MARITAL CONTRACTS AND THE MEANING OF MARRIAGE

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Contracts between spouses that alter the basic default rules of marital property and support are subject to widely varying legal standards across the United States. As with premarital contracts, the goals of efficiency and predictability are often in tension with other policy concerns, such as the recognition that the dynamics of an intimate relationship may distort the bargaining process. Although all states require financial disclosure as a prerequisite for an enforceable marital contract, some impose additional procedural and substantive criteria beyond those applied to premarital contracts. The varying legal standards, in turn, are rooted in competing visions about the meaning of marriage. These divergent constructions of marriage range from a status defined by immutable rights and obligations to an individualized relationship subject to private ordering in almost all respects. In light of evolving social attitudes about marriage and the diminishing popularity of the institution itself, this Essay ultimately recommends a flexible framework that provides a broad scope of contractual freedom while still holding spouses to a core duty of honesty and good faith in forming marital contracts.

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* Mary Anne Richey Professor Emerita of Law, University of Arizona James E. Rogers College of Law. I am deeply grateful to the *Arizona Law Review* for devoting this issue to the field of family law in recognition of my retirement. The provocative scholarship assembled by the editors demonstrates just how fascinating and dynamic a field it is. I also appreciate the willingness of my friend Ira Ellman to contribute an insightful article on the topic of child-support reform. Finally, I thank Brian Bix, Jamie Ratner, and Ted Schneyer for their helpful comments on earlier versions of this Essay, and Corey Mantei and Raphael Avraham of the *Arizona Law Review* for their superb editing. Although I am chairing a project of the Uniform Law Commission that is closely related to the topic of this Essay, all views expressed here are my own and not those of the Commission.

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INTRODUCTION

Across the United States, the legal status of marital agreements remains strangely unsettled. The marital agreement, as used in this Essay, refers to a contract entered between spouses during an ongoing marriage that spells out the spouses' economic rights vis-à-vis one another during the marriage or at its termination by divorce or death.[1] The standards for enforcement of these agreements are more amorphous than the standards for the other two kinds of domestic contracts—separation agreements and premarital agreements. While timing and context distinguish marital, premarital, and separation agreements,[2] all three fall within the sensitive realm of contractual negotiation between intimates.

Courts today largely enforce separation agreements—settlements hammered out by divorcing couples—because public policy favors private consensual resolution of litigation.[3] With over 90% of divorces being resolved by parties through negotiation and settlement, separation agreements have become the

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1. This Essay focuses on agreements that fundamentally alter the property and economic support laws that would otherwise apply to spouses by virtue of their marital status under state law. Agreements containing terms typically treated as unenforceable (e.g., provisions governing spousal conduct during the marriage, child custody, or child support) are not explored here. For an argument that the policies against enforcing certain nonmonetary terms in family contracts could apply to monetary terms as well, see Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998).

2. Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 266 (2010).

3. Not surprisingly, the Uniform Marriage and Divorce Act, with its move toward no-fault divorce and the philosophy of the clean break, endorsed the enforcement of separation agreements between the spouses, subject to a relatively lenient standard of judicial review. *See* UNIF. MARRIAGE & DIVORCE ACT § 306 (amended 1973), 9A U.L.A. 248–49 (1998) (providing for enforcement of terms of separation agreement regarding property and spousal support unless unconscionable).

norm rather than the exception.[4] While valid concerns exist about distortions of bargaining power at the end of a marriage,[5] separation agreements are typically given robust enforcement in the courts in the absence of fraud or duress.[6]

Premarital agreements have had a different history. Courts traditionally were more receptive to premarital agreements that provided for property distribution at death than those that prescribed the consequences of divorce.[7] Until the 1970s, divorce-focused agreements were viewed with deep suspicion because public policy disfavored any contractual arrangement that might encourage divorce or that altered the state-imposed terms of marriage.[8] Over the past four decades, as restrictive divorce laws have given way to no-fault regimes,[9] prenuptial contracting has gained wide acceptance.[10] Most states today have developed standards, whether statutory or judge-made, to respect a fair degree of party autonomy in premarital agreements.[11] While jurisdictions differ as to the degree to which courts should evaluate the substantive fairness of such agreements, the clear

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4. *See generally* DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 909–19 (2d ed. 2009).

5. *See, e.g.*, Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1405–07 (1984) (identifying the unique emotional dynamics between spouses and arguing that courts should carefully scrutinize separation agreements for procedural and substantive fairness).

6. For example, in *In re Marriage of Patterson*, 255 P.3d 634, 645 (Or. Ct. App. 2011), the court upheld a separation agreement signed seven years before the divorce. The court emphasized the public policy favoring marital settlement agreements "to decrease litigation and to remove [divorce] proceedings from the adversarial process." *Id.* at 643 (citing *In re* Marriage of McDonnal, 652 P.2d 1247, 1250 (Or. 1982)); *see also* Billington v. Billington, 595 A.2d 1377, 1381 (Conn. 1991) ("[P]rivate settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine." (citations omitted)).

7. *See generally* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148–58 (1998).

8. *See, e.g.*, McCarthy v. Santangelo, 78 A.2d 240, 241 (Conn. 1951); *see also* Bix, *supra* note 7, at 150–53.

9. *See generally* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988) (analyzing the history of reforms in divorce law, property division, and child custody during the move from fault to no-fault divorce); Jens-Uwe Franck, *'So Hedge Therefore, Who Join Forever': Understanding the Interrelation of No-Fault Divorce and Premarital Contracts*, 23 INT'L J.L. POL'Y & FAM. 235 (2009) (comparing the German and American legal regimes and suggesting that the availability of premarital contracts is a logical corollary of no-fault divorce).

10. The evolution of the law of prenuptial contracts has been explored by numerous scholars. *See, e.g.*, Bix, *supra* note 7, at 148–58; Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 252–54 (1994); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 207–11 (1982); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 352–59 (2007).

11. *See* Bix, *supra* note 2, at 263–66.

trend is toward greater enforceability.[12] The Uniform Premarital Agreement Act ("UPAA"),[13] now adopted in whole or in part by about half of U.S. states, has been a major driver of this trend.[14]

In contrast, the evolution of the law with respect to agreements entered into *after* marriage has not kept pace. The fundamental question as to whether marital agreements are void as contrary to public policy is still being actively litigated in state courts.[15] At least one state adheres to the view that spouses lack legal capacity to contract with one another as to the basic elements of marriage.[16] In several states, spousal support is off limits as a possible subject of a marital agreement.[17] Many states take the position that spouses are in a "confidential relationship" with one another, therefore requiring marital agreements to meet a standard of procedural and substantive fairness that is higher than that applied to premarital agreements.[18] Common concerns are that one spouse will exact unfair concessions from the other as a condition of continuing the marriage,[19] or that a

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12. *Id.* at 266 ("The area of premarital agreements may be the place within family law where there has been the greatest movement towards recognizing private ordering, though even here . . . many states have reserved the right to refuse enforcement where fairness concerns arise, and there remain significant limits on the types of provisions the states will enforce.").

13. UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 39–58 (2001); *see also infra* notes 155–62 and accompanying text.

14. For a current list of states that have enacted the UPAA, see *Legislative Fact Sheet – Premarital Agreement Act*, UNIF. LAW COMM'N, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Premarital Agreement Act (last visited Dec. 30, 2011). Moreover, their variations from the black-letter text can be found in the Uniform Laws Annotated. *See* UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 37–38 (2001). Professor Tom Oldham recently completed a comprehensive critique of the UPAA. J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753785.

15. *See, e.g.*, Bedrick v. Bedrick, 17 A.3d 17, 24 (Conn. 2011) (holding that the enforcement of a postnuptial agreement is not a per se violation of public policy); Ansin v. Craven-Ansin, 929 N.E.2d 955, 962 (Mass. 2010) (same).

16. *See, e.g.*, OHIO REV. CODE ANN. § 3103.06 (2011) (providing that husband and wife cannot contract to alter their legal relations other than to agree for immediate separation and support during the separation).

17. *See, e.g.*, MONT. CODE ANN. § 40-2-303 (2011) (codifying rule that husband and wife cannot contract to alter their legal relations except as to property or for immediate separation and support during separation); NEV. REV. STAT. § 123.080 (2011) (same); N.M. STAT. ANN. § 40-2-8 (2011) (same); OKLA. STAT. tit. 43, § 205 (2011) (same); S.D. CODIFIED LAWS § 25-2-13 (2011) (same).

18. *See, e.g.*, NEV. REV. STAT. § 123.070 (2011) (providing that spousal contracts are subject to standards for "persons occupying relations of confidence and trust toward each other"); *Ansin*, 929 N.E.2d at 963–64 (holding that marital agreements are subject to careful scrutiny, including assessment of whether terms are fair and reasonable at execution and enforcement).

19. *See* Pacelli v. Pacelli, 725 A.2d 56, 58, 61–62 (N.J. Super. Ct. App. Div. 1999) (invalidating marital agreement where husband threatened wife with divorce if she refused to sign, and the agreement was grossly disproportionate). In *Pacelli*, the court held

postnuptial agreement at the beginning of a long marriage may be unfair in light of changed circumstances.[20] At the same time, a few courts reject the "paternalism" of the past in favor of an approach that promotes freedom of contract.[21] Depending on the state, enforcement of a marital contract materially altering the default rules of property and spousal support may be seen as a threat to the institution of marriage or the logical result of rational bargaining between equals.

This Essay explores the divergent enforcement standards for marital contracts and the surprisingly discordant perceptions of the marital relationship that have emerged from case law and state legislation. Developments in Western Europe on family contracts are briefly examined to draw comparative lessons from the European experience. The Essay concludes by suggesting lessons for policymakers from a law reform perspective.

The Uniform Law Commission ("ULC"), also known as the National Conference of Commissioners on Uniform State Laws,[22] is currently engaged in developing an act to govern both premarital and marital agreements.[23] As chair of the Drafting Committee, I am acutely aware of the challenge of proposing standards for marital contracts that could be enacted across the United States.[24] Viable standards must accommodate the competing values that are always at play in family contracts. The goals of protecting vulnerable family members and effectuating family law policy[25] exist alongside the goals of promoting efficiency,

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that marital agreements must be closely scrutinized to ensure that they are not the product of coercion or duress and that the terms are substantively fair at the time of enforcement. *Id.* at 62–63. Minnesota views marital agreements with such suspicion that it has legislatively declared them to be unenforceable unless both spouses were represented by counsel; an agreement is presumed unenforceable if either party seeks a divorce within two years of signing. MINN. STAT. § 519.11 (2011); *see also* Bix, *supra* note 2, at 266–70.

20. *See Bedrick*, 17 A.3d at 25–26. For a more thorough discussion of *Bedrick*, see *infra* notes 124–38 and accompanying text.

21. *See, e.g.*, Stoner v. Stoner, 819 A.2d 529, 532 (Pa. 2003); *In re* Estate of Smid, 756 N.W.2d 1, 8–9 (S.D. 2008). The *Stoner* case is further discussed *infra* Part I.B.3.

22. The National Conference of Commissioners on Uniform State Laws adopted "Uniform Law Commission" as its preferred name in 2006. *See About the ULC*, UNIF. LAW COMM'N, http://nccusl.org/Narrative.aspx?title=About the ULC (last visited Dec. 30, 2011).

23. The Committee's drafts and internal memoranda are available at *Committees – Premarital and Marital Agreements*, UNIF. LAW COMM'N, http://nccusl.org/Committee.aspx?title=Premarital and Marital Agreements (last visited Dec. 30, 2011).

24. The guidelines governing marital agreements developed by the American Law Institute ("ALI"), for example, have influenced the law in a few states but have not been widely adopted. *See generally* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 945–1032 (2002) [hereinafter ALI PRINCIPLES]. The ALI standards were heavily relied on in *Ansin v. Craven-Ansin*, 929 N.E.2d 955 (Mass. 2010). *See infra* notes 107–23 and accompanying text.

25. For an explanation of why economic theory falls short when it is used to analyze exchange, self-interest, and altruism within the family, see Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1016–23 (1995). For an additional argument that premarital agreements exacerbate socio-economic inequality between women and men, see Brod, *supra* note 10, at 252–53.

predictability, and reliance in the furtherance of freedom of contract.[26] Law reform efforts in matters governing the family are notoriously difficult,[27] and the ULC project is no exception.

Today's reformers must also take into account the diminishing popularity of marriage itself.[28] The decline in marriage rates in the United States may signal, in part, disenchantment with the trappings of marriage. If a state's law on marital agreements reflects a particular vision of marriage as an institution, that vision may affect people's choices. An institution heavily laden with mandatory terms may not attract adherents. The extent to which the law should protect spouses from the consequences of their agreements because of their married status is a key concern of the ULC project and the central focus of this Essay.[29] I suggest in the discussion that follows that the law of marital agreements should be compatible with evolving understandings of the meaning of marriage, including the rise of individualized marriage.[30]

I. THE SPECTRUM OF APPROACHES

Commentators, judges, and legislators have offered a range of marriage meanings that vary according to context. This Section first considers the changing nature of the institution of marriage generally before probing interpretations of marriage that are reflected in the legal standards used by courts in evaluating marital contracts.[31]

A. Marriage as an Evolving Institution

Historian Stephanie Coontz reminds us that for much of history, marriage was an arranged union designed to bring together families or kin groups for

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26. The Nobel Prize-winning, Chicago School economist Gary Becker was the first to apply a market theory of law and economics to the family. *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991). Other scholars from decidedly different political persuasions have argued for an expanded role for contracts in marriage. *See, e.g.*, Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 18–20 (1998).

27. *See generally* Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699, 702 (2003) (explaining that reforming family law is difficult not only because of people's deeply held personal convictions but also because reforms seldom achieve the intended goals).

28. *See infra* notes 55–64 and accompanying text.

29. While the progress of family law may have been from status to contract as a general matter, *cf.* HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 174 (John Murray ed., 10th ed. 1920) (1861), family law doctrine in most states clearly has not shaken off "status" entirely.

30. *See* ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 114–15 (2009) (discussing rise of expressive individualism in religious life and in marriage).

31. For an overview of the diversity of contemporary family life in the United States, see J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL'Y 521 (2011).

inheritance, property control, and other economic or political reasons.[32] Love-based marriage, Coontz emphasizes, is of relatively recent vintage and has inevitably destabilized marriage as an institution. As she observes, "The very features that promised to make marriage such a unique and treasured personal relationship opened the way for it to become an optional and fragile one."[33] Likewise, sociologist Andrew Cherlin suggests that the changing goals of marriage have contributed to its fragility, with today's couples viewing marriage as a vehicle for personal fulfillment and self-realization rather than a commitment for life-long sharing.[34]

In a similar vein, Professor Brian Bix has emphasized the complicated interplay between legal change and social values.[35] Changes in legal regulation of marriage inevitably affect "the way we think about marriage."[36] As the law becomes more receptive to private ordering in marriage, for example, those legal changes may not only reflect, but also promote a view of marriage as "less a commitment for life, and more a kind of serial monogamy."[37] Along the same line, Professor Barbara Stark has identified a "postmodern" trend in marriage—a move away from a unitary, fixed notion of marriage toward an institution that is variable according to individualized preferences.[38] In proposing that couples be able to select from a menu of marriage alternatives, she concludes that "marriage law that explicitly contemplates varied, changing, contextualized forms of marriage, may in fact be more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstraction we now call 'marriage.'"[39] While no state has codified a full menu of marriage categories recommended by Professor Stark, providing the option of a covenant marriage is a step in that direction.[40]

Perhaps as a response to the fragility of marriage, Professor Milton Regan maintains that the law should facilitate trust and self-sacrifice in marriage.[41] To

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32. STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 24–31 (2005).

33. *Id.* at 5.

34. *See* CHERLIN, *supra* note 30, at 87–115; *see also* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 56–58 (2011).

35. Bix, *supra* note 7, at 158–62.

36. *Id.* at 159. For a discussion of the way that regulation of non-traditional marriages shapes the way we see traditional marriage, see Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012).

37. Bix, *supra* note 7, at 161. Professor Bix recognizes, however, that marriage can mean quite different things to different people, indicating that the law should be similarly flexible. *Id.* at 162.

38. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1509–20 (2001).

39. *Id.* at 1482.

40. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2011) (authorizing "covenant marriage" with counseling requirements, fault-based limits on divorce, and other restrictions).

41. *See* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 24–26 (1999).

Professor Regan, the ideal marriage is one in which the spouses not only put the interests of the marriage ahead of their individual interests, but do not perceive the marital interests as distinct from their own.[42] Professor Marsha Garrison also sees unique advantages to a marriage relationship based on an ethic of sharing and commitment.[43] She notes that spouses have "publicly assumed binding obligations to each other that restrict other marital opportunities, inhibit participation in other sexual and sharing relationships, structure public and private expectations about their relationship, and burden exit from it. . . . This fundamental difference distinguishes marital relationships, for all their variability, from non-marital relationships."[44] Professor Garrison recommends that the law maintain the unique status of marriage because of the known benefits that the institution provides for participants.[45]

The emergence of same-sex marriage[46] has led some scholars to re-theorize marriage. Professor Suzanne Kim suggests that the dismantling of sex-difference requirements may lead to a functional meaning that reflects the "core values" of marriage, which she identifies as "commitment and caregiving."[47] "If we can manage to untether marriage from its gender hierarchy, its heteronormativity, and its exclusivity," she writes, "then our collective conceptions

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42. *Id.* at 30 (theorizing that marriage involves "both preservation of individuality and commitment to a shared purpose that transcends self"). For a critique of Regan's theory, see Katharine B. Silbaugh, *One Plus One Makes Two*, 4 GREEN BAG 2D 109, 113–14 (2000) (reviewing REGAN, *supra* note 41) (noting that idealization of self-sacrifice in marriage generally works to the disadvantage of women).

43. Marsha Garrison, *Cohabitant Obligations: Contract Versus Status*, *in* THE FUTURE OF FAMILY PROPERTY IN EUROPE 115, 121 (Katharina Boele-Woelki et al. eds., 2011).

44. *Id.* at 127.

45. Professor Garrison opposes, for example, the imposition of marriage-like financial obligations on cohabitants because, in part, such conscriptive remedies might dilute the special nature of the marriage relationship. *Id.* at 136–37.

46. Legalization of same-sex marriage has occurred through state constitutional litigation in three states. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003). Three other states have authorized same-sex marriage by legislative act. N.H. REV. STAT. ANN. § 457:1-a (2011); N.Y. DOM. REL. LAW § 10-a (2011); VT. STAT. ANN. tit. 15, § 8 (2011). Recently, the Washington State Legislature voted to allow same-sex marriage in the state, a law that will go into effect on June 7, 2012, unless opponents gather sufficient signatures before that date to place the matter on the ballot for the November 2012 election. Nicole Neroulias, *Washington Governor Signs Gay Marriage Law*, CHI. TRIB. (Feb. 13, 2012, 9:22 PM), http://www.chicagotribune.com/news/sns-rt-us-gaymarriage-washingtontre81c15l-20120213,0,900211.story. Finally, the District of Columbia enacted a same-sex marriage ordinance in 2009. *See* D.C. CODE § 46-401(a) (2011). Public opinion on same-sex marriage is clearly shifting. *See* Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx (polling showed for first time that majority of Americans (53%) believe same-sex marriage should be recognized as legally valid).

47. *See* Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 41 (2011).

of family may adapt to marriage as it is functionally lived, rather than as it is formally prescribed."[48] Professor Nancy Polikoff, on the other hand, urges a more pluralistic approach to family relationships, with governmental benefits and burdens following function rather than bestowing exclusive status and privilege on the institution of marriage.[49]

Contemporary litigation about entry barriers to marriage has emphasized the symbolic force of marriage and the public power of the label.[50] Courts have recognized that the existence of a separate legal status with the equivalent rights and responsibilities of marriage, but under a different name, would still discriminate against those couples that are denied access to the symbolic power of marriage.[51] The existence of a status that carries all the legal and economic characteristics of marriage is still not "marriage" in the full meaning of the term. Under that view, the public imprimatur and symbolic commitment inherent in marriage are the essence of marriage, not a regime of shared property, tax benefits, or spousal support.[52]

In a different vein, popular understandings of marriage are also in flux. At one end of the spectrum is the view that marriage is a lifelong covenant between a man and a woman based on sexual fidelity and commitment to traditional values.[53] At the other end, columnist and gay activist Dan Savage rejects an absolute rule of

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48. *Id.* at 79.

49. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 2–3 (2008) (arguing for protection of relationships based on demonstrated interdependence and need rather than formal marital status); *see also* DiFonzo, *supra* note 31, at 559–65.

50. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *amendment ruled unconstitutional by* Perry v. Brown, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012); *Kerrigan*, 957 A.2d 407; *Varnum*, 763 N.W.2d 862; *Goodridge*, 798 N.E.2d 941.

51. *See, e.g.*, Opinions of the Justices to the Senate, 802 N.E.2d 565, 571–72 (Mass. 2004). Judge Vaughn Walker echoed that insight in holding that California's domestic partnership regime, which bestowed the practical benefits and burdens of marriage on domestic partners, was nonetheless culturally and symbolically inferior compared to marriage. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993–94 (N.D. Cal. 2010) (finding that "domestic partnerships exist[ed] solely to differentiate same-sex unions from marriages"), *aff'd sub nom. Perry*, 2012 WL 372713.

52. For a provocative comparison of the costs of the marriage rights movement for same-sex couples and interracial couples, see Katherine M. Franke, *The Curious Relationship of Marriage and Freedom*, *in* MARRIAGE AT A CROSSROADS (Marsha Garrison & Elizabeth S. Scott eds., forthcoming 2012).

53. The Family Leader, for example, is a self-described "Christian conservative organization . . . always standing for God's truth in order to strengthen the family." Press Release, The Family Leader, The Family Leader Unveils Presidential Candidate Pledge Document (July 7, 2011), *available at* http://images.minnesotaindependent.com/The-Family-Leader-Presidential-Pledge.pdf. It has published a "marriage vow" to be signed by political candidates to demonstrate their support for the organization's goals. *See id.* The enactment of covenant-marriage laws in a few states allows couples to opt in to a more binding form of marriage with more restrictive divorce laws than what would otherwise apply. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2011).

sexual fidelity and argues that stability and trust, not sexual monogamy, should be the goal of marriage.[54]

The declining marriage rate in the United States reflects the changing nature of the institution. Among the total adult population, the proportion of people in 2009 who were married dropped to the lowest percentage on record,[55] and married couples today no longer constitute a majority of households in the United States.[56] A growing proportion of younger adults who have never married reflects, in part, the increase in the age at first marriage.[57] The decline in marriage has been the sharpest among low-income populations, and it has been particularly steep for African Americans.[58] Conversely, marriage is still the norm for college-educated, higher-income-earning adults, and those marriages are more stable than among the less educated.[59] While the divorce rate has also declined in the past three decades, it remains higher for those in the lower socioeconomic brackets.[60] Similarly, the percentage of births to unmarried women has risen sharply in the past half-century, with the highest percentage of single mothers occurring at the lower socio-economic levels.[61] A number of factors contribute to the shrinking marriage rates: a delay in marriage due to economic concerns and educational pursuits,[62] greater

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54. Mark Oppenheimer, *Married, With Infidelities*, N.Y. TIMES, July 3, 2011, § MM (Magazine), at 22 (discussing Savage's rejection of a one-size-fits-all approach to sexual mores in marriage).

55. *See* ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P70-125, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, at 6–8 (2011), *available at* http://www.census.gov/prod/2011pubs/p70-125.pdf; Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), http://www.prb.org/Articles/2010/usmarriagedecline.aspx (analyzing U.S. Census data and reporting that proportion of persons 18 years and older who are married dropped to 52% in 2009, and 46% of young adults ages 25–34 have never married, surpassing the 45% who are married).

56. *See* Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES, May 26, 2011, at A22.

57. *See* KREIDER & ELLIS, *supra* note 55, at 2, 5 (reporting that proportion of women aged 25–29 who have never married rose from 27% to 47% between 1986 and 2009, and noting that the average age at first marriage has "increas[ed] from 23 for men and 20 for women in 1950, to 28 for men and 26 for women in 2009").

58. *Id.* at 3–5; *see also* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 5–16 (2011); CHERLIN, *supra* note 30, at 159–74.

59. *See* CHERLIN, *supra* note 30, at 168 (noting that the divorce rate has fallen for college-educated women while holding steady or rising for women without college degrees).

60. CHERLIN, *supra* note 30, at 166–69; KREIDER & ELLIS, *supra* note 55, at 11.

61. The share of births to unmarried women rose from 5% in 1960 to 41% in 2008, but the percentages vary dramatically by race: 72% of black women giving birth in 2008 were unmarried, compared to 53% of Hispanic women and 29% of white women. *See* PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES, at iii, 10 (2010), *available at* http://pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf.

62. *See* CHERLIN, *supra* note 30, at 159–74 (noting a rise in age at first marriage, an increase in cohabitation, and the impact of the economic downturn); KREIDER & ELLIS,

social acceptance of unmarried cohabitation and unmarried parenthood,[63] and, perhaps, a growing sense that marriage is unnecessary.[64]

The economic benefits of marriage are also changing. In the past, when fewer wives worked and husbands had greater earning power and more education, "marriage enhanced the economic status of women more than that of men."[65] That reality, along with the persistence of gender roles in marriage, weakened the bargaining power of women before and after marriage.[66] Today, although the wage gap between men and women has decreased only slightly,[67] women have exceeded men in education and income growth over the last four decades and have reached near parity with men as a percentage of the workforce.[68] In almost a quarter of marriages, wives are now the higher-wage earners.[69] Moreover, married women have achieved the same or a higher education level than their husbands in a majority of marriages today, a reversal of the comparative education levels in 1970.[70] Unlike earlier times, when marriage enhanced the economic status of women more than men, the economic benefits derived from marriage today appear

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supra note 55, at 5 (reporting that median age for first marriages has climbed steadily to 28 years of age for men and 26 years of age for women); Rose M. Kreider, Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) 1 (Sept. 15, 2010) (unpublished manuscript) (on file with *Arizona Law Review*) (unmarried cohabitation jumped to 7.5 million in 2010, an increase of 13% from 2009).

63. *See* Mather & Lavery, *supra* note 55.

64. A Pew Research Center survey from 2010 reports that 39% of Americans view marriage as becoming obsolete, compared with 28% in 1978. *See* PEW RESEARCH CTR., *supra* note 61, at i.

65. D'VERA COHN & RICHARD FRY, PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 1 (2010), *available at* http://pewsocialtrends.org/files/2010/10/new-economics-of-marriage.pdf.

66. Several commentators have explored this theme in the context of premarital agreements. *See generally* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993); Brod, *supra* note 10.

67. Among full-time, year-round workers in 2009, women's median earnings rose to 78.2% of men's earnings. DAVID M. GETZ, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY BRIEFS, SERIES ACSBR/09-3, MEN'S AND WOMEN'S EARNINGS FOR STATES AND METROPOLITAN STATISTICAL AREAS: 2009, at 1 (2010), *available at* http://www.census.gov/prod/2010pubs/acsbr09-3.pdf. In nine states, women's earnings were 80% or more of men's earnings. *Id.* at 4 tbl.1.

68. *See* COHN & FRY, *supra* note 65, at 1 (reporting that median household incomes of married men, married women, and unmarried women were about 60% higher than their counterparts in 1970, but household income for unmarried men rose only by 16%); PEW RESEARCH CTR., *supra* note 61, at ii (reporting that, in the last 50 years, "women have reached near parity with men as a share of the workforce and have begun to outpace men in educational attainment").

69. COHN & FRY, *supra* note 65, at 1.

70. *Id.*

to be greater for men.[71] Presumably, the relative bargaining power of men and women may be shifting as well.[72]

B. Marriage in the Context of Spousal Contracts

With the institution of marriage itself in flux, the divergence in enforcement standards for marital contracts is not surprising. State courts considering the enforcement of marital agreements have expressed a panoply of views about the meaning of marriage. Court opinions are rich with judicial aphorisms and asides about the meaning of this most "sacred" of human relationships.[73]

1. Marriage as Fixed Status

The gendered hierarchy that was at the core of the doctrine of coverture still permeates the law. As Blackstone famously pronounced:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.
>
> . . . .
>
> . . . For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself . . . .[74]

While the common law principle of a married woman's incapacity is clearly unacceptable in modern Western society, the shadow of coverture hovers over much of our law.

Because public policy favored marriage as a lifelong status, premarital or marital contracts that prescribed the economic consequences of divorce were traditionally held to be void.[75] Although public policy no longer opposes enforcement of all divorce-oriented agreements, modern courts still invoke it to

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71. *Id.*

72. For a thoughtful exploration of the declining marriage rate as a function of the unavailability of suitable men, see Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455 (2007).

73. Bedrick v. Bedrick, 17 A.3d 17, 27 (Conn. 2011) ("Marriage is 'intimate to the degree of being sacred. It is an association that promotes a way of life . . . a harmony in living . . . a bilateral loyalty . . . .'" (alterations in original) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965))).

74. 1 EHRLICH'S BLACKSTONE 83–84 (J. W. Ehrlich ed., 1959).

75. *See, e.g.*, McCarthy v. Santangelo, 78 A.2d 240, 241 (Conn. 1951) ("The state does not favor divorces. Its policy is to maintain the family relation as a life status." (citations omitted)).

invalidate one-sided agreements that make divorce especially attractive to one spouse.[76]

A close cousin of the theme that public policy should protect marriage is the premise that marriage is an immutable status—a marital contract that modifies the essential meaning of marriage is void.[77] In Ohio, for example, a statute prohibits a husband and wife from contracting with each other to "alter their legal relations."[78] In an unpublished decision, an Ohio appellate court took the statutory bar to an illogical extreme. In *Hoffman v. Dobbins*, the husband and wife entered into an antenuptial agreement barring both of them from all rights of inheritance upon the death of either.[79] Three years into their marriage, the parties executed an amendment to the antenuptial to revoke the terms barring inheritance, apparently intending to restore their rights in one another's estate as a surviving spouse.[80]

When the husband died a few years later, his children from a former relationship successfully argued that the attempted amendment to the antenuptial agreement during the parties' marriage was void under Ohio law as an invalid marital contract.[81] The trial and appellate courts agreed, relying on the Ohio statute.[82] Although a strong argument was available that the parties had intended to *reinstate* the legal relations that the antenuptial contract had abrogated,[83] the court of appeals flatly stated that "[p]ostnuptial agreements, with specific limited exceptions, are not valid in Ohio."[84] The court went on to explain that "[a]n amended contract necessarily alters the legal relations of the husband and wife by either restricting or expanding their legal rights and obligations."[85] Assuming the truth of the wife's factual allegations, the result of the appellate court's decision was that the couple's mutual intent was thwarted. The court disregarded their reinstatement of inheritance rights—potentially their security for the future. The vestiges of the doctrine of coverture reflected in the Ohio statute prevented the widow from inheriting from her husband despite the fact that each of them had

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76. *See, e.g.*, Gartrell v. Gartrell, 908 N.E.2d 1019, 1024 (Ohio Ct. App. 2009) (holding that a premarital agreement was void on the ground that it would encourage divorce because the wife was to receive "a very significant monetary sum for a marriage of very short duration"). As another court put it, "a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce." Wright v. Wright, 761 N.W.2d 443, 448 (Mich. Ct. App. 2008) (citing Day v. Chamberlain, 193 N.W. 824 (Mich. 1923)). In *Wright*, the doctrine was applied to invalidate a marital contract that would have divested the wife of all marital property in the event of divorce. In the court's view, the contract was void since it "was calculated to leave [the husband] in a much more favorable position to abandon the marriage." *Id.* at 449.

77. *See* Hoffman v. Dobbins, No. 24633, 2009 WL 3119635, at *2 (Ohio Ct. App. Sept. 30, 2009); *see also infra* notes 88–96.

78. OHIO REV. CODE ANN. § 3103.06 (2011).

79. 2009 WL 3119635, at *1.

80. *Id.* at *1–2.

81. *Id.* at *2.

82. *Id.*

83. *See id*. at *4 (Belfance, J., dissenting).

84. *Id.* at *2 (majority opinion) (citation omitted).

85. *Id.*

desired precisely that result.[86] Ironically, while the spouses were apparently free to alter the economic consequences of marriage in a premarital contract, the marriage itself imposed a disability preventing them from contractually amending their prior agreement.

Coverture, likewise, formed a backdrop to the decision in *Borelli v. Brusseau*, a case well known to family law professors.[87] There, a California court refused a widow's effort to enforce a contract she had entered into with her ailing husband to be his caregiver.[88] Under the oral agreement, the husband promised to leave the bulk of his separate property to his wife by will if she would attend to his physical and medical needs for the duration of his illness so that he would not have to spend time in a convalescent hospital.[89] The wife did in fact care for the husband at home until his death, but he did not follow through on his part of the bargain. Instead, he left his considerable estate to his daughter from a prior marriage.[90] Interestingly, the couple had signed a premarital agreement that presumably protected the husband's separate assets, a fact that did not figure in the court's holding.[91]

In her suit for specific performance, the widow urged the court to abandon precedents that were "based on outdated views of the role of women and marriage."[92] Both the trial court and the court of appeals, however, reasoned that the wife had a duty to care for her ill husband as a function of the marriage relationship. For that reason, the contract failed for lack of consideration because "[p]ersonal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case."[93]

While the requirement of consideration for marital contracts is often a challenging inquiry in general,[94] the *Borelli* court made clear that it was vindicating an important policy about marriage:

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86. *See id.*; *see also In re* Estate of Shaffer, No. 08-0653, 2009 WL 606003, at *1–2 (Iowa Ct. App. Mar. 11, 2009) (holding that marital agreements cannot waive surviving spousal rights to an elective share of other spouse's estate, although such rights can be waived through premarital agreements).

87. 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993). Several family law casebooks feature *Borelli* as a principal case. *See, e.g.*, LESLIE JOAN HARRIS ET AL., FAMILY LAW 94 (4th ed. 2010); HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 217 (6th ed. 2007); PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS, AND PROBLEMS 139 (2d ed. 1998).

88. *Borelli*, 16 Cal. Rptr. 2d at 20.

89. *Id.* at 17–18.

90. *Id.* at 18.

91. *Id.* at 23 n.2 (Poché, J., dissenting).

92. *Id.* at 19 (majority opinion).

93. *Id.* at 20.

94. Unlike premarital agreements, agreements entered into during marriage need consideration other than the marriage itself. Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004). The doctrine may require courts to assess the mutuality of the spouses' exchange, *see, e.g.*, Simmons v. Simmons, 249 S.W.3d 843, 846–47 (Ark. Ct. App. 2007) (holding that postnuptial agreement containing unilateral promise by husband to convey separate

> Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.[95]

The court added that negotiations in the form of sick-bed bargaining "are antithetical to the institution of marriage as the Legislature has defined it."[96]

The duty of care recognized in *Borelli* may be gender-neutral, but the precedents establishing the duty were steeped in the gender-specific regime of coverture.[97] In *Borelli*, the fact of marriage disabled the widow from collecting on her contract to provide home care to her ailing husband, a contract that ironically would have altered the terms of the couple's premarital agreement. Had the husband hired a stranger to provide the services, that person presumably would have had a viable claim against the estate. By refusing to enforce the marital contract for the benefit of Mrs. Borelli, the court in effect held that the surviving widow had a "pre-existing . . . nondelegable duty to clean the bedpans herself."[98] While the holding may be a function of the court's disapproval of bargaining at the brink of death, it leaves open the possibility that other services performed within a marriage may be deemed beyond the realm of contract. In a related vein, several states statutorily bar married couples from altering the law of spousal support.[99] As a practical matter, such measures may be designed to reduce the number of people on public assistance, but as symbolic measures, they shape the meaning of marriage. In other words, the potential legal duty to support a former spouse becomes an inherent and immutable feature of the marital relationship.

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property to wife failed for lack of consideration), or to decide whether forbearance from filing for divorce is adequate consideration, *see, e.g.*, Bedrick v. Bedrick, 17 A.3d 17, 27 n.5 (Conn. 2011) (noting question but not deciding whether forbearance from bringing divorce action and continuation of marriage was adequate consideration for marital agreement); *In re* Marriage of Tabassum, 881 N.E.2d 396, 408–09 (Ill. App. Ct. 2007) (holding that a delay in filing for divorce for only a few months was valid consideration for marital agreement).

95. *Borelli*, 16 Cal. Rptr. 2d at 20.

96. *Id.*

97. The U.S. Supreme Court described the disabilities of married women in an early decision: "[T]he legal existence of the wife during coverture being merged in that of the husband; and . . . the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent." Thompson v. Thompson, 218 U.S. 611, 614–15 (1910).

98. *Borelli*, 16 Cal. Rptr. 2d at 20 (Poché, J., dissenting).

99. *See, e.g.*, CAL. FAM. CODE § 1620 (2011) (providing that spousal agreement cannot alter legal relations except for terms affecting property); MONT. CODE ANN. § 40-2-303 (2011) (providing that spouses cannot contractually alter legal relations except as to property or for immediate separation and support); N.M. STAT. ANN. § 40-2-8 (2011) (same); OKLA. STAT. tit. 43, § 205 (2011) (same); S.D. CODIFIED LAWS § 25-2-13 (2011) (same).

2. Marriage as Confidential Relationship

In disputes over marital agreements, courts frequently expound on the meaning of marriage as a "confidential" or "fiduciary" relationship.[100] While the terms carry distinct meanings in trust law,[101] they are often used interchangeably when used to describe the special nature of the marital relationship.[102] The confidential marriage relationship was an explicitly gendered vision in older cases because of the husband's dominant economic authority over the wife.[103] Today, the confidential relationship is typically described as triggering gender-neutral duties of fidelity, honesty, good faith, and fair dealing.[104] More pessimistically, marriage may be viewed as a perilous status fraught with risk because a vulnerable spouse may be the victim of coercion and overreaching.[105] Courts and legislators may heighten the standard of evidence, manipulate the burden of proof, or impose timing requirements as a way of accommodating this vision of marriage.[106]

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100. In a few states, no confidential relationship per se is presumed to exist between spouses, but it can be established by showing that one spouse is clearly dominant and the other dependent. *See, e.g.*, Lasater v. Guttmann, 5 A.3d 79, 93–96 (Md. Ct. Spec. App. 2010) (holding that spouses are not true fiduciaries and are presumed not to occupy a confidential relationship). At least one court has held that a fiduciary relationship between spouses may terminate if one or both spouses are represented by legal counsel. *See, e.g.*, Dawbarn v. Dawbarn, 625 S.E.2d 186, 191 (N.C. Ct. App. 2006).

101. *See* 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 2.5 (4th ed. 1987) (distinguishing affirmative duties of fiduciary relationship from "merely confidential relation"); *see also Lasater*, 5 A.3d at 93–94 (citing SCOTT & FRATCHER, *supra*, § 2.5).

102. *See Dawbarn*, 625 S.E.2d at 191 (holding that in "fiduciary relationship" between spouses, each has a duty of full disclosure to the other); Bratton v. Bratton, 136 S.W.3d 595, 601 (Tenn. 2004) (using "confidential" and "fiduciary" interchangeably).

103. *See In re* Estate of Harber, 449 P.2d 7, 16 (Ariz. 1969) (holding that a marriage relationship is confidential, the husband is in a position analogous to a trustee, and when a postnuptial contract is challenged by his wife on grounds of unfairness, he has a burden to prove by clear and convincing evidence that the agreement is not unfair or inequitable); Sande v. Sande, 360 P.2d 998, 1001 (Idaho 1961) (noting that in transactions between husband and wife, the husband, who is manager of community property, stands in fiduciary relationship to his wife (citations omitted)).

104. *See, e.g.*, Ansin v. Craven-Ansin, 929 N.E.2d 955, 965 (Mass. 2010) (stating that each spouse owes a duty of "absolute fidelity" to the other (citing Krapf v. Krapf, 786 N.E.2d 318, 323 (Mass. 2003))); *Bratton*, 136 S.W.3d at 601 (marital relationship is a state of "special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other" (quoting *In re* Estate of Gab, 364 N.W.2d 924, 926 (S.D. 1985))).

105. According to the court in *Pacelli v. Pacelli*, mid-marriage agreements are "pregnant with the opportunity for one party to use the threat of dissolution 'to bargain themselves into positions of advantage.'" 725 A.2d 56, 62 (N.J. Super. Ct. App. Div. 1999) (quoting Mathie v. Mathie, 363 P.2d 779, 783 (Utah 1961)).

106. In California, the implications of the confidential marital relationship for marital agreements are spelled out by legislation. *See, e.g.*, CAL. FAM. CODE § 721 (2011) (providing that spouses can contract with one another regarding property rights at death or divorce; spouses are in fiduciary relationship with highest duty of good faith and fair dealing; and neither spouse shall take unfair advantage); CAL. PROB. CODE § 143(a) (2011) (providing that waiver of rights at death by agreement is enforceable unless done without disclosure or without independent legal representation for the surviving spouse). The

In *Ansin v. Craven-Ansin*, the Massachusetts Supreme Judicial Court addressed the meaning of the marriage relationship when it faced head-on "the long-deferred question of first impression" whether marital agreements should be recognized.[107] The case concerned the validity of a marital agreement entered into by a couple after experiencing significant discord in the marriage. The agreement, which spelled out the economic rights of the spouses in the event of divorce, was a vehicle for salvaging the marriage.[108] In the agreement, the wife disclaimed interest in the husband's considerable assets in exchange for a substantial payment in the event of divorce and other financial benefits.[109] Importantly, each party was represented by legal counsel during the negotiations, and the wife's lawyer successfully bargained for significant concessions during the negotiations.[110] When the parties' marriage ultimately foundered, the wife argued that marital agreements should be declared void as against public policy because they are "innately coercive, usually arise when the marriage is already failing, and may encourage divorce."[111]

The court rejected the wife's categorical approach, noting that "a marital relationship need not vitiate contractual rights between the parties."[112] Differentiating both separation agreements and premarital agreements, however, the court concluded that marital agreements require higher scrutiny. In the premarital context, parties are free to reject an unsatisfactory agreement. At the time of the separation agreement, in turn, the marriage has failed.[113] With the marital agreement, in contrast, a party may use the threat of divorce to obtain an advantage over the other party. As the court put it, "The circumstances surrounding marital agreements . . . are 'pregnant with the opportunity for one party to use the threat of dissolution 'to bargain themselves into positions of advantage.'"'[114] In the court's view, marital agreements are different because they

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California Legislature has been particularly active in the realm of premarital agreements. *See* CAL. FAM. CODE § 1615(c) (2011) (codifying rule that voluntariness for premarital agreement requires representation by independent counsel or written waiver, at least seven days between presentation of agreement and signing, and information about basic effect of agreement if unrepresented by counsel). At least one state presumptively treats a marital agreement as unenforceable if either party seeks a divorce within two years of signing. *See, e.g.*, MINN. STAT. § 519.11(1a)(d) (2011).

107. 929 N.E.2d at 961.

108. The court explained that the "husband promised his wife that he would recommit to the marriage if she would sign a marital agreement. She agreed to do so, she said, in an attempt to preserve the marriage and the family." *Id.* at 960.

109. With marital assets valued at $19 million, the wife was to receive $5 million at divorce, 30% of appreciation of marital assets from time of agreement to time of divorce, free use of marital home for one year, medical insurance, and beneficial interest in her husband's life insurance policy during marriage. *Id.* at 960–61.

110. *Id.* at 964.

111. *Id.* at 962 (internal quotation marks omitted).

112. *Id.* at 961–62.

113. *Id.* at 962–63. The court drew on the ALI's work for some of its reasoning but departed from the ALI in differentiating marital agreements from premarital agreements. *See id.* at 963 n.8.

114. *Id.* at 963 (quoting Pacelli v. Pacelli, 725 A.2d 56, 62 (N.J. Super. Ct. App. Div. 1999)).

are entered into during the marriage when "each spouse owes a duty of absolute fidelity to the other."[115] Moreover, the court emphasized, marital agreements are executed "without the safeguards attendant to divorce proceedings."[116]

The *Ansin* court announced detailed standards for marital agreements, drawing heavily on the work of the American Law Institute.[117] In addition to the ordinary prohibitions against fraud and coercion, the *Ansin* court mandated that each party have the opportunity to obtain separate legal counsel, that full financial disclosure be made before execution, that waivers of rights be knowing and voluntary, and that the terms of the agreement be fair and reasonable at execution and at enforcement.[118] Importantly, the court placed the burden of proof on the party seeking to enforce the agreement, in effect setting up a presumption of invalidity.[119]

In assessing the fairness and reasonableness of the agreement at the time of the divorce, the court made clear that a marital contract need not provide for a division of assets that would have been obtained had the parties litigated without an agreement.[120] Nevertheless, the court pointed to the range of factors relevant to the equitable distribution scheme in Massachusetts as an appropriate measure.[121] In other words, the *Ansin* court endorsed a searching inquiry about the fairness of the terms of a marital agreement while leaving few constraints on judicial discretion. On the facts before it, the court found that the agreement met the announced criteria and ordered specific enforcement.[122] The court was strongly influenced by the fact that the wife had been represented by counsel and had conceded that she understood the rights she was waiving at the time of executing the agreement.[123]

The message of *Ansin* is that marriage not only imposes obligations of good faith, but also creates unique risks of bad faith transactions. Placing the burden on the party defending a marital agreement and requiring broad judicial review for fairness and reasonableness inevitably creates uncertainty. While the decision on the merits shows that the standard is not impossible to satisfy, the *Ansin* framework subordinates contractual autonomy and predictability to the duty of fair dealing inherent in the marriage relationship.

The confidential relationship of spouses was equally important in the Connecticut case of *Bedrick v. Bedrick*.[124] Unlike the facts in *Ansin*, the agreement in *Bedrick* was executed many years before the parties' divorce and before the

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115. *Id.* at 965 (citing Krapf v. Krapf, 786 N.E.2d 318, 323 (Mass. 2003)).
116. *Id.*
117. *Id.* at 963; *see also* ALI PRINCIPLES, *supra* note 24, §§ 7.01–08.
118. 929 N.E.2d at 963–64.
119. *Id.* at 964.
120. *Id.* at 969.
121. In explaining the fairness at enforcement standard, the court stated that a judge may consider such factors as the length of the marriage, conduct of the parties during the marriage, contributions of the parties to the acquisition of assets, and economic need of the parties and children. *Id.* at 968–69 & n.20 (citations omitted).
122. *Id.* at 964–69.
123. *See id.* at 966–67.
124. 17 A.3d 17 (Conn. 2011).

birth of their son.[125] Under the terms of the agreement, the wife, who was not represented by counsel,[126] was to receive a modest settlement and no spousal maintenance, leaving the husband with the bulk of the marital assets.[127] The trial court, expressing serious doubts about the enforceability of postnuptial agreements in general,[128] held that the agreement was unenforceable for a range of reasons.[129]

The Connecticut Supreme Court made clear at the outset that postnuptial agreements promote the private resolution of family issues and are consistent with public policy: "By alleviating anxiety over uncertainty in the determination of legal rights and obligations upon dissolution, postnuptial agreements do not encourage or facilitate dissolution; in fact, they harmonize with our public policy favoring enduring marriages."[130] Nevertheless, the court laid the foundation for a rule of heightened scrutiny by observing that marriage is "one of the most fundamental of human relationships," and warning that "[c]ourts simply should not countenance either party to such a unique human relationship dealing with each other at arms' length."[131] In *Bedrick*, as in *Ansin*, the unique nature of marriage meant that married people might let their guard down during negotiations. According to the court, spouses may act with less caution when contracting about property or support during a marriage than they would prior to marriage, and certainly with less caution than they would exercise with an ordinary contracting party.[132]

The *Bedrick* court held that enforcement of a postnuptial agreement should occur "only if [the agreement] complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the time of dissolution."[133] This standard translated into some familiar requirements. A postnuptial agreement must be voluntary and free of fraud and undue influence, and each spouse must be given full disclosure of property and financial obligations of the other spouse. [134]

More significantly, the court expanded on the required fairness of postnuptial agreements, announcing different standards for the time of execution

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125. The divorce action in *Bedrick* was filed in 2007, about 18 years after the most recent amendment of the parties' postnuptial agreement. *See id.* at 21–22.

126. *Id.* at 28 n.6.

127. The wife was to receive a $75,000 settlement; the value of the parties' combined assets, consisting primarily of a car wash business, was close to $1 million. *Id.* at 22.

128. The trial court viewed postnuptial agreements as "'inherently coercive' because one spouse typically enters into it in order to preserve the marriage, while the other is primarily motivated by financial concerns." *Id.*

129. According to the trial court, the agreement lacked adequate consideration, the wife did not knowingly waive her rights, and enforcement would be unjust in light of changed circumstances. *Id.*

130. *Id.* at 24.

131. *Id.* at 26–27 (citations omitted).

132. *Id.* at 27.

133. *Id.*

134. As the court explained, "This mandatory disclosure requirement is a result of the deeply personal marital relationship." *Id.* at 28.

and the time of enforcement. Fairness at time of execution, in the court's view, means a thorough consideration of circumstances, including the agreement's terms and complexity, disparity in assets, the parties' respective sophistication, access to counsel, and the time each spouse had to reflect on the agreement's terms.[135]

Determining whether an agreement is unconscionable, on the other hand, requires a more substantive inquiry about the impact of the agreement on the parties. In *Bedrick*, the court made clear that mere unfairness or inequality in terms would not be enough. Instead, the question of unconscionability "is analogous to determining whether enforcement of an agreement would work an injustice."[136] The court added that "[u]nforeseen changes in the relationship, such as having a child, loss of employment or moving to another state, may render enforcement of the agreement unconscionable."[137] On the facts before it, the Connecticut Supreme Court agreed with the trial court that the agreement was unconscionable at the time the husband sought to enforce it in light of the dramatic change in the parties' economic circumstances.[138]

The Connecticut court, like the Massachusetts court, viewed marriage as a confidential relationship with duties of utmost trust and good faith. Both courts distinguished marital agreements from premarital agreements and established a more stringent standard for agreements entered into during marriage because of the perceived risks of unfair advantage and distortions of the bargaining process. The standards announced in both decisions attempt to address the danger that one spouse will be vulnerable to the financial demands of the other in order to continue the marriage.

At the same time, in assessing the fairness of an agreement at enforcement, the Connecticut court's approach in *Bedrick* is more deferential to the parties' contractual autonomy by requiring the party challenging the agreement to prove "unconscionability," not mere unfairness or unreasonableness, and the burden of proof remained with the challenger. Still, the standard of "unconscionability," as used in *Bedrick*, clearly invites post hoc evaluation of the substance of marital agreements. Ironically, the agreement in *Ansin* withstood the more demanding standards announced there while the agreement in *Bedrick* failed under the more forgiving measure of that case. The difference in outcome is likely the result not only of the stronger showing of unfairness in *Bedrick*, but also of the key fact that both parties in *Ansin* had independent legal representation.

The ALI's standard for marital agreements, on which *Ansin* heavily relied, would constrain judicial discretion more than does the *Ansin* approach while still permitting judicial review of the terms of an agreement at enforcement under defined circumstances. Recognizing that marriage creates distinct interpersonal dynamics and triggers distinct public policies, the ALI Principles try to achieve "a nuanced accommodation between the benefits of contractual

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135. *Id.*

136. *Id.* (citing Crews v. Crews, 989 A.2d 1060, 1066 (Conn. 2010)).

137. *Id.*

138. *Id.* at 28–29 (explaining that the parties were 57 years old at time of trial, the parties' son had been born after the agreement, and the business had deteriorated).

autonomy, and concerns for the special context in which bargaining over the terms of family relationships tends to occur."[139] The ALI Principles contain detailed procedural requirements for premarital and marital agreements that are designed to ensure that agreements are entered into voluntarily and with full knowledge of the rights being altered.[140] Significantly, the ALI standards place the burden of proof on the party seeking to enforce the agreement with respect to these procedural requirements.[141] As to substantive review, the standards permit a court to refuse enforcement if the challenger can prove that the agreement would create a "substantial injustice," but only if the challenger makes a threshold showing of circumstances that justify judicial review.[142] According to the commentary, the ALI's approach permits substantive review for particularly problematic situations while "retain[ing] considerable deference to contractual freedom."[143] Although the ALI's formulation has not been adopted in its entirety in any state, the policy analysis has influenced courts as well as legislatures.[144]

3. Marriage as Contract

In some jurisdictions, the goal of achieving efficiency and predictability in marital contracts trumps the interest in protecting vulnerable spouses or in implementing substantive marriage policy. Marriage, in other words, becomes a malleable relationship in which the spouses can engage in (almost) arms-length bargaining about (almost) any facet of the relationship. Pennsylvania, in particular,

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139. ALI PRINCIPLES, *supra* note 24, § 7.02 cmt. a. The commentary to the ALI Principles emphasizes that cognitive capacity to enter family contracts, as compared to commercial contracts, is limited because of the unique emotional dynamics and the difficulty of contracting for a future and undesired contingency. Moreover, family contracts typically undermine public policies—expressed by default rules—that protect persons who enter into family relationships. *Id.* § 7.02 cmts. b–c.

140. *Id.* § 7.04 (requiring the party seeking to enforce the agreement to show that the other party's consent was informed and not obtained under duress and creating a rebuttable presumption that consent is informed and voluntary if certain showings are made). The rebuttable presumption of section 7.04 is triggered if both parties had a reasonable opportunity to obtain independent legal counsel, and, if not represented by counsel, the agreement clearly describes the nature of the rights being altered. *See id.* § 7.04(3)(b)–(c). Moreover, the presumption also requires that a premarital agreement be executed 30 days before the parties' marriage. *Id.* § 7.04(3)(a). Finally, the standard provides that a marital agreement may be rescinded within 30 days of execution. *Id.* § 7.04(4).

141. *Id.* § 7.04(2).

142. *Id.* § 7.05(2) (requiring a challenger to show the passage of a prescribed time period, the birth or adoption of children, or an unanticipated change in circumstances).

143. *Id.* § 7.05 cmt. a.

144. The Massachusetts Supreme Judicial Court relied heavily on the ALI commentary in *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963 (Mass. 2010), but stopped short of endorsing the ALI's specific approaches. *See supra* text accompanying notes 117–19; *see also* Eyster v. Pechenik, 887 N.E.2d 272, 280 (Mass. App. Ct. 2008) (quoting ALI as to placing distinctive limitations on people's judgments in family contracts). California's amendments of its Uniform Premarital Agreement Act, including its required waiting period, are similar to those recommended by the ALI. *See infra* note 160 and accompanying text.

has established itself as a leading pro-enforcement jurisdiction with regard to premarital and marital agreements. In *Simeone v. Simeone*, the Pennsylvania Supreme Court reformulated the common law standards governing premarital agreements, noting that "[p]aternalistic presumptions and protections that arose to shelter women" have been "appropriately" discarded.[145] The court held that traditional contract rules should be applied to premarital agreements with one exception. Because parties to premarital agreements "stand in a relation of mutual confidence and trust," they must make a full and fair disclosure of their financial resources.[146] Apart from that narrow concession, the court refused to endorse other safeguards, including any inquiry into the substance of the agreement or the parties' understanding of the rights being relinquished.[147]

The Pennsylvania Supreme Court extended *Simeone* to the postnuptial context in *Stoner v. Stoner*.[148] Although *Stoner* involved a separation agreement rather than a marital agreement, the court's language and reasoning were broad enough to encompass the latter. As the court put it, the question before it was "whether a postnuptial agreement is a valid and enforceable contract even though it did not disclose the statutory rights to which a spouse is entitled."[149] Echoing the philosophy of *Simeone*, the court reiterated that traditional contract principles should govern:

> We decline to resurrect the paternalistic approaches to evaluating marriage contracts by requiring Husband to explain to Wife the statutory rights that she may be surrendering. Such an approach assumes that Wife lacks the intelligence or ability to protect her own rights. Instead, we endorse the parties' rights to freely contract . . . .[150]

In *Stoner*, as in *Simeone*, the court acknowledged that spouses stand in a position of "mutual confidence and trust" at the time of contracting and must make full disclosure of financial resources.[151] The confidential relationship of spouses, however, did not justify requiring that parties be advised of their statutory rights.[152] Similarly, a few other courts have stopped short of requiring a showing that a spouse acted with knowledge of rights being relinquished in a marital agreement, reasoning instead that a party to a contract is presumed to know and understand its contents.[153]

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145. 581 A.2d 162, 165 (Pa. 1990) (enforcing a prenuptial agreement that provided wife with limited support payments).

146. *Id.* at 166–67.

147. *Id.* (rejecting the wife's argument for a per se requirement of independent legal counsel).

148. 819 A.2d 529, 533 (Pa. 2003).

149. *Id.* at 529.

150. *Id.* at 533.

151. *Id.*

152. The court explained that "the right balance is struck by requiring full disclosure of financial assets, in conjunction with the protection of traditional contract remedies for fraud, misrepresentation or duress." *Id.*

153. *See, e.g.*, *In re* Estate of Smid, 756 N.W.2d 1, 8–10 (S.D. 2008) (enforcing postnuptial waiver of rights at death, despite wife's showing that she was not represented by

The limited judicial inquiry in *Stoner* and kindred decisions diverges markedly from those courts that scrutinize spousal agreements not only to ensure financial disclosure, but also to require knowledge of rights being waived and substantive fairness in result.[154] The message of *Stoner* is that spouses should act with due diligence to protect their own self-interest. As a function of the marital relationship, they can appropriately expect a truthful disclosure of financial assets, but beyond financial disclosure, ordinary rules of contract govern.

Courts in a few states have taken the position that the pro-enforcement stance of the UPAA is appropriate for determining enforceability of marital contracts.[155] The UPAA provides that premarital agreements are unenforceable if the challenger proves that the agreement was not voluntary or that the agreement was unconscionable when executed and the challenging party was not provided adequate financial disclosure.[156] In other words, unconscionability by itself is not a basis for voiding an agreement. Moreover, unconscionability in result is not a basis for challenge at all. The only window for challenging the fairness of an agreement at enforcement is the UPAA's narrow provision refusing to enforce a term about spousal support if it makes one party a public charge.[157] Finally, the Act does not explicitly require that a party to a premarital agreement understand the nature of any rights being waived.

The UPAA has been the target of vigorous criticism,[158] and half the adopting states have changed the black letter of the Act in their own jurisdictions.[159] Variations in adopting states include stronger procedural safeguards,[160] broader substantive review of agreements,[161] and increased

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independent counsel, was presented with waiver by husband's attorney when husband was terminally ill, and did not understand nature of rights being waived). The majority decision in *Smid* prompted a dissenting justice to accuse the majority of embracing a "bleak and mercantile view of marriage." *Id.* at 14 (Konenkamp, J., dissenting).

154. *See, e.g.*, Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004) (summarizing majority view as requiring that postnuptial agreements be "free from fraud, coercion or undue influence, that the parties acted with full knowledge of the property involved and their rights therein, and that the settlement was fair and equitable").

155. *See, e.g.*, VA. CODE ANN. §§ 20-147 to -155 (2011). In at least one state, spouses can contract for the application of the UPAA to their postmarital agreement. *See* Davis v. Miller, 7 P.3d 1223, 1229–30 (Kan. 2000).

156. *See* UNIF. PREMARITAL AGREEMENT ACT § 6(a), 9C U.L.A. 48–49 (2001).

157. *See id.* § 6(b).

158. *See, e.g.*, Atwood, *supra* note 66, at 146; Bix, *supra* note 2, at 265; Oldham, *supra* note 14 (manuscript at 1–3).

159. *See generally* Oldham, *supra* note 14 (manuscript at 4–9).

160. *See, e.g.*, CAL. FAM. CODE § 1615(c) (2011) (requiring independent counsel or waiver of that right in writing; a seven-day waiting period between presentation of agreement and time of signing; and, if unrepresented, party was fully informed in writing of effect of agreement and rights being relinquished); CONN. GEN. STAT. § 46b-36g(4) (2011) (requiring opportunity to consult legal counsel); FLA. STAT. § 61.079(7) (2011) (permitting challenge if agreement is involuntary or procured by "fraud, duress, coercion or overreaching").

161. Several states have decoupled unconscionability from nondisclosure so that unconscionability at time of execution by itself is a basis for refusing enforcement. *See, e.g.*, CONN. GEN. STAT. § 46b-36g(2) (2011); IOWA CODE § 596.7(2)(b) (2011); R.I. GEN. LAWS §

protection for spousal support.[162] The uneven enactment history of the UPAA suggests that it diverged significantly from public policy regarding enforcement of premarital agreements in many states. The UPAA's existing framework, if extended to marital agreements, would diverge even more sharply from standards that have emerged in recent case law.

II. A BRIEF INTERNATIONAL COMPARATIVE LOOK

Many nations in continental Europe treat premarital and marital agreements as indistinguishable, imposing the same legal standards on a contracting couple whether the agreement is entered into before or after marriage.[163] Compared to the law of many states within the United States, however, European standards are less deferential to freedom of contract in order to promote predictable property dispositions at divorce, achieve equity for spouses, and protect family interests.[164]

In general, spouses in continental Europe are given the option of selecting among several marital property regimes, not to contract "out of a fair system," but "to choose between alternatives that suit different families, and between different versions of fairness."[165] While important national differences exist within Europe, a common approach permits spouses to contract out of the default marital property regime and to select from a menu of options a different regime to govern their rights *during* marriage.[166] Where the default regime is a shared system, or

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15-17-6(a)(2) (2011). A few states, moreover, permit challenges based on unconscionability at enforcement. *See, e.g.*, N.J. STAT. ANN. § 37:2-32(c) (2011) (defining unconscionable as leaving party without reasonable support or at standard of living far below party's premarital standard of living); N.D. CENT. CODE § 14-03.1-07 (2011) (permitting court to limit application of agreement's terms to avoid unconscionable result).

162. In a few states, spousal support has been declared off limits. *See, e.g.*, IOWA CODE § 596.5(2) (2011); N.M. STAT. ANN. § 40-3A-4(B) (2011). Others have provided additional safeguards for spousal support. *See, e.g.*, CAL. FAM. CODE § 1612(c) (2011) (providing that premarital agreement regarding spousal support is unenforceable if party against whom enforcement is sought was not represented by independent counsel at time of execution or if provision is unconscionable at enforcement).

163. *See* Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 42–62 (2009).

164. *See id.* at 52; *see also* Nina Dethloff, *Contracting in Family Law: A European Perspective*, *in* THE FUTURE OF FAMILY PROPERTY IN EUROPE, *supra* note 43, at 65, 76.

165. *See* LAW COMM'N, CONSULTATION PAPER NO. 198, MARITAL PROPERTY AGREEMENTS 64 (2011) [hereinafter MARITAL PROPERTY AGREEMENTS], *available at* http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

166. *See* Dethloff, *supra* note 164, at 74–81. In France, on the other hand, spouses may mix different regimes listed in the French Civil Code and may establish new regimes not recognized by the law. *See generally* Ryznar & Stepień-Sporek, *supra* note 163, at 45–46 (discussing various ways in which the French Civil Code recognizes significant freedom of contract for spouses).

"community of property," a major use of marital agreements is to permit spouses to opt for separation of property during the marriage.[167]

While marital agreements modifying the default property regime are widely accepted in Europe, that is not the case for marital agreements on post-divorce maintenance and other financial consequences of divorce.[168] Some European countries limit agreements affecting maintenance to settlements entered into at the time of divorce, and others refuse to recognize spousal waivers of future maintenance.[169] Even where maintenance agreements are permitted, courts typically scrutinize them and refuse to enforce agreements that violate stated norms, such as "manifestly unjust, preposterous,"[170] or "highly detrimental to one spouse."[171] Contractual freedom with respect to other financial consequences, such as compensatory payments after divorce, is even more limited.[172]

Significantly, in many European countries, marital agreements must be entered into before a notary.[173] European notaries, in contrast to notaries in the United States, have training and expertise to serve as "impartial advisors" and are generally required to "provide independent advice to both parties."[174] Requiring that marital agreements be executed before a notary is an effort to "ensure the protection of the weaker and less well-informed or prepared spouse."[175]

Until recently, the United Kingdom diverged from the European approach; its law distinguished between prenuptial and postnuptial agreements and refused enforcement of the former as void.[176] In 2010, the U.K. Supreme Court finally recognized the validity of prenuptial agreements, albeit in a holding that subjects agreements to considerable judicial scrutiny for procedural and substantive fairness.[177] In the closely watched case of *Radmacher v. Granatino*, the French husband of a wealthy German heiress sought to invalidate their prenuptial agreement to the extent necessary to give him a "needs-based" order following

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167. *See* Dethloff, *supra* note 164, at 71. In Germany, for example, spouses may choose from contractual property regimes recognized in the German Civil Code, but bargains between spouses must not result in an unacceptably disproportionate distribution of burdens. *See id.* at 78–79 (discussing policies announced by German Federal Supreme Court). In France, by contrast, spouses are barred from changing their property regime until it has been in force for two years, and modifications at that point must be in the interests of the family. *See id.* at 76 (discussing the French Civil Code).

168. *See id.* at 81–84.

169. *See id.* at 82 (discussing law of Poland, Norway, Netherlands, and Italy). Unlike most European nations, German law permits spouses to modify the default rules as to maintenance and even to exclude post-divorce maintenance in its entirety. *See* MARITAL PROPERTY AGREEMENTS, *supra* note 165, at 63 (discussing the German Civil Code); Franck, *supra* note 9, at 247–49 (same).

170. Dethloff, *supra* note 164, at 82 (citation omitted).

171. *Id.* (citing CODE CIVIL [C. CIV.] art. 232, para. 2 (Fr.)).

172. In France, for example, the *prestation compensatoire*, a remedy to alleviate economic disparities between spouses, cannot be waived. *Id.* at 83.

173. *Id.* at 74.

174. *Id.*

175. *Id.*

176. *See* MARITAL PROPERTY AGREEMENTS, *supra* note 165, at 8.

177. *See* Radmacher v. Granatino, [2010] UKSC 42, [2011] 1 A.C. 534.

their divorce. The high court rejected as "obsolete" the traditional public policy voiding a contract providing for divorce.[178]

The justices held that the judiciary's discretionary jurisdiction to determine the effect of an agreement remains intact, but that the court should uphold an agreement freely entered into unless it would be unfair. As the justices put it: "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."[179] Factors relevant to the crucial fairness determination include the timing of the agreement, financial disclosures, the parties' understanding of the terms and whether they acted on advice of counsel, the emotional dynamics of the execution of the agreement, and any impact of the agreement on minor children.[180] The court noted that the parties' contractual autonomy deserves weight because "[i]t would be paternalistic and patronising to override their agreement simply on the basis that the court knows best."[181] At the same time, agreements attempting to address contingencies of the couple's future relationship may be unfair because of changed circumstances.[182]

Significantly, an earlier decision from the Privy Council had ruled that postnuptial agreements should be subject to less judicial scrutiny than antenuptial agreements. In *MacLeod v. MacLeod*, the Council reasoned that the risks of overreaching and unfair tactics are lessened once parties marry.[183] As the Privy Council explained:

> Post-nuptial agreements . . . are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.[184]

Prior to *Radmacher*, then, case law construed the dynamics of premarital agreements to pose a higher risk for vulnerable parties than the dynamics of bargains between people already married.

The U.K. Supreme Court in *Radmacher* addressed the distinctions between marital and premarital agreements in dicta in order to clarify the law for future cases. The court explicitly rejected the reasoning in *MacLeod*, noting that there is no cause for differentiation between the two types of agreements.[185] If premarital agreements look to events far in the future, so can marital agreements entered into at the start of a long marriage.[186] As to the risk of duress, the court

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178. *Id.* [52].
179. *Id.* [75] (citing MacLeod v. MacLeod, [2008] UKPC 64, [2010] 1 A.C. 298).
180. *Id.* [77–82].
181. *Id.* [78].
182. *Id.* [80].
183. *MacLeod*, [2008] UKPC 64, [2010] 1 A.C. 298.
184. *Id.* [36]; *see also* MARITAL PROPERTY AGREEMENTS, *supra* note 165, at 55–57.
185. *Radmacher*, [2010] UKSC 42, [66], [2011] 1 A.C. 534, [66].
186. *Id.* [58–59].

recognized that "duress can be applied both before and after the marriage. The same principle applies in either case."[187] Accordingly, the court rejected the thesis "that ante-nuptial agreements are fundamentally different from post-nuptial agreements."[188]

The standard that *Radmacher* embraced is similar to those of American jurisdictions that require courts to scrutinize agreements for substantive fairness.[189] Just as many courts have done on this side of the Atlantic, the U.K. Supreme Court worked a compromise between respect for individual autonomy and deference to agreements that are knowing and voluntary, and the public policies reflected in marriage and divorce law that require protection of vulnerable parties. By announcing that premarital and marital agreements should be evaluated under the same standard, the court recognized that unique emotional and cognitive vulnerabilities could come into play both before and during marriage.

Interestingly, marriage itself is waning in popularity across Europe. In England and Wales, marriage rates have fallen to the lowest level on record.[190] Similarly, the marriage rate in both France and Germany has dropped precipitously in the last decade and is well below that of the United States.[191] When France created its civil unions, called a *pacte civil de solidarite*, or "PACS," people expected the new status to be most popular among same-sex couples.[192] By 2009, however, the overwhelming majority of civil unions were between opposite-sex couples. The informal and secular nature of the PACS, and the ease of exit as compared to marriage, have enhanced their popularity.[193] If trends continue, new civil unions will outnumber marriages in France.[194]

III. LESSONS FOR PUBLIC POLICY

The law on marital agreements across the United States reveals deep schisms about the meaning of the marital relationship. This lack of consensus may be the inevitable consequence of an evolving institution, but it can produce

187. *Id.* [60].

188. *Id.* [66]. The Law Commission of England and Wales endorsed *Radmacher*'s policy position as to the equal treatment of prenuptial and postnuptial agreements. *See* MARITAL PROPERTY AGREEMENTS, *supra* note 165, at 56–57.

189. The court's approach closely parallels the standards announced in *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011). *See supra* notes 124–38 and accompanying text.

190. *See* David Batty, *Marriage Rates Fall to Lowest-Ever Level*, THE GUARDIAN (Mar. 26, 2008, 11:08 AM), http://www.guardian.co.uk/world/2008/mar/26/gender; Jenny Purt, *Marriage Rate Falls to Record Low*, THE INDEPENDENT (Mar. 30, 2011), http://www.independent.co.uk/news/uk/home-news/marriage-rate-falls-to-record-low-2257527.html.

191. Scott Sayare & Maïa de la Baume, *Bliss for Many French Couples Is Now Less Marital than Ever*, N.Y. TIMES, Dec. 15, 2010, at A1 (reporting decline in marriage rate in France and Germany to about 4 marriages per 1000 residents, compared to rate of 6.8 marriages per 1000 residents in United States).

192. *Id.*

193. The PACS provide most of the economic and tax benefits of marriage but can be terminated with the filing of a registered letter. *Id.*

194. *Id.* (reporting that civil unions already outnumber marriages in Paris's 11th Arrondissement).

considerable uncertainty in a mobile society in which people often reside in different states over the course of their lifetimes. The judicial formulations canvassed in Part I are a response to competing values, and courts clearly diverge in their emphasis of particular policies.

Despite the disparity in case law, points of agreement do exist. Most courts endorse a view that the marriage relationship, regardless of its characterization, triggers obligations of honesty and good faith. The decisions impose higher standards for marital agreements than for ordinary commercial contracts. By broad consensus, those obligations include full disclosure of financial circumstances before an agreement is finalized. Most courts also require that a party to a marital agreement know and understand the nature of the rights being waived, with some going further by placing the burden of proof on the party seeking to enforce the agreement. Finally, many courts evaluate the impact of an agreement at the time of enforcement, but the fairness standards vary.

On the other hand, states remain divided on whether to treat marital agreements differently from premarital agreements. Outlier jurisdictions embrace a view of marriage as a status whose essential relations are beyond the realm of contract by spouses. As shown in *Borelli* and *Hoffman*, when the status of being married imposes a disability on the contracting spouses, that disability can work to the advantage of one party, or that party's estate, and to the great disadvantage of the other spouse.[195] States that prohibit spouses from affecting post-divorce spousal support by agreement are similarly endorsing a minority view that the potential duty to support a former spouse is an immutable feature of marriage.[196] Such a doctrine seems clearly at odds with the cultural trend toward individualized marriage described in Part I.

As to whether different standards ought to govern premarital and marital agreements more generally, it is instructive that many European nations treat the two kinds of agreements similarly. Moreover, the analysis in *Radmacher* is persuasive.[197] The dynamics underlying any agreement—whether entered before or during marriage—are highly dependent on individual circumstances, and neither context seems inherently more likely to produce unconscionable agreements.

A spouse who has made an economic investment in the marriage, for example, may agree to extremely unfavorable terms in order to continue the marriage. The presence of children, in particular, can add pressure to keep the marriage intact so as to avoid "the destruction of a family and the stigma of a failed marriage."[198] Likewise, a fiancée, secure in the assumption that her marriage will last until death, may agree to very unfavorable divorce terms shortly before

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195. Professor Anita Bernstein recently observed that prohibiting couples from altering core duties of marriage by private agreement "gets in the way of private ordering," and she accordingly calls for "parsimony" and "transparency" in defining the "essentials of marriage." Anita Bernstein, *Toward More Parsimony and Transparency in "The Essentials of Marriage,"* 2011 MICH. ST. L. REV. 83, 88.

196. *See supra* note 99 and accompanying text.

197. *See supra* notes 185–88 and accompanying text; *see also* ALI PRINCIPLES, *supra* note 24, § 7.01 & cmts.; MARITAL PROPERTY AGREEMENTS, *supra* note 165, at 56–57.

198. Pacelli v. Pacelli, 725 A.2d 56, 59 (N.J. Super. Ct. App. Div. 1999).

the wedding.[199] A pregnant woman may agree to risky terms in a premarital agreement presented to her as a condition of getting married.[200] Moreover, enforcement of either a premarital or marital agreement can produce hardship if the parties' circumstances have significantly changed over the course of a long marriage.[201] Because irrational bargaining and coercive pressures can operate before and after marriage, treating the vows themselves as triggering a separate regime of contractual constraints seems unjustified.

A fundamental question differentiating marital and premarital agreements is whether the fact of marriage should trigger a switch in burden of proof when the validity of a marital agreement is challenged. Placing the burden of proof on the enforcing party creates a presumption against the validity of the agreement, a position embraced in some courts as an aspect of the "confidential relationship" of spouses.[202] That approach is rooted in earlier times when spousal contracts altering the status of marriage were strongly disfavored largely because of the presumed vulnerability of dependent wives.[203] Marriage law, after all, was dominated by gender-specific rights and responsibilities up until the last two decades of the 20th century.[204]

A presumption against the validity of a marital contract is arguably out of sync with today's norms of individualized marriage and gender equality. In light of the "new economics of marriage" and the enhanced value of marriage to men,[205] the gender of the vulnerable party in marital contracts is becoming less predictable.[206] Moreover, with the advent of same-sex marriage, any theory of marital contracting that is largely shaped by perceptions of underlying gender

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199. Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990).

200. Mallen v. Mallen, 622 S.E.2d 812, 814, 817 (Ga. 2005).

201. Bedrick v. Bedrick, 17 A.3d 17, 24–26 (Conn. 2011).

202. Ansin v. Craven-Ansin, 929 N.E.2d 955, 963–64 (Mass. 2010).

203. *See supra* note 103 and accompanying text.

204. *See generally* GROSSMAN & FRIEDMAN, *supra* note 34, at 58–65; Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2019–20 (2000). For an argument that formal equality has not remedied underlying structural and societal inequalities, see Martha Albertson Fineman, *Equality: Still Illusive After All These Years*, *in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 251, 251–53 (Linda C. McClain & Joanna L. Grossman eds., 2009).

205. *See supra* notes 65–72 and accompanying text.

206. Interestingly, in several of the cases discussed in this Essay, the parties seeking to enforce the agreements were women. *See, e.g.*, Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993); *In re* Marriage of Tabassum, 881 N.E.2d 396 (Ill. App. Ct. 2007); Hoffman v. Dobbins, No. 24633, 2009 WL 3119635 (Ohio Ct. App. Sept. 30, 2009); Radmacher v. Granatino, [2010] UKSC 42, [2011] 1 A.C. 534. Gender dynamics, of course, have not disappeared from the world of spousal contracts. For earlier explorations of the role of gender in premarital contracting, see Atwood, *supra* note 66, at 133 n.29 (noting that the vast majority of challengers in reported cases involving premarital contracts in 1992 were women); Brod, *supra* note 10, at 234–40 ("[M]ost agreements will be to the advantage of the economically superior spouse (usually a man) at the expense of the economically weaker spouse (usually a woman).").

dynamics seems, if not outdated, at least inadequate.[207] For same-sex spouses, marital contracts may offer a practical solution to the economic uncertainty created by disparate marriage recognition laws.[208] To be sure, the changes in the institution of marriage do not mean that vulnerability, dependence, clouded cognition, and unequal bargaining power have disappeared from the world of marital contracting.[209] Still, socioeconomic shifts between men and women and the emergence of same-sex marriage invite us to rethink traditional limits placed on the contractual autonomy of spouses.

The experience of both the ULC and the ALI is instructive as to the challenges of law reform affecting marriage. In the Uniform Premarital Agreement Act, the ULC promulgated standards that veered sharply away from existing common law and toward the realm of commercial contracts.[210] The UPAA's lessening of formalities for agreements, its elimination of the requirement of consideration, and its allocation of burden of proof on the party resisting the agreement have achieved wide acceptance. On the other hand, the UPAA's narrowing of the grounds for challenging a premarital agreement, particularly its treatment of unconscionability, has been vigorously criticized, and was itself the subject of heated debate among the Commissioners.[211] While about half the states have enacted a version of the UPAA, many of those have diverged from the uniform act to provide greater safeguards for fairness—both procedurally and substantively.[212] Moreover, ambiguity in the terminology of the UPAA has led

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207. *See* Bernstein, *supra* note 195, at 86 (suggesting that statutes restricting marriage to opposite-sex unions may have had a "useful effect" by "foster[ing] more parsimony and transparency concerning what courts call 'the essentials of marriage'").

208. Even in states willing to recognize a same-sex marriage from another jurisdiction for purposes of granting a divorce, the recognition of economic rights arising from the marriage remains uncertain. *See, e.g.*, Christiansen v. Christiansen, 253 P.3d 153, 156–57 (Wyo. 2011) (recognizing validity of Canadian same-sex marriage for purposes of divorce in Wyoming but emphasizing that parties were not seeking to enforce any rights incident to their marital status).

209. For an argument that marital contracts should still be analyzed through the prism of gender, see Younger, *supra* note 10, at 350 n.4 (explaining that male pronouns will be used for parties seeking to enforce agreements and female pronouns for parties seeking to avoid agreements because "[m]en are almost always proponents of these agreements; women are almost always the challengers"). In her study of contemporary case law, Professor Younger concluded that by enforcing premarital, postmarital, and cohabitation agreements, "the courts are enabling the dominant party to acquire financial advantages and to shift the risk of a failed relationship from him, even though he can afford to bear it, to her, the weaker party who cannot easily bear such a burden." *Id.* at 427.

210. In particular, the UPAA links unconscionability at execution with nondisclosure of financial assets, requiring that both failings be present to void an agreement; bars consideration of fairness at enforcement; and does not explicitly require that each party's consent be knowing and informed. *See* UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48–49 (2001); Oldham, *supra* note 14 (manuscript at 1–3) (criticizing terms of UPAA and recommending revisions to enhance procedural and substantive fairness).

211. ALI PRINCIPLES, *supra* note 24, § 7.04 cmt. g (describing lack of consensus during debates on UPAA as to role of unconscionability).

212. *See supra* notes 159–62 and accompanying text.

courts to define key terms for themselves.[213] Still, regardless of the many critiques, the UPAA has undoubtedly shaped marriage policy by its robust embrace of private ordering.

The ALI Principles, in turn, have been a major influence on public discourse about family policy, but no state has adopted the ALI's specific proposals for marital and premarital agreements.[214] The impact of the ALI proposals may grow over time among courts and lawmakers, but widespread implementation across the United States seems unlikely. Adopting the complete package of ALI recommendations would require most states to significantly change their existing law on premarital and marital agreements. Nevertheless, the carefully articulated policies within the ALI's work will continue to inform any law reform project going forward.

CONCLUSION

American law does not coalesce around a single conception of marriage. This Essay has shown that different understandings of marriage yield different legal standards for marital contracts. While some states appear to endorse a construct of marriage as an immutable status, others are willing to place marital contracts almost on a par with commercial contracts. In between these two extremes, a consensus exists that the law should impose an obligation of honesty, good faith, and fair dealing on spouses when entering into marital contracts. Imposing a standard of substantive fairness at the time of enforcing an agreement, and the contours of such a standard, is a more contentious question that pits freedom of contract and reliance interests against the protection of vulnerable family members.

The decline of the marriage rate forms a backdrop to any law reform efforts directed at elements of family law. Americans are marrying less and at an older age, but marriage still remains a goal for most young people in the United States.[215] If promoting marriage is a public policy objective, permitting flexibility in the meaning of marriage would seem more likely to attract people to the institution than adhering to a fixed and immutable status. In Europe, where the law typically affords couples less contractual freedom to alter the default rules of marriage, a steeper decline in marriage rates than in the United States has occurred. While the fall in marriage popularity in Europe undoubtedly is due to a coalescence of factors, the phenomenon suggests that couples are seeking a less fixed and more malleable understanding of marriage.

Law reform efforts on marital agreements, such as those undertaken by the ULC, must take into account the spectrum of views about marriage examined in this Essay. At the same time, law reform by definition must be forward looking.

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213. *See, e.g.*, *In re* Marriage of Bonds, 5 P.3d 815, 823–24 (Cal. 2000) (noting that commissioners did not supply definition of "voluntary" and did not discuss it fully), *superseded by statute*, Act of Sept. 10, 2001, ch. 286, § 2, 2001 Cal. Stat. 2316, 2317–18 (codified as amended at CAL. FAM. CODE §§ 1612, 1615 (2011)).

214. *See supra* note 144 and accompanying text.

215. *See* PEW RESEARCH CTR., *supra* note 61, at 23.

When spouses contract between themselves to alter the law that would otherwise apply, the enforceability of their contract should be governed not by shibboleths and abstract ideals, but by a clear legal framework reflecting realistic policy choices.