

Premarital Agreements and Gender Justice[†]

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[†] This title is drawn from DEBORAH L. RHODE, JUSTICE AND GENDER (1989) and Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989).

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The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

Anatole France¹

[T]o grant equal rights in the absence of equal opportunity is to strengthen the strong and weaken the weak.

Lenore J. Weitzman²

I. INTRODUCTION

Premarital agreements³ are playing an increasingly important role in the American marriage ritual.⁴ Such contracts are no longer the exclusive domain of the rich or the famous; they are frequently made by prospective spouses of the middle- and upper-middle classes.⁵ In light of the increasing significance of premarital agreements, the legal rules that govern their enforceability are of great concern not only to lawmakers⁶ and legal scholars, but to the individuals whose economic futures may depend on these agreements.

The popular media have devoted a great deal of attention to the rise in premarital contracting,⁷ but have done little to explore the meaning of this

1. ANATOLE FRANCE, *LE LYS ROUGE*, ch. 7 (1894), *quoted in* JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 548 (4th ed. 1990).

2. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 213 (1985) [hereinafter *THE DIVORCE REVOLUTION*].

3. This Article is concerned only with premarital agreements (synonymous with "antenuptial agreements" and "prenuptial agreements") which govern the economic consequences of the end of marriage. This Article does not consider premarital agreements which regulate the nonfinancial aspects of the couple's marriage relationship. Such premarital agreements raise a host of difficult enforceability issues. *See, e.g.*, LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981) [hereinafter *THE MARRIAGE CONTRACT*]; Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 900-04 (1988); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 35 n.93 (1990).

4. *See, e.g.*, Nancy Blodgett, *Put It in Writing: Marital Pacts on the Rise*, 71 A.B.A. J. 28 (1985); Claudia H. Deutsch, *Prenuptial Decrees Up, Prenuptial Trust Down*, N.Y. TIMES, Nov. 19, 1986, at C1; Susan C. Frunzi, *Planning Ahead for the Wedding Bell Blues*, TR. & EST., July 1990, at 10.

5. *In re Estate of Burgess*, 646 P.2d 623, 625 (Okla. Ct. App. 1982) (noting that premarital contracts "are being used more and more by ordinary modern couples"), *cert. denied*, 646 P.2d 623 (Okla. 1982); Emily Card, *Before—Or Even After—You Say "I Do,"* MS., June 1984, at 72.

6. The term "lawmaker," used throughout this Article, encompasses judges, legislators, and members of the executive branch of government, all of whom play a role in the enactment of legislation or in the development of the common law.

7. *See, e.g.*, Frunzi, *supra* note 4, at 10; Maria L. La Ganga, *Trump Prenuptial Agreement Points*

development for women.⁸ Should the execution and enforcement of premarital agreements be encouraged as a reflection of women's status as equal marital partners capable of contracting? Or should these agreements be subjected to strict scrutiny, as contracts that abrogate the sharing principles underlying all states' laws?⁹ And if these agreements denigrate the sharing principles embodied in family law, do women suffer the consequences?¹⁰ If women generally are the economic victims of premarital agreements, what should the law's response be to premarital contracting? If women are harmed by premarital agreements, fundamental questions about the meaning of gender¹¹ equality and the law's response to discrimination are at stake. Should the law's response to premarital agreements be limited to eradicating disparate treatment of women by mandating equal treatment of men and women as contracting parties? Or should the law's response run the risk of paternalism by recognizing that the achievement of gender equality requires more than equal treatment—it may demand protection of women as a disadvantaged socioeconomic class?¹² Competing with considerations of the meaning of "equal justice" are principles pertaining to "freedom of contract." How can the principles of equal justice and freedom of contract best be reconciled in the law's response to premarital agreements?

to *Business Side of Pre-Wedding Jitters*, L.A. TIMES, Feb. 13, 1990, at D1.

8. But see Card, *supra* note 5, at 72.

9. States that have a community property regime base their laws on the principle that marriage is an economic partnership whose fruits should be shared by both spouses. States that have a common law regime have modified the common law's individualistic approach by enacting equitable distribution statutes and elective share statutes, both of which are based on the concept of marriage as an economic partnership. For a full discussion of marital property regimes and these statutes see *infra* part II.A.

10. Although this Article considers the impact of premarital agreements on women, it must be recognized that women are not a homogeneous group who will be affected equally by all premarital agreements. Just as the terms of the agreements necessarily vary, so does their impact, depending on such factors as the contracting woman's class, race, age, education, ability, skills and employability. In an ideal world, "essentialism" (the perception that all women are alike) would be avoided, but it is impossible to analyze the impact of premarital agreements on all sub-groups of women. Unavoidably, this Article treats women as if they were a homogeneous group, but the risks inherent in this analysis must not be forgotten. See Deborah L. Rhode, *Definitions of Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 197, 198 (Deborah L. Rhode ed., 1990).

11. As a matter of literary license, this Article may treat the terms "gender" and "sex" as interchangeable although they are not synonymous. "[S]ex has referred to biologically based distinctions between man and woman and *gender* has referred to their cultural constructions. Underlying this distinction has been the premise, implicit or explicit, that the most significant differences between the sexes have been a function of culture, not chromosomes." Deborah L. Rhode, *Theoretical Perspectives on Sexual Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 10, at 2. See also Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, J. LEGAL EDUC. 3, 15-16 (Mar.-Jun. 1988).

12. Women are referred to as a "socioeconomic class" (and not simply as an "economic class") because women's economic status has both social causes and social effects. For example, the fact that there is a persistent gender gap between the earnings of men and women may be wholly or partly attributable to a social cause: gender discrimination in the labor market. See *infra* part III. The economic decline which women suffer at the termination of marriage has social effects. It "brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike." THE DIVORCE REVOLUTION, *supra* note 2, at 323.

To explore these issues, this Article first discusses the terms and purposes of premarital agreements. It then examines social science research indicating that premarital agreements disproportionately harm women as a socioeconomic class and further skew the unequal distribution of wealth along gender lines. This Article also describes social scientists' findings that suggest that premarital agreements may often be made under circumstances that accentuate their potential to benefit men at women's expense. This Article then traces the development of the law relating to premarital agreements as it is shifting from a common law system, with the potential to protect women from oppressive agreements, into a system (partly based on the Uniform Premarital Agreement Act)¹³ that abandons this protection and encourages the enforcement of even unconscionable premarital agreements. As this Article illustrates, this development rests on lawmakers' willingness to equate women's achievement of *de jure* equality, with their attainment of *de facto* equality and is furthered by some judges' hostility to feminism.

After discussing the direction in which the law is moving, this Article considers what the law should be. The disparate impact construct for defining discrimination (first elaborated in employment law and state civil rights cases) provides an analytical framework for treating premarital agreements as discriminatory. If premarital agreements are considered discriminatory, legal norms governing the enforcement of such agreements should not be premised solely or primarily on freedom of contract principles. Instead, the law should be based on other fundamental policies: the eradication of gender discrimination and the attainment of economic justice¹⁴ for an economically vulnerable spouse at the end of marriage. This Article then explores the relationship between the attainment of economic justice and considerations of procedural fairness in the enforcement of premarital agreements. It concludes with a discussion of a new approach to determining the enforceability of premarital agreements. This Article recommends that premarital agreements be enforced according to standards relating to economic justice and procedural fairness, with more leeway allowed in the standards of procedural fairness as the degree of economic justice attained by the agreement increases. This Article ends with a discussion of the ramifications of this new approach. This approach reconciles freedom of contract principles and respect for individual autonomy with the eradication of gender discrimination and the protection of an economically vulnerable spouse from great financial hardship at the end of marriage.

13. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987), amended by 9B U.L.A. (Supp. 1994) [hereinafter U.P.A.A.].

14. Economic justice is defined *infra* part V.A.

II. THE PURPOSE AND EFFECT OF MOST PREMARITAL AGREEMENTS IS TO PROTECT THE WEALTH AND EARNINGS OF AN ECONOMICALLY SUPERIOR SPOUSE FROM BEING SHARED WITH AN ECONOMICALLY INFERIOR SPOUSE

Premarital agreements enable prospective spouses to substitute their own contractual system for the state laws that apply when a marriage ends by divorce or death. Every state has a complex set of laws that requires the sharing of property and/or earnings at the end of marriage. The problematic aspect of premarital agreements is that often their significant purpose is to prevent this sharing (particularly at divorce) by requiring both prospective spouses to waive the protections provided by state law.¹⁵ In some agreements, the economically vulnerable¹⁶ spouse may receive a property settlement in return for the waiver, or there may be a provision allowing for the creation of some marital or community property during the marriage.¹⁷ In other agreements, the spouse may not receive any property and marital or community property is not created.¹⁸ In either case, the economically weaker

15. The extent to which a premarital agreement displaces state law protections may vary, as the contents of such agreements are not uniform. (Premarital agreements are tailored to the couple's circumstances, the applicable state law, and the skills and habits of the drafting lawyer(s).) Nevertheless, the primary purpose of most premarital agreements is to waive the protections provided by state law for a divorcing or surviving spouse at marital termination. SAMUEL GREEN & JOHN V. LONG, *MARRIAGE AND FAMILY LAW AGREEMENTS* § 2.06, at 112-14 (1984). Sample and form agreements illustrate this primary purpose. *See, e.g., id.* app. 1 at 349-55; 3 ALEXANDER LINDEY & LOUIS I. PARLEY, *LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS*, Forms 90.01 to 90.34, at 90-2 to 90-27 (1992); Joseph N. DuCanto, *Taking Your Lawyer to the Altar: A Different Perspective on Premarital Agreements*, *PROB. & PROP.*, Jan.-Feb. 1990, at 47, 47-49.

In California, the most common premarital agreement is one which provides that some or all property that would be community property is, instead, the acquiring spouse's separate property. Interview with Daniel J. Jaffe, Esq. and Bruce A. Clemens, Esq., California certified family law specialists in private practice, in Beverly Hills, Cal. (Feb. 3, 1993). In California, even premarital agreements designed to record each party's separate property brought to the marriage, rather than to displace community property protections, frequently abrogate community property sharing principles with respect to a premarital business or professional practice. Interview with Kappy K. Bristol, Esq., California-certified family law specialist in private practice, in Los Angeles, Cal. (Jan. 29, 1993). Similarly, in New York, most premarital agreements are made to prevent the application of state laws mandating the sharing of marital assets. Telephone Interview with Ellen Maurer, Esq., New York City matrimonial lawyer in private practice (Feb. 1, 1993).

16. The "economically vulnerable" spouse or party means the party to a premarital agreement who does not have sufficient wealth or income independent of the marriage to be secure at the end of marriage without the protections provided by the state's marital property regime and support laws. The economically vulnerable spouse may be male or female; but, more often than not, she is female.

17. *See, e.g.,* GREEN & LONG, *supra* note 15, app. 1 at 349-53 (suggesting settlement based on length of marriage in exchange for spouse's waiver of alimony and provision naming life insurance benefits as consideration for antenuptial agreement); 3 LINDEY & PARLEY, *supra* note 15, Form 90.09, at 90-8 to 90-09 (surviving spouse will receive monetary settlement in exchange for waiver of right to share in other spouse's estate). Some agreements allow for the creation of some community or marital property, while providing that other acquisitions are to be the acquiring spouse's separate property. *E.g.* Kenneth D. Kemper, *Not Cast in Stone: How to Modify the Prenuptial Contract*, *FAM. ADVOC.*, Winter 1984, at 8, 9; *FAM. L. SEC., STATE BAR OF CAL., PLAY YOUR BEST TRUMP CARD: PRE- AND POST-NUPTIAL AGREEMENTS*, app. C at 93-104 (1990) (sample agreement).

18. Some agreements entirely displace the state law regime by providing that all property which would

spouse necessarily suffers more harm than the economically superior spouse from the mutual waiver of state law protections.¹⁹ Moreover, even if the weaker spouse is given some settlement in return for the waiver, this remuneration is not likely to equal or exceed the economic protection provided by state law.²⁰

To understand the effect of premarital agreements on women generally, we must first consider the state law protections that are typically waived by a premarital agreement. Nine states have adopted a community property regime²¹ that protects a spouse from an economic free fall at the termination of the marriage by divorce or widowhood. By treating each spouse as a co-owner of the community property,²² a community property regime protects a divorcing or surviving spouse from impoverishment at marital termination, provided that a community estate exists. When the marital community is terminated by divorce, each spouse owns a share of the community property, and the court will award either an equitable or equal share of the community property to a divorcing spouse, depending on the jurisdiction's law.²³ Similarly, when the marital community is terminated by death of a spouse, each spouse owns an equal share of the community property.²⁴ The deceased spouse has testamentary power over only his or her own separate property and

be considered marital or community property will be considered the acquiring spouse's separate property. *E.g.*, 3 LINDEY & PARLEY, *supra* note 15, Forms 90.29 to 90.30, at 90-19 to 90-29 (based on separation-of-assets agreement in *In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976) (en banc)); DuCanto, *supra* note 15, at 47-49.

19. "It is commonplace under the classic, preservation-of-separate-property antenuptial agreement for one spouse to receive by far the greater portion of the couple's net assets upon divorce, and these agreements are enforced. . . . [T]he disparity is not in itself enough to invalidate this agreement." Haas, *supra* note 3, at 913-914 (citations omitted).

20. It would be contrary to the very purpose of most premarital agreements to give the economically vulnerable spouse more than he or she would be entitled to receive under state law. In addition, an agreement which provides more remuneration to a divorcing spouse than state law would provide may be held unenforceable as promoting divorce, in violation of public policy. *See* *Dajani v. Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988); *Noghrey v. Noghrey*, 215 Cal. Rptr. 153 (Cal. Ct. App. 1985).

21. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington have community property regimes derived from Spanish-Mexican or Spanish-French colonial law. WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* at iii (3d ed. 1991). Wisconsin has adopted what is, in effect, a community property regime based on the Uniform Marital Property Act promulgated in 1983. *Id.*

22. A community property law patterned on the Spanish system establishes two categories of marital property: community property and separate property. Community property is all property which stems from the labors of either spouse during the marriage, irrespective of direct contributions to its acquisition or the condition of title. This property is regarded as equally owned by the spouses. The spouses are seen as contributing equally to acquisition regardless of the actual division of labor in the marriage and regardless of which spouse actually 'earned' the property. . . . Separate property in a community property system is property owned before the marriage or which comes to one of the spouses by some gratuitous transfer thereafter.

Susan W. Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. REV. 1, 6 (1976) (citations omitted).

23. See REPPY & SAMUEL, *supra* note 21, at 18-3 to 18-4 for a discussion of the various state standards for division of community property at divorce.

24. *Id.* at 19-1.

his or her share of the community property.²⁵ The remainder of the community property is owned by the surviving spouse, even if the deceased spouse had made a valid will disinheriting the survivor.

The vast majority of states have marital property regimes derived from the English common law.²⁶ Because the common law system treats the acquiring spouse as the sole owner of property and does not presume a system of joint ownership,²⁷ the common law system does not protect a surviving or divorcing spouse from economic hardship at the end of marriage. It is possible that at marital termination, the non-acquiring spouse (e.g., a full-time homemaker) will be left without property and impoverished. To avoid this danger and to recognize that marriage is an economic partnership, every common law state has enacted an "equitable distribution" statute governing the distribution of property at divorce.²⁸ "Equitable distribution doctrine empowers the divorce court to assign property without regard to predivorce legal ownership."²⁹ To avoid the risk that a surviving, non-acquiring spouse will be disinherited and left impoverished by the death of a spouse, every common law state except Georgia³⁰ has adopted an "elective share" statute.³¹ An elective share statute "provide[s] the surviving spouse with an election: The spouse can take under the decedent's will or can renounce the will and take a fractional share of the decedent's estate."³² In addition to enacting elective

25. *Id.*

26. Except for the community property states, *see* states cited *supra* note 21, all the states and the District of Columbia have marital property systems derived from the common law. Emily Osborn, Comment, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903, 903 n.1.

27. The . . . common law approach to marital property sets up two distinct interests, the husband's separate property and the wife's separate property. Common ownership is brought into being only when one or both spouses elect to hold property in both names. The emphasis on separation of interests is a sharp contrast to the unity of interest implicit in . . . the community component of a community property system.

Prager, *supra* note 22, at 5-6 (citations omitted).

28. GRACE G. BLUMBERG, *COMMUNITY PROPERTY IN CALIFORNIA* 4 (2d ed. 1993).

Equitable distribution is a method of allocating property upon divorce based upon the concept that marriage is a partnership or shared enterprise. . . . Such a view is not new, having its doctrinal roots in the community property regime. However, it is a sweeping reform for the vast majority of states which had adhered to the old common law system where property had been awarded solely on the basis of title. Such a system frequently penalized the homemaker (usually the wife), since in the common law system title was usually vested in the husband because he directly contributed to its acquisition.

LAWRENCE J. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 1-2 (1983).

29. BLUMBERG, *supra* note 28, at 4. "Though the [equitable distribution] doctrine initially contained no proportional norms, presumptive norms of 50-50 . . . distribution are becoming more frequent." *Id.* at 5 (citation omitted).

There are significant differences among states' "equitable distribution" statutes, particularly with respect to the scope of property subject to "equitable distribution" by the court. Timothy B. Walker & Linda D. Elrod, *Family Law in the Fifty States: An Overview*, 26 FAM. L. Q. 319, 347-365 (1993).

30. DUKEMINIER & JOHANSON, *supra* note 1, at 377 n.2.

31. *Id.* at 377-78.

32. *Id.* at 378.

share statutes, some common law states protect a surviving spouse by a dower statute. Dower is a surviving spouse's right to an interest in real property that the decedent owned at death, regardless of a decedent's testamentary wishes.³³ In both community property and common law states, there are additional protections from financial hardship for a divorcing or surviving spouse.³⁴ If the marriage ends by divorce, a court may award a divorcing spouse alimony and/or child support.³⁵ If the marriage ends by death of a spouse, the surviving spouse and other dependents may be protected by a

The elective share, whose historical antecedent is the surviving spouse's dower or curtesy right in certain freehold interests, ensures that the surviving spouse receives a substantial portion of the decedent's entire estate, both real and personal. This portion is generally one-third. To guarantee the survivor's share, many states [have provisions that] make it difficult [for a spouse] to defeat a surviving spouse's share by pre-death gift transfers.

BLUMBERG, *supra* note 28, at 4 (citation omitted). "Under typical American elective-share law, . . . a surviving spouse may claim a one-third share of the decedent's estate—not the 50 percent share of the couple's combined assets that the partnership theory [of marriage] would imply." UNIF. PROB. CODE, art. II, pt. 2 gen. cmt. (1991), *reprinted in* JOHN H. LANGBEIN & LAWRENCE W. WAGGONER, *SELECTED STATUTES ON TRUSTS AND ESTATES* 42-43 (1992).

33. WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 116-117 (1988).

34. This Article discusses the protections afforded by state law for a surviving spouse. Federal law may also protect an economically vulnerable spouse at the end of marriage. For example, The Retirement Equity Act of 1984, amending ERISA [Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988 & Supp. III 1991)] requires that pensions paid under covered private plans must be paid as a joint and survivor annuity to the worker and his or her spouse, unless the nonworker spouse consents to some other form of payment of the retirement benefit. This act thus introduces the sharing principle of community property into private pension plans throughout the United States.

DUKEMINIER & JOHANSON, *supra* note 1 at 373. A premarital agreement that fails to meet the federal statutory standards for a waiver of pension benefits will not defeat this federal law protection; it is questionable whether a premarital agreement that does meet such requirements would be an effective waiver of protection. *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2345, 2346 (1993); JACOB MERTENS, *LAW OF FEDERAL INCOME TAXATION* § 25 B.115 (Supp. Nov. 1992).

35. For a discussion of various states' approaches to awarding child support and alimony (also called "spousal support" or "maintenance"), see generally 2 HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 220-407 (2d ed. 1987); Walker & Elrod, *supra* note 29, at 365-77, 393-408.

family allowance,³⁶ a probate homestead,³⁷ a personal property set-aside³⁸ and/or a small estate set-aside.³⁹

Some or all of these state law protections for a surviving or divorcing spouse may be waived by a premarital agreement.⁴⁰ Thus, premarital agreements generally disadvantage the economically vulnerable spouse by precluding the protections offered by state law without providing equivalent remuneration in return.

Premarital agreements are not made by prospective spouses with an intent to disadvantage or to discriminate against women as a group. Perhaps the most frequent motivation for entering into a premarital agreement is that the upcoming marriage is a partial or joint remarriage.⁴¹ A spouse about to remarry may want a premarital agreement because he or she has children from a prior relationship and wants to protect his or her assets for them, free from

36. Every state has a statute authorizing the probate court to award a family allowance for maintenance and support of the surviving spouse (and often of dependent children). The allowance may be limited by the statute to a fixed period (typically one year), or it may continue thereafter while the will is being contested or for the entire period of administration. The allowance . . . is in addition to whatever other interests pass to the surviving spouse.

DUKEMINIER & JOHANSON, *supra* note 1, at 374.

37. Nearly all states have homestead laws designed to secure the family home to the surviving spouse and minor children, free of the claims of creditors Although the homestead laws vary in many details, generally the surviving spouse has the right to occupy the family home (or maybe the family farm) for his or her lifetime The decedent has no power to dispose of a homestead so as to deprive the surviving spouse of statutory rights therein.

Id. at 373.

38. Related to the homestead is the right of the surviving spouse (and sometimes of minor children) to have set aside to her certain tangible personal property of the decedent enumerated in a statute. These items, which are also exempt from creditors' claims, usually include household furniture and clothing, but may also include a car and farm animals. The set-aside is usually subject to several conditions and limitations, but, if these are met, the decedent usually has no power to deprive the surviving spouse of the exempt items.

Id. at 374.

39. "In a number of states, intangible personal property up to a fixed sum (for example, \$20,000) may . . . be set aside to the surviving spouse Usually this set-aside is available only in small estates, and it permits the surviving spouse to avoid probate administration." *Id.*

40. *E.g.*, *In re Marriage of Dawley*, 551 P.2d 323, 329 (Cal. 1976) (en banc); *In re Marriage of Gudenkauf*, 204 N.W.2d 586, 586-88 (Iowa 1973); *Prevatte v. Prevatte*, 411 S.E.2d 386, 389 n.1 (N.C. Ct. App. 1991); *see also infra* note 136. *But see* U.P.A.A. § 3 cmt., 9B U.L.A. 374 (1983) (in some states, alimony may not be limited or modified by premarital agreement); Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRM. LAW. 1, 16-17 (1992) [hereinafter Younger (1992)] ("A number of states have statutes which prohibit couples from making antenuptial agreements which adversely affect their children's support rights.") (citations omitted).

41. Scott, *supra* note 3, at 79 n.174. "Premarital agreements are not customary in a first marriage." Stuart B. Walzer & Paula Walzer, *A Guide to Drafting Non-Marital Partnership Agreements and Premarital Agreements*, in MARITAL AND NON-MARITAL CONTRACTS 23, 37 (Joan Krauskopf ed., 1979). Although premarital agreements are usually made in a partial or joint remarriage, there are circumstances under which such an agreement may be made in a first marriage for both spouses. If a prospective spouse will inherit substantial family wealth or participates in the ownership or management of a family-owned business, the spouse is sometimes persuaded by relatives to make a premarital agreement. DuCanto, *supra* note 15, at 47; Frunzi, *supra* note 4, at 11; Interview with Daniel J. Jaffe, Esq. and Bruce A. Clemens, Esq., *supra* note 15.

conflicting claims by the new spouse.⁴² A spouse about to remarry may have gone through a tumultuous divorce; he or she may desire a premarital agreement to avoid the emotional and financial costs that accompany divorce litigation over property and support rights, should another divorce occur.⁴³ In some cases, a premarital agreement may be motivated by a prospective spouse's hostility to the state law concept that marriage is an economic partnership and to the sharing of income and property, particularly at divorce.⁴⁴

If we consider these common purposes for premarital agreements⁴⁵ in the context of our society, it becomes evident that premarital agreements generally disadvantage women.⁴⁶ Because the primary purpose of most premarital contracts is to protect the wealth and earnings of a prospective spouse from being distributed to the other spouse at death or divorce, most 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). As one practitioner has observed, "Normally, the prenuptial agreement is sought by the wealthier party, who is trying to protect his or her assets and income. Thus, it is usually the future husband who insists that his future wife, with lesser (or no) assets and lower earnings, enter into a prenuptial agreement."⁴⁷

42. MCGOVERN ET AL., *supra* note 33, at 127; Paula S. Glickstein, *Drafting Prenuptial and Post-Marital Agreements*, L.A. LAW., Oct. 1991, at 32, 32; Sandra Tedlock, *Premarital Agreements*, ARIZ. ATT'Y, Apr. 27, 1991, at 12, 12.

43. Glickstein, *supra* note 42, at 34; Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look toward the Future*, 24 FAM. L.Q. 77, 78 (1990).

44. One practitioner has observed that although both parties may oppose the sharing of wealth as a matter of principle, usually the party with the property is the party with the principles. Telephone Interview with Bruce A. Clemens, Esq., California certified family law specialist in private practice (Nov. 19, 1992).

45. There are other purposes for premarital agreements in addition to the most common purposes discussed in the text. For example, a premarital agreement may be used to specify and identify separate property brought to the marriage by a spouse. See 3 LINDEY & PARLEY, *supra* note 15, at 90-91 (referring to antenuptial agreements limited to defining separate property). A premarital agreement may specify that property that would otherwise be community or marital property is instead a spouse's separate property in order to avoid creditors. Glickstein, *supra* note 42, at 34; see *Leasefirst v. Borrelli*, 17 Cal. Rptr. 2d 114 (Cal. App. Dep't Super. Ct. 1993) (wife's earnings, which were separate, not community, property pursuant to premarital agreement, could not be reached by husband's creditors). A premarital agreement to avoid creditors' claims is particularly useful if one spouse has alimony and child support obligations from a previous marriage, and the new spouse does not want his or her earnings liable for payment of those obligations. Interview with Kappy K. Bristol, Esq., *supra* note 15.

46. The central thesis of this Article—that premarital agreements disadvantage women—is also a theme of other articles which consider the impact of premarital agreements at divorce (not at death of a spouse) and focus primarily on the shortcomings of the U.P.A.A. See, e.g., Barbara A. Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993); Ronald S. Ladden & Robert J. Franco, *The Uniform Premarital Agreement Act: An Ill-Reasoned Retreat from the Unconscionability Analysis*, 4 AM. J. FAM. L. 267 (1990). Another article observes that premarital agreements harm women, but disclaims any intention to analyze the law from a "sexist" perspective. Pamela E. George, *Can a Woman of the 90's Have It All? Or, Is She Once Again Faced with That Age Old Question—"What's a Girl To Do?"*, 8 J. AM. ACAD. MATRIM. LAW. 73, 73 n.1, 104 (1992).

47. Kemper, *supra* note 17, at 9. "The classic scenario [for a premarital agreement] involves a woman with lesser assets than a man'" Deutsch, *supra* note 4, at C1 (quoting Executive Director of N.J. Commission on Sex Discrimination in the Statutes). E.g., *Margulies v. Margulies*, 491 So. 2d 581 (Fla. Dist. Ct. App.), *rev. denied*, 500 So. 2d 545 (Fla. 1986) (husband was wealthy businessman with net worth of at least \$50 million; wife was flight attendant); *Warren v. Warren*, 523 N.E.2d 680 (Ill. App. Ct. 1988) (husband was multimillionaire president and partial owner of oil company; wife was a secretary); Braddock

Premarital agreements adversely affect the economic and social well-being of many women; they contribute to the financial vulnerability of women as a class, and they magnify society's unequal distribution of resources along gender lines.

III. PREMARITAL AGREEMENTS UNDERMINE THE PRECARIOUS SOCIOECONOMIC STATUS OF WOMEN AND SHARPEN GENDER INEQUALITY IN THE DISTRIBUTION OF WEALTH

Legal scholarship generally suffers from a deficit of empirical research;⁴⁸ the legal writing dealing with premarital agreements is no exception. There seems to be no statistically valid empirical research that systematically studies the characteristics of the men and women who make premarital agreements or of the contents of the contracts themselves.⁴⁹ Therefore, unfortunately, we cannot determine with certainty the full social and economic impact of such agreements. However, it is evident that when premarital agreements are made by women who are not wealthy independent of marriage, their enforcement has serious societal implications. The little empirical data concerning premarital contracts that exists indicate that these agreements disadvantage

v. Braddock, 542 P.2d 1060 (Nev. 1975) (husband was successful businessman whose wealth equalled \$700,000; wife was much younger waitress whose assets were \$2,500 plus furniture and clothing); Kosik v. George, 452 P.2d 560 (Or. 1969) (husband was real estate broker with resources of approximately \$100,000; wife was department store clerk with resources of about \$4,000).

48. JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 57, 61-65 (1992).

49. Only two law review articles have provided empirical information about the parties who make premarital agreements, but neither article purports to present a systematic, statistically valid survey. Charles W. Gamble stated that he surveyed all 54 premarital contract cases reported in the SEVENTH DECENNIAL DIGEST for 1956-1966 to determine some of the characteristics of the men and women who made premarital contracts. (The author refers to 54 cases, although he lists only 53 in his article.) Although the survey is limited in scope and the information is out-dated, it is interesting because it is one of the only attempts to make an empirical evaluation of premarital contracting. This survey is discussed *infra*, text accompanying notes 77-80. Barbara Atwood surveyed "the 39 reported cases in 1992 involving challenges to the validity of a premarital agreement in the context of divorce . . ." to substantiate her thesis that women, as compared to men, are disproportionately harmed by premarital agreements because women are economically vulnerable. Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692 (1972). Atwood, *supra* note 46, at 133 n.29. This survey is discussed *infra* note 50.

Lenore Weitzman surveyed the provisions of fifty-nine relationship contracts written by students in an upper-division sociology course at the University of California in 1977. Because this sample of students is not an accurate representation of the population which makes premarital agreements, the survey of their contracts does not shed light on the provisions of typical premarital agreements (the sample is "*an admittedly nonrepresentative group*"). THE MARRIAGE CONTRACT, *supra* note 3, at 419.

Apart from these few studies, the author of this Article was unable to find empirical research concerning premarital agreements, despite a diligent search of legal literature and social science literature indices.

women.⁵⁰ Social science research strongly suggests that premarital agreements generally harm women and the children in their care.⁵¹

Women may suffer significant harm from premarital agreements that preclude the sharing of property because, generally, women are less wealthy than men. According to government statistics, female wealthholders are a minority of total wealthholders. In 1989, about 3.4 million persons were "top wealthholders with gross assets of \$600,000 or more"⁵²; of these, only about 41% (slightly more than 1.4 million persons) were women, as compared to the nearly 59% (about two million persons) who were men.⁵³ In 1989, about 61% of the wealthiest persons were male; there were 22,000 men, as compared with 15,000 women, who had estates of \$10 million or more.⁵⁴ These statistics demonstrate that the vast majority of the wealthiest persons are men.

Women tend to be harmed by premarital agreements that preclude income sharing because of the gender gap in earnings. As a class, women earn less than men.⁵⁵ In 1990, women earned seventy-one cents for every dollar earned

50. Barbara Atwood found that, in 33 of the 39 divorce cases reported in 1992 involving the validity of a premarital agreement, the wife sought to avoid enforcement of the agreement. Atwood, *supra* note 46, at 133 n.29. In the six cases where the husband challenged the validity of the agreement, "the wife frequently was still the economically subordinate party." *Id.* at 133-34. "[O]f the 18 reported cases citing the U.P.A.A. in which the validity of a premarital agreement was at issue, 15 involved challenges brought by women." *Id.* at 142 n.70 (citations omitted).

51. The devastating economic and social consequences of marital termination for women affect millions of children. Overwhelmingly, children living in single-parent households live with their mothers. In 1993, about 26.7% of all children under age eighteen lived with one parent. Of the 17,872,000 children who lived with one parent, approximately 87.2% of them (15,586,000 children) lived with their mothers while about 12.7% of them (2,286,000 children) lived with their fathers. Arlene F. Saluter, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20-478, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1993, at XI (compiled from Table F. Living Arrangements of Children Under 18 Years, by Race and Hispanic Origin: 1993, 1980, and 1970) [hereinafter MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1993]. In March 1993, 38.4% of children living only with their divorced mothers had a family income which fell below poverty level; 45.8% of children living only with their divorced mothers had a family income below 125% of poverty level. *Id.* at 36 (Table 6. Living Arrangements of Children Under 18 Years, by Marital Status and Selected Characteristics of Parent: March 1993). 32.3% of children living only with their widowed mothers had a family income below poverty level, and 39.2% of these same children had a family income below 125% of poverty level. *Id.* By contrast, 18.1% of children living only with their divorced fathers had a family income below poverty level, and 24.9% of them had a family income below 125% of poverty level. *Id.* 8.8% of the children living with their widowed fathers only had a family income below the poverty level, and 12.3% of them had a family income just above poverty level. *Id.*

52. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 482 (Table No. 743. Top Wealthholders with Gross Assets of \$600,000 or More: 1989) [hereinafter 1994 STATISTICAL ABSTRACT].

53. *Id.*

54. *Id.* A government study of estate tax returns filed in 1986, 1987 and 1988 revealed that the majority of male decedents (in 1986) were married, and the average size of a married male decedent's gross estate was \$1,715,216. A majority of female decedents were widowed and "the average size of their estates was \$1,265,472, considerably lower than that of married male decedents. In fact, only about a third of widowed women [with gross estates of at least \$500,000] had gross estates of \$1 million or more, again, far fewer than married men [nearly half of whom had such large estates]." BARRY W. JOHNSON, INTERNAL REVENUE SERV., 9 STATISTICS OF INCOME BULL. 27, 28 (1990).

55. Social scientists disagree about the possible causes for the persistent gender gap in earnings and whether (or to what extent) the gap is the result of discrimination in the labor market. Janice F. Madden, *The Persistence of Pay Differentials, in 1 WOMEN AND WORK: AN ANNUAL REVIEW* 76, 76-77, 109-10 (L. Larwood et al. eds., 1985). One major study concluded that "[t]wo-thirds of the wage gap between white men and white women and three-quarters of the gap between white men and black women cannot

by men.⁵⁶ In that year, the real median earnings of women working full-time, year-round were \$19,820; the real median earnings of comparable male workers were \$27,870.⁵⁷ In 1993, the median weekly earnings of women working full-time were \$395; for men, the median earnings were \$514.⁵⁸ In 1993, the median weekly earnings for women working full-time, who maintained families were \$379; for full-time male workers who maintained families, the median earnings were \$482.⁵⁹ In that year, in every occupational category measured (except mechanics and repairers), women's median earnings were lower than those of men.⁶⁰

Even the most highly paid women (who would be the most likely to desire a premarital agreement to protect their incomes) suffer from the gender gap in earnings. A study of U.S. Census Bureau data for California in 1989 reveals that the gender gap is "[p]articularly glaring" in "high-profile professions."⁶¹ For example, in medicine and dentistry, women were earning "just over half as much as men."⁶² The average yearly pay for female lawyers was \$61,773 while the average yearly pay for male lawyers was \$92,148.⁶³ Thus, even a highly compensated woman who marries a similarly situated man, is likely to be disadvantaged by a premarital agreement that shelters each spouse's income from the state-mandated income sharing.⁶⁴

There have been numerous studies of the economic, social, and demographic characteristics of persons who remarry.⁶⁵ Because many (if not

be accounted for by sex differences in skills, work participation, or labor-force attachment." Mary Corcoran et al., *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, 10 SIGNS 232, 247 (1984).

56. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 177, CURRENT POPULATION REPORTS, HOW WE'RE CHANGING: DEMOGRAPHIC STATE OF THE NATION: 1992, at 3 (ratio of male to female earnings was 0.71 in 1990) [hereinafter HOW WE'RE CHANGING].

57. *Id.*

58. 1994 STATISTICAL ABSTRACT, *supra* note 52, at 429 (Table No. 665. Full-Time Wage and Salary Workers—Number and Earnings: 1983 to 1993).

59. *Id.*

60. Comparisons were made in all but two categories: private household service, which had an insufficient number of male workers to measure, and construction trades, which had an insufficient number of female workers to measure. *Id.*

61. Shawn Hubler & Stuart Silverstein, *Women's Pay in State Lags 31% Behind Men's*, L.A. TIMES, Dec. 29, 1992, at A1.

62. *Id.*

63. *Id.*

64. Although a wealthy woman or a highly compensated woman might not be economically vulnerable at the end of marriage (provided she is still working and is still paid well), premarital agreements made by such women remain a matter of social concern. These agreements allow the gender gap in earnings and gender inequality in the distribution of wealth to be maintained despite the sharing principles underlying state law. The law's response to premarital agreements made by even rich or well-paid women can demonstrate the depth of society's commitment to eradicate gender discrimination from the economy.

65. See, e.g., Arthur J. Norton & Louisa F. Miller, *Marriage, Divorce, and Remarriage in the 1990's*, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23-180, CURRENT POPULATION REPORTS (1992); Arthur J. Norton & Louisa F. Miller, *Remarriage Among Women in the United States: 1985*, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23, NO. 169, CURRENT POPULATION REPORTS, STUDIES IN HOUSEHOLD AND FAMILY FORMATION (1990); Kris Bulcroft et al., *Antecedents and Consequences of Remarriage in Later Life*, 11 RES. ON AGING 82 (1989); Paul C. Glick, *Remarriage: Some Recent Changes and Variations*, 1 J. FAM. ISSUES 455 (1980) [hereinafter Glick, *Remarriage*]; Paul C. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL.

most) premarital agreements are made before a remarriage, these studies provide insight into who is making premarital agreements and the probable effect of those agreements on women.⁶⁶ They suggest that the prospective wife is more likely to be harmed by a premarital agreement than the prospective husband. He may be considerably older and wealthier than his prospective wife, and therefore he has greater bargaining power in negotiating a premarital agreement. In addition, the woman who wants to remarry may have to make compromises on the way to the altar that a man would not have to make.

Anecdotal evidence supports the stereotype of the couple who makes a premarital agreement: an older, wealthy man marrying a younger, impecunious woman.⁶⁷ For example, there is this description of premarital contracting written by a family lawyer:

A typical scenario is the contemplated marriage of a well-to-do man, once divorced, and a penniless woman who has never been married. *His* lawyer prepares a premarital agreement—then the groom-to-be gives his fiancée a copy and tells her to go to a lawyer and “get it signed.”⁶⁸

This popular stereotype may be rooted in the reality that, among remarried couples, there may be a great age disparity, with the husband considerably older than the wife. In fact, there may also be a great disparity in wealth, income, and business experience (to the advantage of the husband) if the husband's relatively advanced age is a proxy for accumulated wealth or the realization of a high income level.⁶⁹

24 (1989) [hereinafter Glick, *Remarried Families*]; Paul C. Glick & Sung-Ling Lin, *Recent Changes in Divorce and Remarriage*, 48 J. MARRIAGE & FAM. 737 (1986) [hereinafter Glick & Lin]; Sunjoo Oh, *Remarried Men and Remarried Women: How Are They Different?*, 9 J. DIVORCE 107 (1986); Constance L. Shehan et al., *Women in Age-Discrepant Marriages*, 12 J. FAM. ISSUES 291 (1991); Barbara F. Wilson & Sally C. Clarke, *Remarriages: A Demographic Profile*, 13 J. FAM. ISSUES 123 (1992).

66. The assumption that most premarital agreements are made before a remarriage, and the observations made in this Article, presuppose that the characteristics of couples who remarry and make premarital agreements reflect or approximate the characteristics of remarried couples generally. This assumption underscores the need for a statistically valid, empirical study of premarital agreements and the couples who make them.

67. For example, Judge Beverly B. Savitt of the Marin County Superior Court described the couples who make premarital agreements. Most commonly, there is a prospective spouse who has been married before and wants to protect children from the prior marriage with the agreement; second most commonly, one prospective spouse is wealthy and the other is “naive.” PLAY YOUR BEST TRUMP CARD: PRE- AND POST-NUPTIAL AGREEMENTS (The Rutter Group 1990) (conference held by the Family Law Section, California State Bar (August 25, 1990)). See, e.g., *Warren v. Warren*, 523 N.E.2d 680 (Ill. App. Ct. 1988) (husband, president, and partial owner of an oil company was about twenty years older than wife, a secretary); *Volld v. Volld*, 286 N.E.2d 42 (Ill. App. Ct. 1972) (wealthy husband was twenty years older than wife, a school teacher).

68. JAN C. GABRIELSON, PRACTICAL REFLECTIONS OF A CALIFORNIA DIVORCE LAWYER 26 (1989).

69. But see Hernan Vera et al., *Age Heterogamy in Marriage*, 1 J. MARRIAGE & FAM. 553, 563 (1985) which questions the notion that age-discrepant marriages are particularly popular among the upper and upper-middle classes. The study found that age-discrepant marriages are more common among members of the lower class.

Social scientists have found that a partial or joint remarriage is far more likely to be an age-discrepant marriage⁷⁰ than a first marriage for both spouses.⁷¹ "Marital history appears to be the greatest predictor of [a woman] being in an age-discrepant marriage [as compared to a woman's race, education, and ethnic background]—those who are in first marriages are considerably less likely than those in remarriages to be in such pairings."⁷²

Previous marital status has been shown to be associated with age differences between spouses. For instance, Glick and Landau (1950) reported that in first marriages the bride is usually 1 to 3 years younger than the groom. In marriages in which both spouses have been previously married, the average age difference is 4 years. In marriages in which the bride has never been married but the groom has, the average age difference is 6 years, with the husband being older. Finally, in those marriages in which the wife has been married previously but the husband has not, the average difference between spouses' ages is less than 1 year (U.S. Department of Health and Human Services, 1987).⁷³

[W]omen tend to marry older men. The U.S. National Center for Health Statistics (1989) reported that in 1983 all grooms had a mean age at marriage that was 2.7 years older than all brides. Previously divorced grooms were 6.8 years older on average than their never-married brides, while previously widowed grooms were 11.3 years older on average than their never-married brides.⁷⁴

70. There is no agreement among social scientists as to what age difference between a wife and husband requires that the marriage be classified as "age-discrepant" or as "age-heterogamous," as opposed to being an "age-homogamous" marriage. Shehan et al., *supra* note 65, at 295-96. The determination of whether the age gap between the wife and husband is sufficiently great to create an age-heterogamous marriage involves subjective judgment. Maxine P. Atkinson & Becky L. Glass, *Marital Age Heterogamy and Homogamy, 1900 to 1980*, 47 J. MARRIAGE & FAM. 685 (1985). This is especially true in American society, where what is perceived to be an age-homogamous marriage is really a form of constrained age-heterogamy with the husband being an average of 2.8 years older than the wife. Shehan et al., *supra* note 65, at 303.

71. Louisa F. Miller & Jeanne E. Moorman, *Married-Couple Families with Children*, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23, NO. 162, CURRENT POPULATION REPORTS, STUDIES IN MARRIAGE AND THE FAMILY 32 (1989) [hereinafter MILLER & MOORMAN]; Glick, *Remarriage*, *supra* note 65, at 463; Shehan et al., *supra* note 65, at 299-300, 303.

72. Shehan et al., *supra* note 65, at 303.

73. Shehan et al., *supra* note 65, at 294. Similar statistics are reported and analyzed for the year 1988 in Wilson & Clarke, *supra* note 65, at 128-30.

74. MILLER & MOORMAN, *supra* note 71, at 32.

The age disparity between husbands and wives in remarriage tends to be greater when the groom is older.⁷⁵ According to a study of data compiled for the years 1980 through 1988:

Most grooms over 50 years of age wed divorced or widowed women who were approximately a decade younger than themselves. Fewer than 5% of grooms 50 to 54 years of age married women under the age of 30, and only 8% married women 30 to 34 years of age. In terms of average age differences, previously divorced grooms 50 to 54 years of age were 8.5 years older than their wives on average; those 55 to 59 were 9.9 years older; those 60 to 64 were 10.8 years older; and those 65 years of age and over were 11.4 years older than their brides.⁷⁶

There is empirical data that suggest that couples entering into premarital contracts are likely to be remarrying and are likely to be entering into age-discrepant marriages. In Professor Gamble's survey of premarital contract cases reported for the years 1956 to 1966, he found that most of the couples were remarrying.⁷⁷ Gamble stated that of the fifty-four cases he had surveyed, forty-eight involved men who had been previously married and thirty-eight involved women who had been previously married.⁷⁸ Many of the couples were separated by a great age disparity, in which the prospective husband was older than the future wife. Of those fifty-four cases, twenty-six reported the ages of both the prospective husband and wife at the time of contracting.⁷⁹ Of those twenty-six cases, in seventeen cases the husband was at least nine years older than the wife, and in sixteen of those cases, the husband was at least ten years older than the wife.⁸⁰

If age is a proxy for accumulated wealth and business experience, then the relatively older man who enters into remarriage with a younger woman is likely to have a considerable advantage when negotiating a premarital agreement. At least one study has noted that the power imbalance created by the age disparity in remarrying couples may affect negotiations between the parties.⁸¹ Presumably, the content of the premarital agreements will reflect

75. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, at 88 (1991) (Table No. 132. Marriages—Age Differences of Bride and Groom, by Age: 1987) [hereinafter 1991 STATISTICAL ABSTRACT].

76. Wilson & Clarke, *supra* note 65, at 130. The authors interpret this data as contradicting the popular impression that marriages between mature men and much younger women are typical. However, another inference may be drawn from the statistics they report: May-December weddings are not uncommon.

77. Gamble, *supra* note 49, app. at 730-32.

78. *Id.* at 733.

79. *Id.* at 730-32.

80. *Id.*

81. The establishment of a new household through remarriage unquestionably demands a lot of negotiating about how the household will be run and even how the decisions will be made. Although individual personalities play the dominant role in such negotiations, the relative bargaining power of a bride and groom will also depend on

the superior bargaining power, experience, and resources of the prospective groom.

Other characteristics of remarried couples (aside from their age-discrepant marriages) suggest the likelihood that premarital agreements will be sought more often by men than by women to shield their wealth and/or earnings. According to social science research, the men most likely to remarry have characteristics that suggest they could benefit from a premarital agreement, while the opposite is true for women. Studies have shown that for divorced men, as income level rises, the probability of remarriage increases. By contrast, for divorced women, as income increases, the probability of remarriage declines.⁸² Women who are highly educated or occupationally or financially independent, and therefore might want a premarital agreement to shelter their earnings, are the least likely of divorced women to remarry.⁸³ The divorced women who are most likely to remarry are those who are the most financially dependent,⁸⁴ and therefore would be harmed by a premarital agreement that displaces a state's system of financial protection for a divorcing or surviving spouse. In addition, one study found that older women who remarry are unlikely to be employed after remarriage.⁸⁵ We can presume that these women would not need or want to have a premarital agreement sheltering their earnings.

The comparative remarriage rates for men and women suggest that women who want to remarry might be especially likely to accede to unfavorable premarital agreements. "The number [of currently divorced persons who had not remarried] was higher for women than for men (8,845,000 vs. 6,283,000)"⁸⁶ Because a divorced or widowed man is far more likely to remarry

their relative ages and relative levels of education. In joint remarriages, the majority of grooms were more educated, as well as older, than their own wives. In partial remarriages, although the divorced spouses, male or female, were older, they had less education than their single spouses. Initially, the superior age and experience would give the divorced spouse more bargaining power, but that advantage would fade when the younger spouse gains occupational as well as educational superiority. This calls for adaptability and renegotiation.

Wilson & Clarke, *supra* note 65, at 131-32.

82. Glick, *Remarriage*, *supra* note 65, at 474, 476; Glick, *Remarried Families*, *supra* note 65, at 26; Oh, *supra* note 65, at 107, 111-12.

83. Oh, *supra* note 65, at 107, 112. See also Glick, *Remarriage*, *supra* note 65, at 474, 476. But see Glick, *Remarried Families*, *supra* note 65, at 26 (although income is inversely related to remarriage for women generally, in certain occupations there may be a greater likelihood of remarriage for a high-income woman).

84. NORTON & MILLER, *supra* note 65, at 4 (remarriage more frequent among divorced women with very young children, and among women with less education); Glick & Lin, *supra* note 65, at 737 (young, divorced mothers with children more likely to remarry than their childless counterparts; young, divorced women without a high school diploma most likely to remarry; remarriage rates lowest for young, divorced women with at least some college education); Frank L. Mott & Sylvia F. Moore, *The Tempo of Remarriage Among Young American Women*, 45 J. MARRIAGE & FAM. 427, 430-31 (1983) (younger white divorced women are more likely to remarry quickly if they are not working full-time and satisfied with their employment, or if they have relatively little education); Oh, *supra* note 65 at 107, 110-11, 112.

85. Bulcroft et al., *supra* note 65, at 99.

86. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-20, NO. 450, CURRENT POPULATION REPORTS, MARITAL STATUS AND LIVING ARRANGEMENTS, 2 (March 1990). However, for years, the

than is a divorced or widowed woman,⁸⁷ and because unmarried women feel economic pressure to marry,⁸⁸ a woman who wants to remarry might have to compromise to a degree that her prospective groom does not.

To summarize, if the characteristics of couples who make premarital agreements approximate the characteristics of American couples who remarry, we can make some observations about couples who make premarital agreements. There may be a considerable imbalance of power, experience, and resources in favor of the prospective husband. Moreover, the prospective wife might feel more pressure to compromise than does the prospective husband. Under such circumstances, the stage has been set for a premarital agreement to be so one-sided as to be unconscionable.⁸⁹ Such an agreement will harm a woman at her most financially difficult time—the end of marriage.

Women are especially vulnerable to the financial consequences of divorce⁹⁰ and widowhood because they occupy the lowest rungs of the

marriage rate for single women has been higher than the marriage rate for single men. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 101 (Table No. 143. Marriage Rates and Median Age of Bride and Groom, by Previous Marital Status: 1970 to 1988) [hereinafter 1993 STATISTICAL ABSTRACT].

87. See 1993 STATISTICAL ABSTRACT, *supra* note 86, at 101 (Table No. 143). In 1988, there were 122.2 remarriages per 1,000 divorced men, while there were only 90.5 remarriages per 1,000 divorced women. Wilson & Clarke, *supra* note 65, at 125-26. "Remarriage rates for divorced men were higher than for divorced women in every age group except 20 to 24." *Id.* at 128. In 1988, "the remarriage rate after widowhood was almost 5 times higher for men (25.1 per 1,000) than for women (5.3 per 1,000)." *Id.* at 132-33. Although, in absolute numbers, more women remarried than men, the remarriage rates for men were significantly higher because of the relative scarcity of divorced and widowed men, as compared to divorced and widowed women. *Id.* at 126, 133. In 1988, divorced women outnumbered divorced men by about two million. *Id.* at 126. In the same year, widowed women outnumbered widowed men by about 9.8 million persons. *Id.* at 132.

88. The economic pressures for a woman to marry and remain married are demonstrated by the statistics relating to the feminization of poverty and the financial consequences of marital termination for women. See *infra* notes 90-120 and accompanying text.

89. Premarital agreements are not customary in a first marriage. A premarital agreement is sometimes demanded when it is a first marriage for one of the partners. Often such a situation involves a first marriage for a young woman and a second marriage for an older man. In this situation the man generally has assets he wants to protect. The party demanding the agreement is generally the party with the greater bargaining power. This disproportion in bargaining power may poison the relationship and may also make the agreement vulnerable to attack at the time of breakup. A client who reluctantly signs a one-sided agreement is likely to seek to set it aside.

Walzer & Walzer, *supra* note 41, at 37.

90. Just as women are economically vulnerable at divorce, thousands of children also suffer the financial consequences of divorce. See *supra* note 51. Child support payments do not protect children from the economic decline suffered by their mothers. In 1990, there were 5 million women who had been awarded child support and were supposed to receive payments in 1989. Only about one-half of these women received the full amount due; the remaining 2.5 million women were equally divided between those receiving partial payment and those receiving nothing. HOW WE'RE CHANGING, *supra* note 56, at 2. Moreover, child support payments, even when fully paid, are often insubstantial. See, e.g., Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in DIVORCE REFORM AT THE CROSSROADS, at 75-101 (Stephen D. Sugarman & Herma H. Kay eds., 1990). In a 1988 study, the average child support payment in early 1985 was approximately \$2,550, only about 11% of the family income of the women then receiving child support. Arlene F. Saluter, *Singleness in America*, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23, NO. 162, CURRENT POPULATION REPORTS, STUDIES IN MARRIAGE AND THE FAMILY, 6 (1989). "Inadequate, unenforced child support awards are the norm . . . and they are a manifestation of gender bias." Lynn H. Schafran, *Gender Bias in Family Courts: Why Prejudice Permeates the Process*, FAM. ADVOC., Summer 1994, at 22, 25 [hereinafter Schafran].

American economic ladder. (The feminization of poverty in the United States has been so well documented,⁹¹ it needs no extended discussion.⁹²) One of the earliest and most influential studies of the economic consequences of divorce, *The Divorce Revolution*, stated that when their income is compared to their needs, divorced men experienced an average 42% rise in their standard of living in the first year after divorce while divorced women (and their children) experienced a 73% decline.⁹³ This often-cited finding and the methodology employed in *The Divorce Revolution* have been questioned by subsequent studies,⁹⁴ but even critical commentators agree that, generally, women suffer a precipitous economic decline after divorce.⁹⁵ One social scientist has reported that "[o]ver 40% of divorcing households headed by women saw their incomes immediately cut by more than one half, while only one sixth of divorced or separated men experienced a comparable drop."⁹⁶ One analysis of statistical data found that women's income-to-needs ratios

91. See, e.g., *THE DIVORCE REVOLUTION*, *supra* note 2, at xiv, 350-52, 483-84 & nn.40-55; Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 *SIGNS* 121, 121-22 & nn.2-4 (1987); Corcoran et al., *supra* note 55, at 244; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. REV.* 1103, 1103-04 & n.5 (1989); Roger A. Wojtkiewicz et al., *The Growth of Families Headed by Women: 1950-1980*, 27 *DEMOGRAPHY* 19, 19 (1990).

92. According to federal government statistics, in 1991, 13% of all families (13,956,000 families) were below the poverty level, yet 46% (3,597,000 families) of the families with children headed by single mothers were below the poverty level. 1993 *STATISTICAL ABSTRACT*, *supra* note 86, at 473 (Table No. 745. Families Below Poverty Level—Alternative Inflation Adjustment: 1970 to 1991). "In 1989, 43.2 percent of all poor families were maintained by a married couple, while 51.7 percent were maintained by a female with no husband present . . . In contrast, only 12.5 percent of nonpoor families were maintained by women." BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23, No. 173, *CURRENT POPULATION REPORTS, POPULATION PROFILE OF THE UNITED STATES: 1991*, at 18, 19 (1991). In 1991, families maintained by a married couple had a median income of \$40,995; families maintained by a male householder had a median income of \$28,351; but families maintained by a female householder had a median income of only \$16,692. 1993 *STATISTICAL ABSTRACT*, *supra* note 86, at 464 (Table No. 724. Money Income of Families—Median Family Income, by Race and Hispanic Origin: 1991). When the money incomes of all families are differentiated into quintiles, in 1990, 49.9% of all female-headed families were concentrated in the lowest one-fifth of income; by contrast, 25.7% of all male-headed families were in the lowest one-fifth, and only 13.2% of all married-couple families were concentrated in the lowest quintile of income. 1994 *STATISTICAL ABSTRACT*, *supra* note 52, at 450 (Table No. 705. Money Income of Families—Percent Distribution by Income Quintile and Top 5 Percent for Selected Characteristics: 1990). In 1992, 25.8% of all women had an income of less than \$5,000; 47.2% of all women had an income of less than \$10,000. 1994 *STATISTICAL ABSTRACT*, *supra* note 52, at 473 (Table No. 723. Money Income of Persons—Percent Distribution, by Income Level, in Constant (1992) Dollars: 1970 to 1992). By comparison, in the same year, 12% of all men had an income of less than \$5,000 and 25% of all men had an income of less than \$10,000. *Id.*

93. *THE DIVORCE REVOLUTION*, *supra* note 2, at 323.

94. E.g., Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 90, at 130-35, 149-53, 149 n.39; Scott, *supra* note 3, at 33-34 n.74. See also SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN*, at 19-25 (1991) (criticizing Weitzman's methodology).

95. See, e.g., LESLIE A. MORGAN, *AFTER MARRIAGE ENDS* 26-27 (1991) ("Most researchers conclude that the direction of change is as Weitzman describes, with women's income status declining and that of their former spouses improving, but the true magnitude over time is smaller than Weitzman reports.") (summarizing various studies) (citation omitted); Stephen D. Sugarman, *Introduction*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 90, at 4 (criticizing Dr. Weitzman's study, but summarizing all authors in book, who agree that a large proportion of divorced women, especially those with young children, face serious financial problems and a reduced standard of living after divorce); Scott, *supra* note 3, at 33.

96. MORGAN, *supra* note 95, at 25 (citation omitted).

declined an average of 30% in the first year after divorce.⁹⁷ Sadly, the economic decline suffered by divorced women persists years after the divorce. In one study it was reported that over a seven-year span, the economic well-being of divorced wives had declined 29% from married levels.⁹⁸ Another study found that divorced women dropped to 70% of their pre-divorce household income levels and remained there unless they remarried.⁹⁹ Still another study found that divorced, separated, and widowed women experienced significant income declines, concluding, "for the duration of widowed, divorced, or separated status, the average women [sic] in midlife can for the most part expect to see no major improvement in total family income beyond inflation."¹⁰⁰

Just as divorce is a financial tragedy for almost all women who experience it, widowhood is devastating for older women, who are among the most economically precarious members of society.¹⁰¹ For this reason, premarital agreements that preclude the sharing of wealth at the death of a spouse may especially harm elderly women.¹⁰² After all, women are far more likely than men to be the surviving spouses affected by premarital agreements.¹⁰³

97. *Id.* at 26.

98. *Id.*

99. *Id.* at 25.

100. *Id.* at 76. In a longitudinal study of more than 5,000 women ages thirty to forty-four, between 1967 and 1982, Morgan found that the median income of widowed women declined 35%, the median income of divorced women declined 29%, and the median income of separated women declined 23%. *Id.* at 72-3.

101. In 1989, 11.4% of the elderly were impoverished; 7.8% of elderly men and 14.0% of elderly women lived below the poverty line. U.S. SENATE SPECIAL COMM'N ON AGING ET AL., AGING AMERICA: TRENDS AND PROJECTIONS - 1991, at 53 (Table 2-6: Number and Percent of Elderly Below Poverty, by Race, Hispanic Origin, Sex, and Living Arrangement: 1989) [hereinafter AGING AMERICA]. See also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23, NO. 173, CURRENT POPULATION REPORTS, POPULATION PROFILE OF THE UNITED STATES: 1991, at 22-23 (1991). In 1987, 20.0% of widowed, elderly women lived below the poverty line (and 23.9% of divorced, elderly women were impoverished). Saluter, *supra* note 90, at 10 (Table J. Economic Characteristics of the Elderly, by Sex and Marital Status: 1987). By comparison, in 1987, 14.6% of widowed, elderly men lived below the poverty line (and 19.1% of divorced, elderly men were impoverished). *Id.*

102. Although premarital agreements recently have been popularized by the media and seem to be more commonly used now than in the past, undoubtedly there are many elderly women who are affected by premarital agreements they have signed. Women have long made premarital agreements (particularly those contemplating the death of a spouse), as illustrated by Professor Gamble's references to premarital agreement cases from the nineteenth and early twentieth centuries. Gamble, *supra* note 49. His survey of premarital agreement cases from 1956 to 1966 found that the average woman making a premarital agreement was at least middle-aged. *Id.* at 733. Of the 26 cases in which the prospective wife's age was reported, the average age for women at the time of the premarital contract was 49 years, with 81% of the women older than 40. *Id.* By comparison, the average age for men in the 29 cases that reported the prospective groom's age was 63 years; 91% of the men were over 50 years of age. *Id.* (However, Professor Gamble's small and early study may not reflect the ages of most couples who currently make premarital agreements.)

103. In 1993, about 2.6% of all men age 15 years and over were widowed, but about 11% of all women age 15 years and over were widowed. MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1993, *supra* note 51, at 1 (figures compiled from Table 1. Marital Status of Persons 15 Years and Over, By Age, Sex, Race, Hispanic Origin, Metropolitan Residence, and Region: March 1993).

The fact that women generally live longer than men is not the only explanation for the fact that many more women than men are widowed. AGING AMERICA, *supra* note 101, at 210. "[W]idowed and divorced men are more likely to remarry than are women." *Id.* In addition, women generally marry men who are older so that even if their life expectancies were equal, wives would generally survive their husbands'

"Widowhood is the single status experienced most often by elderly women and is more likely to be a permanent one for women than for men."¹⁰⁴

A premarital agreement can deprive an elderly widow of property at a time when she needs it most.¹⁰⁵ One research study concluded that the "incomes of women who had been widowed for various lengths of time were about half of what they had been prior to widowhood."¹⁰⁶ Another study found that "[o]lder women who become widowed faced a 64% risk of falling into poverty at least once during a 10-year period . . . [and] more than half of these once-poor widows fall below the poverty line again within the subsequent 6 years."¹⁰⁷

In 1989, widows and divorced women had the lowest and second-lowest median incomes of unmarried [elderly] women, reflecting the loss of pension income and earnings often associated with the divorce or the death of a wage-earning spouse. The median income of widowed women (\$8,362) was 75 percent of that of widowed men (\$11,200), because men are more likely to retain pension or earned income after the death of a spouse.¹⁰⁸

Whether a marriage ends by a husband's death or by divorce, the women most likely to have signed premarital agreements (those who had an upper-class or upper middle-class standard of living during marriage) generally experience a precipitous economic decline. Several research studies have found that at divorce, the greatest decline in per capita or household income occurred among women whose incomes had been highest during marriage.¹⁰⁹ Dr. Lenore Weitzman concluded that at divorce, children and wives of upper middle-class men experience the greatest relative deprivation of income.¹¹⁰

deaths. See *supra* text accompanying note 74.

104. Saluter, *supra* note 90, at 4. In 1993, there were about 11.2 million widows and 2.5 million widowers in the United States; 76% of them were 65 years old or over. However, of all men age 65 years and over, 14.3% were currently widowed as compared with 47.6% of women age 65 and older. MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1991, *supra* note 51, at 1 (figures compiled from Table 1. Marital Status of Persons 15 Years and Over, By Age, Sex, Race, Hispanic Origin, Metropolitan Residence, and Region: March 1993).

105. Women generally experience significant declines in income as they age as a result of retirement and widowhood. MORGAN, *supra* note 95, at 25; Peter Uhlenberg & Mary Anne P. Salmon, *Change in Relative Income of Older Women, 1960-1980*, 26 GERONTOLOGIST 164, 170 (1986). Marital status change, particularly the death of a spouse, has been found to contribute to loss of income. AGING AMERICA, *supra* note 101, at 50. In addition, "[o]lder people who do not live with a spouse have a significantly lower net worth than do older married couples. For example, older unmarried women who headed a household had a net worth in 1988 of \$47,233, only 38 percent of the median net worth of older married couples (\$124,419 . . .)" *Id.* at 77.

106. MORGAN, *supra* note 95, at 25.

107. MORGAN, *supra* note 95, at 28 (citations omitted).

108. AGING AMERICA, *supra* note 101, at 47. Although several studies have concluded that when women are widowed their incomes decline significantly, the studies differ on whether, and to what extent, men who are widowed suffer an income decline. MORGAN, *supra* note 95, at 25.

109. MORGAN, *supra* note 95, at 26; Schafran, *supra* note 90, at 24.

110. THE DIVORCE REVOLUTION, *supra* note 2, at 327.

She found that for the couples with the highest incomes in her study,¹¹¹ who were married less than ten years, about one year after divorce¹¹² the median income of former wives was 29% of the couple's pre-divorce family income; by contrast, the median income of former husbands was 75% of the pre-divorce family income.¹¹³ Dr. Weitzman also compared the per capita income of men's and women's households before and after divorce.¹¹⁴ She found that "[f]or the highest income couples" there was a "144 percent difference between the per capita incomes of former husbands and wives."¹¹⁵ She concluded that for couples with the highest incomes in her study, who were divorced after marriages of eleven to seventeen years, about one year after divorce the per capita post-divorce income of women's households was 64% of the pre-divorce family income; the per capita post-divorce income of men's households was 222% of the pre-divorce family income.¹¹⁶ Although subsequent researchers have questioned the accuracy of Dr. Weitzman's statistics,¹¹⁷ other studies have reached results consistent with Dr. Weitzman's conclusions. Summarizing a number of studies, Professor Leslie Morgan stated,

[W]omen experiencing the ending of their marriages, regardless of the means by which they end [widowhood, divorce or separation], typically experience declines in economic well-being. This decline does not occur equally for men nor are all women equally affected. In the case of divorce, *the women who lose the most are those who had the highest incomes during marriage, typically incomes that relied heavily on high earnings of their husbands.*¹¹⁸

It may be an overstatement to assert that premarital agreements are propelling millions of divorced and widowed women into poverty, but social science research demonstrates that all but the wealthiest women who have signed premarital agreements will suffer serious economic and social harm at the end of marriage.¹¹⁹ The findings and statistics discussed in this article

111. Those couples with a predivorce yearly income of \$40,000 or more. *Id.* at 328.

112. *Id.* at 324.

113. *Id.* at 326. These discrepancies were evident in couples divorced after being married eleven to seventeen years as well. *Id.* at 329.

114. *Id.* at 327. The comparisons between post-divorce per capita income for men's and women's households "show how the presence of children in the wife's household increases demands on her income. When a mother shares her smaller portion of the pie with the couple's children, both she and the children end up with significantly less money than the father." *Id.* at 329.

115. *Id.* at 329.

116. *Id.* at 330.

117. See *supra* notes 94-95 and accompanying text.

118. MORGAN, *supra* note 95, at 40 (emphasis added). However, Professor Morgan notes that although women with the highest income levels experienced the greatest relative declines in income at marital termination, they continued at relatively high income levels after marital termination. *Id.* at 92.

119. Women are significantly more likely to be poor at any adult age than are men and face higher risks of ever experiencing poverty in their lifetimes.

document society's great inequality in the distribution of wealth and earnings along gender lines. Premarital agreements can only sharpen that inequality and add to the economic and social burdens suffered by women at the end of marriage.¹²⁰ For these reasons and others,¹²¹ premarital agreements merit special scrutiny before enforcement. Yet, recent developments in the law have made premarital agreements more readily enforceable with no regard for their potential to harm women.

IV. THE RECENT TREND OF THE LAW CONCERNING PREMARITAL AGREEMENTS IS TO PROMOTE THEIR ENFORCEMENT, TO THE DETRIMENT OF WOMEN

A. Introduction

The law relating to premarital agreements has evolved based on lawmakers' changing conceptions about the status of women in society.¹²² Prior to the 1970s, lawmakers' perceptions reflected the reality of women's legal and economic inequality, and the common law of premarital agreements embraced principles that could be utilized by judges to protect women from the harsh economic consequences of unfair agreements.¹²³ Beginning with the 1970 decision by the Florida Supreme Court in *Posner v. Posner*¹²⁴ that determined that a premarital agreement that contemplates divorce is not per

. . . Poverty for women is heavily concentrated among those who are widowed, divorced, and separated. The rate of poverty is disproportionately high among the female heads of single-parent households created either through nonmarital childbearing or divorce, and among middle-aged and older women who have experienced some form of marital dissolution. Thus, it appears that marriage provides economic protection to women . . .

MORGAN, *supra* note 95, at 2 (citations omitted).

120. "Because of women's inferior earning capacity in the market place, the persistence of gendered divisions of labor in the home, and the consequent disparity in economic bargaining power between men and women, the strict enforcement of prenuptial agreements is more likely to disadvantage wives than husbands." Atwood, *supra* note 46, at 154.

121. The features of antenuptial contracts that justify greater state supervision than is ordinarily exerted over commercial contracts include the special legal status of the marriage relationship in our society, the trust and confidence the law expects of marriage partners, the emotional intensity surrounding the decision to marry, the common belief that the marriage will last forever, and the potential lack of understanding of the economic rights that are being waived. This coalescence of factors, when viewed against the backdrop of persistent gender inequality in the marketplace, warrants a relaxation of the rules of contract to accommodate other social values.

Atwood, *supra* note 46, at 135. *See also* Younger (1992), *supra* note 40, at 3-4 (describing why antenuptial contracts cannot be "contained" by ordinary contract rules).

122. *See generally* Gamble, *supra* note 49.

123. *See* Gamble, *supra* note 49, at 729 (noting that at the time men and women were not treated equally and that a good rule would recognize the inequality).

124. *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970). *Posner* is discussed *infra* parts IV.B.1. and IV.D.

se void as violative of public policy, lawmakers in many states began making premarital agreements more readily enforceable. This development was motivated by the lawmakers' recognition of women's de jure equality with men and of women's entry into the labor market, as well as by their desire to protect the rights of men and women, as equal competent adults, to contract with one another.¹²⁵ Although *Posner* led to the enforceability of many premarital agreements, judges simultaneously followed *Posner* while retaining the previously established common law principles that were used to protect women from unfair premarital agreements.

Recently, however, with the 1983 promulgation of the Uniform Premarital Agreement Act (hereinafter U.P.A.A.),¹²⁶ its subsequent adoption by more than one-third of the states,¹²⁷ and the 1990 decision by the Pennsylvania Supreme Court in *Simeone v. Simeone*,¹²⁸ the law of premarital agreements has taken a sharp turn. The law has begun to make premarital agreements more readily enforceable by treating them as ordinary contracts and by shedding the common law principles protective of women. Some states have gone even further: those states that have adopted the U.P.A.A. without modification contemplate the enforcement of even unconscionable premarital agreements.¹²⁹

The trend toward abandoning the protective aspects of premarital agreement law appears to be the result of a distorted or idealized perception by lawmakers that women have achieved de facto equality with men. At best, this view is the result of lawmakers' ignorance of women's actual socioeconomic status and their misunderstanding of the nature of sex discrimination. At worst, this view is the consequence of lawmakers' hostility to gender equality. In either case, the law is moving too far, too fast, in the direction of largely unfettered enforcement of premarital agreements, to the detriment of women.

In order to understand the evolution of the law and the import of recent developments (particularly the *Simeone* decision and the U.P.A.A.), we must first understand what the current law is concerning the enforcement of premarital agreements.

125. The *Posner* decision and its progeny may be seen as part of a larger movement towards increasing the privatization of family law.

126. Unif. Premarital Agreement Act, 9B U.L.A. 369 (1987 & Supp. 1994).

127. The U.P.A.A. has been adopted (in either modified or unmodified form) in the following states: Arizona, Arkansas, California, Hawaii, Illinois, Iowa, Kansas, Maine, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas and Virginia. Unif. Premarital Agreement Act, 9B U.L.A. 46 (Supp. 1994).

128. *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

129. The U.P.A.A. goes beyond treating premarital agreements as ordinary contracts; it enables the enforcement of unconscionable premarital agreements under certain circumstances. See discussion *infra* part IV.F.

B. *A summary of the current law relating to premarital agreements in states that have not enacted the Uniform Premarital Agreement Act*¹³⁰

All states recognize, to some extent, the enforceability of premarital agreements.¹³¹ In the states that have not enacted the U.P.A.A.,¹³² the standards for enforcing premarital agreements primarily have been developed by the judiciary on a case-by-case basis.¹³³ Therefore, the law varies greatly among the jurisdictions. Factual patterns in cases that present recurring issues are common among the states. Almost universal among the states are the factors that courts consider, in varying degrees, to determine the enforceability of a premarital agreement: (1) considerations of public policy; (2) procedural fairness (i.e., whether, given the circumstances under which the parties negotiated and executed the agreement, the parties executed the agreement voluntarily, and knew the nature and value of the rights affected by the agreement); and (3) substantive fairness (i.e., whether the terms of the agreement fail to meet some standard of substantive sufficiency, so that the agreement's provisions are either unfair or unconscionable or otherwise unenforceable).¹³⁴

1. *Considerations of public policy*

As with all contracts, considerations of public policy may render a premarital agreement partially or wholly unenforceable. Courts in many states have held that considerations of public policy limit the permissible scope of

130. The discussion of current law is based on this Author's survey of the common law and on the following publications: Lewis Becker, *Premarital Agreements: An Overview*, in *PREMARITAL AND MARITAL CONTRACTS* 1 (Edward L. Winer & Lewis Becker eds., 1993); Phillip Gainsley & Susan C. Rhode, *The Role of Substantive Fairness in Premarital Agreements*, in *PREMARITAL AND MARITAL CONTRACTS* 51 (Edward L. Winer & Lewis Becker eds., 1993); Laura W. Morgan & Brett R. Turner, *Attacking and Defending Antenuptial Agreements: A 1993 Update* (pts. 1 & 2), 5 *DIVORCE LITIG.* 129 & 149 (1993).

Many other commentators have also described the current law concerning the enforcement of premarital agreements. *E.g.*, 1 HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 1.9 (2d ed. 1987); GREEN & LONG, *supra* note 15, at §§ 2.07-2.24 (1984 & Supp. 1992); 3 LINDEY & PARLEY, *supra* note 15, at §§ 90.01-90.15; James O. Pearson, Jr., Annotation, *Failure to Disclose Extent or Value of Property Owned as Ground for Avoiding Premarital Contract*, 3 A.L.R. 5TH 394 (1992 & Supp. 1994); Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R. 4TH 22 (1987 & Supp. 1994); Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights upon Divorce or Separation as Affected by Circumstances Surrounding Execution—Modern Status*, 53 A.L.R. 4TH 85 (1987 & Supp. 1994); Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights upon Divorce or Separation as Affected by Fairness or Adequacy of Those Terms—Modern Status*, 53 A.L.R. 4TH 161 (1987); Younger (1992), *supra* note 40; Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 *RUTGERS L. REV.* 1059 (1988) [hereinafter Younger (1988)].

131. 3 LINDEY & PARLEY, *supra* note 15, at 90-91.

132. *See supra* note 127.

133. In states which have not enacted the U.P.A.A., courts have been the driving force in developing the law of premarital agreements. Atwood, *supra* note 46, at 136. In those states, generally any legislation relating to premarital agreements is limited in scope and does not define, in a comprehensive way, the standards for enforcing such agreements. Becker, *supra* note 130, at 5.

134. *See* Morgan & Turner, *supra* note 130, at 131 (describing these factors).

a premarital agreement. For example, states have an overriding interest in protecting the welfare of children. Therefore, courts have held that a premarital agreement's waiver of child support, custody, or visitation is unenforceable.¹³⁵ States also have an interest in protecting the economic welfare of their adult residents. Therefore, some states treat premarital provisions that waive or limit spousal support as violative of public policy and unenforceable.¹³⁶ (It is paradoxical that courts do not invoke the same public policy to render unenforceable, at least in some circumstances, premarital waivers of marital property rights and community property rights.)

It is common state policy to protect the institution of marriage. Until the 1970 decision by the Florida Supreme Court in *Posner v. Posner*,¹³⁷ states effectuated this policy by refusing to enforce premarital agreements that addressed the division of property or spousal support on divorce; the only enforceable premarital agreements were those that contemplated the end of marriage by death of a spouse.¹³⁸ Since *Posner*, the states have changed their position and now enforce premarital agreements contemplating divorce. However, states currently implement the policy of protecting marriage by refusing to enforce premarital agreements that promote divorce (e.g., agreements that allow a party to profit by divorcing).¹³⁹

2. The relationship between procedural fairness and substantive fairness in the enforcement of premarital agreements

The concept of procedural fairness includes two components: (1) voluntariness and (2) knowledge.¹⁴⁰ The degree to which procedural fairness determines enforceability varies from state to state. All states hold that an agreement that is involuntary is unenforceable.¹⁴¹ However, some states will

135. Becker, *supra* note 130, at 7 (citing *Edwardson v. Edwardson*, 798 S.W.2d 941, 946 (Ky. 1990); *Morgan & Turner, supra* note 130, at 134 (citing, *inter alia*, *Edwardson*, 798 S.W.2d 941 at 946; *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986)).

136. Becker, *supra* note 130, at 6 (citing, *inter alia*, *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964), *cert. denied*, 385 S.W.2d 288 (Tenn. 1964)); *Morgan & Turner, supra* note 130, at 133-34 (citing, *inter alia*, *Howell v. Landry*, 386 S.E.2d 610 (N.C. Ct. App. 1989), *cert. and dismissal denied*, 392 S.E.2d 90 (N.C. 1990)). States are divided as to the enforceability of premarital agreement provisions which determine spousal support ("alimony" or "maintenance") at divorce. In some states, premarital agreements may limit or waive spousal support rights at dissolution, while in other states, such provisions are not enforceable. Compare, e.g., *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982) (holding that agreement in contemplation of divorce not necessarily void); *Volid v. Volid*, 286 N.E.2d 42, 46-47 (Ill. App. Ct. 1972) (considering fully and rejecting the argument that provisions determining support at divorce violate public policy) with *In re Marriage of Dawley*, 551 P.2d 323, 328-29 (Cal. 1976) (en banc) (holding that provisions which limit or waive spousal support promote divorce and are unenforceable).

137. *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

138. The *Posner* decision and the subsequent development of the law are discussed in detail *infra* parts IV.C. and D.

139. Becker, *supra* note 130, at 6-7 (discussing *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988); *In re Marriage of Noghrey*, 215 Cal. Rptr. 153 (Cal. Ct. App. 1985); *Neilson v. Neilson*, 780 P.2d 1264, 1269-70 (Utah App. 1989)); *Morgan & Turner, supra* note 130, at 133.

140. See Becker, *supra* note 130, at 8; *Morgan & Turner, supra* note 130, at 131.

141. *Morgan & Turner, supra* note 130, at 131.

enforce agreements made with insufficient knowledge, provided the agreement is substantively fair. In some states, a premarital agreement is enforceable either if it is substantively fair or if the challenging party¹⁴² knew the nature and value of the rights affected by the agreement.¹⁴³ In other states, a premarital agreement is only enforceable if it is both substantively fair and the challenging party must have had the requisite knowledge; in other words, the agreement must be both substantively and procedurally fair.¹⁴⁴ In at least one state, Pennsylvania, the courts do not review the substantive fairness of premarital agreements.¹⁴⁵

3. *Procedural fairness*

Generally, prospective spouses are thought to be in a confidential or fiduciary relationship.¹⁴⁶ Therefore, when making a premarital contract, they are held to standards of the highest good faith and fair dealing. Courts often state that a premarital agreement is enforceable if it was made voluntarily, after full disclosure of all material facts bearing on the agreement (particularly each party's financial resources). Although many court opinions refer to the duty of disclosure, courts are ultimately concerned not with disclosure *per se*, but with each party's understanding of the nature and value of rights affected by the agreement.¹⁴⁷

4. *The first component of procedural fairness: Voluntariness*

The issue of voluntariness in premarital agreements arises in diverse factual settings,¹⁴⁸ and the states vary as to what evidence or circumstances establish

142. Professor Atwood has found, "Of the 39 reported cases in 1992 involving challenges to the validity of a premarital agreement in the context of divorce, 33 were cases where the wife was the party asserting the challenge." Atwood, *supra* note 46, at 133 n.29 (citations omitted). "[O]f the 18 reported cases citing the U.P.A.A. in which the validity of a premarital agreement was at issue, 15 involved challenges brought by women." *Id.* at 142 n.70 (citations omitted).

143. Morgan & Turner, *supra* note 130, at 131.

144. Morgan & Turner, *supra* note 130, at 131.

145. Morgan & Turner, *supra* note 130, at 131 (discussing *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990)). *Simeone* is discussed in detail in this Article; see *infra* part IV.E.

146. Morgan & Turner, *supra* note 130, at 132 (citing, *inter alia*, *Estate of Serbus v. Serbus*, 324 N.W.2d 381 (Minn. 1982); *Estate of Benker v. Benker*, 331 N.W.2d 193, 196 (Mich. 1982)). *Contra In re Marriage of Dawley*, 551 P.2d 323, 331 (Cal. 1976) (en banc); *Eckstein v. Eckstein*, 514 N.Y.S.2d 46, 49 (N.Y. App. Div. 1987).

147. See, e.g., *DeLorean v. DeLorean*, 511 A.2d 1257, 1261 (N.J. Super. Ct. Ch. Div. 1986) ("The only way that Mrs. DeLorean could knowingly and intelligently waive her legal rights in Mr. DeLorean's assets was if she was fully and completely informed what they were."); *In re Marriage of Matson*, 730 P.2d 668 (Wash. 1986) (holding that for a premarital agreement to be enforceable, each party must have made an intelligent and voluntary waiver of rights, with an understanding of the legal consequences of the agreement, after full disclosure of each party's assets). See also *Warren v. Warren*, 523 N.E.2d 680, 683 (Ill. App. Ct. 1988) (discussing as one issue, whether wife understood the terms of the premarital agreement, whether husband's general, non-specific disclosure of wealth was adequate, and whether wife had knowledge of the husband's property).

148. In many cases involving a question of voluntariness, the defending party presented the challenging party with a draft of a premarital agreement just days or hours before the wedding. Cases which involve

that an agreement was made involuntarily.¹⁴⁹ Despite the difficulty of defining the concept, some commentators have observed that voluntariness “has elements of the normal contract law doctrines of duress and undue influence, but due to the parties’ confidential relationship, it is broader than the normal meaning of either of those concepts.”¹⁵⁰ In deciding whether an agreement was executed voluntarily, courts do not limit their inquiry to technical notions of fraud and duress.¹⁵¹

*5. The second component of procedural fairness: Knowledge of the nature and value of the rights affected by the premarital agreement*¹⁵²

There has been extensive litigation over whether the challenging party knew the material facts bearing on the agreement (usually the defending party’s financial resources), and over whether he/she had a sufficient understanding of the terms of the premarital agreement. It is hazardous to generalize from the many court opinions, as the outcome of each case turns on the unique facts present in the dispute and on the state’s general approach to the question of whether requirements for procedural fairness are to be liberally or strictly construed. However, we can make some observations about the commonly recurring fact patterns that present knowledge issues.

The question of whether a challenging party had sufficient knowledge of the value of rights affected by the agreement often arises in the form of a dispute over the necessity for, and adequacy of, the defending party’s disclosure of financial information before the premarital agreement was signed. In such cases the states have discussed a host of questions. Are the parties required to disclose their financial resources in order to make a binding

such questions of timing are the most common fact patterns for presenting the issue of voluntariness to a court. Morgan & Turner, *supra* note 130, at 135. Morgan and Turner have concluded that if the parties informally discussed the agreement for more than a month before its signing, a court is likely to find that it was executed voluntarily, even if there was a short period of time between presentation of the draft and the wedding. *Id.* (citing, *inter alia*, Williams v. Williams, 720 S.W.2d 246 (Tex. Ct. App. 1986); *In re Marriage of Leathers*, 779 P.2d 619, 622 (Or. Ct. App. 1989), *cert. denied*, 789 P.2d 263 (Or. 1990)). If the agreement was not informally discussed until the days just before the wedding, a court is likely to be reluctant to enforce it. *Id.* (citing, *inter alia*, Lutgert v. Lutgert, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976); Zimmie v. Zimmie, 464 N.E.2d 142 (Ohio 1984)).

The question of voluntariness often arises when the prospective wife is pregnant, and the prospective husband refuses to marry her without a premarital agreement. The cases are split on whether this establishes that the agreement was signed involuntarily because of duress or undue influence. Morgan & Turner, *supra* note 130, at 137-38 (discussing, *inter alia*, Rowland v. Rowland, 599 N.E.2d 315 (Ohio Ct. App. 1991) (finding that there was duress, overreaching was demonstrated by fact that wife was pregnant at time husband pressured her to sign agreement); Hamilton v. Hamilton, 591 A.2d 720 (Pa. Super. Ct. 1991) (holding that there was no duress, even though 18 year old, pregnant, unemployed wife signed agreement after being informed by husband that he would not marry her without agreement, and because she signed agreement despite her attorney’s advice not to do so)).

149. See Becker, *supra* note 130, at 18.

150. Morgan & Turner, *supra* note 130, at 135.

151. Becker, *supra* note 130, at 10. Courts often do not distinguish the theoretically distinct concepts of duress and voluntariness. *Id.*

152. At least one commentator treats questions relating to the parties’ knowledge of the nature of the rights waived by the agreement as presenting an issue of voluntariness. Becker, *supra* note 130, at 11-15.

premarital agreement? If financial disclosure is required, what information must be provided and how complete must the disclosure be? If a defending party failed to adequately disclose his or her financial resources before the agreement was executed, can the agreement be enforced nevertheless, because the challenging party had independent knowledge of the other's financial resources? How specific must that independent knowledge be to support enforcement of a premarital agreement if there has been inadequate disclosure? Professor Lewis Becker concludes that states differ as to whether financial disclosure is required for a binding premarital agreement.¹⁵³ "[S]ome jurisdictions seem to make full financial disclosure an absolute requirement, while others provide that if the agreement is not fair and reasonable, then there must be full disclosure. . . . Still other jurisdictions seem to follow the rule that there is no absolute requirement of disclosure."¹⁵⁴

As to the extent and accuracy of required disclosure, some commentators have concluded that generally "[t]he disclosure need not be exact, but it must be reasonably accurate."¹⁵⁵ "[A]ll that is necessary is that there be sufficient disclosure to allow a party to make an informed decision"¹⁵⁶ In general, the parties must disclose the approximate value, as well as the existence, of their assets.¹⁵⁷ Although some court opinions create ambiguity, and some jurisdictions specifically reject requirements that income be disclosed, in others, parties must disclose their income as well as their assets.¹⁵⁸ Even if there has not been adequate financial disclosure, an agreement may be upheld if the challenging spouse had independent knowledge of the other party's financial circumstances.¹⁵⁹ The states vary, however, as to how specific that knowledge must be to support enforcement of the agreement.¹⁶⁰

States also require (in varying degrees) that the parties understand the nature of the rights affected by the agreement, even if the parties knew the

153. Becker, *supra* note 130, at 18-19.

154. Becker, *supra* note 130, at 18-19 (citations omitted).

155. Morgan & Turner, *supra* note 130, at 139 (citing, *inter alia*, Wylie v. Wylie, 459 S.W.2d 127 (Ark. 1970) (holding that failure by husband to disclose net worth voided agreement); Estate of Stack v. Venzke, 485 N.E.2d 907 (Ind. Ct. App. 1985) (finding that failure to fully disclose extent of property made postnuptial agreement unenforceable)).

156. Becker, *supra* note 130, at 21 (citing Gula v. Gula, 551 A.2d 324, 327 (Pa. Super. Ct. 1988), *appeal denied*, 562 A.2d 827 (Pa. 1989)).

157. Morgan & Turner, *supra* note 130, at 139 (citing, *inter alia*, Casto v. Casto, 508 So. 2d 330 (Fla. 1987) (applying cases and standards relating to premarital agreements to a postnuptial agreement); Fern v. Fern, 207 So. 2d 291 (Fla. Dist. Ct. App. 1968)).

158. Becker, *supra* note 130, at 21; Morgan & Turner, *supra* note 130, at 139 (citing, *inter alia*, Orgler v. Orgler, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989); DeLorean v. DeLorean, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986)).

159. Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986) ("This independent knowledge serves as a substitute for disclosure.").

160. Becker, *supra* note 130, at 19-20 (comparing *In re Marriage of Lewis*, 808 S.W.2d 919, 923 (Mo. Ct. App. 1991); Sogg v. Nevada State Bank, 832 P.2d 781, 786 (Nev. 1992) with *In re Estate of Ascherl*, 445 N.W.2d 391, 393 (Iowa Ct. App. 1989); *Ex parte Walters*, 580 So.2d 1352, 1354 (Ala. 1991); Warren v. Warren, 523 N.E.2d 680, 683 (Ill. App. Ct. 1988)).

value of the rights affected by the premarital agreement. States may also vary in the evidence needed to prove that the challenging party did not fully understand the agreement and the weight given to that factor.¹⁶¹ Even if a prospective spouse read the premarital agreement and its terms were understandable, frequently the question arises whether a party must understand legal concepts (e.g., equitable distribution, alimony) and the legal effects of a premarital agreement to have signed it knowingly and voluntarily. "States may vary considerably as to whether a spouse's knowledge of his or her legal rights is a factor in determining voluntariness."¹⁶² Before upholding a premarital agreement, courts in many states consider whether a party had access to legal advice before signing the agreement. While the states do not require that each party have legal advice or be represented by independent counsel to render the agreement enforceable, many courts consider whether a party had an adequate and meaningful opportunity to consult with independent counsel as a significant factor in determining whether an agreement was made knowingly and voluntarily.¹⁶³

6. Substantive fairness

Far more divergence exists among the states regarding the definition and application of standards relating to substantive fairness than exists for standards of procedural fairness.¹⁶⁴ Courts vary to such an extent in their definition and application of these standards that even the commentators cannot agree on a description of the common law.¹⁶⁵ Some states measure an agreement's

161. Becker *supra* note 130, at 12-13 (discussing, *inter alia*, Simeone v. Simeone, 581 A.2d 162, 165-66 (Pa. 1990); *In re Marriage of Foran*, 834 P.2d 1081, 1089 (Wash. Ct. App. 1992); Pajak v. Pajak, 385 S.E.2d 384, 388-89 (W. Va. 1989); Greenwald v. Greenwald, 454 N.W.2d 34, 39-40 (Wis. Ct. App.), *cert. denied*, 454 N.W.2d 806 (Wis. 1990)).

162. Becker, *supra* note 130, at 11-12 (comparing Simeone v. Simeone, 581 A.2d 162, 165-67 (Pa. 1990) with Orgler v. Orgler, 568 A.2d 67, 70-71 (N.J. Super. Ct. App. Div. 1989); *In re Marriage of Matson*, 730 P.2d 668, 672-73 (Wash. 1986) (en banc) and Kahn v. Kahn, 756 S.W.2d 685, 695-96 (Tenn. 1988); *In re Marriage of Matson*, 730 P.2d 668, 672-73 (Wash. 1986) (en banc)).

163. *E.g.*, Fletcher v. Fletcher, 628 N.E.2d 1343, 1348 (Ohio 1994) (holding that if agreement provides less than equitable distribution, law mandates that disadvantaged party must have had "meaningful opportunity to consult with counsel"); Becker, *supra* note 130, at 14; Morgan & Turner, *supra* note 130, at 136-37 (discussing, *inter alia*, Lutgert v. Lutgert, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976); Ferry v. Ferry, 586 S.W.2d 782, 787 (Mo. Ct. App. 1979); Orgler v. Orgler, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989); *In re Estate of Crawford*, 730 P.2d 675 (Wash. 1986) (en banc); Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985)).

164. Gainsley & Rhode, *supra* note 130, at 52-53.

165. Compare Becker, *supra* note 130, at 26-27 (discussing cases which draw on commercial law principles to define "unconscionability") with Morgan & Turner, *supra* note 130, at 152 ("the test for unconscionability is clearly different in the antenuptial agreement setting than in the business setting . . ."). Compare Morgan & Turner, *supra* note 130, at 150 (the difference between "unfairness" and "unconscionability" is one of degree, with "unconscionability" being the more stringent standard) with Gainsley & Rhode, *supra* note 130, at 57 ("unconscionability," if used to measure the substantive sufficiency of an agreement at the time of execution, is akin to "unfairness" whereas "unconscionability," if used to measure the agreement's sufficiency in light of changed circumstances since execution, is similar or identical to "foreseeability").

substantive fairness by whether it is "unfair,"¹⁶⁶ while other states consider whether the agreement is "unconscionable."¹⁶⁷ At least one state, West Virginia, has substituted a foreseeability analysis for a substantive fairness review.¹⁶⁸ Whatever standard of substantive fairness the jurisdiction adopts, it is clear that the standard cannot be precisely defined.¹⁶⁹ Recognizing this, some courts and commentators have attempted to list the factors most commonly considered by the courts in determining substantive fairness.¹⁷⁰ It is also clear that the fact that an agreement makes an unequal division of income or wealth does not render the agreement unenforceable.¹⁷¹

Within a jurisdiction, courts may apply different standards of substantive fairness, depending on whether the challenged provision of the premarital agreement deals with property division or spousal support. In a number of states, courts apply a more stringent fairness standard to the alimony provisions of an agreement than to its property provisions.¹⁷² As an alternative, or in addition, courts may judge the fairness of the alimony provision as of the time of enforcement of the agreement or in light of changed circumstances since its execution, whereas courts in the same jurisdiction may judge the fairness of the property provisions as of the time of execution.¹⁷³

166. Gainsley & Rhode, *supra* note 130, at 53; Morgan & Turner, *supra* note 130, at 150 (citing, *inter alia*, *Burtoff v. Burtoff*, 418 A.2d 1085 (D.C. 1980); *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987); *In re Marriage of Matson*, 730 P.2d 668 (Wash. 1986) (en banc); *Button v. Button*, 388 N.W.2d 546 (Wis. 1986); *Ruzic v. Ruzic*, 549 So. 2d 72 (Ala. 1989)).

167. Gainsley & Rhode, *supra* note 130, at 53; Morgan & Turner, *supra* note 130, at 150 (citing *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988); *Rose v. Rose*, 526 N.E.2d 231 (Ind. Ct. App. 1988); *In re Estate of Ascherl*, 445 N.W.2d 391 (Iowa Ct. App. 1989); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985)).

168. Gainsley & Rhode, *supra* note 130, at 56 (discussing *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985)). There, the West Virginia Supreme Court of Appeals held that courts are to enforce the literal terms of a premarital agreement which is not so outrageous as to be unconscionable "to the extent that circumstances at the time the marriage ends are roughly what the parties foresaw at the time they entered into the prenuptial agreement." *Id.* (quoting *Gant*, 329 S.E.2d at 116).

169. *But see* Upham v. Upham, 630 N.E.2d 307, 311 (Mass. App. Ct. 1994) (unconscionability requires a greater showing of inappropriateness than a "fair and reasonable" standard but there is overlap between the standards).

170. Gainsley & Rhode, *supra* note 130, at 55, assembled the following list of factors "that focus on the conditions at creation and enforcement of the agreement and the parties' expectations for the future" from several court opinions: (1) the parties' objectives in making the agreement; (2) the financial situation of each party; (3) the physical and emotional condition of each party (including their ages and health); (4) the parties' economic resources (including education, occupation, earning capacity); (5) other family commitments or obligations; (6) each party's expected contribution to the marriage (e.g., relocating, homemaking); (7) each party's business or financial expertise and how it affects his/her relative bargaining power and understanding of the agreement; (8) whether the accumulation of property after the agreement showed that both parties understood the agreement's operation; (9) the needs of each party and each party's ability to be self-supporting at the end of marriage. For a similar list of factors, see Morgan & Turner, *supra* note 130, at 151 (including additional factors: the duration of the marriage; the parties' standard of living during the marriage; the property each party brings into the marriage).

171. Gainsley & Rhode, *supra* note 130, at 53-54 (discussing *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989) (en banc); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985)). Often, the very purpose of a premarital agreement is to insure an unequal division of wealth. *Id.* at 53.

172. Gainsley & Rhode, *supra* note 130, at 58; Morgan & Turner, *supra* note 130, at 153. See, e.g., *Unander v. Unander*, 506 P.2d 719, 721 (Or. 1973).

173. Morgan & Turner, *supra* note 130, at 150-51 (citing, *inter alia*, *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) (en banc); *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984)). See also *Osborne v. Osborne*,

There are several reasons why some states more closely scrutinize a premarital agreement's alimony provisions. As Gainsley and Rhode have stated:

The obvious and basic rationale for this substantial scrutiny of [spousal] support provisions is that if the financially dependent spouse is not supported by his or her financially independent spouse, the burden will fall on the general public. . . . Another reason for the extra scrutiny of support provisions is that the need for spousal maintenance cannot be adequately foreseen at the time the premarital agreement is executed. An additional rationale for this bifurcation is that property provisions in a premarital agreement normally have a lesser impact on a spouse's standard of living than the impact from insufficient spousal maintenance provisions.¹⁷⁴

As is true with standards of substantive fairness generally, the standards for measuring the fairness of alimony provisions vary among jurisdictions.¹⁷⁵

The states are divided as to when to measure the substantive fairness of an agreement. Many states limit their review of the substantive fairness to the circumstances existing at the time of the agreement's execution.¹⁷⁶ Other states consider the circumstances at the time of enforcement (at divorce or a spouse's death).¹⁷⁷ Some states will evaluate an agreement's fairness at the time of execution but will consider whether to enforce the agreement in light of changed circumstances between the time of execution and enforcement.¹⁷⁸ Some courts require a substantive inquiry into the agreement's fairness at both the times of execution and of enforcement.¹⁷⁹ Finally, some courts will use different times to measure substantive fairness, depending on whether the court is evaluating premarital agreement provisions dealing with property division or with spousal support.¹⁸⁰

A state's choice as to the time when substantive fairness is measured reflects the jurisdiction's accommodation between "competing private and

604 So.2d 858, 860 (Fla. Dist. Ct. App. 1992) (holding that agreement's terms settling property rights are enforceable but terms regarding alimony must be modified due to changed circumstances).

174. Gainsley & Rhode, *supra* note 130, at 58-59.

175. *See Id.*

176. Morgan & Turner, *supra* note 130, at 150 (citing, *inter alia*, Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); Justus v. Justus, 581 N.E.2d 1265 (Ind. Ct. App. 1991); Perkinson v. Perkinson, 802 S.W.2d 600 (Tenn. 1990)).

177. Morgan & Turner, *supra* note 130, at 150 (citing Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988); Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990)).

178. Gainsley & Rhode, *supra* note 130, at 60-61 (citing, *inter alia*, Button v. Button, 388 N.W.2d 546 (Wis. 1986)). Those states which use a "foreseeability analysis" in determining the enforceability of an agreement necessarily examine the agreement both at the time of execution and at the time of enforcement. *Id.* at 60 (citing Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985)).

179. Gainsley & Rhode, *supra* note 130, at 61 (citing McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989) (en banc)).

180. *See supra* text accompanying note 172.

public interests involved in the enforcement of any premarital agreement."¹⁸¹ Gainsley and Rhode have noted:

A strict rule that permits an examination of fairness only at execution heavily favors the parties' freedom to contract. This time frame also provides a high degree of predictability for future enforcement because the facts to which a fairness test will be applied are known from the beginning of the marriage. This measurement of time has the disadvantage of not being able to mitigate an unforeseen and unfair outcome at the end of a marriage. Jurisdictions adopting fairness tests to mitigate future adverse results diminish the viability of premarital agreements, to some degree, by rendering their enforcement less predictable.¹⁸²

7. *The burden of proof*

According to the traditional approach, initially, the challenging party has the burden of proof, but in almost all cases, the burden shifts to the defending party. Most states consider an affianced couple to be in a confidential or fiduciary relationship, and therefore, the prospective spouses are held to the highest standards of good faith and fair dealing when making a premarital agreement. According to this traditional approach, if the agreement is substantively unfair (i.e., if it makes little or no provision for the economically weaker spouse (almost always the wife), or if the agreement is disproportionate to the economically superior spouse's means), then the court will presume that the agreement was the result of the economically superior spouse taking advantage of his partner's trust (i.e., the agreement resulted from fraud or concealment by that spouse of facts or circumstances material to the proposed agreement). Thus, the spouse seeking enforcement of the agreement (almost always the husband) has the burden of proving that the execution of the agreement by the other party was a voluntary waiver of support and/or property rights, with some knowledge of their nature and value.¹⁸³ In other words, in many states, the defending party seeking enforcement of the premarital agreement must show that the agreement is either substantively fair or was fairly procured.

A number of states have departed from this traditional approach. Some states have modified it,¹⁸⁴ others have rejected it entirely and placed the

181. Gainsley & Rhode, *supra* note 130, at 61.

182. Gainsley & Rhode, *supra* note 130, at 61.

183. Morgan & Turner, *supra* note 130, at 132 (citing, *inter alia*, Lutgert v. Lutgert, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976); *In re Estate of Hopkins*, 520 N.E.2d 415 (Ill. App. Ct. 1988); and, Pearce v. Pearce, 824 S.W.2d 195 (Tex. Ct. App. 1992)).

184. Morgan & Turner, *supra* note 130, at 132 (citing Estate of Benker v. Benker, 331 N.W.2d 193 (Mich. 1982) and McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989) (en banc) as limiting the circumstances under which the burden will shift from the challenging party to the defending party).

burden of proof on the challenging party.¹⁸⁵ In a few jurisdictions, premarital agreements are considered inherently suspect. In these jurisdictions, courts have placed the burden of proof entirely on the party seeking enforcement of the premarital agreement.¹⁸⁶

C. The early common law relating to premarital agreements developed principles with the potential for protecting women from unfair agreements

Prior to the *Posner* decision in 1970, women seeking divorces were protected by the common law principle that premarital agreements contemplating the end of marriage by separation or divorce violate public policy and are void *ab initio*.¹⁸⁷ Thus, premarital agreements were not permitted to displace the state's legal system of protecting a divorcing spouse from economic hardship. While this rule was adopted by the judiciary to further the state's interest in protecting the institution of marriage, its effect was to prevent women from waiving their property and support rights at divorce.

Although, before *Posner*, premarital agreements contemplating divorce were not enforceable,¹⁸⁸ premarital agreements addressing the property rights of a surviving spouse at widow(er)hood had long been favored and were enforceable in many states.¹⁸⁹ However, many courts held that premarital agreements effective at widow(er)hood as to property distribution could not

185. Morgan & Turner, *supra* note 130, at 133 (citing, *inter alia*, Rinvelt v. Rinvelt, 475 N.W.2d 478 (Mich. Ct. App. 1991); MacFarlane v. Rich, 567 A.2d 585 (N.H. 1989); Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985)).

186. Morgan & Turner, *supra* note 130, at 133 (citing Barnhill v. Barnhill, 386 So. 2d 749 (Ala. Civ. App.), writ denied Barnhill, 386 So. 2d 752 (Ala. 1980)).

187. Brooks v. Brooks, 733 P.2d 1044, 1048-49 & 1048 n.7 (Alaska 1987).

188. *Posner* is often cited as the first decision to change the law regarding the validity of a premarital agreement which contemplates that the marriage might end by divorce. See Brooks v. Brooks, 733 P.2d 1044, 1049 n.7 (Alaska 1987). However, an earlier case, Hudson v. Hudson, 350 P.2d 596 (Okla. 1960) had upheld a premarital agreement waiving alimony at divorce. Unlike *Posner*, *Hudson* did not discuss the policy implications raised by the court's enforcement of a premarital agreement contemplating divorce, and *Hudson* was not influential in changing the direction of the law. Gamble, *supra* note 49, at 715.

189. Courts favored the enforcement of premarital agreements contemplating the death of a spouse; such agreements were thought to promote marriage and domestic harmony and were considered in furtherance of public policy. Brooks v. Brooks, 733 P.2d 1044, 1048 n.4 (Alaska 1987) (noting that such agreements have been valid since the time of Shakespeare); *In re Estate of Lopata*, 641 P.2d 952, 956 (Colo. 1982) (en banc); *In re Malchow's Estate*, 172 N.W. 915, 916 (Minn. 1919); Gross v. Gross, 464 N.E.2d 500, 504 (Ohio 1984).

settle rights to support.¹⁹⁰ This rule has protected women because historically, husbands had the duty of support.¹⁹¹

In cases involving the enforcement of premarital agreements upon the death of a spouse, in many states courts elaborated a series of interrelated principles with the potential to protect women from the enforcement of unfair premarital agreements.¹⁹² The concepts that premarital agreements are the product of a confidential relationship, that each party must act honestly and in good faith, and must disclose all facts that materially bear on the proposed agreement (particularly one's financial resources), and that the court may review the premarital agreement for substantive and/or procedural fairness, could shelter women from the enforcement at widowhood of harsh and unfair premarital agreements. These related principles resulted from judges' accurate perceptions that women were, in fact, legally and economically unequal to men and in need of protection.¹⁹³

D. In the 1970s, courts began to question whether the law should protect women from unfair premarital agreements

The Florida Supreme Court's decision in *Posner* was a watershed in the law's development.¹⁹⁴ In *Posner*, the court broke with settled law and determined that "antenuptial agreements settling alimony and property rights of the parties upon divorce . . . should no longer be held void *ab initio* as 'contrary to public policy.'"¹⁹⁵ The court ruled that a premarital agreement

190. Gamble, *supra* note 49, at 694-95 & n.7 (citing, *inter alia*, Williams v. Williams, 243 P. 402 (Ariz. 1926); Warner v. Warner, 85 N.E. 630 (Ill. 1908); French v. McAnarney, 195 N.E. 714 (Mass. 1935) (stating that in divorce context, antenuptial contract waiving husband's duty to support wife is violative of public policy and unenforceable, although such agreement may settle property rights); Motley v. Motley, 120 S.E.2d 422 (N.C. 1961) (holding that antenuptial contract waiving husband's duty to support wife after divorce is violative of public policy and unenforceable)).

191. Singer, *supra* note 91, at 1112-13. See *Husband and Wife - Antenuptial Contracts Providing for Property Settlement in the Event of Divorce*, 35 MINN. L. REV. 504 (1951) (referring to the husband's duty to support a wife who was not expected to be a wage earner).

192. These principles are still applied to premarital agreements (including those contemplating divorce) by courts in states which have not enacted the U.P.A.A. See *infra* note 201 and accompanying text. Although these principles have the potential for protecting women from unfair agreements, the courts have not always been sufficiently vigilant. Too often, premarital agreements have been upheld despite questionable circumstances suggestive of unfairness. See Lee v. Lee, 816 S.W.2d 625 (Ark. Ct. App. 1991) (enforcing agreement drafted by husband's lawyer, even though wife signed one hour before wedding ceremony and did not read); Gooch v. Gooch, 664 S.W.2d 900 (Ark. Ct. App. 1984) (upholding agreement although husband was wealthy lawyer and did not disclose value of assets or income, and wife received no property at divorce); *In re Marriage of Adams*, 729 P.2d 1151 (Kan. 1986) (enforcing agreement presented to wife just one hour before wedding ceremony, where husband refused to marry her without agreement, and she had previously refused to sign this agreement); Fletcher v. Fletcher, 628 N.E.2d 1343 (Ohio 1994) (enforcing agreement at divorce although signed the night before wedding, with vague terms which never referred to "divorce," where wife may not have understood need for independent counsel).

193. *In re Estate of Geyer*, 533 A.2d 423, 431, 433-34 (Pa. 1987) (Nix, C.J., dissenting), *overruled by Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (citing Justice Nix's dissent with approval), and 3 LINDEY & PARLEY, *supra* note 15, § 90.03, at 90-37.

194. Brooks v. Brooks, 733 P.2d 1044, 1049 n.7 (Alaska 1987).

195. *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970). Although the question certified to the Florida Supreme Court related only to the validity of an antenuptial agreement *respecting alimony*, the court also

contemplating divorce is enforceable "as to conditions existing at the time the agreement was made"¹⁹⁶ if it meets the same standards of fairness imposed by preexisting Florida common law on premarital agreements contemplating the death of the spouse,¹⁹⁷ and if the agreement does not promote the procurement of a divorce.¹⁹⁸

After *Posner*, courts in many states followed Florida's lead and held that premarital agreements settling property rights at divorce are not violative of public policy and may be enforced.¹⁹⁹ Courts also confronted the corollary problems addressed by *Posner*: if a premarital agreement settling property rights at divorce is enforceable, may the agreement determine, limit, or waive alimony? If such an agreement may determine alimony, will changed circumstances render the contract's alimony provisions unenforceable or subject to judicial modification? Courts confronting these questions after *Posner* were divided in their answers.²⁰⁰

As courts examined the new issues raised by the enforcement of premarital agreements contemplating divorce, judges questioned whether the law's continued protection of women was justified. Courts did not immediately abandon the law's protective principles,²⁰¹ but their questioning paved the way for the law's recent development, the U.P.A.A., that goes beyond equating premarital agreements with ordinary, commercial contracts.

The court opinions after *Posner* that reconsidered the law of premarital agreements assert four common themes. One theme focuses on the achievement by women of formal, legal equality as a justification for enforcing premarital

discussed the validity of premarital agreements settling property rights at divorce. According to the language of the opinion, the court upheld the validity of antenuptial agreements "settling alimony and property rights of the parties upon divorce" *Id.*

196. *Posner*, 233 So. 2d at 385. The court's opinion clarified that the parties' antenuptial agreement respecting alimony was subject to Florida statutory law empowering a court to modify alimony due to changed circumstances. *Id.* at 385-86.

197. *Id.* at 385. In *Posner*, the court adopted the standards of enforceability which had been set forth in *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962), to govern premarital agreements contemplating the death of a spouse. *Posner*, 233 So. 2d at 385. According to *Del Vecchio*, a premarital agreement is enforceable if: (1) there is a fair and reasonable provision for the wife, or (2) there was a full and frank disclosure of the prospective husband's financial resources, or (3) the prospective wife had a general and approximate knowledge of the prospective husband's financial resources. *Del Vecchio*, 143 So. 2d at 20. (Some of the *Del Vecchio* standards have been superseded by Florida legislation. *Cuillo v. Cuillo*, 621 So. 2d 460, 463, 464 (Fla. Dist. Ct. App. 1993) (Farmer, J., concurring specially).)

198. *Posner*, 233 So. 2d at 385.

199. *E.g.*, *Brooks v. Brooks*, 733 P.2d 1044, 1048-51 (Alaska 1987) (tracing evolution of the law since *Posner*); *Newman v. Newman*, 653 P.2d 728, 731-32 (Colo. 1982) (en banc); *Scherer v. Scherer*, 292 S.E.2d 662, 664-66 (Ga. 1982); *In re Marriage of Boren*, 475 N.E.2d 690, 693-94 (Ind. 1985); *Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981) (citing many cases following *Posner*).

200. *See supra* notes 136, 171-175, and accompanying text.

201. Courts judged premarital agreements contemplating divorce by the same standards of enforcement that had been developed earlier to determine the enforceability of premarital agreements effective at widow(er)hood. Thus, the protective principles of the law (centered on confidential relationship theory) were retained at the same time that the law made premarital contracts contemplating divorce enforceable. *See Newman*, 653 P.2d at 731; *Posner*, 233 So.2d at 385; *Osborne*, 428 N.E.2d at 816 (adopting enforceability standards of *Rosenberg v. Lipnick*, 389 N.E.2d 385 (Mass. 1979), which were based on confidential relationship theory).

agreements between men and women as equal, contracting partners.²⁰² A second theme vaguely refers to women's changed social status (without convincing evidence of women's actual equality) as a justification for enforcing premarital agreements.²⁰³ The third theme emphasizes the widespread entry of women into the labor market (while ignoring sex discrimination in employment) as a reason for treating women as needing less protection from premarital agreements.²⁰⁴ Finally, the fourth theme treats the protective stance of the law as a manifestation of archaic paternalism.²⁰⁵

Courts elaborating these four themes erroneously focused on women's de jure equality while ignoring their de facto inequality.²⁰⁶ It seems that some

202. *E.g.*, *Spector v. Spector*, 531 P.2d 176, 180-83 (Ariz. Ct. App. 1975) (discussing long-standing equality of women under Arizona law to support decision allowing prospective spouses to make premarital contract involving present and future property of parties); *Parniawski v. Parniawski*, 359 A.2d 719, 721 (Conn. Super. Ct. 1976) ("In view of the relatively equal status of women to men under the law, as it is now evolving, married couples should not be deprived of the right by contract to divide their property as they please.") (citation omitted); *Potter v. Collin*, 321 So. 2d 128, 132 (Fla. Dist. Ct. App. 1975) ("In this day and age there is no longer any suggestion that women are unequal and in need of the protective arm of the court."), *cert. denied*, 336 So. 2d 1180 (Fla. 1976); *Ranney v. Ranney*, 548 P.2d 734, 739 (Kan. 1976) (Schroeder, J., concurring); and *Laird v. Laird*, 597 P.2d 463, 468 (Wyo. 1979).

203. *E.g.*, *Parniawski*, 359 A.2d at 721 ("While there is validity to the Madison Avenue pronouncement that 'you've come a long way, baby,' it is equally true that the former complete protective role of the court regarding alimony is no longer necessary in the light of social changes."); *Neilson v. Neilson*, 780 P.2d 1264, 1267-68 (Utah Ct. App. 1989) (courts have held prenuptial agreements contemplating divorce to be enforceable "partially in response to . . . changes in the economic and social position of women.").

204. *E.g.*, *Arnold v. Arnold*, 553 S.W.2d 251, 259 (Ark. 1977) (Byrd, J., concurring) ("[O]ur laws on antenuptial agreements . . . need a substantial revision in view of the educational and business acumen of the present day woman."); *Scherer v. Scherer*, 292 S.E.2d 662, 665-66 (Ga. 1982) (quoting *Volld v. Volld*, *infra*); *Volld v. Volld*, 286 N.E.2d 42, 46-47 (Ill. App. Ct. 1972) (citing women's entry into labor market and development of career skills to support court's holding that antenuptial contract fixing support at divorce is enforceable).

205. *E.g.*, *Spector*, 531 P.2d at 183 ("[C]ases which are based either consciously or unconsciously on the old idea of the inferiority of the female sex and the subserviency of the wife to the husband are not in point" when determining whether a premarital agreement violates public policy); *In re Estate of Lopata*, 641 P.2d 952, 954 n.6 (Colo. 1982) (en banc) (stating that confidential relationship theory was adopted on "assumption that the male was the dominant force in the relationship. There is substantial doubt concerning whether this view of premarital relationships is accurate in today's society.") (citations omitted); *In re Estate of Burgess*, 646 P.2d 623, 625 (Okla. Ct. App.) ("[C]ourts have tended to be . . . more exacting of . . . [premarital] contracts than of other contracts. At the root of this tendency seems to lie an attitude of paternalism toward women. . . . Well-intentioned though this chivalrous attitude may have been in the past, times have changed."), *cert. denied*, 646 P.2d 623 (Okla. 1982). See *Knight v. Knight*, 333 S.E.2d 331, 333 (N.C. Ct. App. 1985) (dismissing principles protective of wives relating to separation agreements as archaic); *Beck v. Beck*, 814 S.W.2d 745, 749 (Tex. 1991) (stating that Texas decisions forbidding contracts to change community property to separate property were based on "outmoded belief" that women needed legal protection), *cert. denied*, 112 S. Ct. 1266 (1992).

206. Of course, not all judges believed that women's de jure equality rendered them the de facto economic and social equals of men. For example, in *In re Estate of Geyer*, 533 A.2d 423, 433 (Pa. 1987) (Nix, C.J., dissenting), *overruled by* *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), Chief Justice Nix acknowledged, "unfortunately, we have as yet to reach sexual equality in the market place, [but] there are compelling forces moving in that direction" *Id.* at 433. However, he contended, with the constitutional mandate and public policy of gender neutrality, the law of premarital agreements should not be developed to protect women; premarital contracts should be subject to the normal rules of contract law. *Id.* at 433-34. (His position was adopted in *Simeone*, 581 A.2d 162). In *Reiling v. Reiling*, 474 P.2d 327 (Or. 1970), *overruled in part*, *Unander v. Unander*, 506 P.2d 719 (Or. 1973), the court stated:

Despite the advance of women's rights and their increasing participation as wage earners, we believe there is much to be said for a public policy that protects the right of a wife to receive support upon separation or divorce. There is still a vast number of women with no skills who

judges were ignorant of women's actual, continued, economic and social inequality (particularly in the labor market), while others may have been unsympathetic to women or hostile to gender equality.²⁰⁷ The following discussion of several opinions following *Posner* illustrate the limitations of many judges' understanding of women's actual status in society.

Just two years after it had decided *Posner*, the Florida Supreme Court rendered an opinion remarkable for its hostility to women. In *Belcher v. Belcher*,²⁰⁸ the court held that a premarital agreement, wherein the wife had waived temporary alimony in exchange for property worth \$200,000, was unenforceable. The court decided that because the parties had not dissolved the marriage by divorce, the husband's obligation to support his wife continued; a husband may not contract away his duty to support his wife during the marriage.²⁰⁹ While the result of the court's decision is protective of women,²¹⁰ its opinion denigrates women:

are only marginally employable or who properly devote their full time to the rearing of their children. We hold that antenuptial agreements which prohibit alimony are contrary to public policy and void.

Reiling, 474 P.2d at 328.

207. For instances of courts displaying such attitudes, see *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972), discussed *infra* text accompanying notes 208-14; *Potter v. Collin*, 321 So. 2d 128 (Fla. Dist. Ct. App. 1975), *cert. denied*, 336 So. 2d 1180 (Fla. 1976) discussed *infra* text accompanying notes 214-19. In a remarkable gender bias case, *Iverson v. Iverson*, 15 Cal. Rptr. 2d 70 (Cal. Ct. App. 1992), the appellate court reversed a trial court decision enforcing a premarital agreement and remanded with directions that the matter be tried before a different judge. The California Court of Appeal found the trial court record "so replete with gender bias" that it concluded that the divorcing wife challenging the validity of the premarital agreement could not have received a fair trial. *Id.* at 71. Several statements revealed the trial judge's stereotyped ideas about gender roles and were insulting to women. For example, assuming that the husband had little to gain by marrying the wife when they were already cohabiting, the trial judge stated: "[W]hy, in heaven's name, do you buy the cow when you get the milk free, as we used to say. And, so, he's getting the milk free. And Cheryl [the appellant/wife] is living with him in his home." *Id.* at 72 (citation omitted). Although not expressing hostility to women, the court in *Broadie v. Broadie*, 493 P.2d 289 (Kan. 1972) used language relating to the female anatomy which some readers will consider offensive and insensitive to women. Rejecting the argument that there is no confidential relationship between prospective spouses about to embark on a marriage of convenience the court wrote:

Some courts in other jurisdictions, in the spirit of the women's liberation movement, have held the confidential relationship which imposes the duty to disclose property is not present under circumstances similar to those in this case. Those courts hold that the duty to disclose is not present when the intended marriage is one of convenience. These courts reason that the business judgments of the parties are not subject to being clouded by the *prehymeneal ardor* and tenderness which ordinarily is assumed to be present when a man and woman are about to embark upon matrimonial seas.

Id. at 293-94 (emphasis added) (citation omitted). Similarly, the court's opinion in *In re Marriage of Knoll*, 671 P.2d 718 (Or. Ct. App. 1983) is not openly hostile to women's equality, but its sarcastic tone does suggest an outmoded attitude toward gender roles. The court, upholding a premarital agreement over the wife's objections, stated:

The agreement was invalidated by the trial court, because no one had provided the wife with a detailed explanation of it. In the context of this case, we believe that such a requirement would be pushing [the] husband far beyond what is legally required and into the realm of chivalry.

Id. at 720. Judge Warren, dissenting, responded that the disclosure requirements which the court majority refused to impose on the husband were "required by law (not by chivalry)" *Id.* at 723 (Warren, J., dissenting).

208. 271 So. 2d 7.

209. *Id.* at 9-10.

210. If the duty of support is imposed on the husband but not the wife, the court's opinion is also paternalistic.

The husband rends his double knit garments in perplexed agitation that the wife should be permitted to accept the \$200,000 fruits of her agreement (a home, stocks and insurance if he dies) and then to impeach the implicit terms of an agreement stating that he should not be compelled to comply with support upon separation, out of his remaining \$3 million. To him, she seems to be saying at this later time, "Yeah, but what have you done for me LATELY?" Perhaps a husband must consider (notwithstanding today's "women's lib" for extended "equal" rights for women) that classic observation of Lord Byron in his *Pearls of Wisdom*: "Women are made to be loved—not to be understood." Someone has said, "We call them 'the opposite sex' because just when you think you've fooled her, it's just the opposite!"²¹¹

In *Belcher*, the concurring opinion by Chief Justice Roberts (who wrote the court's opinion in *Posner*²¹²) paints an unrealistically optimistic picture of women's economic status and stereotypes the wife as a potential alimony drone:

[U]ntil recent years, a divorced wife had little prospect of being able to work and earn a livelihood, and it was essential to a well-ordered society that she be appropriately maintained by her estranged husband so that she would not become a charge on the community. Times have now changed. The broad, practically unlimited opportunities for women in the business world of today are a matter of common knowledge. Thus, in an era where the opportunities for self-support by the wife are so abundant, the fact that the marriage has been brought to an end because of the fault of the husband does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has. We do not construe the marriage status, once achieved, as conferring on the former wife of a shipwrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way.²¹³

Unfortunately, *Belcher* is not the only court opinion that insults women. In *Potter v. Collin*,²¹⁴ the court found that at the husband's death, a premarital agreement between a wealthy, eighty-one-year-old man and a "relatively impecunious"²¹⁵ forty-seven-year-old woman, that made a

211. *Belcher*, 271 So. 2d at 12.

212. *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

213. *Belcher*, 271 So. 2d at 16 (Roberts, C.J., concurring specially).

214. 321 So. 2d 128 (Fla. Dist. Ct. App. 1975), *cert. denied*, 336 So. 2d 1180 (Fla. 1976).

215. 321 So. 2d at 129.

“seemingly unreasonable and penurious provision”²¹⁶ for the widow, was valid. The court used the following demeaning language²¹⁷ to link women’s purported achievement of equality with the court’s willingness to enforce premarital agreements:

[A]ny adult contemplating marriage who is sui juris can voluntarily agree to take all, little, or nothing from his or her prospective spouse’s estate upon the latter’s death, if the former is fully informed at the time he or she so elects. This rule applies to women as well as men. In this day and age there is no longer any suggestion that women are unequal and in need of the protective arm of the court. . . . No longer will the courts in viewing antenuptial contracts invariably begin “with the realization that between persons in the prematrimonial state there is a mystical, confidential relationship which anesthetizes the senses of the female partner.”²¹⁸

In *Gant v. Gant*,²¹⁹ West Virginia’s highest court ruled that premarital agreements establishing property rights and support obligations at divorce are enforceable. Like the court in *Potter v. Collin*, the *Gant* court viewed women as having advanced so far up the economic ladder that they no longer needed the law’s protection from premarital agreements.

The older rule [that premarital agreements contemplating divorce are either void or presumptively invalid] was grounded in yesteryear’s sound public policy: in general, thirty years ago women did not work in the market economy; society enjoyed a consensus that favored lifetime marriage and disfavored divorce; and prenuptial agreements that limited the support obligation in favor of former wives encouraged divorce and made divorced women potential charges of the state.

Circumstances have changed dramatically in the last three decades, however. As Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq. (1972), amply demonstrates, women are protected in their efforts to enter the market sector of the economy, and in fact, today 58.7 percent of all married women are gainfully employed. Furthermore, we no longer have a society-wide consensus on the sanctity of marriage ²²⁰

216. *Id.* at 131.

217. The language of *Potter v. Collin* quoted in the text of this Article was called “demeaning to women” by Judge Baskin in his concurring opinion in *Duttenhofer v. Duttenhofer*, 474 So. 2d 251, 258 (Fla. Dist. Ct. App. 1985) (Baskin, J., concurring specially), *cert. denied*, 482 So. 2d 348 (Fla. 1986).

218. *Potter*, 321 So. 2d at 132 (citation omitted) quoting Gamble, *supra* note 49, at 719.

219. 329 S.E.2d 106 (W. Va. 1985).

220. *Id.* at 112 (citations omitted).

As these excerpts illustrate, the *Posner* progeny (with their four common themes) are based on, and themselves perpetuate, an over-simplified, unduly optimistic picture of women's socioeconomic status in America during the 1970s and 1980s. Because the law relating to premarital agreements has always been significantly affected by lawmakers' perceptions of the role of women and their need for protection, it is imperative that lawmakers have a realistic vision of women's status, free from gender bias. If lawmakers' views are fanciful or misogynistic, it is likely that the law will not be fair or consonant with societal needs. As more fully discussed below, the law that has developed in the wake of *Posner* and its progeny—the U.P.A.A. and *Simeone v. Simeone*²²¹—is flawed. It ignores women's continued social and economic inequality and thus fails to take into account the discriminatory effect of premarital agreements.

E. Lawmakers are abandoning the principles that protect women from oppressive premarital agreements based on their mistaken belief that women have achieved equality

The striking decision by the Pennsylvania Supreme Court in *Simeone v. Simeone*²²² represents the logical conclusion to judges' questioning the ongoing need for protecting women in light of their purported equality. Like many opinions after *Posner*, *Simeone* questioned the continuing need for the law to protect women in light of their entry into the labor market and attainment of formal equality, and characterized preexisting, protective law as archaic paternalism. However, unlike many other courts, the *Simeone* court took the next step: it repudiated the most significant protections from oppressive premarital agreements afforded women by the common law. *Simeone* illustrates how the law is flawed when it is premised on judges' misconceptions about women's achievement of equality and when, as suggested in Justice Papadakos's concurrence,²²³ it appears to be based on hostility to feminism.

The facts in *Simeone*²²⁴ present the classic setting for a premarital agreement. At the time of the execution of the premarital agreement, "[o]n the eve of the parties' wedding"²²⁵ in 1975, Catherine E. Walsh Simeone was a twenty-three-year-old, unemployed nurse and Frederick A. Simeone was a thirty-nine-year-old neurosurgeon earning approximately \$90,000 per year. In addition, Frederick had property worth approximately \$300,000. The

221. 581 A.2d 162 (Pa. 1990).

222. *Id.* This decision is well-analyzed in *Family Law*, 104 HARV. L. REV. 1399 (1991). The author argues that traditional contract doctrines (frustration of purpose and principles relating to liquidated damages clauses) allow a court to scrutinize the fairness of premarital agreements.

223. *Simeone*, 581 A.2d at 168 (Papadakos, J., concurring).

224. *Id.* at 163-64.

225. *Id.* at 163.

agreement was prepared by Frederick's lawyer and Catherine signed it without seeking the advice of independent counsel.²²⁶ The agreement provided that in the event of separation or divorce, Frederick's support obligation would be limited to payments of \$200 per week, up to a maximum of \$25,000.

In 1982, the parties separated and in 1984, divorce proceedings commenced. Between 1982 and 1984, Frederick had made support payments totalling the \$25,000 (the contractual limit) when, in 1985, Catherine filed a claim for alimony *pendente lite*. The enforceability of the premarital agreement (with its ceiling on Frederick's support obligation) was thereby placed in issue. The lower courts denied Catherine's claim,²²⁷ rejecting her various contentions that the premarital agreement was invalid.²²⁸ The Pennsylvania Supreme Court, in upholding the contract, rewrote the state's common law relating to the validity of premarital agreements.

Before *Simeone*, the Pennsylvania Supreme Court had ruled in *In re Estate of Geyer*²²⁹ and in *In re Estate of Hillegass*²³⁰ "that a prenuptial agreement will be upheld if it either made a reasonable provision for the spouse or was entered after a full and fair disclosure of financial status."²³¹ A statement in the plurality opinion in *Estate of Geyer* had suggested that if a premarital agreement did not make a reasonable provision for a spouse, the agreement would be upheld if there was "evidence that the parties were aware of the statutory rights which they were relinquishing" and if there was "full and fair" financial disclosure.²³² In *Simeone*, the court overruled these prior decisions to the extent they "permitted examination of the reasonableness of prenuptial agreements and allowed inquiries into whether parties had attained informed understandings of the rights they were surrendering"²³³ The *Simeone* court held that premarital agreements should be governed by principles that apply to ordinary contracts:

226. Frederick's lawyer did not advise Catherine regarding the legal rights she surrendered under the agreement. *Id.*

227. A master's report upheld the validity of the premarital agreement and denied Catherine's claim for alimony *pendente lite*. *Id.* at 164. "Exceptions to the master's report were dismissed by the Court of Common Pleas of Philadelphia County. The Superior Court affirmed. *Simeone v. Simeone*, 551 A.2d 219 (1988)." *Id.*

228. Catherine asserted several grounds to support her challenge to the premarital agreement. She contended that there was inadequate disclosure of the statutory rights she was relinquishing and that the agreement did not make reasonable provision for her. *Id.* Catherine also contended that the agreement should be considered void because she did not fully understand the legal rights she was surrendering. *Id.* Catherine asserted that she executed the agreement under conditions of duress; "it was presented to her at 5 p.m. on the eve of her wedding, a time when she could not seek counsel without the trauma, expense, and embarrassment of postponing the wedding." *Id.* at 167.

229. *In re Estate of Geyer*, 533 A.2d 423 (Pa. 1987) (plurality opinion), *overruled by Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

230. *In re Estate of Hillegass*, 244 A.2d 672 (Pa. 1968), *overruled by Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

231. *Simeone*, 581 A.2d at 164 (citation omitted).

232. *Id.* (citation omitted).

233. *Id.* at 166-67. *Geyer* and some earlier decisions, "required that, at least where there had been an inadequate disclosure made by the parties, the bargain must have been reasonable at its inception." *Id.* at 166 (citation omitted).

Traditional principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation, or duress. Consideration of other factors, such as the knowledge of the parties and the reasonableness of their bargain, is inappropriate. Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.²³⁴

Accordingly, the court held that "the reasonableness of a prenuptial bargain is not a proper subject for judicial review."²³⁵ But the court did not abandon all protections afforded by prior law. It retained the financial disclosure requirement associated with the confidential relationship existing between parties to a premarital agreement,²³⁶ a theory that the court considered "consistent with traditional principles of contract law."²³⁷

Simeone is flawed because it is based on an overly optimistic, simplistic view of women's attainment of equality. Perhaps it is also based on hostility to feminism, as Justice Papadakos's concurrence suggests.

According to the court:

There is no longer validity in the implicit presumption that supplied the basis for *Geyer* and similar earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.

Accordingly, the law has advanced to recognize the equal status of men and women in our society. *See, e.g.*, Pa. Const. art. 1, § 28 (constitutional prohibition of sex discrimination in laws of the Commonwealth). Paternalistic presumptions and protections that arose

234. *Id.* at 165 (citation omitted).

235. *Id.* at 166. The court even clarified that it was precluding judicial review into the reasonableness of a premarital agreement either at the time of its inception or at the time of divorce.

236. *Id.* at 167. The court recognized that parties to a premarital agreement "do not quite deal at arm's length, but rather . . . stand in a relation of mutual confidence and trust that calls for disclosure of their financial resources." *Id.* Therefore, in the absence of a "full and fair" financial disclosure (but not necessarily an "exact" disclosure), a party may assert "a material misrepresentation in the inducement for entering a prenuptial agreement" *Id.*

237. *Id.*

to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. It would be inconsistent, therefore, to perpetuate the standards governing prenuptial agreements that were described in *Geyer* and similar decisions, as these reflected a paternalistic approach that is now insupportable.²³⁸

The difference between the court's opinion and Justice Papadakos's concurrence illustrates how a lawmaker more sensitive to women's continuing inequality would fashion a different rule of law to govern premarital agreements.²³⁹ The concurring opinion castigates the majority for ignoring the facts of women's continuing inequality and for the suggestion of hostility to feminism in the court's approach.

I cannot join the opinion authored by Mr. Justice Flaherty, because . . . it contains a number of unnecessary and unwarranted declarations regarding the "equality" of women. Mr. Justice Flaherty believes that, with the hard-fought victory of the Equal Rights Amendment in Pennsylvania, all vestiges of inequality between the sexes have been erased and women are now treated equally under the law. I fear my colleague does not live in the real world. If I did not know him better I would think that his statements smack of male chauvinism, an attitude that "you women asked for it, now live with it." If you want to know about equality of women, just ask them about comparable wages for comparable work. Just ask them about sexual harassment in the workplace. Just ask them about the sexual discrimination in the Executive Suites of big business. And the list of discrimination based on sex goes on and on.²⁴⁰

Justice McDermott dissented.²⁴¹ He would allow a party challenging a premarital agreement to prove, by clear and convincing evidence, that the agreement is unenforceable because it was inequitable at its inception or has become unfair, at divorce, due to intervening events.²⁴² Justice McDermott's dissent is especially interesting because of his reliance on a policy that might be called "economic justice at the termination of marriage."²⁴³ Recognizing that the state has a paramount interest in the marriage and family relationship,

238. *Id.* at 165 (citation omitted).

239. Justice Papadakos would continue to adhere to Pennsylvania pre-*Simeone* standards and, applying those standards, would have enforced the agreement at issue. *Id.* at 168 (Papadakos, J., concurring).

240. *Id.*

241. *Id.* (McDermott, J., dissenting).

242. *Id.* at 169-71.

243. The attainment of economic justice for both spouses at the termination of the marriage should become the guiding concern for courts in premarital agreement disputes. See discussion *infra* part V.

and in "the protection of parties to a marriage who may be rendered wards of the state, unable to provide for their own reasonable needs,"²⁴⁴ he wrote:

Although it should not be the role of the courts to void pre-nuptial agreements merely because one spouse may receive a better result in an action under the Divorce Code to recover alimony or equitable distribution, it should be the role of the courts to guard against the enforcement of pre-nuptial agreements where such enforcement will bring about only inequity and hardship. *It borders on cruelty to accept that after years of living together, yielding their separate opportunities in life to each other, that two individuals emerge the same as the day they began their marriage.*

At the time of the dissolution of marriage, what are the circumstances which would serve to invalidate a pre-nuptial agreement? This is a question that should only be answered on a case-by-case basis. However, it is not unrealistic to imagine that in a given situation, one spouse, although trained in the workforce at the time of marriage, may, over many years, have become economically dependent upon the other spouse. In reliance upon the permanence of marriage and in order to provide a stable home for a family, a spouse may choose, even at the suggestion of the other spouse, not to work during the marriage. As a result, at the point of dissolution of the marriage, the spouse's employability has diminished to such an extent that to enforce the support provisions of the pre-nuptial agreement will cause the spouse to become a public charge, or will provide a standard of living far below that which was enjoyed before and during marriage. In such a situation, a court may properly decide to render void all or some of the provisions of the pre-nuptial agreement.²⁴⁵

It is ironic that Justice McDermott's dissent draws on an outmoded stereotype of the full-time homemaker but is in harmony with the economic needs of women in contemporary society, while the court's opinion purports to be progressive but puts women in a position where their unequal economic status can be magnified by oppressive premarital agreements.

244. *Simeone*, 581 A.2d at 169-70.

245. *Id.* at 170-71 (emphasis added).

F. The Uniform Premarital Agreement Act goes further than Simeone v. Simeone toward making premarital agreements readily enforceable

In 1983, the National Conference of Commissioners on Uniform State Laws promulgated the U.P.A.A.²⁴⁶ The Commissioners' purpose was to offer a model statute governing premarital agreements that would provide certainty as to the enforceability of premarital agreements and would create uniformity among the states.²⁴⁷ The statute is comprehensive, addressing many aspects of premarital agreements (e.g., formalities for execution;²⁴⁸ effectiveness if the marriage is valid²⁴⁹ or void;²⁵⁰ permissible content;²⁵¹ amendment and revocation;²⁵² and, timeliness of actions to enforce agreements).²⁵³ But the most important provision—the "key operative section of the Act"²⁵⁴—is section 6, that provides the standards governing enforcement of premarital agreements.²⁵⁵

The U.P.A.A. has been criticized by many commentators with good reason.²⁵⁶ The greatest failing of the U.P.A.A. is Section 6, which allows enforcement of an unconscionable agreement if: (1) there was fair and reasonable disclosure, or (2) if the challenging party reasonably could not have

246. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987 & Supp. 1994).

247. Prefatory Note, 9B U.L.A. at 369.

248. § 2, 9B U.L.A. at 372.

249. § 4, 9B U.L.A. at 375.

250. § 7, 9B U.L.A. at 378.

251. § 3, 9B U.L.A. at 373.

252. § 5, 9B U.L.A. at 375.

253. § 8, 9B U.L.A. at 379.

254. 9B U.L.A. at 369, prefatory note.

255. Section 6 states in full:

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

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

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

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

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

§ 6, 9B U.L.A. at 376.

256. See, e.g., Atwood, *supra* note 46; George, *supra* note 46; Ladden & Franco, *supra* note 46; J. Thomas Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757 (1984); Younger (1992), *supra* note 40. This Article is not an exhaustive reiteration of the many flaws in the U.P.A.A. which have been the subject of commentators' critiques and need no further discussion herein.

knowledge of the defending party's financial circumstances, or (3) if there was a written waiver of disclosure beyond that provided.

According to the common law in many states, a premarital agreement is enforceable only if it is substantively fair or was fairly procured; in other states, an agreement is enforceable if it is both substantively fair and procedurally fair.²⁵⁷ But, according to Section 6 of the U.P.A.A., an agreement is unenforceable only if it is both procedurally unfair and substantively unfair (*i.e.*, unconscionable). Unconscionability, standing alone, should be the basis for setting aside or at least modifying a premarital agreement,²⁵⁸ as is the case with ordinary contracts.²⁵⁹

In pursuit of its goal of making the enforcement of premarital agreements more certain, the U.P.A.A. sacrifices virtually all principles that have been created by the common law to prevent the enforcement of unfair agreements. For example, many courts have held that a premarital agreement is unenforceable because there was not a full and fair disclosure of a party's financial resources before execution of the agreement.²⁶⁰ According to common law principles, an agreement may be enforced although there was no disclosure if the challenging party had actual, independent knowledge of the other's financial circumstances.²⁶¹ But under the U.P.A.A., even an unconscionable agreement is enforceable despite a party's failure to disclose financial information and in the absence of independent knowledge. According to Section 6, the burden of proof is on the challenging party;²⁶² an

257. See discussion *supra* part IV.B.2.

258. See George, *supra* note 46, at 105; Ladden & Franco, *supra* note 46, at 273-74; Younger (1992), *supra* note 40, at 42. Some states have adopted a modified version of the U.P.A.A., and make unconscionability, standing alone, a ground for refusing enforcement of the agreement. *E.g.*, IOWA CODE ANN. § 596.8 (West 1994); NEV. REV. STAT. ANN. § 123A.080 (Michie 1993); N.J. STAT. ANN. § 37:2-38 (West 1994); N.D. CENT. CODE § 14-03.1-07 (1993).

259. If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

260. *E.g.*, Faver v. Faver, 583 S.W.2d 44 (Ark. 1979); Estate of Benker v. Benker, 331 N.W.2d 193 (Mich. 1982); Rudbeck v. Rudbeck, 365 N.W.2d 330 (Minn. Ct. App. 1985); Marschall v. Marschall, 477 A.2d 833, 842 (N.J. Super. Ct. Ch. Div. 1984) (agreement unenforceable if party defending premarital agreement does not prove full financial disclosure at trial). See generally Pearson, *supra* note 130.

261. Hughes v. Hughes, 471 S.W.2d 355, 357-59 (Ark. 1971); Megginson v. Megginson, 10 N.E.2d 815, 819 (Ill. 1937); Hartz v. Hartz, 234 A.2d 865, 871 (Md. 1967) (stating that knowledge of the other party's financial resources may substitute for full disclosure). See discussion and cases cited in Pearson, *supra* note 130, at 426-30.

262. § 6(a), 9B U.L.A. at 376 ("A premarital agreement is not enforceable if the party against whom enforcement is sought proves that . . ."). Section 6 "tilt[s] the balance toward validity" of agreements by imposing the burden of proof on the party challenging the premarital agreement. Younger (1992), *supra* note 42, at 39 n.198. The U.P.A.A.'s position is extreme. It rejects not only the opposite position which has been adopted by many states (*i.e.*, the party seeking enforcement of the agreement must prove it was fairly obtained and/or is substantively fair), but also declines to adopt a middle ground that has been taken by other states: the party challenging the agreement has the burden of proving a defense to the agreement's enforcement, but if an agreement is disproportionate to the superior spouse's means, the party seeking enforcement must show that the agreement was fairly procured. See *id.*

unconscionable agreement is enforceable unless he or she can prove that (1) there was no "fair and reasonable disclosure,"²⁶³ (2) there was no voluntary written waiver of disclosure,²⁶⁴ and (3) the challenging party either "did not have, or reasonably could not have had" knowledge of the other's financial resources.²⁶⁵ The practical effect of these provisions will be to validate almost every (unconscionable) agreement. Many, if not most, professionally-drafted agreements will include a written waiver of disclosure.²⁶⁶ Moreover, under the U.P.A.A., even if there were no disclosure and no waiver, an unconscionable agreement would be upheld if the challenging party should have had independent knowledge of the other's financial circumstances.

Section 6 of the U.P.A.A. mandates that the determination of whether a premarital agreement is unconscionable be made in light of circumstances at the time of execution of the agreement, rather than at the time of enforcement.²⁶⁷ Although the U.P.A.A. follows the approach taken by several states in this regard,²⁶⁸ it rejects the better view that unconscionability should be judged based on the circumstances existing when the agreement is enforced.²⁶⁹ Criticizing the U.P.A.A.'s approach, Professor Thomas Oldham wrote:

In order to be unenforceable under the [U.P.A.A.] . . . the contract must be unconscionable at the time of execution. Admittedly, courts normally determine the unconscionability of a commercial contract according to the circumstances existing at the time of execution. Still, marital contracts are somewhat different from commercial transactions. First, in marital contracts spouses plan for what will occur at dissolution. The marriage, however, may not be dissolved for decades. The term of most commercial contracts is much shorter. Second, important public policy concerns relate to the circumstances of the spouses *at divorce*, not at the time the contract was signed. The circumstances of spouses can change dramatically during a marriage. For example, one spouse may develop health problems or may have a diminished earning capacity as a result of working solely as a

263. § 6(a)(2)(i), 9B U.L.A. at 376.

264. § 6(a)(2)(ii), 9B U.L.A. at 376.

265. § 6(a)(2)(iii), 9B U.L.A. at 376.

266. *Accord*, George, *supra* note 46, at 85-86; Ladden & Franco, *supra* note 46, at 275.

267. § 6(a)(2), 9B U.L.A. at 376. However, § 6(b) does allow a court to consider the substantive sufficiency of an agreement's alimony provisions according to circumstances existing at the time of separation or divorce. If a spouse would be eligible for welfare, the court may order the other party to provide support (only to the extent necessary to avoid that eligibility) notwithstanding the premarital agreement. These U.P.A.A. provisions are so harsh as to be cruel. "A spouse should not have to be in the position of being placed on the welfare rolls [sic] before relief is available." George, *supra* note 46, at 105. *Cf.* ILL. ANN. STAT ch. 750, § 10/7 (1992) (a court may order alimony, notwithstanding agreement, if a provision "causes one party to the agreement undue hardship in light of circumstances not reasonably foreseeable at the time of the execution of the agreement . . .").

268. See *supra* text accompanying note 176.

269. George *supra* note 46, at 85, 105-06; Younger (1992), *supra* note 40, at 42.

homemaker. Few would dispute that the state has a strong interest in attempting to ensure that each spouse will be financially self-sufficient after divorce, and that any children will be adequately supported. Consequently, the state has a stronger interest in policing the substantive fairness of the division of property at divorce. The circumstances of the parties at the time the marital contract was signed are irrelevant to these public policy concerns. So, the . . . focus upon the fairness of a marital contract solely at the time of execution seems unwise. If substantive fairness is to be relevant to the question of enforceability of marital contracts, the focus should be upon the fairness of the contract at divorce.²⁷⁰

Under the U.P.A.A. it is possible for an unrepresented,²⁷¹ prospective wife to make a binding premarital agreement that is so one-sided as to be unconscionable. Such an agreement would be binding if it includes a written waiver of her right to disclosure or if the circumstances suggest that she had reason to know of his financial means (even absent actual knowledge).

The official comments accompanying the U.P.A.A. do not indicate that the commissioners considered the impact of premarital agreements on women, but some scholars have speculated that "[w]hen the Uniform Act was promulgated, the drafters apparently labored under the misapprehension that women were the economic equals of men."²⁷²

The Uniform Premarital Agreement Act has the stated objective of validating and enforcing prenuptial agreements. By shifting the burden of proof to the party seeking to contest the agreement and eliminating the unconscionability analysis, the danger exists that a large segment of the population will be deprived of the wealth they helped generate, propelling the nonrevenue-producing spouse toward poverty.²⁷³

The revolution in divorce law has unwittingly created a new victim. The acceptance of divorce, the view of alimony as being rehabilitative in nature, and the role of women in caring for children has often left women in economic deprivation. The Uniform Premarital Agreement Act perpetuates this prejudice, allowing women to contract away their

270. Oldham, *supra* note 256, at 775-76 (citations omitted) (discussing the Uniform Marital Property Act as well as the U.P.A.A.).

271. "Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed." § 6 cmt., 9B U.L.A. at 377 (1983) (citation omitted).

272. Ladden & Franco, *supra* note 46, at 273. I disagree, however, with these commentators' further observation that this misapprehension resulted in part from "the women's movement preaching that women are economic equals." *Id.* The women's movement has long "preached" that women should be the economic equals of men, but has long recognized that they are not.

273. *Id.* at 267.

right to an equitable division of property as well as an appropriate and necessary level of support. The effect is the impoverishment of women as a class.²⁷⁴

In summary, recent developments relating to premarital agreements, notably the *Simeone* opinion and the Uniform Premarital Agreement Act, suggest that lawmakers are operating under an assumption of women's formal legal equality. By focusing on women's idealized de jure equality, lawmakers have ignored women's actual, continuing social and economic inequality. By ignoring women's de facto inequality, lawmakers reforming the law of premarital agreements have overlooked the adverse economic impact that premarital agreements have on women as a class. Lawmakers should recognize premarital agreements for what they are: contracts that violate societal norms against gender discrimination.

G. The meaning of equality and the discriminatory effect of premarital agreements

Typically, the law only protects victims of discrimination who are members of groups who have suffered from economic deprivation or who have been disempowered or disenfranchised.²⁷⁵ It may seem unnatural to think of women who enter into premarital agreements as victims of discrimination because premarital contracts have long been perceived as the province of the rich. However, the view of women who are harmed by premarital agreements as rich women²⁷⁶ or "trophy wives"²⁷⁷ unworthy of the law's protection is both heartless and simplistic. When viewed in the contemporary social and economic context of the United States, premarital agreements appear to contribute to the unequal economic status of women.²⁷⁸ When we consider such agreements in light of the disparate impact construct, their status as discriminatory contracts becomes clear.

Disparate impact explains how and why premarital agreements are discriminatory: a seemingly neutral rule, standard, practice, or contract, applied on an equal basis, discriminates against a protected group if it disadvantages that group to a disproportionate degree relative to its impact on

274. *Id.* at 279-80.

275. Certainly, women (who have been excluded from the political process, been discriminated against with respect to employment and educational opportunities, and been treated as inferiors in numerous laws affecting business and property ownership) should "qualify" as victims of discrimination. *See* *Califano v. Webster*, 430 U.S. 313, 317 (1977) (disparity in economic conditions of men and women caused by longstanding discrimination against women).

276. In many cases, the woman executing the premarital agreement was not wealthy. *See, e.g.*, cases cited *supra* note 47.

277. The demeaning term "trophy wife" is used to reflect the views of critics who oppose the idea of protecting women from unfair premarital agreements and is not used to reflect this author's own perceptions of any group of women.

278. *See* discussion *supra* part III.

another comparable group. Under this theory, discrimination can occur without any actor or lawmaker intending to discriminate and without disparate (unequal) treatment.²⁷⁹ Thus, even if premarital agreements are drawn by prospective spouses and enforced by lawmakers without an intent to discriminate against women, and even if the terms of enforceable premarital agreements are gender-neutral and are applied equally to men and women, the overall enforcement of these agreements inevitably disadvantages women as a socioeconomic group.²⁸⁰ It is this disadvantageous, disproportionate impact on women (as compared to the impact on men) that is the disparate impact that constitutes the sex discrimination inherent in almost all premarital agreements.

Although disparate impact has not been employed by lawmakers in the analysis of premarital agreements, there is no reason why it should not be used to define discrimination in this context.²⁸¹ Initially, disparate impact was used by the United States Supreme Court²⁸² to define race discrimination in employment that violates Title VII of the Civil Rights Act of 1964,²⁸³ but its application has been expanded. Long ago, the Court held that disparate impact may be used to prove sex discrimination in employment.²⁸⁴ The disparate impact methodology has a respectable pedigree in cases arising under laws other than Title VII (*e.g.*, the Age Discrimination in Employment Act²⁸⁵

279. Disparate treatment is the more obvious form of discrimination. The treatment of comparable individuals or comparable groups in an unequal or different way based on some characteristic (*e.g.*, race or gender) is discrimination. Whether that discrimination is unlawful depends on prevailing constitutional and legal principles. Disparate treatment cases abound. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (holding that Alabama's statutory scheme providing that husbands, but not wives, may be required to pay alimony violates Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that Oklahoma liquor laws applying different standards to males and females purchasing beer violates Equal Protection Clause).

280. Because the purpose of almost all premarital agreements is to shelter the wealth and income of the spouses from the sharing principles imposed by state law at the end of marriage, premarital agreements generally benefit the wealthier spouse. Social and economic research findings suggest that most of the wealthier spouses who make premarital agreements are male. *See discussion supra* part III.

281. Courts have declined to use a disparate impact analysis where there is a requirement that the unlawful discrimination be intentional. *Washington v. Davis*, 426 U.S. 229 (1976) ("disparate impact" does not establish that District of Columbia's employment standards for police officers discriminated on the basis of race in violation of Fifth Amendment Due Process Clause). This exception to the general principle which recognizes disparate impact as a method for identifying discrimination has no application to premarital agreements and their effect on women.

282. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the employer had required that all employees have a high school degree or pass two standardized general intelligence tests in order to work in certain departments. Although the employer had applied these seemingly race-neutral requirements on an equal basis, the Court concluded that, in the absence of evidence that these requirements were job-related, the fact that these requirements disqualified a disproportionate number of African-American employees was sufficient to establish unlawful race discrimination.

283. 42 U.S.C. § 2000e (1988), as amended by 42 U.S.C. § 2000e (Supp. III 1991).

284. *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (female applicant for position of prison guard established *prima facie* case of sex discrimination by proving that minimum height and weight requirements excluded disproportionate number of women).

285. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1988). *See also* *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting) (arguing that Supreme Court has never decided whether disparate impact may be used to prove discrimination violating the Age Discrimination in Employment Act).

and state constitutional provisions²⁸⁶), and in contexts other than employment disputes.²⁸⁷ Moreover, disparate impact has been used by some courts in family law cases to define discrimination.²⁸⁸

Distinguished commentators have used a disparate impact analysis in their consideration of family law issues. For example, the main thesis of *The Divorce Revolution*²⁸⁹ implicitly rests on a disparate impact methodology. There, Dr. Weitzman contends that the supposedly sex-neutral, no-fault divorce regime of California has had a devastating, disproportionate economic impact on divorced women as compared to men. Another more recent example is *The Illusion of Equality*.²⁹⁰ The author, Professor Martha Fineman, decries the failure of lawmakers and feminist reformers to recognize and remedy the disproportionate adverse impact of "degendered" family law rules on women. Although her book uses different terms, Fineman advocates a disparate impact approach to family law when she calls on reformers to move beyond conceptualizing discrimination as unequal treatment toward recognizing the harmful impact that even gender-neutral rules have on women in the context of their socioeconomic status.²⁹¹

286. *Dupree v. Alma Sch.* Dist. No. 30, 651 S.W.2d 90 (Ark. 1983) (state's system of funding school districts based on wealth had disparate impact on students in poor districts and violated state constitutional guarantees of equal protection and equal educational opportunities).

287. Disparate impact often has been used to challenge the constitutionality of a state's system of financing public education. *See supra* note 286. More generally, it has been used to challenge the constitutionality or legality of a wide variety of state laws. *E.g.*, *State ex rel. Stephan v. Smith*, 747 P.2d 816, 845-46 (Kan. 1987) (holding state laws appointing counsel for indigent defendants unconstitutional as applied because of disparate burden placed on some members of the bar according to their geographic locations); *Texas Educ. Agency v. Stamos*, 817 S.W.2d 378 (Tex. Ct. App. 1991) (unsuccessful challenge to state laws requiring student to have specified grade-point average to be eligible for participation in extracurricular activities, on grounds that laws had disparate impact on learning-disabled, African-American, and Mexican-American students).

288. *Maxfield v. Maxfield*, 452 N.W.2d 219, 225 (Minn. 1990) (Yetka, J., dissenting) (stating that presumption for granting custody of minor children to parent who is primary caretaker has disparate impact on fathers and, in effect, creates maternal preference); *In re Support of Isabellita S.*, 504 N.Y.S.2d 367, 369-70 (N.Y. Fam. Ct. 1986) (adoption of rule that denies or diminishes spousal support because of pregnancy would have disparate impact on women and would violate equal protection guarantees of U.S. and New York State Constitutions); *Zummo v. Zummo*, 574 A.2d 1130, 1152 n.38 (Pa. Super. Ct. 1990) (consideration of church attendance of divorced parents in relation to custody or religious upbringing of minor children would not only have disparate impact on men because women have higher church attendance rates, but would also implicate father's constitutional, parental and religious rights).

289. *THE DIVORCE REVOLUTION*, *supra* note 2.

290. MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* (1991).

291. Professor Fineman writes:

Throughout this book, I explore the tension between different, "instrumental" versus "symbolic," understandings of equality as the basis for reform . . . [T]here are powerful symbolic reasons for the association of equality with sameness of treatment. There are problems that arise, however, when symbolism is the primary concern. While "rule," or formal, equality may avoid the pitfalls of protective or "special-treatment" rules, which can be used to disadvantage women as well as to help them, the application of equal treatment assumes that those subjected to the rules are in fundamentally the same position. If this is not the case, the result of applying rule-equality may be to further perpetuate result-inequality.

Rules that focus on result-equality, by contrast, are attempts to ensure that the *effects* of rules as they will be applied will place individuals in more or less equal positions. Such rules are constituted to take into account the different structural positions of women and men in our society and seek to achieve parity in position between individuals. Result-equality is a more instrumental approach to restructuring the relationships between men and women and may require

Professor Fineman suggests that to achieve "result-equality," the legal norms may have to embrace "gendered" rules that are facially unequal. Although Professor Fineman's implicit use of a disparate impact construct is sound, her discussion of enacting gendered laws to eradicate inequality is problematic. Fortunately, the "difference debate" (*i.e.*, whether differences between men and women justify different treatment of the sexes²⁹²) does not have to be resolved to address the discrimination inherent in most premarital agreements. Gender-neutral principles and policies can be developed to govern the enforcement of premarital agreements that will mitigate their discriminatory impact.

V. PROCEDURAL FAIRNESS AND ECONOMIC JUSTICE

What should be the law's response to premarital agreements that generally violate our norms against sex discrimination? One response might be for lawmakers to consider all premarital agreements void *ab initio* and unenforceable,²⁹³ as contracts violative of public policy.²⁹⁴ But this position is analogous to throwing out the baby with the dirty bath water. It overlooks the fact that while premarital agreements generally harm women, such agreements also serve beneficial purposes. Premarital agreements encourage marriage, an institution that society protects and exalts. They enable spouses to transfer their wealth to persons other than their spouses who may have weighty legal or moral claims for support (*e.g.*, children from a prior marriage).²⁹⁵ Moreover, as women gradually achieve economic parity with men, premarital agreements will not harm them and will, instead, empower them to control their own property free from the legal claims of a spouse, a spouse's creditors,²⁹⁶ and the mandates of the state's marital property regime. Most significantly, it is paternalistic and insulting to suggest that women are so in need of the law's protection that they cannot be allowed to make

that these groups be treated differently in order that they end up on the same level. However, because result-equality rules are facially unequal, they are much harder to justify. The basis for different treatment must be detailed, defended and, ultimately, accepted by those upon whom the rules operate. In the context of divorce, result-equality arguments, while available, have not been forcefully made.

Id. at 3.

292. See generally THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 10.

293. There would be constitutional problems with the law refusing to enforce premarital agreements against women because such agreements discriminate against them as a class, while continuing to enforce these agreements against men. See the disparate treatment cases cited *supra* note 279.

294. An agreement, or specific terms of an agreement, may be unenforceable on grounds of public policy. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 259 at § 178.

295. See discussion *supra* part II.

296. *E.g.*, Leasefirst v. Borrelli, 17 Cal. Rptr. 2d 114 (Cal. App. Dep't Super. Ct. 1993) (holding that premarital agreement meant that wife's earnings during marriage were her separate property and could not be reached by husband's creditor for debt incurred during marriage, although her earnings were the only income of the couple).

enforceable premarital agreements. Instead, the law must support women in their efforts to negotiate fair premarital agreements.

A. Lawmakers should be guided by the fundamental public policy of attaining economic justice for the economically vulnerable spouse at the end of marriage.

The recent trend in the law has been to exalt the "freedom of contract" principle to the point where even an unconscionable premarital agreement may be enforced.²⁹⁷ But a freedom of contract regime enables the economically powerful to dictate the terms of the contract and sharpens the existing inequality in the distribution of wealth and resources.²⁹⁸ Until there is true economic and social parity between men and women, lawmakers must temper the relentless freedom of contract approach by considering countervailing policies and concerns.²⁹⁹

Lawmakers considering premarital agreements should be guided by a fundamental public policy: the attainment of economic justice for the economically vulnerable spouse (and, incidentally, any children in his/her care) at the termination of marriage. This "economic justice" policy should act as a lodestar, guiding the court's application of standards of procedural fairness that must be equally considered in determining the enforceability of a premarital agreement. Courts should uphold a premarital agreement only if its substance effectuates the law's goal of guaranteeing the economically vulnerable spouse economic justice at the termination of marriage, or failing that, if the negotiating process that led to the unjust agreement was truly fair.

What is "economic justice" at the end of a marriage?³⁰⁰ There are several possible meanings,³⁰¹ but the best definition of the concept implicitly treats

297. U.P.A.A. § 6, 9B U.L.A. at 376.

298. Gregg Temple discusses how the legal equality "of all men" and freedom to enter into contracts "feed[s] existing economic inequality":

The regime of contract forced the individual to struggle for his own set of rights, but only the economically powerful could win the struggle. Only the wealthy had the chance freely to negotiate their contract conditions. Consequently, the linkage between the idea of progress and formal legal equality and private autonomy turned out to be a delusion. The freedom of the individual is not only a question of legal structure, but also a question of concrete economic order, especially of the distribution of goods.

Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121 (1985) (quoting Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 946 (1971)).

299. Cf. Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS*, supra note 90 at 191, in which the authors contend that the state's policy of non-intervention in domestic matters resulting in the privatization of family law "has served to reinforce gender inequalities. These inequalities are not simply private concerns. The growing number of divorced women and children in serious need is a matter of profound public importance." *Id.* at 193.

300. Concepts like "justice" and "fairness" are necessarily elusive and are best defined by their application on a case-by-case basis. Nevertheless, we must define the concept of economic justice (however imperfect the definition), if it is to become a guiding public policy.

301. An agreement may be treated as economically unjust if there is a great disparity between the property and support that would be available at the marriage's end to a divorced or surviving spouse under state law, and the property and support that the agreement provides. The problem with this definition of

the institution of marriage as a partnership that enhances, and does not exploit, each spouse. Economic justice is attained if, at the end of marriage, a spouse's economic position is not significantly worse than it was before the marriage—taking into account the spouse's economic gains and losses (including opportunity gains and costs) that accrued during the marriage.³⁰² For example, suppose a woman of modest means signed a premarital agreement waiving all rights to property and support at divorce and then married a very wealthy man. During the marriage, the couple's lifestyle was commensurate with his wealth, and she did not work outside the home or further her education. Suppose that after several years the couple decides to dissolve the marriage. Should the premarital agreement (leaving the wife of a rich man with no property and no support) be enforced? Some observers would say that if the wife benefitted during the marriage by living a rich person's lifestyle, the agreement is fair: she "got" what she bargained for, and her husband has no further obligation. But this analysis is superficial. It does not take into account the nature of marriage: a partnership in which each spouse gives up something and in some way supports the other—even if she or he enjoys tangible wealth while the marriage is intact.

To make an accurate determination of whether the wife is treated fairly by this agreement, we must consider what she has given up as well as what she

"economic justice" is that it renders the freedom of contract principle illusory; it prevents the parties from making an agreement that significantly departs from the mandates of state law. The very reason that prospective spouses make premarital agreements is to avoid the mandates of state law. Therefore, courts have held that a premarital agreement will not be treated as unfair merely because there is a disparity between the agreement's terms and the property or support available under state law. *See Megginson v. Megginson*, 10 N.E.2d 815, 820 (Ill. 1937); *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 268 n.8 (Minn. 1989) (en banc).

An agreement may be considered economically unjust if there is a great disparity between the property and support provided by the agreement, and the property and support necessary to maintain the divorcing or surviving spouse at the marital standard of living. The problem with this approach is that it compares the outcome of the premarital agreement with a standard used in some states to determine the level of spousal support. BLUMBERG, *supra* note 28, at 10-12. This denies the parties the freedom to contract and defeats the parties' purpose for making a premarital agreement (to avoid state law requirements).

Finally, an agreement may be considered economically unjust if there is a significant disparity between the means of the economically superior spouse and the contractual provisions made for the economically weaker spouse. (This is a test that has been used by many courts to determine whether there should be a presumption that the premarital agreement was reached by a spouse's abuse of the confidential relationship and a shift in the burden of proof to the proponent of the agreement to show that the agreement was fairly and voluntarily made, with knowledge of the nature and value of the rights affected by the agreement. *See* authorities and cases cited *supra* part IV.B.7.) The problem with this test of economic justice is that it renders almost every agreement economically unfair (as the case law attests). The courts are then left to choose between refusing to enforce almost all premarital agreements because they are economically unfair, or determining the enforceability of almost all agreements according to standards of procedural fairness. (Under current law, in states that consider substantive and procedural fairness to be alternatives to enforcement, the courts have chosen the latter course.) For the reasons discussed in this section, the enforceability of premarital agreements should be resolved according to considerations of both economic justice and procedural fairness.

302. This definition of "economic justice" requires a court to compare a spouse's position before marriage (including the spouse's economic potential) with his/her position after marriage and to determine whether enforcement of the agreement at the end of the marriage will render the spouse in a significantly worse position than he/she would have been in if he or she had not married. If the spouse is significantly harmed by the agreement (and, indirectly by the marriage), the agreement is economically unjust.

has received during the marriage. Has she foregone the opportunity to build up a business that she began before marrying and then abandoned during marriage? Has she given up the chance to enhance her earning capacity by obtaining an education or training? Has she allowed some marketable skill to atrophy while she attended to her marriage? Is she as employable at the time of divorce as she was when she married? Are there children of the marriage who will live with her after divorce and inhibit her ability to support herself as she did before the marriage? These kinds of questions can be answered by experts; we can place a value on a spouse's lost opportunity costs and compare a spouse's economic position before and after marriage.³⁰³

If, as a consequence of enforcing the premarital agreement, the spouse is significantly worse off after marriage than before, then the agreement is economically unjust. The agreement has contributed to making the marriage a financially exploitative experience rather than an enriching one.

There are compelling reasons why lawmakers should be guided by an "economic justice" policy. The goal of mitigating economic harm at divorce and widow(er)hood has long been a matter of public policy,³⁰⁴ yet it has not been recognized as a fundamental principle in relation to premarital agreements. It is better for society and the parties directly involved for the divorcing or surviving spouse to leave the marriage with sufficient economic resources to begin or resume a productive life, rather than burdened by a lack of wealth. If children are in the care of the economically vulnerable spouse, it is better for them and for society if their are not hampered by their parent's lack of resources at the end of marriage. In the case of divorce, the harmony between ex-spouses that may be achieved if each spouse is treated justly will redound to the benefit of the children and to society. In addition, application of the "economic justice" standard assists women who suffer from the disparate impact of premarital agreements and thereby furthers the public policy of eradicating gender discrimination.

303. After a marriage has ended, an economist can calculate the value of the educational, career, business, and other financial opportunities that a spouse sacrificed during marriage and can compare the spouse's actual economic position at the end of marriage with the economic position he/she might have been in had he/she not foregone these opportunities. Telephone Interview with Dr. Herbert T. Spiro, A.S.A., Professor Emeritus of Finance, California State University at Northridge, and President, American Valuation Group (Apr. 28, 1993). See also Allen M. Parkman, *Dividing Human Capital with an Eye to Future Earnings*, 12 FAM. ADVOC., at 34 (Fall 1989); Allen M. Parkman, *The Economic Approach to Valuing a Sacrificed Career in Divorce Proceedings*, 2 J. AM. ACAD. MATRIM. L., at 45 (1986). In these articles, Professor Parkman discusses how to value a spouse's sacrifice of human capital (an individual's asset value or ability to generate a future stream of income) during marriage (i.e., how to measure the value of the educational, career, and business opportunities that a spouse sacrificed during marriage).

304. As a matter of policy, states are concerned with mitigating the economic harm suffered by their residents at the end of marriage. The states' enactment of equitable distribution statutes and elective share statutes (see discussion *supra* part II.A.) are premised on this policy. See Barbara Klarman, *Marital Agreements in Contemplation of Divorce*, 10 J.L. REFORM 397, 404-05 (1977) (citing cases that illustrate "society's continuing interest in the financial support of its citizens.").

B. Procedural fairness, together with considerations of economic justice, should determine a premarital agreement's enforceability

If the attainment of economic justice at the end of marriage were a fundamental public policy, what would its role be in determining the enforceability of premarital agreements? Should the substantive fairness of an agreement be the sole determinant of its validity?³⁰⁵ Should the court refuse to enforce an economically unjust agreement? Alternatively, should the court refuse to enforce an unjust agreement as written, but modify it to render it just? Should a court resolve the issue of enforcement of an economically unjust agreement by examining the fairness of the negotiations that culminated in the unjust agreement? We must ask one fundamental question: What is the relationship between considerations of economic justice and procedural fairness?

It may be argued persuasively that an economically unjust premarital agreement should be unenforceable even if it was procured fairly. But this position elevates "economic justice" above all other public policies and ignores significant principles that militate in favor of enforcing even unjust agreements: first, society's concern with protecting the freedom of men and women to contract and to pass their family wealth to persons of their choosing; second, society's desire to promote the institution of marriage; and, third, society's need to allow parties to settle voluntarily and amicably their property rights in advance of marriage, in lieu of engaging in litigation at the end of marriage. More importantly, to refuse to enforce an economically unjust premarital agreement that resulted from a fair bargaining process suggests that adults cannot be trusted to protect their own interests. Finally, in most instances, women will be challenging premarital agreements; to refuse to enforce unjust agreements smacks of paternalism. Therefore, an economically unjust agreement should be enforceable, but only if the law guarantees that the agreement was fairly procured.³⁰⁶

Conversely, an economically just agreement that was unfairly procured should not be enforceable. It offends notions of respect for individual autonomy that underlie the "freedom of contract" principle to argue that a party should be bound by an agreement to which he/she did not voluntarily assent. Moreover, even if an agreement is economically just, a financially vulnerable spouse may be harmed if it was procured unfairly. For example, if a prospective husband did not provide a full and accurate disclosure of all his assets, his wife has been harmed; she might have insisted on more favorable terms or might have refused to sign any premarital waiver of support

305. If economic justice were the sole determinant of an agreement's enforceability, an economically unjust agreement would be invalid (even if it was fairly procured) and an economically just agreement, even if made involuntarily, would be enforceable.

306. The way in which courts may determine whether a premarital agreement was fairly procured is discussed *supra* parts IV.B.3-5.

and property rights had she known his true economic circumstances. For this reason, even an economically just agreement should not be enforced if it was not fairly and voluntarily made. Thus, economic justice should not be the sole determinant of whether a prenuptial agreement is enforceable; the fairness of the bargaining process that culminated in execution of the agreement must be a co-determinant of an agreement's enforceability. The policy of guaranteeing economic justice to a vulnerable spouse should be tempered by the recognition that if the bargaining process that led to an unjust agreement was fair, the agreement should be enforced.

C. There should be an inverse relationship between the economic justice of a prenuptial agreement and the strictness with which a court applies standards of procedural fairness

All states insist that to be enforceable, a prenuptial agreement must be the product of a fair contracting process, but courts differ greatly as to what constitutes procedural fairness in particular circumstances. As a general principle, procedural fairness means that a prenuptial agreement was voluntarily and knowingly made, with an understanding of its legal consequences, after each party was made aware of the material facts relevant to the agreement (particularly the other party's financial resources).³⁰⁷ Most of the controversies relating to the procedural fairness of an agreement involve a consideration of at least one of the following issues:³⁰⁸ Did a challenging party understand the agreement and make a knowing waiver of property and/or support rights? Was the agreement made sufficiently before the wedding ceremony so that a challenging party's signature was not obtained under duress and so that the party had an adequate time to consider and understand the agreement? Did a challenging party have a meaningful opportunity to consult with independent legal counsel about the agreement (regardless of whether the party actually consulted with legal counsel)? Was there a full disclosure of the material facts relevant to the agreement (particularly the wealthier party's financial resources)? If there was an incomplete or inaccurate disclosure of material facts, did the other, challenging party have adequate, independent knowledge of those material facts? Courts have not provided uniform answers or a singular approach to these issues; the cases have been resolved based on the facts presented and on the courts' inclination to impose exacting or lenient standards of procedural fairness.³⁰⁹

307. This formulation of procedural fairness assumes that the prospective spouses are in a confidential or fiduciary relationship and must deal honestly and in good faith with one another. See discussion *supra* part IV.B.3.

308. These issues relating to procedural fairness and their resolution by courts in various states are discussed *supra* parts IV.B.3-5.

309. See discussion *supra* parts IV.B.3-5.

This Article suggests a new approach to determining the enforceability of premarital agreements, one which recognizes lawmakers' apparent desire to have a flexible concept of "procedural fairness" as well as a set of guiding standards, rather than a rigid set of rules, to be applied on an ad hoc basis to individual factual settings.³¹⁰ This Article proposes that lawmakers allow the application and content of rules relating to procedural fairness to vary from case to case, depending on the degree of economic justice attained by a premarital agreement in a particular case. In other words, to effectuate the "economic justice" policy while ensuring that agreements are fairly made, courts would consider both factors—the economic justice of the agreement and the procedural fairness of its execution—in inverse relation to each other when deciding whether to enforce a premarital agreement. The more economically just the agreement, the more leeway the court should allow in the procedural requirements necessary to uphold the agreement; the more economically unjust the agreement, the more demanding the court should be in determining whether the agreement was procured fairly.³¹¹ In essence, the law may presume that an economically just agreement is the result of a fair bargaining process and that an economically unjust agreement is the result of an unfair bargaining process.³¹²

310. In a few instances, lawmakers have adopted inflexible rules to determine whether a premarital agreement has been fairly or unfairly procured. A few states have statutes specifying that a premarital agreement must be executed at a specified time before the wedding to be valid. DEL. CODE ANN. tit. 13, § 301 (1981) (ten days); MINN. STAT. ANN. § 519.11 subd. 2 (West 1990) (must be executed prior to the day of the wedding). Florida has enacted a statute that excuses the parties' duty to disclose financial information before making a premarital agreement that waives the rights of a surviving spouse to share in the estate of a deceased spouse. FLA. STAT. ANN. § 732.702(2) (West 1992 & Supp. 1993).

The problem with "bright line" rules such as these is that they may prevent enforcement of some economically just and otherwise procedurally fair agreements. On the other hand, such rules provide some certainty about the enforceability of agreements and thereby decrease litigation. In any case, most states take a more flexible approach to determining the procedural fairness of an agreement.

311. This proposal implicitly recognizes that within the range of economically just agreements some will be more just than others.

The approach to enforceability proposed by this Article has some drawbacks. The judicial determination of whether an agreement is economically just may require the use of expert testimony and a significant investment of time and resources by the court and by the parties. If, however, the policy of guaranteeing economic justice to a vulnerable spouse is of sufficient importance, these costs are a necessary consequence of vindicating public policy. Moreover, if an agreement were fairly obtained, there would be no need for a court to determine whether the agreement is economically just; if the agreement complies with the highest standards of procedural fairness, it will be upheld.

The uncertainty in the enforcement of premarital agreements created by this proposal does not seem to be any greater than the uncertainty that exists under current common law. Moreover, the uncertainty over an agreement's enforceability may be beneficial. Parties may reduce the uncertainty by making an agreement that leaves the economically vulnerable spouse with significant economic benefits at the end of marriage or by making certain that the negotiating process was procedurally fair (for example, by retaining independent legal counsel for each party, by making a complete and accurate disclosure of all facts that materially bear upon the agreement, especially each party's financial resources, or by allowing sufficient time before the wedding for negotiation of the agreement to ensure that each party understands the agreement and acts voluntarily). In addition, unless the law adopts a Draconian approach to premarital agreements that renders almost all agreements certainly valid (the U.P.A.A.'s approach) or certainly void, there must be some uncertainty and litigation over the enforcement of such agreements.

312. Alternatively, lawmakers might adopt a two-tier system that would be easier to implement but does not reflect the reality that there is a range of economically just agreements. A two-tier system would presuppose two categories of agreements: economically just agreements and economically unjust

Under the approach to enforceability proposed by this Article, the court may consider which requirement inherent in the notion of procedural fairness has been violated; not all the procedural requirements may be of equal importance. Most (if not all) courts currently consider an agreement to have been procured fairly if a party had an opportunity to consult with independent legal counsel. It would be justifiable, however, to transform this standard into an almost absolute requirement that each party be represented by independent counsel. This would be necessary to render a premarital agreement enforceable, unless the agreement clearly attains economic justice for the vulnerable spouse.³¹³

agreements. If an agreement is economically just, the party challenging the contract would have the burden of proving that it was unfairly obtained or was involuntarily made according to relatively minimal standards of procedural fairness. If an agreement is economically unjust, the burden would be on the proponent of the agreement to prove that it was fairly procured according to demanding standards of fairness. The presumptions involved would be presumptions affecting the burden of proof (as opposed to those affecting the burden of producing evidence) because the allocation of proof reflects a matter of policy. See JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 343 (4th ed. 1992) (stating presumptions affecting the burden of persuasion may be created to reflect considerations of public policy).

313. Washington state courts have approached the problem of enforcing a premarital agreement when the challenging party has not been represented by independent counsel in a way that corresponds to the proposal made in the text of this Article. The Washington judiciary has stopped short of absolutely requiring that independent counsel be involved to make a premarital agreement enforceable. The absence of independent counsel (although only one factor to consider in determining procedural fairness), however, is a very difficult obstacle to enforcement of a substantively unfair agreement. The Washington courts' opinions are particularly persuasive because they have long been among the most vigilant in the nation in protecting an economically subservient spouse from an unfair premarital agreement. Several early Washington opinions indicated that in order to make a binding premarital contract, the party disadvantaged by the agreement (the wife) must have had independent legal advice before executing the contract. *Friedlander v. Friedlander*, 494 P.2d 208, 213 (Wash. 1972) (en banc); *Hamlin v. Merlino*, 272 P.2d 125, 132 (Wash. 1954). A later Washington Supreme Court opinion explained that the requirement of independent counsel in prior cases was in the context of agreements that did not make fair and reasonable provisions for the wife. *Whitney v. Seattle-First Nat'l Bank*, 579 P.2d 937, 939-40 (Wash. 1978) (en banc). As the court persuasively explained in *Whitney*, there are circumstances in which an absolute requirement that independent counsel must participate to validate a postnuptial or premarital agreement would be undesirable:

[I]ndependent advice is only one factor to be considered in the analysis of the [procedural fairness of the] overall transaction.

A clear and important distinction certainly exists between saying that in particular circumstances a transaction could not be supported in the absence of independent advice, and saying that a general rule of equity exists which makes independent advice indispensable to the validity of transactions between persons occupying a fiduciary relationship.

Where it is plainly shown that a transaction was fair and free from objectionable influence, and especially where the person supposed to have been at a disadvantage is shown to have been of strong and independent mind and in a position to form an intelligent judgment, a requirement that in addition he must have had independent advice "would seem to be arbitrary and unnecessary."

Id. at 938-39 (citation omitted).

Whitney is one of the few cases by the Washington courts that have upheld an agreement challenged by a wife who signed it without independent advice. In *Whitney*, however, the agreement involved was a postnuptial contract, that the court found to be fair, reasonable and not the product of overreaching or fraud. *Id.* at 940. Cf. *In re Estate of Crawford*, 730 P.2d 675 (Wash. 1986) (en banc) (holding substantively unfair premarital agreement void where there was not full disclosure of the value of husband's property, and wife was not given adequate opportunity to obtain independent legal advice); *In re Marriage of Matson*, 730 P.2d 668 (Wash. 1986) (en banc) (holding substantively unfair premarital agreement void where, among other factors, wife was told by husband's attorney that she could seek independent legal advice, but was not encouraged to seek independent counsel, nor given adequate time to consult with independent counsel); *In re Marriage of Foran*, 834 P.2d 1081 (Wash. Ct. App. 1992) (holding substantively unfair

A vigorously enforced requirement that a party have independent legal advice might be more effective than any other single step to guarantee that a premarital agreement was fairly procured. The concern about the fairness of premarital agreements stems from the evidence that premarital agreements are often made between persons with a great disparity of wealth (and frequently with a disparity of age and experience as well). The fact that the agreements are often one-sided (in favor of the economically superior spouse) suggests that the balance of power and influence during contract negotiations between the affianced couple reflects their relative wealth. The best way to equalize this balance of power (other than by redistributing the wealth of the parties) is to have the negotiations conducted by professional representatives of the parties, rather than by the parties themselves. In addition, premarital agreements are executed by two people who are emotionally involved with one another in the charged atmosphere that often precedes a wedding. The best way to introduce an element of rationality and objectivity in these circumstances, and to have the premarital negotiations approach a model of arm's-length contracting between two equals, is to have counsel for each of the parties, not the parties themselves, negotiate the agreement.³¹⁴

According to this Article's proposed approach, courts need to evaluate the facts of a particular case in light of these criteria for procedural fairness, considering both the cumulative effect of the economic justice of the premarital agreement and the degree of compliance with each criterion when deciding

premarital agreement void where, among other factors, court found that wife was advised, in writing, by husband's counsel to seek independent legal advice, but importance of such advice was not explained to wife).

314. One objection to this Article's proposal regarding the importance of independent counsel is that it is based on unproven assumptions about the way lawyers generally behave in negotiations. In truth, we do not know whether the participation of counsel for each party will tend to lead to a bargaining process or to an outcome that is more rational and equitable than if one party was represented by counsel or if neither were represented by counsel (an unlikely scenario for a premarital agreement). (On the difficulties of generalizing about how attorneys negotiate, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 986-88 (1979). Regardless of these difficulties, courts must make some decisions about whether independent counsel should or should not be a requirement for procedural fairness. This Article suggests that the presence or absence of independent counsel should be considered a very significant element in evaluating procedural fairness. See Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1456-57 (1984) (contending that there should be special scrutiny of separation agreements that distribute assets unequally if each party was not represented by independent counsel).

A second objection to this Article's proposal is its cost. The expense of legal services for both parties will make a premarital agreement prohibitively expensive for some couples. While this argument has some validity, it is less persuasive when we consider that generally, a premarital agreement is made to protect the income or property of a wealthy person who probably is able to pay the legal fees necessary to create a fair bargaining process. (It is assumed that the wealthy party's payment of the other party's legal fees could be structured so as not to compromise the independence of the other party's counsel.) In other instances, when the legal expenses exceed the projected benefit of the agreement, a couple may be dissuaded from making a premarital agreement. This consequence—a decline in premarital agreements—may not be undesirable in light of the discriminatory effect of most premarital agreements. Of course, if there were fewer premarital agreements, there might also be fewer marriages. While it is the policy of the law to promote marriage, it is questionable whether the law should encourage the sorts of individualistic, self-centered marriages that will occur only if there is a premarital agreement that prevents a sharing of wealth.

whether to enforce a premarital agreement. Two examples of this approach will suffice.

Example 1:

When they executed a premarital agreement before their marriage, Husband was very wealthy and Wife was a middle-class owner of a restaurant (a sole proprietorship) earning about \$50,000 per year. The agreement provided that on divorce, Wife would have no rights to property acquired during the marriage by Husband and would have no rights to property brought to the marriage by Husband. In lieu of all claims to Husband's property (both its proceeds and its appreciation) and to support, on divorce, Wife will receive support of \$2,000 per month, up to a maximum payment of \$24,000.

Before they signed the premarital agreement, both Husband and Wife had disclosed their financial circumstances, but Husband's disclosure was incomplete and therefore inaccurate. Although he had disclosed (in writing) an estate worth \$10,000,000, Husband failed to disclose one investment worth \$500,000.

After five years of marriage (during which time Wife gave up the restaurant business to socialize with Husband's business associates and to accompany him on his travels), Husband and Wife have agreed to seek a dissolution. Wife challenges enforcement of the premarital agreement on the grounds that it was not fairly obtained because of Husband's incomplete disclosure.

Should a court enforce the agreement? On the one hand, Husband failed to disclose an investment of significant value in an absolute sense. On the other hand, Husband did disclose so much wealth that it is speculative whether disclosure of an additional five percent of Husband's total estate might have affected Wife's bargaining position or her willingness to sign the agreement.

Under the analysis proposed by this Article, the court considering whether Husband has complied with the disclosure requirement (i.e., whether the agreement was procured fairly) should take into account the economic justice of the agreement. The court can presume that if the agreement is economically just, Wife has not been taken advantage of by an unfair bargaining process. While it is possible that she might have taken a different bargaining position had there been full disclosure, if the agreement is economically just, there is little reason for a court to speculate about a different outcome and refuse to enforce the agreement. But if the agreement is economically unjust, the court has little reason, as a matter of public policy, to enforce the agreement where it is doubtful whether it was fairly procured.

The economic justice of the agreement must be determined by a comparison between the agreement's terms and what Wife's position is likely to have been had she not married. For example, if there is persuasive expert testimony that

proves that had she continued her business for five more years instead of marrying it is likely that she would have built a valuable business and would have enjoyed a substantial annual income, than the premarital agreement seems economically unjust. Doubts about whether Husband's failure to disclose his full assets affected the bargaining process or the agreement's terms should be resolved by finding the agreement unenforceable. (The court should not modify the agreement to render it enforceable.)³¹⁵ Wife should receive whatever support and property would be awarded under state law.

Example 2:

Five days before their wedding ceremony, Husband presented Wife with the premarital agreement that had been drafted by Husband's lawyer at Husband's request. (At least four weeks earlier Husband had indicated to Wife his desire to make a premarital agreement, but they had never discussed its terms in detail and she had never assented to the concept.) When presented with the agreement five days before the wedding, Wife consulted with her own lawyer, who advised her not to sign it. However, when Husband told Wife that he would not marry her unless she signed the agreement, Wife reluctantly signed the agreement on the eve of the wedding. The agreement provided that on the death of Husband, Wife would receive \$20,000 in lieu of all statutory and property rights provided by state law. (The agreement was made to preserve Husband's estate for his children from his first marriage.) After three years of marriage, Husband died. Wife challenges enforcement of the agreement on the grounds that she signed it under duress.

Should the court enforce the agreement? Wife had the advice of counsel; despite the lawyer's advice, she knowingly and voluntarily waived her rights. Conversely, the actual agreement was not presented to Wife until shortly before the wedding, at a time when Wife may not have been in a position to have legal counsel effectively negotiate the agreement or to act on counsel's advice and refuse to sign it.

Again, the court's decision whether to enforce the agreement must consider the economic justice of the agreement. For example, if Wife had been retired

315. If the economic justice policy is of fundamental importance, lawmakers must consider whether an agreement which was held unenforceable primarily because it was economically unjust (with some degree of procedural unfairness) should be modified by a court to render it just, and enforceable as modified. The problem with this modification approach is that it does indirectly what should not be done directly: it makes all economically unjust agreements unenforceable (regardless of their procedural fairness), and thereby suggests that women (and men) cannot be trusted to bargain in their own interests. In addition, there might be insurmountable problems for a court asked to rewrite the parties' agreement to make it economically just. The concept of economic justice suggests a range of acceptable agreements but it does not define the terms of a single, just agreement. Although a court can measure an existing agreement and determine whether it is more or less economically just, it may be impossible for a court to select among various potential agreements and their provisions, all of which might comprise an economically just agreement. By refusing enforcement of an unjust agreement and leaving the parties subject to the property and support rights prescribed by state law, the court is leaving them to the regime which the state legislature has determined to be economically just.

at the time of the marriage so that she did not lose a salary or a business or let marketable skills atrophy, she may not be disadvantaged by the payment under the premarital agreement. If the agreement is economically just, the court may resolve doubts about procedural regularity in favor of enforcement. The court may presume that an economically just agreement was fairly procured.

D. If economic justice and procedural fairness were the co-determinants of the enforceability of premarital agreements, the most significant issues that currently divide the states could be resolved on a principled basis

The most significant issues dividing the states relate to the extent to which a court should review a premarital agreement for substantive fairness.³¹⁶ Should a court review the fairness of a premarital agreement's provisions, or should a court enforce a fairly procured agreement without regard to its substantive fairness? If a court should consider substantive fairness, must a premarital agreement be both substantively fair and procedurally fair to be enforceable, or are these considerations alternative requirements for enforcement? What is the standard of substantive fairness—"unfairness," "unconscionability," or "foreseeability"? Should the agreement's substantive fairness be judged as of the time of the agreement's execution, as of the time of its enforcement, or according to some combination that considers both perspectives? Should a court apply more stringent standards of substantive fairness to the agreement's terms governing alimony than the court applies to terms determining the division of property? Should a court award alimony, notwithstanding the provisions of a premarital agreement, if a spouse is unable to provide for herself or himself at divorce due to changed circumstances since execution of the agreement? One way to resolve these issues on a principled basis would be for lawmakers to treat "economic justice" as a lodestar policy of fundamental importance.

An "economic justice" policy demands that premarital agreements be subjected to some level of judicial review for substantive fairness. If the definition of economic justice suggested by this Article were adopted, the standards for judging the substantive fairness of an agreement would be defined. Moreover, there would be clarification as to when substantive fairness is determined; if the attainment of economic justice at the end of marriage were the goal of public policy, the substantive fairness of the agreement would have to be measured at the time of enforcement, not at the time of execution. Currently, some states permit support to be awarded at divorce, despite a premarital agreement, if changed circumstances threaten to make a needy

316. For a discussion of issues relating to substantive fairness and their resolution by the states, see *supra* part IV.B.6.

spouse eligible for public assistance.³¹⁷ If “economic justice” were a fundamental concern, this current approach would be continued, and would probably be extended to cover cases where a needy spouse is suffering significant hardship, although he or she is not threatened with joining the welfare rolls. While this extension would undermine the “freedom of contract” principles underlying enforcement of premarital agreements, it would be consistent with what should be the law’s goals: the attainment of economic justice at the end of marriage and the elimination of gender discrimination in the distribution of financial resources.

The flexible concept of procedural fairness proposed in this Article is consistent with the reality that courts have varied in their approach to procedural fairness issues. But the approach to enforceability proposed by this Article provides a reasoned basis, a lodestar—the economic justice of the agreement—by which a court may determine whether to rigorously or leniently apply standards of procedural fairness in a particular case.

VI. CONCLUSION

Research by social scientists demonstrates that there is a sharp inequality in the distribution of wealth along gender lines. Generally, premarital agreements (wherein prospective spouses typically waive a state’s regime for sharing property or income at the end of marriage without providing equivalent compensation in return) further skew this maldistribution of wealth and impose a burden on women, an already disadvantaged socioeconomic class. Moreover, findings by social scientists suggest that couples who make premarital agreements have characteristics, and act under circumstances, that increase the likelihood of creating a one-sided agreement for the benefit of the prospective husband, at his future wife’s expense. Premarital agreements have a disparate impact on women—and thereby discriminate against them. Thus, the enforcement of premarital agreements implicates public policy concerns related to the eradication of gender discrimination, as well as concerns with individual autonomy and “freedom of contract” principles.

At one time, lawmakers considered premarital agreements to be harmful to women and embraced principles that had the potential for protecting women from oppressive agreements. Recently, some lawmakers and influential scholars, such as the National Conference of Commissioners on Uniform State Laws that promulgated the Uniform Premarital Agreement Act, have viewed premarital agreements in a different light. Assuming that women are equal to men, they have abandoned the protection of women as a goal and have adopted standards that make the enforcement of even unconscionable premarital agreements a relatively easy matter. In so doing, lawmakers and scholars have overlooked a vital fact: while women are the *de jure* equals of men, they are

317. See *supra* notes 173-174 and accompanying text.

not their de facto equals. In their haste to embrace principles of gender equality in the sense of equal treatment, lawmakers and scholars have paid too little attention to another form of gender discrimination: the disparate impact that premarital agreements have on women. It is ironic, if not perverse, that in the name of gender equality, premarital agreements that discriminate against women as a class have been made readily enforceable.

Premarital agreements should be greeted with skepticism, not embraced with enthusiasm. In addition to strengthening the “freedom of contract” principle and supporting individual autonomy, the law governing the enforcement of premarital agreements should be fashioned to effectuate other public policies: the eradication of gender discrimination and the attainment of economic justice for the economically vulnerable spouse at the end of marriage. The tension between these policies and the “freedom of contract” principle can be reconciled by the adoption of a regime that enforces a premarital agreement only if the agreement attains economic justice for the economically vulnerable spouse or, failing that, if the bargaining process culminating in execution of the agreement was demonstrably fair. In determining whether a premarital agreement should be enforced, the law may presume that an economically unjust agreement is the result of an unfair bargaining process and that an economically just agreement is the result of a fair process. The law may adopt varying standards of procedural fairness depending on the degree of economic justice attained by the agreement, with more leeway in the standards of procedural fairness as the agreement appears closer to an ideal of economic justice. By enforcing agreements only if there are guarantees of substantive or procedural fairness, the law will mitigate the disparate impact of premarital agreements on women as a class, while avoiding paternalism and respecting the rights of women (and men) to contract in their own best interests.

