of courts as a civil contract, . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change.

Id. at 210-11.

On the topic of "status to contract" in marriage, one also can draw different and more complicated pictures regarding the history of family law. Two examples will suffice: First, some have argued that there is a largely contractual pre-history, before state intervention transformed marriage into an almost entirely status-bound relationship. See, e.g., Case & Mahoney, *supra* note 73, at 12-15; see also LAWRENCE STONE, *UNCERTAIN UNIONS AND BROKEN LIVES* 20-25 (1995) (discussing "contract marriage" in the sixteenth, seventeenth, and eighteenth centuries, which sometimes involved neither Church nor State). Case & Mahoney demonstrate that there was a time when the State's role in marriage was quite limited. If one goes far enough back into medieval history, there is some evidence that marriage was once "contractual" not only in the sense that the State was not directly involved in validating the relationship, but also in the sense that the parties could establish or alter their rights and duties as a married couple. See Case & Mahoney, *supra* note 73, at 22-24. Second, John Witte, Jr. has shown the ways in which various religious views on marriage have affected the development of marriage law, followed, only in the most recent decades, with a sudden withdrawal from this approach to marriage: thus, not "from status to contract" so much as "from sacrament to contract." See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT* 194 (1997).

81. See, e.g., *Graham v. Graham*, 33 F. Supp. 936, 939-40 (E.D. Mich. 1940) (discussing a range of sex-based limitations on married women).

ties to a marriage substantial power to end the legal relationship if they so choose, to the point that in many states the current rules, as applied, give each spouse more or less a right to divorce upon demand.⁸²

Remaining questions about the abilities of spouses to control the terms of their own marriage relate to their ability to set their obligations to one another during marriage and their ability to agree to the post-divorce consequences of their marriage.⁸³ This Article does not discuss the first issue, that of agreements setting or altering the obligations of spouses to one another,⁸⁴ or altering the grounds for divorce.⁸⁵ Additionally, this Article does not discuss in detail the extent to which the metaphor of contract is helpful or unhelpful in understanding the current rules regarding marriage and divorce.⁸⁶ Even as to agreements

82. The extent to which this is true varies considerably from state to state. There appear to be three states where divorce is possible only with the cooperation or consent of the other party unless fault is shown. See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 723 & n.8 (summarizing the divorce rules in New York, Mississippi, and Tennessee).

83. Ellman and Lohr suggest that marriage might be analogous to a long-term contract between commercial parties "where the standard of performance cannot be adequately specified by contract," and the problems arising from that fact are compensated for by "specify[ing] instead the consequences of termination." Ellman & Lohr, *supra* note 82, at 747. If the state's rules regarding alimony and property division can be thought of in these terms, an express premarital agreement obviously would fit the analogy even better.

For a provocative analysis of marriage within the context of game theory and social norms, see Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley ed., forthcoming 1998).

84. Regarding agreements entered into prior to marriage or during marriage that concern behavior during the course of the marriage, see *supra* note 12. Courts are probably least likely to enforce agreements covering either daily/mundane or intimate aspects of marriage, but such agreements may have benefits for the marriage regardless of the prospects of later legal enforcement. See, e.g., LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 225-333 (1981) (discussing the benefits of "intimate contracts" and offering examples of such agreements).

85. See Rasmusen & Stake, *supra* note 4, at 464-69. For an argument that agreements requiring or favoring fault-based approaches when parties divorce should be enforceable, see Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 906-11 (1988).

86. For an excellent analysis of this issue, see Ellman & Lohr, *supra* note 82, at 737-47. One of Ellman and Lohr's basic points is that it is hard to understand alimony as the "remedy" for a "breach" of the marriage "contract," because the "terms" of any such contract are not set with sufficient clarity by either the State or the

regarding post-divorce consequences of marriage, one must separate out agreements entered into when the process of dissolution is already underway. Courts have a strong tendency to enforce these "separation" agreements, barring a showing of unconscionable terms, duress, fraud, or the like—the types of arguments that also would block the enforcement of standard commercial contracts.⁸⁷ In contrast to divorce-focused premarital agreements, which likely occur in only a small percentage of marriages, separation agreements are very common.⁸⁸ The two types of agreements are similar in that their terms provide for the private ordering of the economic consequences of divorce. They do, however, have some important differences. The frequent use of separation agreements means that the proposal of such an agreement is less likely to come as a surprise to one of the parties. In addition, the incongruity between content and timing in premarital agreements, which requires thinking about divorce at the beginning of the marriage when things are, one hopes, going well, contrasts with the fact that separation agreements involve thinking about divorce when it is clearly imminent.⁸⁹

As for attempts to set the post-divorce terms in advance, the particular focus of this Article is agreements entered into just before marriage. In theory, spouses also could enter into such agreements early in their marriage—after the ceremony but long before divorce seems likely—although courts apparently have not encountered such attempts frequently.⁹⁰

parties. *See id.*

87. *See, e.g.,* Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1444 (1984).

88. As noted earlier, little hard empirical data is available, see *supra* note 15 and accompanying text, so all generalizations in this area will be somewhat speculative and overly dependent on anecdote and non-scientific observation.

89. Consider, by way of analogy, the old common law rule that agreements to arbitrate current disputes were enforceable, but agreements to arbitrate future disputes were not. *See, e.g.,* *Wells v. Mobile County Bd. of Realtors, Inc.*, 387 So. 2d 140, 144-45 (Ala. 1980) (applying common law rule and refusing to enforce an agreement to arbitrate future disputes); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 194, 218 (referring to a 1920 New York statute that made agreements to arbitrate future disputes enforceable).

90. For a discussion of how the law might be different with respect to the division of property upon death or divorce when parties enter into agreements other than

In principle, one could go very far toward a purely private ordering of intimate relationships.⁹¹ In fact, Martha Fineman has already advocated such a scheme, proposing the abolition of marriage as a state institution, with all intimate associations governed by private contracts instead.⁹² While few might support the call for abolishing marriage, there are many who might support substantial private ordering within marriage. The argument is straightforward: marriage is to a large extent a private matter between the people involved. Why should the two individuals not have the right to construct the factual, moral, and legal contours of their marriage relationship as they see fit? Assuming that such private ordering stays well clear of violence, abuse, or exploitation, the argument would continue that it is no

separation agreements *during* marriage, see 3 ALEXANDER LINDEY & LOUIS PARLEY, LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS ch. 91 (1997) ("Postnuptial Agreements"); Jeanne K. Stretch, *Premarital Agreements and Postmarital Agreements Enforced at Death*, in PREMARITAL AND MARITAL CONTRACTS 161-94 (Edward L. Winer & Lewis Becker eds., 1993).

91. It may be worth noting that the parties to a marriage are always free to order their lives as they see fit, within the wide boundaries of tort and criminal law, as long as it is done with the cooperation of both parties. The question is always "only" whether the State will intervene to enforce an agreement at the point when the parties (or their agents, if one of the parties is deceased) are no longer *voluntarily* abiding by the agreement. In the classic case of *Graham v. Graham*, the court, in considering an agreement by which the husband agreed to accompany his wife on her travel in return for an agreement of monthly payment, stated:

There is no reason, of course, why the wife cannot voluntarily pay her husband a monthly sum or the husband by mutual understanding quit his job and travel with his wife. The objection is to putting such conduct into a binding contract, tying the parties' hands in the future and inviting controversy and litigation between them.

Graham v. Graham, 33 F. Supp. 936, 939 (E.D. Mich. 1940).

92. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*]; Martha Albertson Fineman, *Contract, Marriage and Background Rules*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 183, 185-88 (Brian Bix ed., 1998) [hereinafter Fineman, *Contract*]. Professor Fineman has summarized her position as follows:

I suggest that all relationships between adults be nonlegal and, therefore, nonprivileged—unsubsidized by the state. In this way, "equality" is achieved in regard to all choices of sexual relational affiliations. I suggest we destroy the marital model altogether and collapse all sexual relationships into the same category—private—not sanctioned, privileged, or preferred by law.

FINEMAN, *THE NEUTERED MOTHER*, *supra*, at 5.

business of the state that the terms are of one kind rather than another.⁹³ Statutes and old, but apparently still valid, court decisions that make sexual relations outside of marriage illegal or penalize children born outside of wedlock still exist in most states, but courts rarely enforce them, and for the vast majority of people they have few real-world effects.⁹⁴ For most people in most places there is no *legal* barrier to a couple ordering its intimate relationship as it sees fit. A couple may still face *social* sanctions for cohabitation and raising children outside of marriage, but these too vary substantially from place to place and from family to family.⁹⁵

One argument sometimes raised against a private ordering approach is that a contractual approach creates a bias toward individualism, when there are good reasons for wanting to encourage altruism in relationships generally, and especially in marriage and families.⁹⁶ Whatever the merits of this argument as a general claim, in the context of current marriage and no-fault divorce law, contracts can be a useful means for a couple who want to make a *greater* commitment to each other, and who want to create *greater* incentives for altruistic behavior.⁹⁷ Pro-

93. If the sympathetic way of putting the argument is that marriages should be subject to the private ordering of the people involved, the unsympathetic way of characterizing the same position is that marriage should be subject to market forces. See discussion *infra* notes 138-43 and accompanying text.

94. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 98-102 (1996) (summarizing the statutes, if any, relating to "fornication" in each state and under federal law).

95. On the other hand, one might ask: If marriage were completely subject to private ordering, from the obligations of the spouses to one another during marriage to their obligations after dissolution, what interest would couples have in entering such a status, and what interest would the state have in creating or maintaining such a status?

In an unpublished manuscript, Eric Posner makes a similar point from the converse perspective. The rules prohibiting extramarital sex and sanctioning illegitimate births can be a means of encouraging people to make the costly commitment of traditional fault marriage. Where the social and legal sanctions against substitutes for legal marriage have decreased, it is not surprising that the commitment costs of marriage have been reduced, for example, through easier, no-fault exit, and vice versa. See Posner, *supra* note 83 (manuscript at 21-26, on file with author).

96. See, e.g., Schultz, *supra* note 2, at 241-42 (summarizing the argument).

97. This paragraph follows the argument of Rasmusen and Stake, *supra* note 4, at 466-69. For a provocative argument that laws should help foster a return to "status," and, through that return, encourage a greater degree of intimacy and commitment

ponents of private ordering argue that easy-exit divorce laws have the effect of rewarding parties who invest in human capital, such as their career or job skills, both of which are easily transferable after termination of the marriage, while creating a disincentive to investing in the relationship by acquiring abilities and various forms of knowledge that may improve the current relationship but may have little transfer value in a relationship with someone else or in a work context. Thus, couples who want to encourage more altruistic and relationship-centered behavior rationally might choose to enter private agreements waiving their rights to a no-fault divorce.

One hypothetical situation that tests the contractual/libertarian approach involves a couple in which one person, for some reason, refuses to get married without a premarital agreement. For present purposes, assume that the person insists upon an *unreasonable* one-sided agreement. The other party, though unhappy about the agreement, would rather be married with the agreement than not married without the agreement. Does society tell this couple that it will not give them the option of being married with an enforceable agreement, even though that would be their preference?⁹⁸

within families, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 118-53 (1993); see also Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573 (1994) (reviewing REGAN, *supra*, and suggesting the connection of Regan's "status" analysis to a "covenant" model of marriage).

98. The court in *Simeone v. Simeone*, 581 A.2d 163 (Pa. 1990), touched on this issue: "By invoking inquiries into reasonableness, however, the functioning and reliability of prenuptial agreements is severely undermined. Parties would not have entered such agreements, and, indeed might not have entered their marriages, if they did not expect their agreements to be strictly enforced." *Id.* at 166.

Katharine Silbaugh offers an interesting argument for *not* enforcing premarital agreements: Because premarital (and marital) agreements covering nonfinancial aspects of marriage and divorce are not enforceable, and Silbaugh agrees that there are good reasons for not enforcing those types of agreements, "the demands of equality suggest that we should at least have a presumption against the enforcement of monetary contracts." Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. (forthcoming 1998) (manuscript at 4, on file with author). Much of Silbaugh's analysis turns on the argument that it is important to treat the monetary and nonmonetary aspects of marriage equally. See *id.* at 53-66. For her argument to succeed, she needs the further conclusion that it is important to treat the monetary and nonmonetary aspects of *divorce* similarly. Premarital agreements are enforceable only as to the monetary aspects of divorce and unenforceable as to

This argument tracks other comparable fact situations. For example, there are merchants who would not sell to the poor if they were not able to impose relatively high interest payments or fairly severe sanctions for nonpayment of installments.⁹⁹ If the disadvantaged party in the premarital agreement preferred marriage under oppressive terms to not marrying at all, just as the poor person might prefer purchase under oppressive terms to not having the opportunity to purchase, why should the state intervene?¹⁰⁰

This Article does not mean to endorse the view that legal and moral inquiry should begin and end with the question of consent.¹⁰¹ As Robin West has argued, participation in an activity

the nonmonetary aspects, for example, child custody. *See supra* note 12. This second conclusion may or may not follow from the first. Silbaugh also offers responses to the argument that refusing to enforce premarital agreements might prevent some marriages: (1) she doubts that enforcement would in fact prevent many marriages; (2) she points out that a comparable argument might be made regarding marriages prevented by nonenforcement of nonmonetary agreements; and (3) she suggests that no great harm would come from preventing such marriages. *See id.* at 91-93. Those responses are worth serious consideration, though they may not be entirely dispositive. A possible libertarian reply is that Silbaugh's equality argument could support an argument for greater enforcement of nonmonetary agreements as long as the agreements, as always, took sufficient care to minimize third-party effects such as bad effects on children. One could argue, for example, that courts *should* enforce premarital agreements regarding child custody, *except* where a court finds that enforcement would significantly harm the children. This arguably is what happens now with separation agreements in which the divorcing parties agree on child custody arrangements.

99. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447-48 (D.C. Cir. 1965) (holding that cross-collateral clauses in the sale of goods may be subject to a defense of unconscionability); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306-08 (1975) (arguing that such clauses are defensible on economic grounds and that courts should enforce them).

100. One's attitude toward the issues in this line of questioning may depend on one's beliefs about the items in question. One may want to insist on the availability of furniture, or large appliances, or even television sets, to the poor on fair terms—and, the argument might go, to make them available at all *requires* making them available on one-sided terms—because one believes that people *need* these goods to live a dignified life in today's society. Some people would make a similar claim about the role of marriage. There are other people who would find that sort of claim for marriage absurd. It is exactly such diverging views concerning the role and meaning of marriage in society that makes legislative and judicial prescriptions about family law so difficult.

101. *See infra* notes 146-69, 190-218, 234-40, and accompanying text for discussions of this extremely difficult and multi-faceted problem.

(e.g., pornography, surrogacy, prostitution) may be extremely harmful even though fully consensual, and the harm may be of the magnitude necessary to justify state intervention in some form:¹⁰²

The liberal insistence that these transactions are problem-free because consensual does little but assume away a set of harms, and the radical insistence that because they are harmful they must therefore be subtly coercive, even when seemingly consensual, does little but give offense to the worker or the woman whose competency is thereby challenged.¹⁰³

Another part of the problem is that for every person who makes choices of this kind,¹⁰⁴ fully aware of what he or she is giving up and freely choosing to do so for whatever benefits may seem to come from the choice, there will be many others who act in ways that are less free, knowing, or autonomous.

Additionally, one could argue that sometimes restricting choices, while decreasing the welfare of the choosers in the short term, may lead to longer-term gains in welfare. Forbidding child labor had the effect in the short term of making matters harder for the families of children who could have been bringing needed money to the household. In the longer term, however, the prohibition probably worked to hasten the development of free public education and other child welfare provisions, which increased the overall welfare of the families in question.¹⁰⁵ This, however, is a hard argument to make at the best of times, and it is not obvious how the nonenforcement of premarital agreements is likely to lead to, or be an integral part of, a similar political dynamic bringing about the betterment of those initially made worse off by the reduction of choice.¹⁰⁶

102. See Robin West, *The Other Utilitarians*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 197, 220 (Brian Bix ed., 1998).

103. *Id.*

104. For example, to accept a premarital agreement, to take on a job conventionally thought to be degrading, to play a movie role conventionally thought to be demeaning, or to sell sexual services or a body part.

105. See Michael J. Trebilcock, *Critiques of The Limits of Freedom of Contract: A Rejoinder*, 33 *OSGOODE HALL L.J.* 353, 374-75 (1995).

106. See *id.* at 375-76.

The analysis returns, inevitably, to the question of the state interest in marriage, in wanting couples married rather than unmarried and in wanting marriages to be of a particular form. One also can ask the question from the other side: What is the interest couples have in being married if they are able to shape their relationship as they wish when they remain unmarried?

The state shows its preference for the married state over the unmarried state by offering certain benefits to married couples that unmarried couples do not get or can get only with difficulty, including health benefits, survivorship rights, and rights to make health care decisions on behalf of the other partner.¹⁰⁷ This in turn also gives one of the more prosaic reasons couples choose to marry—to obtain those benefits. Another reason parties marry is that their own beliefs or the beliefs of their community involve significant social sanctions against unmarried couples and/or the children of unmarried couples.

Many individuals, including the same-sex couples litigating for the right to marry, clearly seem to want marriage for its own sake, beyond whatever monetary or “practical” benefits may come from that status and beyond simple questions of family or community approval. Part of the value of marriage is the public commitment involved and the community support that mobilizes to support the marriage relationship. Even beyond that, marriage has a positive social meaning and an attractiveness as an institution. One wonders, however, whether the social meaning of marriage just might be the residue of a time when marriage had greater significance because of the social and legal sanctions for sexual relations or having children outside of marriage.

Returning to the State’s side of the equation, one characterization of the State’s interest in marriage is that it has an interest in promoting stable family units of a certain kind, which arguably provide the best atmosphere within which to raise children and which arguably contribute to general social stability. A more cynical view of state interest captures an aspect of the historical explanation as well as an aspect of the present reality. To this

107. See *Baehr v. Lewin*, 852 P.2d 44, 58-59 (Haw. 1993) (discussing such benefits as one reason why same-sex couples would want to marry).

view, marriage is not about the altruistic and romantic union of two people, nor is it about the private ordering of two hyper-rational bargainers. Rather, it is about protecting established families and their property. Historically, the public aspect of marriage—requiring public registration and ceremony before someone with delegated public power—was motivated in large part by the desire of wealthy families to prevent their children from making secret marriage contracts with attractive but “unsuitable” members of a lower class.¹⁰⁸ Premarital agreements imposed by the family of someone about to be married for the purpose of keeping wealth within the family reflect this same pragmatic view of marriage.

Another obvious sense in which marriage is not just a private matter between the parties involved is that it often involves children. In principle, premarital agreements should have little effect on children, as the agreements are not enforceable on issues of child custody and child support,¹⁰⁹ and enforcement of the state child support guidelines should guard children of divorced parents from economic harm. With non-custodial parents often failing to live up to their child support obligations, however, the fact that the custodial parent receives less property or spousal support than he or she otherwise might will have obvious implications for the child’s well-being. Similarly, the arrival of children in a family may lead the financially weaker spouse to abandon or de-emphasize his or her career, a move that could well exacerbate the post-divorce effects—on both the financially weaker spouse and, derivatively, the children of the marriage—of rights waived under the agreement.

A. *Separation Agreements Versus Premarital Agreements*

One way to try to pinpoint the source of society’s discomfort with enforcing some or all premarital agreements is to contrast this with reactions to separation agreements, which the courts have been traditionally more likely to accept and enforce as written. In cases where the spouses enter an agreement with a

108. See STONE, *supra* note 80, at 32-34.

109. See *supra* note 12.

view to divorce, and the provision for the poorer or weaker spouse over time turns out to be clearly inadequate, should the courts consider ignoring, invalidating, or modifying the agreement?¹¹⁰ In one such case, a Canadian court awarded an estranged wife permanent maintenance, but she subsequently agreed to a one-time lump sum payment in lieu of maintenance.¹¹¹ Fifteen years later, the former wife had exhausted the funds she received and was living at the poverty level.¹¹² Meanwhile, her former husband had become quite wealthy.¹¹³ The former wife sought an order of spousal support despite her earlier agreement to waive her rights to support, and the Canadian Supreme Court refused her request on the basis of the earlier agreement.¹¹⁴ Other Canadian cases have come out the other way, with courts refusing to enforce separation agreements by which one party waived rights to support when they found that subsequent developments were not in the contemplation of the parties when they signed the agreement.¹¹⁵

To the extent that one's reaction to a separation agreement that works out poorly for one party is the same or different from one's reaction to the premarital agreement that works out poorly for one party, one can gain evidence as to whether it is the peculiar premarital nature of the latter which raises the question or one's view about the obligations of spouses to one another, regardless of agreements voluntarily entered before, during, or after marriage. One may argue that in situations where one spouse has invested so much of his or her life into a marriage, and, not coincidentally, into supporting the other spouse's ability to advance in his or her career, it is unfair for that spouse to be left worse off while the prosperous spouse thrives, regardless of agreements once entered.¹¹⁶ The argument hinges on a non-

110. See generally Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1242-44, 1270-76 (1998) (discussing separation agreements).

111. See *Pelech v. Pelech* [1987] 7 R.F.L. (3d) 225, 225.

112. See *id.*

113. See *id.*

114. See *id.* at 225-26.

115. See, e.g., *Santosuosso v. Santosuosso* [1997] 27 R.F.L. (4th) 234 (awarding spousal support despite the wife's agreement to waive her rights to support).

116. See Hadfield, *supra* note 110, at 1243, 1271-76 (offering similar arguments in

waivable duty arising from a combination of the nature of the relationship and the actual sacrifices made.

Occasions exist when the argument for enforcing the premarital agreement might be *stronger* than for enforcing a separation agreement. For example, one of the parties might have relied on the enforceability of the premarital agreement in his or her decision to marry, a reliance arguably more substantial than any reliance likely involved in entering separation agreements.¹¹⁷ The question then becomes whether this argument of reliance is enough to overcome claims of non-waivable duties.

B. Some Middle Paths

Middle path approaches to regulating marriage and divorce attempt to bridge private ordering and full state regulation. These include treating state rules as default rules around which individuals can contract and having the state offer couples a list of options from which they must select one.

1. Default Rules and Reasonableness

Contract law, in particular Article 2 of the Uniform Commercial Code, offers examples of how a set of rules can respect individual choice while also encouraging fair outcomes and expressing public policy. Allowing contracting parties the authority to set their own terms on most issues accomplishes this goal. Default rules prevail if the parties are silent, but the parties can “contract around” these rules by express terms in an agreement.¹¹⁸ These default rules usually reflect either the terms parties most likely would choose in any event—and therefore the ones that are most likely to reflect particular parties’ actual intentions—or the terms considered fairest to the parties.¹¹⁹

the context of separation agreements).

117. In such cases, the reliance will be more along the lines of litigating or not litigating a claim regarding property division or spousal support.

118. See, e.g., U.C.C. §§ 2-308 (place for delivery), 2-309 (time for shipment; termination), 2-310 (time of payment), 2-509 (risk of loss) (1989). For a provocative argument that, in practice, the U.C.C. default rules operate more like quasi-compulsory norms, see Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1755-59 (1997).

119. Among the extensive commentaries on the nature and purpose of default rules

Second, the law establishes presumptions in favor of certain understandings of provisions—usually understandings likely to be fairer to the weaker party—when the contract is ambiguous, but again allows agreements on contrary terms if the agreement clearly expresses those terms.¹²⁰

The connection between this approach to contracts and the regulation of premarital agreements is as follows: When some state laws and some commentators argue that the enforceability of premarital agreements should turn on the substantive fairness of the terms of each agreement, how does one determine whether the substantive terms are reasonable? One could argue that the state may justify intrusive forms of review because of its interest in maintaining its rules and standards for property division upon separation and divorce. This, however, requires

are: Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (advocating the use of "penalty" defaults, for which the parties would not have contracted, to force parties to reveal beneficial information to each other or to third parties); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985) (arguing that rational actors would prefer default rules that maximize the joint benefits from contracting); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992) (claiming that courts are usually correct in not supplying terms to incomplete contracts, including incomplete relational contracts and that the incompleteness often is caused by asymmetrical information, and thus there are no problems that the courts could solve by supplying terms).

The statement in the text is, at best, incomplete. Sometimes, there are other reasons for choosing a default rule. Ayres and Gertner argue that there are occasions when the default rule chosen should *not* be the one that most parties would have chosen ("the majoritarian default rule") or even the one that these particular parties would have chosen ("an optimally tailored default rule"), but rather one that will enhance efficiency by forcing the parties to contract expressly over an issue. See Ayres & Gertner, *supra*, at 101-04. Also, sometimes there might be reasons for having the default rule be a "muddy" standard, allowing parties to contract around it to form a bright-line rule, or to have the default rule impose more stringent obligations, allowing parties to contract around it to form a less stringent obligation. See, e.g., Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1403-08 (1992) (book review) (discussing the advantages of "muddy" default rules in corporate law).

120. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 227 (stating the presumption, in some circumstances, against interpreting a term as a condition), 228 (stating the presumption that a "satisfaction" clause should be understood in objective, not subjective, terms) (1981).

one to see state standards as a statement of what is reasonable, and anything else as unreasonable or unjust, and one therefore only should depart from those standards with great reluctance.

One could just as easily see current or future state standards simply as default rules, as Calabresi and Melamed saw liability rules.¹²¹ Only the parties can determine what constitutes a reasonable settlement, and the default rule offers, at best, an imperfect estimation for those occasions when the parties have not or could not come to terms. The ideal solution, from a law and economics perspective, is what in fact occurs in premarital agreements: the parties themselves agree to a reasonable settlement of their economic issues.¹²² When the parties do not agree, the state's ideas of fairness are used.

The above discussion, however, likely assumes roughly similarly situated partners, who both might be considering the issues surrounding the terms of dissolution. To the extent that people have concerns about the enforcement of premarital agreements, it is because of quite different scenarios—in particular, those in which parties with great wealth, sophistication, and bargaining power write agreements that “contract around” the “default” terms.¹²³

2. *Menus of Options*

An alternative frequently discussed among commentators in recent years, which seems to offer a middle position between purely private ordering in marriage and a strong state role, is that of a “menu.” Using this device, the State would set out a series of options regarding roles within marriage, property rules during marriage, property rules upon divorce or death, and so on, from which each couple about to marry would have to choose one.¹²⁴ Louisiana's recently enacted covenant marriage law

121. See Calabresi & Melamed, *supra* note 9, at 1106-10.

122. The court in *Simeone v. Simeone*, 581 A.2d 163, 165 (Pa. 1990), offered a similar argument: “We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what they regard as an acceptable distribution scheme for their property.” *Id.* at 166.

123. The author is grateful to Eric Posner for the point summarized in this paragraph.

124. See Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and*

does this on a small scale.¹²⁵ The Louisiana law requires couples marrying in that state to choose between a traditional marriage, which would allow divorce on no-fault or fault grounds, and a "covenant marriage," which would allow divorce usually only on fault grounds.¹²⁶ Under the no-fault provisions, a couple may obtain a divorce after a separation of six months, or immediately if one spouse is guilty of adultery or has been sentenced to prison for a felony.¹²⁷ A covenant marriage would allow a divorce only if the couple had been separated for two years,¹²⁸ or if one spouse is guilty of adultery, physical or sexual abuse, or abandonment for at least a year.¹²⁹ As one commentator stated, this "choice would almost certainly make for some awkward premarital conversations."¹³⁰

The comparison with premarital agreements is obvious, but the differences also are telling. The covenant marriage is a choice imposed by the state, and all couples must face it. Also, there are only two options, and they involve the availability of

Exclusivity of Remedies in Partnership and Marriage, 58 LAW & CONTEMP. PROBS., Winter 1995, at 221; Rasmusen & Stake, *supra* note 4, at 460-64; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 85-86 (1990); Stake, *supra* note 8, at 429-37; Weisbrod, *supra* note 71, at 807-14.

125. See LA. REV. STAT. ANN. § 9:272 (West 1998).

126. See *id.* § 9:307; see also Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 27, 1997, at A1. Already-married couples may "convert" their marriages into covenant marriages by executing a declaration of intent to that effect. See LA. REV. STAT. ANN. § 9:275. For a good overview of the covenant marriage law, the problems it was meant to address, and the new problems it might create, see Margaret F. Brinig, *The Marriage Covenant*, in THE FALL AND RISE OF FREEDOM OF CONTRACT (F. H. Buckley ed., forthcoming 1998).

127. See LA. REV. STAT. ANN. § 9:275.

128. "Separation" in the above description means only "living separate and apart." *Id.* § 9:307(A)(5). If a court had rendered a "judgment of separation from bed and board," it would be sufficient grounds for divorce that the parties had been living "separate and apart" for an additional year (one year and six months, if there were minor children) beyond the date of the judgment of separation from bed and board. *Id.* § 9:307(A)(6)(a),(b).

129. See *id.* § 9:307(B).

130. Sack, *supra* note 126, at A1. The early evidence is that few people are taking up the "covenant marriage" option. See Bruce Nolan, *Bishops Back Off Covenant Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1, available in 1997 WL 12674773 ("In the month after the law took effect Aug. 15, Louisiana officials statewide issued only 26 covenant marriage licenses out of about 3,000.").

divorce rather than the economic consequences of divorce. In contrast with the proposals for “a menu of options,” the covenant marriage law has too few options, and covers too little legal ground to be considered a meaningful reform.

3. *Sunset Provisions*

A proposal commentators have discussed informally on a number of occasions¹³¹ is that premarital agreements might seem less problematic if there were a “sunset provision” that ended the effectiveness of some or all of the agreement’s provisions once the marriage lasted a certain number of years or once children were born. Legislation could implement such a provision,¹³² though of course the parties themselves would be free to insert such terms within an agreement.¹³³

Sunset provisions offer a compromise between the interest in private ordering and concerns about rationality—concerns which grow the longer a couple is married and the more their lives change—and between the interest in private ordering and the state interest that parties not be left destitute at the end of a long marriage. While there are not many examples of similar provisions in the law, the law of copyright, until recently, provided a right that automatically expired after a term of years.¹³⁴

131. For example, the proposal was raised when an earlier version of this Article was presented at Boston College Law School and at Quinnipiac College School of Law.

132. Courts could in principle also create such rules as a matter of their common law powers, but rules of that kind are not the ones that courts seem most comfortable in promulgating. Courts instead prefer talking of only enforcing “reasonable” terms, or, to refer to the analogous problem of restrictive covenants, only enforcing the covenant for a “reasonable” time.

133. See Edward L. Winer, *Practical Considerations for Premarital Agreements*, in *PREMARITAL AND MARITAL CONTRACTS* 143-52 (Edward L. Winer & Lewis Becker eds., 1993) (providing an example of a premarital agreement in which the parties revert to statutory rules if the marriage lasts at least five years).

134. See 1 PAUL GOLDSTEIN, *COPYRIGHT* § 4.10, at 4:187 (1998) (“[T]he 1976 Copyright Act [gave] authors and their statutory successors the nonwaivable right to terminate copyright grants after the lapse of a prescribed period.”). The prescribed period varies depending on when the grant was executed. See *id.* (citing sections 203 and 304(c) of the 1976 Act).

Like escalator clauses within premarital agreements,¹³⁵ sunset provisions might create unfortunate incentives for parties otherwise uncertain about their marital future to act decisively for divorce before the rights under the contract expire or change.¹³⁶ It is possible, however, that courts could mitigate this problem by using a "good faith" requirement and not giving full contractual effect to terminations timed for such reasons.¹³⁷

C. Commodification

When activities or arrangements go from state prohibition or state regulation to purely private ordering, the change often raises concerns about the "commodification" of the activity or arrangement in question.¹³⁸ To what extent does enforcement of premarital agreements constitute a "commodification" of marriage, or the entry of marriage into the market? The critics of commodification generally assert that some things should not be considered part of the market, and should not have a price tag placed upon them.¹³⁹ It is not coincidental that society considers something it values greatly to be "priceless" or "beyond price."¹⁴⁰ The non-commodification argument comes in different

135. See, e.g., Winer, *supra* note 133, at 147-48 (discussing form agreement with provisions authorizing different levels of support if the marriage ended before two years or between two and five years).

136. See, e.g., Bruce Weber, *Donald and Marla Are Headed for Divestiture*, N.Y. TIMES, May 3, 1997, at 27 (reporting that Donald Trump divorced his second wife when he did because of the timing of a sunset provision in their premarital agreement).

137. Cf. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (holding that the termination of an at-will employee, apparently motivated by the desire to deny the worker a commission arguably already "earned," was wrongful because done in "bad faith").

138. See RADIN, *supra* note 77, at 1-15; Neil Duxbury, *Do Markets Degrade?*, 59 MOD. L. REV. 331, 331 (1996); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 347-49 (1986) (noting that there are situations in which monetary valuation or monetary substitution would seem inappropriate); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 785-90 (1994) (same).

139. See, e.g., RAZ, *supra* note 138, at 347-49.

140. One also notes Oscar Wilde's definition of a cynic as someone "who knows the price of everything, and the value of nothing." Oscar Wilde, *Lady Windermere's Fan*, in *THE IMPORTANCE OF BEING EARNEST AND OTHER PLAYS* 7, 45 (Peter Rahy ed.,

forms. The most basic form holds that some items, such as babies or human organs, should not be sold. Others make the slightly different argument that some items, such as one's liberty, should not be alienable, and that others, such as services for surrogacy or for arranging an adoption, though compensable, should have strict constraints as to the terms of compensation.¹⁴¹

Premarital agreements do not raise the issue of "commodification" in the way that prostitution, surrogacy agreements, or the sale of human organs do, in that they involve no straight purchase or market valuation of any service. They do evoke a sense of an agreement likely, though not certainly, concerned with monetary arrangements in an area in which society is somewhat uncomfortable about negotiating over the monetary terms. At the least, a background monetary issue exists in some of these arrangements: unless one party agrees to waive part of his or her rights to property and spousal support upon divorce, the other party will refuse to marry. It becomes, in such circumstances, a question of how much money, discounted by time and by contingency of divorce, this marriage is worth to the party to whom the agreement is presented.¹⁴²

Mary Anne Case and Paul Mahoney summarize the arguments regarding commodification briefly but succinctly. On one side is the view that "it is unseemly to bargain about love"; on the other side is the semi-economic claim "that couples may have different preferences regarding how their lives will be

Oxford U. Press 1995) (1891).

141. See, e.g., RADIN, *supra* note 77, at 20 (discussing the concept of "incomplete commodification"); Duxbury, *supra* note 138, at 331.

142. Separation agreements, though they also are quite expressly agreements concerning the division of assets, do not raise commodification questions in the same way. In part, this is because the marriage, and presumably the love that once held it together, is at that point past, and so one would not speak of those values being commodified by a separation agreement. Additionally, separation agreements are simply the necessary disentangling of two lives which had, until then, been joined at least to some extent by law, and usually to a great extent in fact. Separation agreements are not seen as commodifications because no obvious alternative to having such agreements—or similar divisions being done by the courts or by the operation of law—seems workable.

structured, and as between the state and the couple themselves, many people would regard the couples as the ones better positioned to reach a mutually satisfactory accommodation of those preferences."¹⁴³

Those with concerns about bargaining over the terms of marriage or the terms of dissolution can hold resolutely to whatever default rules their state provides and refuse to marry anyone who will not marry without a premarital agreement, which may not be bad advice in any event. To the extent that states get around to a Louisiana-like result of having a menu of options from which couples must choose, choice will no longer be avoidable, but it also may no longer have the same unpleasant social meaning that premarital agreements now seem to carry for many.

III. LONG-TERM AND RELATIONAL CONTRACTS

A. *Contractual Approaches: Old and New*

When the court in *Simeone* and certain commentators advocated applying the standards from contract law to premarital agreements, they intended the agreements to be subject to minimal scrutiny.¹⁴⁴ That perspective seems to depend, however, on a view of contract law that is decades behind the developments in contractual doctrine and commentary.¹⁴⁵ A modern approach to contract law might reach results that, by enforcing some premarital agreements but not others, better reflect the intuitions of most people regarding the fair result in different cases. This section first discusses the common law doctrine of duress and how courts might use it to reach acceptable results in premarital agreement cases without deviating in any significant way from normal contract analysis. Second, this section considers how

143. Case & Mahoney, *supra* note 73, at 20. Case and Mahoney go on to note that there may be a problem of third-party effects that could justify some greater state role in setting possible agreement terms. *See id.* This, however, is different than saying that such matters should not be subject to private ordering at all.

144. *See Simeone v. Simeone*, 581 A.2d 162, 165-68 (Pa. 1990).

145. A similar view is well-presented and discussed at greater length in Weisbrod, *supra* note 71.

some ideas from Article 2 of the Uniform Commercial Code might be helpful in construing premarital agreements, in particular the doctrine of "good faith." Additionally, the next part of the Article considers the possibility of applying some ideas from the treatment of relational contracts to this area.

1. *Duress and Related Doctrines*

It is quite possible that for many of the circumstances in which intuition suggests that a court should not enforce a premarital agreement, the fairly conventional contract analysis of duress could justify such a conclusion. The *Simeone* case, discussed previously,¹⁴⁶ is one case in which a judge or jury might reasonably have used duress to refuse to enforce the agreement. Another example involved the marriage of John and Christina DeLorean. In that case, the premarital agreement provided that all property and income acquired by each person before the marriage *and* after the marriage would remain the separate property of that person.¹⁴⁷ When the marriage ended 13 years later, the parties' combined assets of over \$20 million were almost all in the husband's name.¹⁴⁸ The agreement had been presented to the bride-to-be only hours before the wedding, with the threat that the wedding would be canceled if she did not sign the agreement.¹⁴⁹ The case, however, had factors that may have pointed away from a finding of duress: the bride-to-be had access to an attorney, though one selected by the husband-to-be;¹⁵⁰ though the husband-to-be had much greater assets and business experience, the bride-to-be had some experience in business; and the bride-to-be had been through a prior marriage and

146. See *supra* text accompanying notes 40-55.

147. See *DeLorean v. DeLorean*, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986).

148. See *id.*

149. See *id.* at 1258-59; cf. *Juliano v. Juliano*, No. FA 94039973, 1997 Conn. Super. Ct. LEXIS 2396, at *1 (Sept. 5, 1997) (discussing premarital agreement signed three hours before the wedding and concluding, based on timing alone, that the agreement was unenforceable because of coercion).

150. See *DeLorean*, 511 A.2d at 1259. Actually, the attorney advised against signing the agreement. See *id.*

divorce.¹⁵¹ The court in *DeLorean* decided to enforce the agreement,¹⁵² but a reasonable judge or jury could have come to a contrary conclusion using the normal common law understandings of duress and related doctrines.

In *Ex parte Williams*,¹⁵³ a woman, after discovering that she was pregnant, had asked the father of the child to marry her. Two months later, the father-to-be told the woman that he would marry her only if she signed a premarital agreement.¹⁵⁴ The woman signed the agreement and the parties were married, but after seven years of marriage, the husband sued for divorce and sought to enforce the premarital agreement.¹⁵⁵ The Alabama Supreme Court, reversing summary judgment for the husband, held that there remained genuine issues of material fact regarding voluntariness and full disclosure.¹⁵⁶ As to the former, the court characterized the issue as

whether the father's conditioning the marriage on the pregnant mother's signing the antenuptial agreement, joined with the mother's moral objection to abortion and the importance of legitimacy in a small town, created a coercive atmosphere in which the mother had no viable alternative to accepting the father's condition for marriage, i.e., signing the agreement.¹⁵⁷

Richard Craswell, in his work on unconscionability, presents one helpful way to articulate what is most bothersome about the process behind many of the agreements in these cases.¹⁵⁸

151. *See id.*

152. *See id.* at 1264.

153. 617 So. 2d 1032 (Ala. 1992).

154. *See id.* at 1034. The agreement stated that "in the event of legal termination of the marriage, the wife is to receive \$1,000 per year for each year that the parties are married for a maximum of ten years." *Id.*

155. *See id.*

156. *See id.* at 1035.

157. *Id.*

158. *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993). Unconscionability, understood in conventional ways, has and will continue to have significance, as courts use that doctrine to invalidate the most egregiously one-sided premarital agreements. *See, e.g., DeLong v. DeLong*, 1998 Mo. App. Ct. LEXIS 69, at *43-*45 (Jan. 20, 1998)

Craswell borrows terminology from an earlier work by Calabresi and Melamed¹⁵⁹ to offer a helpful clarification or proposed modification of the way one thinks about questions of unconscionability, duress, and related issues.¹⁶⁰ Craswell casts the argument largely in terms of economic analysis and efficiency,¹⁶¹ but the point relevant to the present discussion can be made in lay person's language. Craswell's analysis explains that when a court is considering not enforcing a contractual term due to procedural or substantive unfairness, it should consider how such unfairness most easily could be prevented.¹⁶² Consider a contract signed when one party had a gun pointed at his or her head. The party effecting the coercion can avoid this type of procedural inequity easily. The proper response by the courts therefore is to refuse to enforce agreements reached in this unfair way in order to create a strong incentive for parties not to reach agreements through coercion of this type.

A contrasting situation involves an insurance agreement with many pages of exclusion clauses in small print, written in language difficult to understand. Courts could conclude that the insurance carrier has not obtained proper consent for these clauses because the consumer did not fully understand the content of what she was signing.¹⁶³ One option would be for courts to say that none of these clauses will be enforceable, unless the carrier specifically drew the consumer's attention to the clauses and explained them in terms that the consumer could understand. The problem is that it might not be reasonable or

(invalidating on the basis of unconscionability a premarital agreement that excluded the wife "from virtually all assets that the marriage would acquire").

159. See Calabresi & Melamed, *supra* note 9.

160. See Craswell, *supra* note 158, at 15-63; Richard Craswell, *Remedies When Contracts Lack Consent: Autonomy and Institutional Competence*, 33 OSGOODE HALL L.J. 209, 214-21 (1995).

161. In particular, the article offered analysis in terms of whether entitlements are protected by property rules or liability rules. When an entitlement is protected by property rules, no infringement of the entitlement will be allowed without receiving the consent of the entitlement holder. If, however, the entitlement is protected by a liability rule, infringement of the entitlement will be allowed as long as damages are paid.

162. See Craswell, *supra* note 158, at 8-12, 17-20.

163. See *id.* at 10-12.

practical to demand this type of diligence on the part of insurance companies; it might take days to explain all the terms of an agreement. Where obtaining full and proper consent to contractual terms is not practical, an alternative is for the courts to say that they only will enforce the terms to the extent that those terms are reasonable.¹⁶⁴ To the extent that the terms are not reasonable, the courts will impute a reasonable term in place of the unreasonable one.

This kind of analysis could be applied in the context of premarital agreements by looking at these agreements, considering what aspects of them are troubling, and determining whether it would be better in the long term to offer the remedy of nonenforcement or the remedy of reasonable default provisions.¹⁶⁵ In many cases, one party presents the agreement to the other on the eve of marriage, with the condition that if he or she does not sign it, the marriage is off.¹⁶⁶ One could argue that, given the social and emotional realities of such situations, this is coercion that rises to the level of duress. If such a judgment is made, it is important then to analyze how difficult it would be to prevent this kind of coercion. Given that there usually would be no difficulty in simply presenting the agreement to the other party at an earlier time, the decision then should be that agreements presented on the eve of marriage, with the threat of not going through with the ceremony if the agreement were not signed, would not be enforceable.

The presentation of a proposed agreement on the eve of marriage also might raise the possibility of a defense of undue influence. Undue influence involves the combination of overpersuasion by one party and vulnerability on the part of the other.¹⁶⁷ A party often is vulnerable because of the emotional

164. *See id.*

165. On the treatment of state divorce rules as default provisions, see *supra* text accompanying notes 118-23.

166. *See, e.g.,* *Simeone v. Simeone*, 581 A.2d 162, 163 (Pa. 1990).

167. The classic case of undue influence is *Odorizzi v. Bloomfield School District*, 54 Cal. Rptr. 533 (Cal. Ct. App. 1966). In that case, a teacher had been arrested for homosexual activity, and after he returned from arrest and interrogation, having had little sleep for two days, he was confronted in his apartment by his principal and

strain of an impending marriage, caused by both the event itself and the stress that often comes with its planning. When, in this situation, one learns that the premarital agreement must be signed "right now" or the wedding is off, a strong argument for undue influence is present.¹⁶⁸

Parties to a premarital agreement easily can avoid the procedural impropriety of presenting an agreement on the eve of marriage, and courts might largely end the practice by adopting a bright-line rule. If courts clearly state that they will not enforce agreements presented at the last moment when they could have been presented at an earlier time, such as two weeks—or two months—before the wedding, the frequency of such practices should diminish drastically.

Of course, this is not meant to overstate optimism regarding bright-line rules.¹⁶⁹ The variety of fact situations in real cases always will outrun bright-line rules set out to create and effect

the district superintendent. *See id.* at 537. They said that they had his best interests at heart, urged him to resign at once, warned him of the adverse consequences if he did not resign, and told him that there was no chance to consult an attorney. *See id.* at 537-38. The court concluded that the teacher could rescind the signed resignation on the basis of undue influence. *See id.* at 543.

168. The court in *Odorizzi* listed seven elements that indicate overpersuasion:

- (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party to the servient party, [and] (7) statements that there is no time to consult financial advisers or attorneys.

Id. at 541. Many of these factors, if not all of them, may be present when a premarital agreement is presented at a late date.

169. For one argument in favor of bright-line rules in this area, see *Gant v. Gant*, 329 S.E.2d 106, 115 (W. Va. 1985):

In crafting rules in an area such as the enforcement of prenuptial agreements only one thing is certain: no matter what rules we adopt there will be cases when the application of those rules will be inequitable. Therefore, the question to be asked is whether the adoption of firm rules making prenuptial agreements presumptively enforceable in their stated, explicit terms will advance or undermine legitimate public policy that favors marriage. In the field of prenuptial agreements, firm rules favoring enforceability inevitably further the public policy of encouraging middle aged, cohabiting couples to regularize their relationships by getting married.

fair results. For example, if the rule provides that a premarital agreement will not be enforceable if it is presented for the first time merely days before the ceremony, a case likely would arise in which the parties *discussed* the agreement, at greater or lesser length and in greater or lesser detail, months before, but it was presented only days before the ceremony. Dealing with such varying fact patterns is the function of the common law, but such a scenario reminds one that bright-line rules are unlikely to remove *all* uncertainty and unpredictability in this area.

2. U.C.C. and Good Faith

The court in *Simeone*, when it relegated premarital agreements to a contractual approach, seemed to have in mind some classical conception of contract encompassing *caveat emptor*, naive "plain meaning" enforcement, and little attention to the relationship between the parties or the larger context within which the agreement was signed.¹⁷⁰ If one could apply "contract principles" to premarital agreements, why not apply, by analogy, the quite different principles underlying Article 2 of the U.C.C.?¹⁷¹

The U.C.C. obligates parties to exercise good faith in performing and enforcing the obligations of an agreement,¹⁷² construes contractual terms in light of the parties' course of performance and course of dealing and in light of trade usage,¹⁷³ and implies various warranties unless they are expressly excluded.¹⁷⁴

170. *Simeone* did offer one difference for premarital agreements: that courts should view the parties to the agreements as fiduciaries for the purpose of requiring disclosure of financial matters. See *Simeone*, 581 A.2d at 167 ("Parties to these agreements do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust that calls for disclosure of their financial resources.").

171. This Article discusses the application of U.C.C. principles *by analogy*. It does not imply in any way that marriage is, or should be considered, as a kind of "sale of goods."

172. See U.C.C. § 1-203 (1989). The *Restatement* also imposes this requirement. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

173. See U.C.C. §§ 2-202, 2-208.

174. See *id.* §§ 2-314, 2-315. The text slightly overstates matters, as implied warranties also can be modified or excluded by the parties' course of performance or by

For contracts of indefinite duration, a party may terminate only after reasonable notice,¹⁷⁵ and courts sometimes have held actions apparently authorized by the express wording of a contract to be bad faith actions in breach of the agreement.¹⁷⁶ These changes from classical contract thinking are by no means limited to U.C.C. cases.¹⁷⁷

If courts apply *these* types of contract principles to premarital agreements, there will be far less reason for complaint. Perhaps courts could interpret the terms of premarital agreements that appear to be one-sided in more reasonable ways by using the tools of modern contract law, or by disallowing the strict enforcement of the express terms of some agreements as contrary to "good faith." These are possibilities that require further thought and creative suggestion. Also, as discussed in the next section, modern thinking concerning long-term agreements may provide useful tools and approaches for interpreting premarital agreements.

B. Different Treatment for Long-Term Contracts?

A growing body of literature has discussed whether contracts governing long-term commercial relations should be considered, either by the law or at least by legal commentators, in a way significantly different from other contracts.¹⁷⁸ Advocates of dif-

usage of trade. See *id.* § 2-316(3)(c).

175. See *id.* § 2-309 & cmt. 5.

176. See, e.g., *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 760 (6th Cir. 1985) (holding that a lender's contractual right to call in a debt on a demand instrument was limited by the obligation to act in good faith); *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 805-06 (9th Cir. 1981) (holding that the right of seller to raise prices without notice was limited by good faith obligation).

177. See, e.g., RESTATEMENT (SECOND) OF CONTRACT § 90 (1981) (enforcing promises where there has been detrimental reliance and where injustice only can be avoided by enforcement); *id.* at § 205 (imposing on parties a "duty of good faith and fair dealing"); *id.* at § 208 ("Unconscionable Contract or Term"); *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975) (invoking the "reasonable expectations" doctrine by which, in insurance contracts, a party will not be held to the plain meaning of a policy term if it is oppressive and contrary to what the insured reasonably would have expected); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 215 (N.Y. 1917) (inferring a term where such is required to effect the "business efficacy" of the agreement).

178. For the argument that courts should treat relational contracts differently, see

ferent treatment argue that "beyond a certain point, contracts governing long-term relations come to appear less like individual bargains, in which all the terms can be discerned from the intentions of the parties at the time of formation, and more like *constitutions* governing polities—requiring similar modes of ongoing interpretation."¹⁷⁹ Courts should understand the agreement between the parties—in particular, any *written* agreement between the parties—in *light of* the ongoing relationship, they argue, and the presumptive purpose of court (or arbitrator) intervention should be to maintain that relationship, even if slight deviation from or supplementation to the precise terms of the contract is required.¹⁸⁰

Those who oppose different treatment assert that with long-term agreements, as in most places, it is better to enforce terms strictly as written, as this will reflect better the choices and preferences of the parties.¹⁸¹ Such a method of interpretation, they argue, is more efficient and avoids the "freedom of contract"

generally IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980), Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43 (1993), and Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978). See also Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981) (expressing support for a particular approach to "best efforts" and termination provisions in relational contracts, based on the particular tradeoffs involved in such agreements).

For the contrary perspective, that relational contracts should not receive different treatment, see Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992) (arguing that different treatment would undermine the freedom of contract, in particular the freedom *not* to be contractually liable without a manifestation of one's consent); Richard Craswell, *The Relational Move: Some Questions from Law and Economics*, 3 S. CAL. INTERDISC. L.J. 91 (1993) (rejecting the search for norms immanent in a relationship; in relational contracts as in other contracts, substantive moral values and policy choices should determine what terms should be required or supplied); Melvin A. Eisenberg, *Relational Contracts*, in GOOD FAITH AND FAULT IN CONTRACT LAW 291-304 (Jack Beatson & Daniel Friedmann eds., 1995) (arguing against the application of special rules to relational contracts, but asserting that contract rules and principles should be reformulated for a fairer or better application to all contracts); and Schwartz, *supra* note 119 (pointing out that relational contracts are usually incomplete because of asymmetrical information, and it would be unwise for courts to supply terms in those circumstances).

179. RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINES* 1262 (1995).

180. See, e.g., *id.* at 1262-65.

181. See, e.g., Schwartz, *supra* note 119, at 315-18.

problem of foisting contractual obligations on parties who never consented to them.¹⁸² More subtle arguments for this position maintain that agreements that appear to be "incomplete" are so because of an asymmetry of information between the parties, or because of a fear that more "complete" provisions would encourage strategic behavior by one of the parties.¹⁸³

In the context of the dealings between merchants covered by the U.C.C., Lisa Bernstein recently offered an intriguing critique of courts and codes that try too hard to find and apply immanent norms in order to maintain long-term relationships.¹⁸⁴ Certain provisions of the U.C.C. normally are interpreted in such a way that, when one party to an agreement repeatedly does not hold the other party strictly to the terms of their agreement, the court will hold that the performance of the parties reflects the *actual* terms of the parties' agreement, even though the performance appears inconsistent with the express terms.¹⁸⁵ Bernstein argues that such interpretations show a deep misunderstanding of the parties' actions. A reasonable commercial party will act one way when it trusts its transaction partner and when it is trying to enhance the relationship; it will act another way when the trust is gone and the relationship is at an "endgame" phase.¹⁸⁶ When courts do not recognize this distinction, when they enforce "relationship-enhancing" norms even at an endgame stage, they misunderstand the parties and, moreover, create unfortunate disincentives to parties offering such relationship-enhancing concessions during the course of the commercial relationship.¹⁸⁷

182. Additionally, there is literature detailing the "transaction cost economics" of continuing relationships. It explains how, due to various factors, including the bounded rationality of the parties, contracts will necessarily be incomplete; therefore, there will be a need to try to design the contract or the relationship in such a way as to minimize the incentives the parties have to act opportunistically (rather than cooperatively) within the contractual relationship. See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 29-34 (1985).

183. See, e.g., Schwartz, *supra* note 119, at 272-73.

184. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796-1814 (1996).

185. The most famous or "notorious" example is probably *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981).

186. See Bernstein, *supra* note 184, at 1797-98.

187. See *id.* at 1796-1806.

The point for those advocating a particular approach to long-term and relationship contracts is that one must distinguish legal standards that may in fact help to maintain the relationship from those that will have no such effect because they will be applied only in endgame situations. Premarital agreements—at least the vast majority of those subject to court action and academic commentary—purport to control the endgame situation:¹⁸⁸ they affect the disposition of property upon separation, divorce, and death. Though the enforceability of such provisions may have indirect effects on maintaining the relationship at earlier points,¹⁸⁹ the terms of such agreements become relevant only when the marriage relationship is already over.

Though it appears, therefore, that the flexible approaches suggested by some courts and commentators for long-term agreements may have a place in understanding the modern approach to contract law, they are not applicable to divorce-centered premarital agreements, which do not govern the day-to-day maintenance of the marriage relationship. The approaches to long-term agreements aimed at maintaining relationships would, however, be highly relevant if and when states start enforcing agreements focused on the actions and obligations of parties *during* marriage.

188. One might note that these agreements relate to the endgame *of the marriage*, but if there are minor children from the marriage, there will be ongoing connections between the parents and the children—and between the parents, as regards care of the children—for which the divorce is at most a stage in the middlegame. The point remains, however, that because courts do not enforce premarital agreements dealing with child custody and child support, and because separate laws and norms rule that domain, the effect of premarital agreements is marginal at best. One also could argue that in circumstances when a premarital agreement made the process of divorce faster and less hostile—without claiming that premarital agreements *usually* have that effect—the agreement could work to the long-term benefit of parents' relationships with their children.

189. Consider, for example, (1) those who will not marry without having an apparently enforceable agreement, and (2) the spouses-to-be whose views of their partners are undermined badly when such agreements are presented on the eve of marriage, proposed agreements that might never have been presented had they not been thought enforceable.

Additionally, premarital agreements with less than generous terms may reinforce in a small way an effect created in a strong way by no-fault easy-exit divorce rules: creating greater (relative) rewards for partners who invest in their own careers and marketable skills while offering lesser (relative) rewards for investing in the relationship. See Rasmusen & Stake, *supra* note 4, at 466-69.

C. *The Problem of Rationality*

The previous section considered what long-term agreements might demonstrate about flexible or relationship-enhancing norms in the regulation of those agreements. This Article now focuses on long-term agreements for another purpose: for the issue they, like premarital agreements, raise regarding the rationality and consent of the parties entering the agreement.

Although both the traditional theories justifying contract law and the ideas underlying the influential economic analysis of law assume that people act rationally¹⁹⁰ to protect their own interests, recent work in psychology has begun to question that assumption.¹⁹¹ There are particular situations and circumstances in which parties are particularly unlikely to act in a rational way, and the law—especially contract law—should respond to that reality.¹⁹²

Premarital agreements are good examples of contracts that illustrate problems with rational judgment, as they involve long-term planning and the consideration of possible negative outcomes at a time when the parties are most likely to be optimistic that no such negative outcomes will occur. Parties need protection in this situation because they are unlikely to be able to think clearly for themselves regarding the consequences of divorce at any time, and certainly not immediately before marriage.¹⁹³ Lynn A. Baker and Robert E. Emery have shown that

190. The problem discussed in this section is usually characterized as one of rationality, but sometimes the discussion goes instead by the characterization of "consent" or "voluntariness." The three terms arguably touch on different aspects of the same problem.

191. See generally JUDGMENT UNDER UNCERTAINTY (Daniel Kahneman et al. eds., 1982) (containing a collection of articles summarizing recent research "uncovering judgmental heuristics and exploring their effects"); *Special Issue: Rationality*, 3 LEGAL THEORY 101-210 (1997); see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (suggesting an approach to the economic analysis of law informed by research regarding "bounded rationality"); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998) (arguing that given bounded rationality, paternalistic rules can enhance efficiency).

192. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213-25 (1995).

193. One could take this sort of argument much further, on the issue of consent to the marriage itself: "An old French argument on parental consent had it that the consent of elders was necessary because when a man was under the influence of the

even those who are well educated in such matters, e.g., law students in a family law course, carry an unduly optimistic view about the chances that their marriage will last.¹⁹⁴ More general studies in psychology have confirmed that people tend to evaluate causal theories in a self-serving manner; though people may know that fifty percent of marriages end in divorce, they convince themselves—with little grounding for their conclusions—that they have characteristics that will put them in the portion that will endure.¹⁹⁵ People who assume that they will not divorce will not work hard to maintain a fair deal contingent on divorce occurring, just as parties do not bargain hard for reasonable terms on the failure of installment payments, as they do not expect to ever fail in their payments.¹⁹⁶ Additionally, parties may have some sense of the consequences of failure one year from now, but it may be harder to foresee and plan for the consequences of failure fifteen years from now—after one or both partners have made sacrifices in their careers and perhaps after children have been born.

Robert Nozick argued that one criterion of being in love is the belief that it—both the feeling and the relationship underlying it—will go on forever.¹⁹⁷ If one thinks that it will end in a few weeks—or even a few years—then one is not in love.¹⁹⁸ At the same time, the cold fact is that approximately one in every two marriages in the United States will end in divorce.¹⁹⁹ These facts sit uneasily together; people know divorce is not rare, but

most imperious of the passions, he was not exercising free will." Weisbrod, *supra* note 71, at 802 (footnote omitted).

194. See Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 *LAW & HUM. BEHAV.* 439 (1993).

195. See Ziva Kunda, *Motivated Inference: Self-Serving Generation and Evaluation of Causal Theories*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 636, 636 (1987).

196. Another clear analogy is an employee's consideration of termination provisions in his employment contract. See generally Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 *MICH. L. REV.* 8 (1993) (exploring the rationality problems with employment contracts).

197. See ROBERT NOZICK, *THE EXAMINED LIFE* 70 (1989).

198. See also W. Somerset Maugham, *Red in 1 THE COMPLETE SHORT STORIES OF W. SOMERSET MAUGHAM* 149, 161 (1952) ("If you had asked them I have no doubt that they would have thought it impossible to suppose their love could ever cease. Do we not know that the essential element of love is a belief in its own eternity?").

199. See Baker, *supra* note 70, at 226 & n.34, 245 & n.101.

keeping a pragmatic eye on things—here, on the likelihood of failure—seems just the type of attitude that may make failure more likely.

The other problem with scrutinizing rationality or consent in these sorts of premarital agreements is that the issue is whether the parties have consented to a change in the standard rules that apply to parties during marriage or upon divorce, and it is far from clear that most people entering a marriage ever knew of those rules from the beginning. As one commentator wrote, “even the most oppressive contract of adhesion spells out its significant terms, if only in fine print. Not so in marriage In terms of nondisclosure of its legal effects, marriage may be the ultimate consumer fraud on unsuspecting innocents acting in an emotional fog.”²⁰⁰

Requiring knowledge about waiver in a premarital agreement may seem strange in a context in which marriage itself effects a far more significant change in people’s rights and duties, and only one state in fifty requires that those about to be married be informed about those changes so that they may make a “knowing waiver of their rights.”²⁰¹ As Eric Rasmusen and Jeffrey Stake pointed out recently, an additional factor explaining people’s lack of rational bargaining in entering premarital agreements, and even more clearly in *not* entering such agreements when it would be in their interests to do so, is that “most people were and are unaware of the important behavioral incentives the terms of divorce create for behavior during marriage.”²⁰²

The premarital agreement is one among a motley variety of agreements that calls into question the “rationality,” “consent,” or “voluntariness,” in the full senses of those concepts, of a party to the agreement. Someone who chooses freely has no moral basis for complaining about the consequences of that choice, and when someone promises freely, she should be held to that promise. The “freely” in the phrase, however, is usually a shorthand for optimal conditions in a variety of factors. These conditions

200. HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 89 (3rd ed. 1995).

201. Baker, *supra* note 70, at 221 (naming Louisiana as the one state requiring knowledge).

202. Rasmusen & Stake, *supra* note 4, at 461.

include: having full information about the consequences of the choice and the alternatives available; not being coerced by physical threats, direct economic threats, or dire consequences due to extreme economic circumstances; and not being subject to strong emotional desires or irrational psychological tendencies. Some contracts are made in conditions approximating the optimal. As for those that are sufficiently far from the optimal, the legal system often will refuse to enforce the resulting contract or will deem it "voidable," thus allowing the person making the agreement to have it enforced or not enforced at her discretion.²⁰³ Premarital agreements, by their nature, are less than ideal for rational bargaining; some sets of facts, like those given in the section on duress,²⁰⁴ may push the situation well into the region of nonenforcement.

An analogy to surrogacy agreements also raises an interesting issue regarding how the law should approach premarital agreements. One argument for not enforcing surrogacy agreements is that a not-yet-pregnant woman signing such an agreement cannot fully appreciate how she might feel after she has carried a baby to term.²⁰⁵ Pregnancy involves myriad physical changes, including hormonal changes which may have significant emotional and psychological effects. One could argue that, because of these changes, the person who has given birth is simply "a different person" from her prepregnancy self.²⁰⁶ The prior self

203. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 164, 173, 175, 177 (1981) (addressing misrepresentation, abuse of fiduciary relation, duress, and undue influence).

204. See *supra* text accompanying notes 146-69.

205. See *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988). The Tennessee Supreme Court offered a similar analysis in evaluating the enforceability of agreements between a husband and a wife relating to the disposition of untransferred "pre-embryos" from an in-vitro fertilization process. See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) ("[T]he parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.").

206. See Jennifer Gerarda Brown, *The "Sophie's Choice" Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENVER U. L. REV. 1255, 1273-78 (1998); see also Virginia Held, *Non-Contractual Society: A Feminist View*, in SCIENCE, MORALITY & FEMINIST THEORY 111, 126 (Marsha Hanen & Kai Nielson eds., 1987) ("A woman can have decided voluntarily to have a child, but once that decision has been made, she will never again be unaffected by the fact that she has brought this

should not be able to bind the later self, at least in matters relating to the pregnancy.²⁰⁷ At a minimum, society should be skeptical about the ability of the earlier self to judge the interests and preferences of the later self. This most obviously will be true when the woman involved in the surrogacy agreement has never before been pregnant. It seems a less forceful argument when the woman has been pregnant previously,²⁰⁸ and the argument seems to weaken as the woman's experience with pregnancy increases. A woman who has been pregnant a number of times, especially if one of those times was recent, is less well-placed to argue that she could not know what pregnancy would do to her, or how she would think about a child she was carrying after it is born. One might make a comparable argument regarding the extent to which close friends of hers have gone through a pregnancy, and so on.

A similar type of analysis might apply to the circumstances surrounding premarital agreements. If it is difficult for many people to think about the possibility of divorce at the outset of their marriages, that difficulty likely is less pervasive for people who have been married a number of times. This is especially true for those who have gone through divorce more than once, or have had a recent experience with divorce.

A Pennsylvania court offered a comparable argument on the difficulty of rational foresight and planning as one reason for not enforcing, after divorce, a premarital agreement regarding the religious upbringing of the children.²⁰⁹ The court wrote:

particular child into existence.”).

207. Professor Brown expressly limits the argument to voiding surrogacy agreements. See Brown, *supra* note 206, at 1276 (“[B]y voiding the surrogacy contract we would not declare all of the woman's decisions suspect, but only those that relate specifically to the nature of the relationship between mother and child.”). Much of the preceding reasoning, concerning the “pregnant woman” being a *different person* from the “post-partum self” and about not giving the former “power over another” by enforcing her agreements, *id.*, however, gives the impression of an argument that could be generalized to negate consent for all forms of agreement, regardless of their subject matter.

208. *But see id.* at 1277 & n.68 (suggesting that prior experience with childbirth does not overcome the problems of rationality and continuity, because subsequent pregnancies and childbirth experiences may be quite different from earlier ones).

209. See *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990).

[W]hile religious upbringing agreements may serve an important and beneficial purpose by promoting careful consideration of potential difficulties prior to marriage, . . . parties entering into such agreements generally will not be able to anticipate the fundamental changes in circumstances between their prenuptial optimism, their struggles for accommodation, and their ultimate post-divorce disillusionment.²¹⁰

Requiring each party to consult with an independent lawyer for premarital agreements to be enforceable may partly solve this problem.²¹¹ As lawyers can help clients considering living wills come to terms with situations they might otherwise not be able to imagine themselves having to face (“Of course it won’t happen to you . . . ; *but if it did*, which kinds of treatments would you want and which would you not want?”), so a lawyer might be able to force an overly-optimistic spouse-to-be to think about the unthinkable in a marriage context (“Of course you will not get divorced . . . ; *but if you did*, what division of property would you consider fair?”). As noted earlier, one option is to force couples about to marry to choose from a menu of options.²¹² This likely would have the similar effect of forcing parties to think through matters they otherwise might have been less willing or less able to address. It also would remove the “signaling” problem—the situation in which a party decides not to present a premarital agreement, even though the agreement is reasonable given the couple’s circumstances—because the act of presenting an agreement may make the presenter appear to be saying that he or she does not think the marriage will last.²¹³ This is not to say that mandatory recourse to independent counsel, mandatory choice among pre-set options, or similar requirements would avoid all problems of rationality, but only that such tools might serve to reduce them, for at least some contracting romantic partners.

210. *Id.* at 1147.

211. The author is indebted to Scott Altman for the ideas in this paragraph.

212. *See supra* text accompanying notes 124-30.

213. *See Rasmusen & Stake, supra* note 4, at 461.

One possibility is to treat premarital agreements as some courts treat restrictive covenants in employment agreements. As mentioned above, the two types of agreements raise some obvious similarities in the problems of consent and rationality.²¹⁴ In some jurisdictions, when a court finds a restrictive covenant unreasonable—e.g., limiting employment for too long a period of time, or over too broad a geographical area—the court will not void the provision entirely, but will “blue pencil” it. This method enforces the provision to the extent reasonable—that is, to the extent necessary to protect the legitimate interests of the employer, taking into account the interests of the employee and the public.²¹⁵ The question then returns to the basic one of how to determine what a reasonable agreement would be, an issue raised earlier.²¹⁶

Other areas of contract law, including contracts of adhesion,²¹⁷ and allegedly unconscionable agreements,²¹⁸ raise substantial questions about the quality of the consent parties give when entering agreements. In contrast to these agreements, premarital agreements, though one-sided, ironically may be one of the few types of agreements many individuals will enter that are individually drafted—and perhaps also negotiated at arm’s length—rather than constructed from a standard form on take-it-or-leave-it terms.

The extent to which parties enter premarital agreements with less than full rationality, consent, or voluntariness is not entirely clear, and it is likely to vary from party to party in different fact situations. Even if one were to reach the conclusion that

214. See *supra* note 196 and accompanying text.

215. See, e.g., *Durapin, Inc. v. American Prods., Inc.*, 559 A.2d 1051, 1058 (R.I. 1989) (rejecting blue-pencil doctrine and favoring modification and enforcement). See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 5.8, at 384 (1990) (discussing the “blue-pencil rule”).

216. See *supra* text accompanying notes 118-23.

217. See, e.g., *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169, 173-77 (Iowa 1975) (discussing the application of doctrine of “reasonable expectations” to an insurance policy, grounded largely on the claim that such policies are adhesion contracts).

218. See generally *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965) (defining unconscionability); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing procedural and substantive unconscionability).

there is a general and significant problem of rationality, two related problems follow. First, the problem of rationality is, as discussed, hardly confined to premarital agreements, but probably arises in like form whenever there are long-term agreements or agreements whose duration overlaps major life changes. Considering how substantial portions of contract law could change or should change to deal with this issue involves a major rethinking well beyond the scope of this Article.

Second, if one accepts that there is a problem of rationality, what protective rule or available remedy would respond properly to the problem as it pertains to premarital agreements? The possibilities mentioned above—making consultation of lawyers a requirement for an enforceable agreement, requiring couples to choose from a menu of options, and authorizing partial or complete invalidation for certain kinds of one-sided provisions—are imperfect responses, but they are beginnings.

IV. THE SOCIAL CONTEXT

Some of the commentary regarding how the courts should treat premarital agreements has been grounded, expressly or implicitly, in arguments regarding the social context in which people enter such agreements. When considering such arguments, it is important to separate out those that use the social context to argue for a different treatment of agreements in general or of all agreements between parties of widely unequal bargaining power, and those that focus specifically or especially on premarital agreements. This is not to object to the wisdom of far-reaching general reforms or the proposition that general reforms sometimes must be enacted piecemeal, but only to avoid the confusion that can result when an argument against a treatment of a particular kind of contract is misunderstood as an argument concerning contract doctrine generally.

The two most common arguments addressing social context in this area derive from concerns about pervasive gender inequality and concerns about pervasive inequalities of resources and sophistication among potential contracting parties generally. The sections below treat the topics in turn. The first seems to have more direct applicability to premarital agreements than the second, but both are relevant in considering whether to enforce particular agreements.

A. *The Issue of Gender Equality*

As far as the research for this Article shows, all statutory and decision-based law on premarital agreements is and has been facially neutral on gender matters. Advocates for various positions on the enforcement of premarital agreements, however, have seen the issue as one substantially tied to gender equality. First, the court in *Simeone* argued that the standard of the fairness approach, allowing enforcement of premarital agreements only if substantive and procedural fairness were proven, reflected a paternalistic attitude toward women that had lost justification.²¹⁹ The court stated that earlier decisions regarding the enforcement of premarital agreements had "rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter,"²²⁰ and that this belief was no longer warranted.

A more common way of connecting the enforcement of premarital agreements to gender equality is by the proposition that courts should continue or strengthen the requirements of substantive and procedural fairness because the *actual* effect of neutral, nonintrusive rules would be to impoverish women, who tend to be the poorer parties being asked to waive their rights in such agreements.²²¹ For example, Gail Frommer Brod supports her conclusion that the enforcement of premarital agreements

219. See *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

220. *Id.* The opinion continued:

Society has advanced . . . to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. . . . Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.

Id. Needless to say, there are many who would disagree with the above comments. See, e.g., *id.* at 168 (Papadakos, J., concurring) ("I fear my colleague[s] do] not live in the real world.").

221. See Atwood, *supra* note 34, at 132-34, 154; Brod, *supra* note 2, at 283-87; Singer, *supra* note 80, at 1540-49 ("Disadvantages of Privatization: . . . Exacerbation of Existing Gender Inequalities"); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1509-13 (1983) (arguing that nonintervention in domestic matters only serves to reinforce existing financial and physical inequalities within intimate relationships).

“generally harm[s]” women and the children in their care in large part on the grounds that men are disproportionate among the wealthy, that women are disproportionate among the poor, and that women’s average income is significantly lower than men’s.²²² As the legal attitude toward premarital agreements becomes more accepting and less intrusive, the argument goes, women are ever more likely to feel an overall negative effect. In Brod’s words, “[b]y ignoring women’s de facto inequality, lawmakers reforming the law of premarital agreements have overlooked the adverse economic impact that premarital agreements have on women as a class. Lawmakers should recognize premarital agreements for what they are: contracts that violate societal norms against gender discrimination.”²²³

From a similar set of starting assumptions, one can focus on the point of agreement rather than on the effect of enforcement. If women tend to be in circumstances that constrain their choices and make them appear less than entirely free, there might be some argument for nonenforcement. This argument, however, may have deleterious effects of its own. As one commentator summarized the dilemma: “Is it possible to protect women from the oppressive consequences of harmful, constrained choices . . . without divesting women of agency?”²²⁴

Additional issues arise if one were to begin to see premarital agreements in gendered terms, taking it as generally true that women will be the economically weaker party whose rights are generally bargained away in such agreements. For example, one should consider the argument by Robin West that women, by nature, may be more likely to accede to authority or to enter mas-

222. See Brod, *supra* note 2, at 240-42. At one point in her article, Brod appears to equate, or at least to invite the equation, of greater income, resources, and experience with greater bargaining power in entering a premarital agreement. See *id.* at 247 & n.89. It is probably worth clarifying that in the context of premarital agreements, “bargaining power” belongs to the party *less* desirous of getting married—which may sometimes be the party who has fewer resources. Although anecdotally it usually is the woman who is more desirous of getting married, there also will be numerous occasions when it is the man, and there seems little reason to believe that the level of the parties’ resources will correlate (in a positive or negative way) with their desire to marry.

223. *Id.* at 279.

224. Hadfield, *supra* note 110, at 1236-37.

ochistic situations.²²⁵ Also, some have argued that women are disadvantaged in general by bargaining, whether in negotiating contracts or in mediation processes, as they are by nature or socialization less selfish and less self-centered.²²⁶

There are contrary arguments that *enforcing* agreements of this sort better serves women. Even in the context of surrogacy agreements, one court stated: "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law."²²⁷ One argument thus is that "equal treatment" or "equal respect" would entail enforcing the agreements women enter *even* in these areas of law.²²⁸ Another might be that there is a strong feminist argument for enforcing *especially* these sorts of agreements. Martha Fineman recently wrote, regarding contracts for sexual or reproductive services: "It is interesting to note from the perspective of contract as a metaphor for bargaining that human activities in which women might be considered to have either a 'natural' monopoly or to possess more on the 'supply' than 'demand' side of the equation have been written out of contract."²²⁹ Brod's argument that there should be fairness tests for premarital agreements because they, in practice, disproportionately affect women²³⁰ invites the above response that equal respect requires no special treatment. Fineman's argument,²³¹ which implies that the power to contract has been

225. See Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) [hereinafter, West, *Authority*]; Robin West, *Submission, Choice, and Ethics: A Reply to Judge Posner*, 99 HARV. L. REV. 1449 (1986); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

226. See Rasmusen & Stake, *supra* note 4, at 472-73 & nn.83-89 (summarizing argument and citing sources).

227. *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993).

228. See *id.*

229. Fineman, *Contract*, *supra* note 92, at 187.

230. See *supra* notes 222-23 and accompanying text.

231. See *supra* text accompanying note 229. Fineman's reference to women having a "natural monopoly" is true in part, but it requires some refinement. Within a committed heterosexual pairing, a woman has a "monopoly" over certain reproductive

removed in some areas perhaps *because* women have greater power in those areas, applies to sexual and reproductive services, but not in as obvious a way to premarital agreements. Anecdotally or stereotypically, it is the woman who more often wants the commitment of marriage while the man resists—and thus, if this stereotype were always true, it would be the woman more often than the man who would be willing to waive rights to enter into marriage—though there are certainly many situations in which the roles are reversed.

Additionally, one must consider the now-standard argument that rules or standards meant to protect weaker parties by allowing them to avoid contractual obligations may actually work against that group. This “protection” makes it harder for them to enter agreements they want to enter because other parties will refuse to enter agreements with members of the group when they know that the members of the group can avoid enforcement.²³² The application to premarital agreements was discussed earlier: There may be situations when a woman would only be able to marry if she were able to bind herself to a premarital agreement, and she would prefer to be married with the agreement rather than unmarried and “protected” from that agreement.²³³

B. Other Inequalities

Another line of argument against enforcing premarital agreements relates to the instances in which one party appears to be imposing one-sided terms on the other party, regardless of the

and sexual services; however, in a different perspective, taking into account the way that commitments may break down (or may never have been established), individual women are “in competition with” one another, and the monopoly metaphor does not apply. Still, from either perspective, it is worth pointing out that women have a comparative bargaining advantage relative to the men with whom they are bargaining.

232. *See, e.g.*, *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 928 (7th Cir. 1983) (arguing that allowing financial difficulty by itself to be sufficient to plead economic duress, and thus make agreements voidable, would be contrary to the interests of financially strapped companies, as they would be unable to enter into binding financial settlements when they wanted to do so).

233. *See supra* note 98 and accompanying text.

gender of the more powerful party. One group of commentators offered the following critique of *Simeone*:

Simeone applies laissez-faire with a vengeance. Although the majority might like to think of its opinion as modern, much of its style of reasoning actually comes straight out of the end of the nineteenth and the beginning of the twentieth century. Back then, courts made the same kind of assumption that specifics of the law of contract could be logically deduced from more abstract notions of equality. For example, during the period of American constitutional law history known as the *Lochner* era . . . courts invalidated protective labor legislation on the basis that political equality logically implied freedom of contract—that derogation from the principles of freedom of contract involved improper paternalistic assumptions about the inferiority of workingmen.²³⁴

The point here is that the relationship between men and women in general or between some men and women only has the appearance of equality and voluntary choice. The facts of the situation are those of unequal power and the coerced choices and unfair agreements which result from such facts.²³⁵

It is a point worth making, but it is not a point that seems limited to the premarital agreements or even to the domestic context in general. In all parts of life, and not just in relationships between men and women, people enter substantively unfair agreements because their relative lack of power leaves them little or no other choice. It is a *general* policy question that the legal system must answer: To what extent is the state going to intervene to try to protect weaker parties and to correct imbalances?²³⁶

Much of the point of the previous sections of this Article has been that there are resources within modern contract thinking to respond to the more egregious forms of one party taking advantage of another in a premarital agreement. These principles

234. WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW 73 (1994).

235. Momentarily separated are the arguments based on the arguably gendered nature of the inequalities in these situations.

236. See, e.g., Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

may not guarantee complete fairness in the execution or enforcement of agreements, but they can help move society toward that goal. Beyond that, the question remains whether there should be a systematic change of the approach to contracts or, perhaps, to the approach to contracts in long-term and relational agreements, and that question goes far beyond the scope of this Article.

Obviously, the question of legal reform to effect fairness is a difficult and subtle problem. First, though the legal system should not too quickly acquiesce to injustice, there likely are limits on the extent to which law can rectify or compensate for inequities pervasive in society.²³⁷ As noted earlier, for those without power, sometimes the only alternative to a bad bargain is no bargain at all, and it is not clear why it always would be to someone's benefit to have that choice taken away.²³⁸ Though, also as noted earlier, there *may* be reasons in some circumstances to take the choice away.²³⁹ Second, attempts to protect often have other unintended negative consequences beyond the mere withdrawal of choice.²⁴⁰

CONCLUSION

It is a mistake to try to evaluate the enforceability of premarital agreements without considering the larger context their consideration evokes—e.g., the way society thinks about marriage and, in particular, the extent to which marriage is or should be a matter of private ordering; the proper legal treatment of long-term agreements, especially those agreements that raise issues

237. Fineman elaborates on a similar point concerning the limitations of law in FINEMAN, *THE NEUTERED MOTHER*, *supra* note 92, at 15-20.

238. *See supra* notes 98-100 and accompanying text.

239. *See Brown, supra* note 206, at 1255-62 (noting that there are circumstances when no choice is better than having choice because of the horrible or tragic nature of the choosing); West, *Authority, supra* note 225 (noting that some people, especially women, sometimes may be inclined to act in a masochistic way or a way unduly submissive to authority).

240. *See, e.g.,* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1031 (1984) (discussing how legislation benefitting pregnant employees could be "so trivial that its primary function is to reinforce stereotypical ideas about men and women" or "so substantial that it is likely that those required to provide it would avoid dealing with women in order to escape it" (footnote omitted)).

of rationality; and the proper legal treatment for agreements that come against a background of systemic inequalities.

Substantial reasons exist for enforcing premarital agreements, reasons often connected with the protection of significant reliance by one or both of the parties. 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. A likely approach would set requirements (e.g., full disclosure of assets and consultation with independent counsel) and bright-line rules or presumptions (e.g., agreements presented within days of a wedding, when they could have been presented weeks or months earlier, will be presumptively considered voidable for duress) for these agreements. Such an approach could support reasonable reliance, but, alternatively, might also lead to unfair results in some individual cases.

If a state were sufficiently worried about the unfair results in the individual cases for which bright-line rules and conventional contract doctrines would give insufficient protection, it might be justified in choosing as an alternative a case-by-case, all-things-considered approach to enforcement.²⁴¹ The disadvantage of such an approach, as indicated above, would be that it makes it difficult for any party to rely on enforcement, and those who would not act (e.g., would not marry in a certain situation) without reasonable assurances that a court will enforce the agreements they enter would then not act. Depending on one's fears regarding the frequency with which premarital agreements effect injustice, this cost nonetheless may be considered worth paying.

241. A case-by-case approach sometimes seems to be a cowardly way out, passing on the hard decisions to others—initially and primarily in this case, the family court judges. If, however, one determines that the important factors to consider were too numerous and various, there may be little choice. Courts have reached similar conclusions in family law probably more often than any other area of dispute, especially in the way the all-things-considered “best interests of the child” standard is pervasive for most decisions involving children.