

# TEN YEARS LATER: LINGERING CONCERNS ABOUT THE UNIFORM PREMARITAL AGREEMENT ACT

by Barbara Ann Atwood\*

[T]he Uniform Premarital Agreement Act is a valuable tool with which responsible adults can establish a distribution scheme each party deems fair. "It's like disability insurance," explains a Chicago lawyer. "You hope you never have to use it, but it's nice to know it's there." It should be the law everywhere.<sup>1</sup>

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The U.P.A.A. makes no radical departure from the developing common law; indeed, it incorporates the best principles of existing state laws on premarital agreements. . . . It is time that responsible partners to a marriage be treated by the law as adults, not as inexperienced and vulnerable children.<sup>2</sup>

In response to the unabashed sales pitch of the National Conference of Commissioners on Uniform State Law<sup>3</sup> (N.C.C.U.S.L.), more than one-third of the states in the United States have adopted the Uniform Premarital Agreement Act (U.P.A.A.) since its promulgation in 1983, and support for the Act may be building.<sup>4</sup> Because the U.P.A.A. is a "uniform" act, its pre-packaged format

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\* Professor of Law, University of Arizona College of Law. I thank Jamie Ratner for his helpful disagreement with many of the ideas expressed in this essay, and for the comments offered by colleagues at the University of Arizona Law College Faculty Seminar. I also appreciate the skillful research assistance of Matt Erickson and Dave Caylor.

1. UNIFORM LAW COMMISSIONERS, *Enforceable Premarital Agreements—An Idea Whose Time Has Come*, in THE UNIFORM PREMARITAL AGREEMENT ACT — INFORMATION PACKET (1990) (on file with author).

2. UNIFORM LAW COMMISSIONERS, *Why All States Need The Uniform Premarital Agreement Act*, in THE UNIFORM PREMARITAL AGREEMENT ACT — INFORMATION PACKET (1990) (on file with author).

3. The National Conference of Commissioners on Uniform State Law (N.C.C.U.S.L.), during its century of operation, has produced an impressive list of model acts and has literally dominated the legal landscape in a few select areas. See generally NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, 1990-91 REFERENCE BOOK 2 (1990). The UNIFORM COMMERCIAL CODE, UNIFORM CHILD CUSTODY JURISDICTION ACT, and UNIFORM PROBATE CODE are notable examples of the Commissioners' success in the state legislatures. At the same time, more than half of the uniform laws produced by the N.C.C.U.S.L. have achieved no significant adoption. James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2103 (1991). The Commissioners lack of success with regard to many of its acts is not due to lack of trying. According to an insider, "[t]he Conference has two sides — production and sales. It produces uniform acts and then tries to sell them to state legislatures." Lawrence W. Waggoner, *Tributes to William J. Pierce*, 89 MICH. L. REV. 2079 (1991). As an "elite" (unelected) legislature, the Commissioners generally lobby the lawmakers in their home states to enact the uniform laws unchanged. See White, *supra*.

4. In a notably slow start, the U.P.A.A. was adopted by only three states in the first three years following its promulgation, but it has now been adopted in some version in 18 states. See U.P.A.A., 9B U.L.A. 31 (Supp. 1992) (Table of Jurisdictions Wherein Act Has Been Adopted). Adopting states include Arizona [ARIZ. REV. STAT. ANN. §§ 25-201 to 25-205 (1991)]; Arkansas [ARK. CODE ANN. §§ 9-11-410 to 9-11-413 (Michie 1987)]; California [CAL. CIV. CODE §§ 5300 to 5317 (West Supp. 1992)]; Hawaii [HAW. REV. STAT. §§ 572D-1 to 572D-11 (Supp. 1991)]; Illinois [ILL. ANN. STAT. ch. 750, para. 10-1 to 10-11 (Smith-Hurd Supp. 1993)]; Iowa [IOWA CODE ANN. §§ 596.1 to 596.12 (West Supp. 1992)]; Kansas [KAN. STAT. ANN. §§ 23-801 to 23-811 (1991)]; Maine

and the N.C.C.U.S.L.'s representations of the Act's compatibility with existing law should continue to generate particularly easy and nonreflective endorsements from state legislatures.<sup>5</sup> In light of persistently high divorce rates in the United States<sup>6</sup> and the apparent popularity of antenuptial agreements,<sup>7</sup> the widespread adoption of the U.P.A.A. may impact more people in their private lives than much of the better-publicized business within state capitals. The time is ripe for a reflection on the Act's controversial core provisions.

Despite the representations of the N.C.C.U.S.L., the U.P.A.A. departs, sometimes dramatically, from the common law of many states. Under the U.P.A.A., parties to premarital agreements have little chance to escape the terms of those agreements, including agreements that limit or eliminate marital property and spousal support rights.<sup>8</sup> Specifically, under the U.P.A.A., a spouse may avoid enforcement of a premarital agreement only by proving that the agreement was not executed voluntarily or that the agreement was unconscionable when it was executed.<sup>9</sup> Retrospective unconscionability alone, however, is insufficient

[ME. REV. STAT. ANN. tit. 19, §§ 141 to 151 (Supp. 1991)]; Montana [MONT. CODE ANN. §§ 40-2-601 to 40-2-610 (1991)]; Nevada [NEV. REV. STAT. §§ 123A.010 to 123A.100 (1991 Supp.)]; New Jersey [N.J. STAT. ANN. §§ 37:2-31 to 37:2-41 (West Supp. 1991)]; North Carolina [N.C. GEN. STAT. §§ 52B-1 to 52B-11 (Supp. 1991)]; North Dakota [N.D. CENT. CODE §§ 14-03.1-01 to 14-03.1-09 (1991)]; Oregon [OR. REV. STAT. §§ 108.700 to 108.740 (1991)]; Rhode Island [R.I. GEN. LAWS §§ 15-17-1 to 15-17-11 (1988)]; South Dakota [S.D. CODIFIED LAWS §§ 25-2-16 to 25-2-25 (Supp. 1991)]; Texas [TEX. FAM. CODE ANN. §§ 5.41 to 5.50 (West Supp. 1992)]; and Virginia [VA. CODE ANN. §§ 20-147 to 20-155 (1992)].

5. In studying the relatively conflict-free adoption of no-fault divorce laws in the United States, Herbert Jacobs has observed that the proponents of no-fault reforms often emphasized "the compatibility of their proposal with existing law and practice." See HERBERT JACOBS, *THE SILENT REVOLUTION* 12 (1988).

6. Divorce rates in the United States rose steadily through the 1970's and through the mid-1980's, and have apparently remained steady at a relatively high level for the last few years. See 41 NATIONAL CENTER FOR HEALTH STATISTICS, No. 1, MONTHLY VITAL STATISTICS REPORT 7 (1992) (divorce rate for 1992, 1991, and 1990 was 4.7 per 1000 population, as compared to 4.8 per 1000 population in 1989); 39 NATIONAL CENTER FOR HEALTH STATISTICS, No. 12 SUPP. 2, MONTHLY VITAL STATISTICS REPORT 7 (divorce rate in 1940 was 2.0 per 1000 population as compared to 4.0 per 1000 in 1972 and 5.0 per 1000 in 1985).

7. Empirical information about the frequency of antenuptial contracting is hard to locate. A recent article observed, without citation of underlying data, that "[w]ith the increase of divorce, premarital agreements have become more acceptable and more desirable, not only to provide for property disposition upon a subsequent dissolution of a marriage, but also to keep property separate so that children of a prior marriage can be provided for and protected." Sandra Tedlock, *Premarital Agreements*, 27 ARIZ. ATT'Y 12 (1991) (special issue on family law). In a different vein, one critic despairingly referred to "[t]he profusion of prenuptial agreements" as "only the most egregious example of the contractualization of marriage." See Matthew P. Bergman, *Status, Contract, and History: A Dialectical View*, 13 CARDOZO L. REV. 171, 193 (1991) (urging a move toward a status-oriented moral vision of marriage). The well-publicized legal disputes over antenuptial contracts between celebrities may contribute to the current perception that use of such agreements is on the rise. See, e.g., Larry Martz, *The War of the Trumps*, NEWSWEEK, Feb. 26, 1990, at 38. An early article showed that most marriages involving premarital agreements were between previously married, older persons. See Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 730 (1972).

8. In this Essay, I am concerned primarily with antenuptial agreements that dictate the economic consequences of divorce. Divorce-related antenuptial agreements have garnered slower acceptance in the courts than agreements determining the economic consequences of death of a spouse. See Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059, 1068 (1988). The Uniform Premarital Agreement Act relaxes the common law constraints on enforceability and will have its most significant impact on divorce-related antenuptial agreements.

9. See UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9B U.L.A. 376 (1987).

under the Act to void an agreement; the party challenging the agreement must also show that he or she was not provided a reasonable disclosure of the financial assets and obligations of the other party before execution of the agreement, that the party did not waive the right to disclosure, and that the party had no independent knowledge of the other's assets or debts.<sup>10</sup> Agreements affecting spousal support, if valid under the described tests, may be disregarded by a court only if the agreement renders one spouse eligible for public assistance.<sup>11</sup> By constraining the doctrine of unconscionability and by eliminating almost all inquiries into the impact of the agreement at the time of enforcement, the U.P.A.A. effects crucial changes in the existing common law of many states.

This Essay examines the implications of the U.P.A.A. for divorcing spouses. Although premarital agreements may prescribe various aspects of post-marriage conduct, the focus of this Article is on the premarital agreement that purports to settle the economic consequences of divorce. A typical scenario that surfaces again and again in the case law is the following:<sup>12</sup> A woman of modest means and minimal employability signs an agreement prepared by her wealthy and sophisticated husband-to-be, or by his lawyer. The agreement is presented to her hours or a few days before the scheduled wedding, and she is told that there will be no wedding if she refuses to sign. Although in theory she has an opportunity to consult with independent counsel, she rarely does. Instead, she signs the document after a cursory reading. The document provides that all property brought into the marriage by either party remains his or her separate property, and that all property acquired by either party during the marriage will be that party's separate property. It also waives all rights that either party might have as to alimony in the event of divorce. Finally, the document contains a brief listing of assets held by each party. At some point in the future, after the marriage has foundered and husband and wife find themselves in the divorce court, the wife attempts to escape the terms of the premarital agreement by claiming rights under the state's marital property laws or its spousal support laws. Under the U.P.A.A., a court would be required to decide the enforceability of the contract without regard to the woman's ignorance of the marital rights she waived years ago, the length of the marriage, intervening changes in circumstance, or other equitable arguments often available at common law.

In this Essay I explore the stepped-up enforceability of premarital agreements under the U.P.A.A. in light of the unique nature of premarital negotiations. In addition, I identify potential conflicts between the U.P.A.A. and other currents of modern family law. By stripping away marital property rules and spousal support obligations, many premarital contracts perpetuate economic disparities between the contracting parties. Since men generally occupy a position of economic superiority, strict enforcement of premarital agreements may work to the

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10. *Id.* The full text of this provision is set forth *infra* at note 79.

11. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9B U.L.A. 376 (1987).

12. Fact patterns in the following recent cases loosely parallel the hypothetical. In re Marriage of Iverson, 15 Cal. Rptr.2d 70 (Cal. Ct. App. 1992); Krawczynski v. Krawczynski, 1992 WL 229262 (Conn. Super. Ct. 1992); Conigliaro v. Conigliaro, 1992 WL 435703 (Del. Fam. Ct. 1992); Osborne v. Osborne, 604 So. 2d 858 (Fla. Dist. Ct. App. 1992); Sogg v. Nevada State Bank, 832 P.2d 781 (Nev. 1992); Fletcher v. Fletcher, 1992 WL 206646 (Ohio Ct. App. 1992); In re Marriage of Foran, 834 P.2d 1081 (Wash. Ct. App. 1992).

ultimate economic disadvantage of women. The Essay concludes that the U.P.A.A. goes too far in the direction of contractual autonomy at the expense of other manifest public policies relevant to marriage and divorce.

The subject of premarital agreements does not receive uniform analyses from feminists. Some commentators, such as Marjorie Schultz and Lenore Weitzman, have taken the position that the law should encourage premarital contracting since women may fare better under a private agreement than they would under the patriarchal marriage and divorce law of most states.<sup>13</sup> Moreover, they point out, the paternalism of the early law on premarital contracts denigrated women by depriving them of contractual autonomy.<sup>14</sup> On the other hand, the risk of contractual autonomy is that one may make contracts that are disadvantageous in their inception or that become disadvantageous over time. While Schultz and Weitzman prefer the empowerment that comes through contractual autonomy, others (like myself) are concerned that the empirical reality of unequal bargaining positions for most women will result in unequal bargains.<sup>15</sup> In addition, some writers have questioned the general trend toward contractualization of family law, focusing on the risk of overreaching in spousal contracting and on society's unique interest in the marriage relationship.<sup>16</sup>

A compromise position, available at common law in some states and one that I urge as a revision to the U.P.A.A., endorses a model of presumptive enforceability for premarital agreements.<sup>17</sup> The presumption of enforceability, accommodating the value of private decisionmaking in family matters, treats men and women as equal contracting parties capable of rationally and individualistically planning for the future.<sup>18</sup> The model, however, contemplates an escape from

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13. See, e.g., LENORE WEITZMAN, *THE MARRIAGE CONTRACT* 353-59 (1980); Marjorie M. Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982). Both Schultz and Weitzman seem more concerned with empowering individuals to alter the traditional economic and behavioral rules of marriage than with the problem of enforceability of divorce-oriented premarital agreements.

14. See WEITZMAN, *supra* note 13, at xx-xxi, 353-54; Schultz, *supra* note 13, at 270-72.

15. Frances Olsen recognized the risk of "perpetuat[ing] the inequalities in . . . relationships" through contract in her compelling study of the family/market dichotomy. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1537-38 (1983). See also CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988) (challenging the assumption that women can ever achieve equality through a contractual approach to marriage). One need not join the "sameness/difference" debate, see generally Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 23-24 (1991), to acknowledge that women's disparate economic status informs the balance of power in contracts between women and men. In this article I do not argue for special rules for women, but simply for greater judicial discretion than is allowed under the U.P.A.A.

16. See, e.g., Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984) (urging more vigorous procedural and substantive fairness standards for separation agreements); Paul G. Haskell, *The Premarital Estate Contract and Social Policy*, 57 N.C. L. REV. 415 (1979); Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979). For a far-ranging discussion of the trend toward private ordering in family law, see Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

17. While the U.P.A.A. might be described as endorsing presumptive enforceability, the statute's stringent standards for challenging premarital agreements elevate the presumption to an almost insurmountable barrier.

18. The virtues of private ordering have been touted in recent scholarship, in part because of disillusionment with the work of judges in interpreting and applying the malleable law of marriage and divorce. See, e.g., Jeffrey Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992) (arguing for mandatory prenuptial contracts for all persons at the time of marriage); Robert Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015 (1985).

enforcement where the agreement does not satisfy a standard of both procedural fairness and substantive conscionability. Importantly, the model's substantive review includes an assessment of the premarital agreement's operation at the time of enforcement. By providing the escape, the compromise model recognizes the unique nature of the marriage relationship, the possibility of irrational and uninformed decision making at the time of contracting, the likelihood of unforeseen changes in circumstance over the life of a marriage, and the real risk of disadvantage to the economically weaker spouse.<sup>19</sup>

## I. THE NATURE OF THE ANTENUPTIAL AGREEMENT

Special treatment of premarital contracts by the courts should be unnecessary unless their enforcement poses special problems or implicates special policy concerns. Judith Younger has identified three distinctions between antenuptial agreements and ordinary commercial contracts: (1) antenuptial agreements typically deal with subjects of greater interest to the state than the subjects of commercial contract; (2) the parties to antenuptial contracts are in a confidential relationship and are "usually not evenly matched in bargaining power"; and (3) antenuptial agreements are to be performed in the future in the context of a relationship which the parties have not yet begun and which may continue for many years before the agreement is executed.<sup>20</sup>

Younger has identified important characteristics of the typical antenuptial contract, but I would alter the analysis in some respects. Her first point suggests that family-related disputes are generally of more concern to the states than disputes arising under the standard commercial contract. Insofar as antenuptial agreements address matters of concern to children, such as child support and child custody, the states' traditional *parens patriae* role justifies intervention to protect the welfare of the affected child.<sup>21</sup> A different source of state authority, however, must be called upon to justify a court's nullification of agreements that address only such matters as property division and spousal maintenance.<sup>22</sup> That authority derives from the interest that the state has in the marriage relationship itself.

When a man and woman negotiate on the brink of marriage, they are contemplating a uniquely state-supported relationship of human intimacy, a relationship that has always received special governmental protection. Only the state recognizes the means of creating the relationship, and it likewise holds a

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19. For a recent state court exposition of the "compromise model," see *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990). A contrasting model that rejects all second-guessing by courts into the fairness of premarital agreements can be found in *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

20. See Younger, *supra* note 8, at 1061.

21. See 2 JOSEPH STORY, *EQUITY* §§ 1328-37 (13th ed. 1886) (explaining that the chancery authority to protect infants was an outgrowth of the Crown's *parens patriae* power to protect all persons unable to care for themselves). The U.P.A.A. specifies, for example, that the right of a child to support "may not be adversely affected by a premarital agreement." See UNIF. PREMARITAL AGREEMENT ACT § 3(b), 9B U.L.A. 373 (1987). Also, child custody is conspicuously absent from the list of topics that the U.P.A.A. authorizes for coverage in a premarital agreement. See *id.* § 3(a).

22. In the era when married women were regarded as constituting something less than full legal persons, the state's *parens patriae* authority might have extended to all transactions affecting their interest. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*442-45.

monopoly on the means of dissolution. Moreover, the "default" rules governing division of marital property and availability of spousal support at divorce reveal a state's philosophy of economic responsibility between marital partners. As promulgator of the rules, the state retains the power to decide whether and to what extent couples may by agreement diverge from that state's marital property regime and spousal support scheme.

The special nature of the marriage relationship likewise underpins Younger's second point. She reasons that parties to an antenuptial contract are in a confidential relationship, unlike contracting parties generally, and that they typically possess unequal bargaining power. Because of the special legal and social status of marriage, courts have generally opined that parties to an antenuptial agreement have a duty to negotiate fairly, in good faith, and with full disclosure.<sup>23</sup> This heightened duty of disclosure distinguishes premarital negotiations from the arms-length bargaining traditionally associated with commercial contracts. By enforcing such a duty, courts recognize that the state has an interest in fostering stable marriages and that the state interest is more likely to be achieved through a model of marriage as a relationship of mutual trust, confidence, and fair dealing. Legal recognition of the confidential relationship gives rise, in turn, to procedural and substantive protections for parties to the premarital contract.

The confidential or fiduciary obligation of premarital partners takes on importance when one considers that antenuptial agreements will always be between a female and a male. Inequality in economic bargaining power between parties to an antenuptial contract may often exist, and, in light of economic reality, the female generally will be the less powerful bargainer. Women still earn significantly less than males in the marketplace, even when comparing full-time workers.<sup>24</sup> Although more women are in the labor market now than a decade ago, the earnings of full-time female workers continue to fall far below the earnings of full-time male workers.<sup>25</sup> Moreover, the disparity between earning power of males and females only increases if one compares married men with married women.<sup>26</sup> That heightened disparity is due, in part, to the persistence of gendered divisions

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23. See, e.g., *Hook v. Hook*, 431 N.E.2d 667 (Ohio 1982); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); see generally ALEXANDER LINDEY & LOUIS PARLEY, 3 LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS 90-34 to 90-39 (1991). Although at least one state has refused to extend the good faith obligation of marriage to the premarital negotiators, that position seems to create a false dichotomy, since premarital agreements become effective only upon marriage. See *In re Marriage of Dawley*, 551 P.2d 326 (Cal. 1976). Also, a policy of not requiring premarital partners to negotiate in good faith and with complete disclosure is inconsistent with the State's interest in strengthening the institution of marriage.

24. See RITA MAE KELLY, *THE GENDERED ECONOMY* 203-07 (1991) (documenting work patterns of males and females that show continued clustering of females in lower-paying job categories).

25. See MONTHLY LAB. REV., Dec. 1990, at 4 (showing 63.9% ratio of women's wages to men's wages as of 1988). See also June O'Neill, *The Wage Gap Between Men and Women in the United States*, 3 INT'L. REV. COMP. PUB. POL'Y. 353 (1991) (reporting a 66% ratio of female to male earnings as of 1988).

26. In 1987, wives who worked full time earned 57% of what their husbands earned working full time. See BUREAU OF THE CENSUS, CURRENT POP. REP., SERIES P-60 No. 165, EARNINGS OF MARRIED COUPLE FAMILIES: 1987 2. See also VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988).

of labor in the home.<sup>27</sup> Thus, at divorce, when the terms of many antenuptial agreements become subject to enforcement, the wage gap between the male and female will often be even larger. Although courts cannot adopt a gender-specific approach to the evaluation of prenuptial agreements, the likelihood of disparity in economic bargaining power is one of several factors that warrant greater scrutiny of such agreements than of commercial contracts.<sup>28</sup>

An overview of recent cases involving antenuptial agreements reveals, predictably, that the overwhelming majority of parties attacking premarital agreements at divorce are women.<sup>29</sup> In those cases, the wife, as the economically subordinate spouse, typically is asking for a more favorable economic settlement — through invocation of the state's marital property law or its spousal support law — than what she would receive under the terms of the agreement. Moreover, in the few cases that involved challenges by husbands, the wife frequently was

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27. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (advocating changes in public support for childcare to benefit children and families); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 106-108 (1991) (noting the asymmetry of spousal economic interdependence because of women's greater responsibility for child care and women's lower marketability outside home).

28. Elizabeth Anderson has identified other factors that impede the attainment of gender equality in contracts between men and women. These factors include the traditional socialization of women in Western societies as "individuals who do not conceive of themselves as aggressive, self-seeking bargainers, and who hence are not motivated to act on such a self-conception;" and the asymmetry in heterosexual relationships regarding home labor and peer expectations. See Elizabeth G. Anderson, *Women and Contracts: No New Deal*, 88 MICH. L. REV. 1792, 1807 (1990) (reviewing CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988)). See also Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibility*, 38 UCLA L. REV. 1483 (1991) (suggesting a theory of divorce law based on women's innate and cultural differences); Carol Rose, *Women and Property*, 78 VA. L. REV. 421 (1992) (exploring the impact of women's presumed "taste for cooperation" on their ability to acquire and retain property).

29. 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. See *Anttila v. Sinikka*, 611 So. 2d 565 (Fla. Dist. Ct. App. 1992); *In re Marriage of Iverson*, 15 Cal. Rptr.2d 70 (Cal. Ct. App. 1992); *Knowles v. Knowles*, 1992 WL 371915 (Ohio Ct. App. 1992); *Ex parte Williams*, 1992 WL 362058 (Ala. 1992); *In re Marriage of Johnston*, 843 P.2d 760 (Mont. 1992); *Boos v. Boos*, 1992 WL 337471 (Ohio Ct. App. 1992); *Conigliaro v. Conigliaro*, 1992 WL 435703 (Del. Fam. Ct. 1992); *Scism v. Scism*, 844 S.W.2d 506 (Mo. Ct. App. 1992); *Martin v. Martin*, 612 So. 2d 1230 (Ala. Civ. App. 1992); *Bressler v. Bressler*, 601 N.E.2d 392 (Ind. Ct. App. 1992); *In re Marriage of Jelinek*, 1992 WL 278704 (Ill. App. Ct. 1992); *Matuga v. Matuga*, 600 N.E.2d 138 (Ind. Ct. App. 1992); *Lobatto v. Lobatto*, 586 N.Y.S.2d 971 (N.Y. Sup. Ct. 1992); *Krawczynski v. Krawczynski*, 1992 WL 229262 (Conn. Super. Ct. 1992); *Ryland v. Ryland*, 605 So. 2d 138 (Fla. Dist. Ct. App. 1992); *In re Marriage of Foran*, 834 P.2d 1081 (Wash. Ct. App. 1992); *Fletcher v. Fletcher*, 1992 WL 206646 (Ohio Ct. App. 1992); *Osborne v. Osborne*, 604 So. 2d 858 (Fla. Dist. Ct. App. 1992); *In re Marriage of Sokolowski*, 597 N.E.2d 675 (Ill. App. Ct. 1992); *Foster v. Foster*, 609 A.2d 1171 (Maine 1992); *Lieberman v. Lieberman*, 587 N.Y.S.2d 107 (N.Y. Sup. Ct. 1992); *In re Marriage of Hailstone*, 1992 WL 151555 (Del. Fam. Ct. 1992); *Devault v. Devault*, 80 Ohio App.3d 341 (Ohio Ct. App. 1992); *Booth v. Booth*, 486 N.W.2d 116 (Mich. Ct. App. 1992); *Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992); *Winger v. Pianka*, 831 S.W.2d 853 (Tex. Ct. App. 1992); *Fields v. Fields*, 1992 WL 74207 (Ohio Ct. App. 1992); *Coggins v. Coggins*, 601 So. 2d 109 (Ala. Civ. App. 1992); *In re Marriage of Lundtvedt*, 484 N.W.2d 613 (Iowa Ct. App. 1992); *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. Ct. App. 1992); *Schneider v. Schneider*, 824 S.W.2d 942 (Mo. Ct. App. 1992); *Porter v. Porter*, 593 So. 2d 1120 (Fla. Dist. Ct. App. 1992); *In re Marriage of Martin*, 585 N.E.2d 1158 (Ill. App. Ct. 1992). In six cases husbands tried to avoid enforcement of premarital agreements. *Dobbins v. Dobbins*, 1992 WL 341001 (Ohio Ct. App. 1992); *Moss v. Moss*, 589 N.Y.S.2d 683 (N.Y. Sup. Ct. 1992); *DiVincenti v. McIntyre*, 611 So. 2d 140 (La. Ct. App. 1992); *Johnson v. Johnson*, 1992 WL 209320 (Ohio Ct. App. 1992); *Sherill v. Sherill*, 1992 WL 108707 (Tenn. Ct. App. 1992); *In re Marriage of Lemoine-Hofmann*, 827 P.2d 587 (Colo. Ct. App. 1992).

still the economically subordinate party.<sup>30</sup> The premarital agreements in such cases, however, guaranteed to the wife an economic advantage at divorce that the husband was seeking to avoid. The statistical breakdown, though not drawn from a comprehensive sampling, suggests that in *most* contemporary litigation involving antenuptial agreements, the woman has occupied a position of economic dependence during the marriage, and the woman is the party trying to escape the agreement at divorce.

Younger's third point goes to the forward-looking nature of the contract, a contract to be performed in the future in the context of a relationship not yet begun. Under that view, the antenuptial contract spells out the consequences of something neither party wants or expects to occur, and for that reason one or both parties may not attend carefully to the details of the agreement. Although one could argue that such a characterization does not adequately distinguish the antenuptial agreement from a commercial partnership agreement that provides for the consequences of partnership dissolution, the partners to a marriage generally expect it to last forever,<sup>31</sup> while few commercial partners have such a vision.<sup>32</sup>

I would build on Younger's insight. The premarital agreement is special in that its prospectivity concerns the possible demise of a marriage. Because of the strength of the desire to marry, the willingness of one party to agree to future economic consequences of divorce may not be animated by rational bargaining.<sup>33</sup> The unique emotional atmosphere surrounding the execution of premarital agreements may lead a person to sign without careful deliberation, since hesitancy may reveal lack of commitment to the relationship, lack of confidence in the

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30. See, e.g., *Sherill v. Sherill*, 1992 WL 108707 (Tenn. Ct. App. 1992) (wife seeking to compel husband to comply with antenuptial agreement to make a will); *Johnson v. Johnson*, 1992 WL 209320 (Ohio Ct. App. 1992) (wife seeking to maintain ownership of husband's assets according to terms of prenuptial agreement).

31. The scant empirical evidence that exists suggests that young people are generally optimistic about the durability of marriage in their own lives. See Arland Thornton & Deborah Freedman, *Changing Attitudes Toward Marriage and Single Life*, 14 FAM. PLAN. PERSP. 297, 300 (1982). In an important recent study, Professors Lynn Baker and Robert Emery of the University of Virginia surveyed a population of marriage license applicants and found that the vast majority of respondents had accurate perceptions about the national divorce rate but perceived that their own marriage had little or no chance of ending in divorce. See Lynn Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, LAW & HUM. BEHAV. (forthcoming 1992) (manuscript on file with author). Of course, those couples who enter into antenuptial agreements may not, as a group, share the same sense of idealism about their marriage as other couples about to wed. Some early data showed that most couples who signed antenuptial contracts were older than the average marrying couple and had generally been married previously. See Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 730-33 (1972). On the other hand, if prenuptial contracting becomes as popular as the N.C.C.U.S.L. suggests it should, we can expect more persons marrying for the first time to seek its benefits.

32. The subject of dissolution, including its causes, effects, and implications, is extensively treated in the *Uniform Partnership Act*. See UNIF. PARTNERSHIP ACT §§ 29-43, 6 U.L.A. 364 (1969).

33. In the reported cases, the desire to marry is often the motivating force behind the signature of one party. In *Liebelt v. Liebelt*, 801 P.2d 52 (Idaho Ct. App. 1990), for example, the antenuptial agreement was signed two days before the wedding. The prospective husband told his future wife that he would not marry her if she refused to sign the contract. In rejecting the wife's later challenge to the agreement, the court reasoned that the husband's threat should have put the wife on notice that the agreement was serious. *Id.* at 55. See also *Fecht v. Fechtel*, 556 So. 2d 520 (Fla. Dist. Ct. App. 1990) (agreement nullifying wife's alimony rights signed hours before the wedding).



relationship, or a suspicion of the bona fides of the other party.<sup>34</sup> Moreover, many people don't have a firm understanding of state laws regulating such matters as marital property and spousal maintenance.<sup>35</sup> Thus, a person's assent to an agreement affecting her unknown rights, in the future at an unknown (and unthinkable) time, may often be far from rational.<sup>36</sup>

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.

In the discussion that follows, I contrast the common law of premarital agreements, developed *ad hoc* in true common law style, with the framework embodied in the U.P.A.A. Each approach differentiates the antenuptial agreement from the standard commercial contract, but the U.P.A.A. significantly constrains the common law power of the courts to refuse enforcement. The U.P.A.A., by precluding almost all inquiries into the substantive effect of premarital agreements

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34. As Stephen Sugarman and Herma Hill Kay observed in another context, "Because entering into marriage in our society is thought more often to be the result of romantic love than hard-headed business bargaining, there is reason to fear that many individuals would not insist upon terms that would sufficiently protect themselves." STEPHEN SUGARMAN & HERMA HILL KAY, *DIVORCE REFORM AT THE CROSSROADS* 142 (1990). Other writers have likewise questioned the general move towards a "partnership" characterization of marriage. See, e.g., MARTHA ALBERTSON FINEMAN, *The Illusion of Equality* 174 (1991) ("Through the application of a business, contractual, partnership model, dependency and need are obscured."). The empirical study conducted by Professors Baker and Emery shows that, notwithstanding the media attention to high divorce rates, most couples at the time of marriage believe that their marriage has little chance of failure. See Baker & Emery, *supra* note 31, at 8-10. Interestingly, less than 2% of the respondents in the same study reported that they would consider entering into a prenuptial agreement. *Id.* at 10. The authors speculate that this disinterest in prenuptial contracts may reflect the parties' fear that a contrary attitude would show lack of optimism about the marriage's longevity. *Id.* at 18.

35. In the empirical study conducted by Professors Baker and Emery, the respondents' knowledge of the law of marriage and divorce, as demonstrated in a series of objective questions, was only slightly better than chance. See Baker & Emery, *supra* note 31, at 6. In an earlier article, Professor Baker observed that Louisiana was alone in requiring that marriage license applicants be informed of the economic terms of the marriage contract. See Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J. L. REF. 217, 221 (1990).

36. Exploring the paternalism underlying the waiting periods mandated by some states between the time a couple obtains a marriage license and the time they can formally marry, Anthony Kronman has suggested that persons about to marry are "especially likely to be influenced by strong and potentially distorting passions. . . . Like powerful passions of any sort, those that attend a marriage or divorce inhibit the imagination, making it more difficult for those involved to achieve a measure of neutrality." Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L. J. 763, 796 (1983). Kronman's insights about mandatory waiting periods for marriage would seem equally applicable to prenuptial contracts, where the very opportunity to marry may hinge on one party's willingness to give up economic rights at divorce. Jeffrey Stake has recognized that the "cognitive dissonance" inherent in planning for divorce at the time of marriage may inhibit couples from entering into premarital agreements in the first place; he argues that a rule mandating such premarital negotiation would avoid the basis for negative inference. See Stake, *supra* note 18, at 427. The psychological resistance, however, to serious negotiation about divorce at the time of marriage would not necessarily be eliminated by a rule mandating premarital agreements. If agreements were mandated, the emotionally resistant party might simply agree to anything.

at the time of enforcement and by diluting the traditional requirement of full disclosure, comes down vehemently on the side of contractual freedom.

## II. THE COMMON LAW — EVOLVING SOCIAL POLICY

In the absence of the U.P.A.A., most states have little statutory law on the subject of premarital agreements. Instead, judges have performed their "interstitial lawmaking"<sup>37</sup> function, formulating rules of decision by identifying certain generalized public policy objectives. The articulated policies, not surprisingly, have changed over time.

The common law traditionally was more receptive to prenuptial agreements dictating the economic consequences of death than to agreements dictating the economic consequences of divorce.<sup>38</sup> The public policies that courts relied upon in refusing to enforce divorce-oriented antenuptial agreements included the desire to protect the institution of marriage by discouraging divorce and the need to protect the legally incapacitated married woman. Thus, the early reported opinions express judicial fear that any antenuptial agreement providing for separation or divorce "invites dispute, encourages separation and incites divorce."<sup>39</sup> Courts explained that an agreement significantly narrowing the husband's financial risk at divorce might lead him "to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited."<sup>40</sup> Premarital agreements purporting to limit the husband's financial liability at separation or divorce were accordingly voided.<sup>41</sup>

The standard that antenuptial agreements may not "provide for or tend to induce divorce" still appears in contemporary case law, but the application of that standard has changed. Modern courts, often with an acknowledgement of the changed legal and economic status of women, no longer reject as *per se* invalid those prenuptial agreements that dictate the economic consequences of divorce. Instead, the courts analyze the agreements under varying standards of procedural and substantive fairness, to be discussed below.<sup>42</sup> Notwithstanding the judicial receptivity, courts today are apt to refuse enforcement of agreements

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37. The interstitial lawmaking function of the federal courts was described in HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953). I use the term more loosely here to mean decisionmaking by courts that fills in the gaps left by incomplete statutes. Sometimes state courts may be working in a statutory vacuum, with their full common law powers intact, or they may be working between the lines of a detailed code.

38. See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 6 (2d ed. 1988).

39. *Fricke v. Fricke*, 42 N.W.2d 500, 502 (Wis. 1950). See also *Stratton v. Wilson*, 185 S.W. 522 (Ky. 1918) (parties should not be led into the breaking of marriage vows by the allurements of any stipulations entered into before marriage).

40. *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964); see also *Fricke v. Fricke*, 42 N.W.2d 500 (Wis. 1950).

41. In *Williams v. Williams*, 243 P. 402 (Ariz. 1926), for example, the Arizona Supreme Court nullified an antenuptial agreement that purported to limit a husband's liability for alimony to \$500. The court reasoned that such a provision would enable a guilty husband to escape all responsibility for support of his former wife. "To hold to the contrary would be equivalent to holding that a man may contract in advance to be relieved from liability for his own negligence, tort, or even crime." *Id.* at 404. The court's language is steeped in the sexism and fault-based divorce world of the past. See also *Fricke v. Fricke*, 42 N.W.2d 500 (Wis. 1950).

42. See, e.g., *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975); *In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976).

that provide for a windfall settlement for one spouse at divorce. Reasoning that an agreement that makes an exceptionally generous provision for the wife at divorce will give her a profit incentive to seek dissolution of the marriage, courts have struck down such agreements in recent years.<sup>43</sup> Ironically, then, while courts today frequently uphold agreements that strip away community property or equitable distribution principles and thereby benefit the husband, agreements that explicitly bestow an advantage on the wife *beyond* ordinary marital property rules are vulnerable to challenge under the "inducement of divorce" rubric.

In many states, courts have recently confronted questions of the enforceability of premarital agreements and seem willing to break with outdated public policy rationales that underpin the older precedents. In general, apart from the "inducement of divorce" rationale, the evolving common law measures antenuptial agreements under a standard of both procedural and substantive fairness; the details of that common law vary from jurisdiction to jurisdiction.<sup>44</sup>

In light of the confidential relationship between persons about to marry, the most salient factors relevant to procedural fairness include whether each prospective spouse revealed to the other all financial assets and liabilities and whether each understood the effect of the agreement, including the rights that were being waived.<sup>45</sup> The facts of individual cases have raised various other factors, including each party's opportunity to consult with independent counsel, the circumstances and timing of the execution of the contract, and the business sophistication of each party.<sup>46</sup> Although the emphasis differs from state to state, the case law

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43. See *Neilson v. Neilson*, 780 P.2d 1264 (Utah App. 1989); *In re Marriage of Noghrey*, 169 Cal. App.3d 326 (Cal. Ct. App. 1985); *Matthews v. Matthews*, 162 S.E.2d 697 (N.C. Ct. App. 1968). See also *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984) (unusually favorable provision for wife may be reason for voiding agreement under "inducement of divorce" standard); RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1979). In an unusual application of the doctrine, the California Court of Appeals in *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988), held that an antenuptial agreement regarding dowry was unenforceable because it would tend to encourage divorce. There the Jordanian husband had agreed to pay his wife about \$2,500 in Jordanian dinars at death or divorce as dowry. The court reasoned that the contract provided for the wife "to profit by a divorce," and was therefore void as against public policy. *Id.* at 872. Under the reasoning of the court, any agreement that awards monetary support to one of the parties in the event of divorce would be suspect.

44. See generally CLARK, *supra* note 38, at 7-11 (noting that some courts apply a more rigorous fairness test than others in deciding the enforceability of prenuptial contracts). For an overview of the case law, see 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 161-225 (1987).

45. In *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975), for example, the court explained that an antenuptial agreement, to be enforceable, must be "free from any taint of fraud, coercion or undue influence; the prospective wife must have acted with full knowledge of the property involved and her rights therein, and the agreement must have been fair and equitable." *Id.* at 185. Upholding the validity of a premarital agreement in that case, the court found that the wife, who was represented by counsel, fully understood the terms of the agreement. By contrast, in *Orgler v. Orgler*, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989), the court held a premarital agreement invalid because the wife did not know the full value of defendant's property and did not understand the concept of equitable distribution. See generally CLARK, *supra* note 38, at 3-5.

46. See, e.g., *In re Marriage of Matson*, 730 P.2d 668, 671 (Wash. 1986) (presumption of fraud exists where agreement greatly disfavors one party; court should consider opportunity to consult attorney, circumstances of execution, business experience of parties, awareness of financial resources of other party, and understanding of rights being forfeited); *Orgler v. Orgler*, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989) (husband's failure to fully disclose assets and wife's lack of understanding of concepts of equitable distribution and alimony justified nullification of agreement).

seems to coalesce on one point — that fair and full disclosure of financial holdings is an absolute prerequisite to enforcement of a premarital agreement.

As to substantive fairness, divergent approaches exist in the state courts. While the vast majority of states require that antenuptial contracts satisfy some degree of substantive fairness, the nature and timing of the fairness review vary. Some courts seem to have retained significant power to control the financial incidents of divorce, in spite of premarital agreements, by asserting the power to determine whether the agreements' terms were "fair," "just," or "equitable."<sup>47</sup> Other states, importing from commercial law the more deferential "conscionability" standard, have shown less willingness to overturn premarital agreements.<sup>48</sup>

The timing of the substantive review plays a critical role in litigation over premarital agreements. Many states adhere to a standard that assesses the fairness of the terms of antenuptial agreements at the time of execution *and* at the time of enforcement. In *Brooks v. Brooks*,<sup>49</sup> for example, the Alaska Supreme Court discussed the evolving public policy considerations that now justify enforcing antenuptial contracts. According to the court, the advent of no-fault divorce and concomitant changes in society warrant an *ad hoc* evaluation of the fairness of antenuptial agreements rather than an absolute rule barring their enforcement. In *Brooks* the court summarized the typical criteria that state courts consider in assessing fairness:

1. Was the agreement obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact?
2. Was the agreement unconscionable when executed?
3. Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?<sup>50</sup>

Thus, *Brooks* requires procedural fairness in the execution of the agreement and substantive conscionability/fairness in the terms of the agreement. Under *Brooks* that substantive review includes an assessment of the terms of the agreement at the time of execution as well as the operation of the agreement at the time of enforcement in light of intervening changed circumstances.<sup>51</sup>

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47. See, e.g., *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975); *Hengel v. Hengel*, 365 N.W.2d 16 (Wis. Ct. App. 1985), and cases collected in Roy, *supra* note 44, at 188-92.

48. See, e.g., *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985), and cases collected in Roy, *supra* note 44, at 192-96.

49. 733 P.2d 1044 (Alaska 1987).

50. *Id.* at 1049 (relying on *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982)).

51. *Brooks* was heavily relied on in *Rinvelt v. Rinvelt*, 475 N.W.2d 478 (Mich. Ct. App. 1991), where the Michigan court held that a prenuptial agreement in contemplation of divorce was not *per se* against public policy. The court declared that an agreement governing the distribution of property in the event of divorce is valid where the agreement was procured voluntarily and is ostensibly fair in result, measured as of the time of execution *and* the time of enforcement. *Id.* at 483. Similarly, in *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990), the court overturned a long-standing precedent that had barred enforcement of antenuptial agreements prescribing the economic consequences of divorce. In *Edwardson* the state high court relied on the interim change to a no-fault system of divorce and the improved legal status of women in abandoning the *per se* rule of nonenforceability. In its place, the court adopted a rule requiring that the antenuptial agreement be entered into with full disclosure of each party's financial circumstances and that the agreement *not be unconscionable at the time of enforcement*. See also *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984) (where husband's assets had increased from \$500,000 to \$8 million over duration of marriage, court refused enforcement of premarital agreement against wife on ground that enforcement would be unconscionable in light of changed circumstances); *McKee-Johnson v. Johnson*, 444 N.W.2d 259

Similarly, in Arizona a recent appellate case abandoned a longstanding rule that antenuptial agreements could not affect spousal support rights. At issue in *Williams v. Williams*<sup>52</sup> was an antenuptial agreement that specifically waived any right to spousal maintenance upon divorce. The Arizona appeals court seized the opportunity to reformulate the common law, relying in part on changes in the legal and social landscape. The court reasoned that the now gender-neutral duty of spousal support, created by statute,<sup>53</sup> was evidence of continuing state interest in enforcing support obligations. That interest, however, did not render all antenuptial agreements affecting spousal maintenance void *per se*; rather, according to the court, each agreement should be evaluated on a case-by-case basis.

In articulating the standards to be used in determining the validity of premarital agreements, the *Williams* court reiterated the traditional requirement that the agreements be "fairly entered into upon full disclosure, and without fraud, overreaching or duress."<sup>54</sup> As an independent measure, the court also required that such agreements be "fair and equitable in their procurement *an [sic] in their result*."<sup>55</sup> In summarizing the applicable standards, the court stated, "An inquiry must be conducted regarding whether the agreement between the parties was fairly reached and whether it adequately provides for support of the spouse consistent with the needs and resources of both spouses at the time of dissolution."<sup>56</sup>

*Williams* suggests that a court, when examining substantive fairness, should look not only to the circumstances existing at the time of execution but also to the parties' circumstances at divorce. The holding would seem to prevent enforcement of an antenuptial agreement that would leave ex-spouses in unreasonably disparate financial circumstances. By maintaining that degree of judicial oversight, the court accommodated not only the state interest in fostering contractual autonomy but also the interest in protecting the welfare of the divorced spouse.

In some states, courts have differentiated between antenuptial agreements affecting property distributions at divorce, and agreements modifying or eliminating alimony obligations, in identifying the appropriate time for a fairness review. In those jurisdictions, courts have reasoned that agreements affecting property rights should be evaluated as of the time of execution whereas agreements

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(Minn. 1989); *McFarlane v. Rich*, 567 A.2d 585 (N.H. 1989); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985); *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

52. 801 P.2d 495 (Ariz. Ct. App. 1990).

53. See ARIZ. REV. STAT. ANN. § 13-3611 (1989).

54. 801 P.2d at 498 (emphasis added, citation omitted).

55. *Id.* (emphasis added). The court elaborated, somewhat ambiguously, on the requirement of substantive fairness. Stating that the results must not be made unconscionable by circumstances existing at the time of the divorce, the court identified one example as "when enforcement of the [agreement] would render one spouse without a means of reasonable support or a public charge." *Id.* Although the example suggests that only in extreme situations involving the indigency of one spouse should a court refuse to enforce the antenuptial agreement, other passages in the opinion suggest a somewhat less deferential posture. The court of appeals quoted from *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984), in which the Ohio court suggested that enforcement of the literal terms of antenuptial agreements should be avoided if necessary to "mitigate potential harm, hardship, or disadvantage to a spouse which would be occasioned by the breakup of the marriage . . ." 801 P.2d at 499 (quoting *Gross*, 464 N.E.2d at 509).

56. 801 P.2d at 499.

affecting support rights should be assessed as of the time of divorce.<sup>57</sup> The rationale for such distinctions seems to be that the state's interest in assuring a means of support for its citizens justifies greater supervision of agreements altering the laws of alimony. In describing the proper standard for antenuptial agreements affecting alimony, such courts have looked to whether the circumstances at the time of divorce have significantly changed so as to render the antenuptial agreement unfair or unreasonable.<sup>58</sup>

Several states have settled on a time-of-execution fairness review for all prenuptial agreements, similar to the approach of the U.P.A.A.<sup>59</sup> The pivotal concern in such cases seems to be preservation of freedom of contract and the concomitant predictability in arranging one's future financial affairs. In strongly contractarian reasoning, at least one state has recently adopted a standard that eschews any substantive fairness review whatsoever. In *Simeone v. Simeone*,<sup>60</sup> the Supreme Court of Pennsylvania announced that a premarital agreement is valid and enforceable without regard to the reasonableness or fairness of the agreement, so long as the parties made full and fair disclosure at the time of execution. In *Simeone*, the agreement in question limited the wife to support payments of \$200 per week from her physician-husband in the event of separation or divorce, subject to an overall limitation of \$25,000. The parties separated after seven years of marriage, and before divorce proceedings were commenced the husband made payments satisfying the \$25,000 limit. The case came before the Pennsylvania Supreme Court on the wife's application for alimony *pendente lite*. The court held that the wife's request was barred by the parties' antenuptial contract.

The court in *Simeone* rejected any inquiry into fairness of the agreement, either at the time of execution or the time of enforcement. The limited avenue left open for challenging the validity of such agreements was to show the absence of full and fair disclosure of financial circumstances at the time of execution or a material misrepresentation in the inducement of the contract. Concluding that "the reasonableness of a prenuptial bargain is not a proper subject for judicial review," the court opined that the very act of signing is evidence that the parties believed the agreement to be reasonable at the time of its inception.<sup>61</sup>

As with many court decisions that have abandoned existing common law constraints on the enforceability of such contracts, the *Simeone* court called into service empirical assumptions about the social and economic equality of the sexes. The court reasoned that any greater interference with the parties' freedom to contract would necessarily embrace the view that spouses are of unequal status

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57. See, e.g., *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988); *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982); LINDEY, *supra* note 23, at 90-11; CLARK, *supra* note 38, at 8-9. As Professor Clark points out, the distinction between the alimony and property provisions of an antenuptial contract may pose a difficult task for courts, since the purpose of both property division and support is to provide financially for the obligee spouse. *Id.* at 9, n.51. A recent court opinion relied on *Clark* in ruling that the spousal support and marital property terms of an antenuptial agreement should be scrutinized for fairness at the time of divorce to determine if the disadvantaged spouse can still be self-supporting. See *Justus v. Justus*, 581 N.E.2d 1265 (Ind. Ct. App. 1991).

58. See, e.g., *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988).

59. See, e.g., *Spector v. Spector*, 531 P.2d 176, 185 (Ariz. Ct. App. 1975); see generally Younger, *supra* note 8, at 1080-82.

60. 581 A.2d 162 (Pa. 1990).

61. *Id.* at 166.

and that women are not knowledgeable enough to understand the nature of contracts they enter. According to the court, "[s]ociety has advanced . . . to the point where women are no longer regarded as the 'weaker' party in marriage, or in society generally. . . . *Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have . . . been discarded.*"<sup>62</sup>

The *Simeone* court's presumption of rational dealing between the parties to an antenuptial agreement is an appropriate starting point for assessing the validity of such agreements. To the extent the law of premarital agreements can shape behavior between persons about to marry, a model of rational decisionmaking may, indeed, encourage rationality. On the other hand, the *Simeone* approach creates an irrebuttable presumption of rationality and fair-dealing, so long as there is full disclosure of financial circumstances at the time of execution. *Simeone's* world view is belied by the reported cases revealing the precipitous and highly-charged circumstances under which many premarital agreements are signed.<sup>63</sup>

In summary, while the variations in the common law of premarital agreements are significant, most states have endorsed a test that requires a court to assess both procedural and substantive fairness of agreements. Many courts have deemphasized contractual reliance interests by looking to the fairness of agreements not only at the time of execution but also at the time of enforcement.<sup>64</sup> As will be seen, the N.C.C.U.S.L., in drafting the U.P.A.A., emphasized freedom of contract over other competing values in selecting among the common law approaches.

### III. THE U.P.A.A.

The promulgation of the U.P.A.A. in 1983 carried forward the partnership model of marriage that the Uniform Marriage and Divorce Act (U.M.D.A.) had

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62. *Id.* at 165 (emphasis added).

63. In *Simeone* itself the agreement was drafted by the neurosurgeon-husband's lawyer, was presented to the wife (an unemployed nurse) on the eve of the wedding, and was signed by her without advice of counsel. *Simeone*, 581 A.2d at 163. Similarly, in *Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992), the wife was presented with the premarital agreement on the day before the couple's scheduled wedding at the office of the husband's attorney. After a 30-minute visit arranged by her husband-to-be with another attorney down the hall, the wife became upset over some of the terms of the agreement, and the wedding was postponed. Several weeks later, a new wedding date was set. The day before the second scheduled wedding, the parties again went to the husband's lawyer's office, and there signed the premarital agreement. The court held that the agreement was unenforceable because of the circumstances of the signing and the husband's failure to fully disclose his financial status. See also *Matter of Marriage of Matson*, 730 P.2d 668 (Wash. 1986) (first meeting to review sample agreement occurred four days before wedding, and agreement was to be signed night before wedding); *Bauer v. Bauer*, 464 P.2d 710 (Or. Ct. App. 1970) (agreement presented to wife on day of wedding). In *Liebelt v. Liebelt*, 801 P.2d 52 (Idaho Ct. App. 1990), the antenuptial agreement was signed two days before the wedding, and was presented to the wife as a prerequisite to the marriage. The court held that the husband's threat of refusal to marry was not wrongful in the eyes of the law. The court reasoned that he had every right to refuse to marry, and the wife should have been put on notice that the agreement was "serious." See also *Howell v. Landry*, 386 S.E.2d 610 (N.C. Ct. App. 1989) (agreement signed on night before wedding); *Fechtel v. Fechtel*, 556 So.2d 520 (Fla. Dist. Ct. App. 1990) (agreement, signed hours before wedding, upheld as valid since agreement accurately recited husband's property as being in excess of \$339,000 and wife's property as being in excess of \$1000).

64. See *supra* cases cited note 52.

embodied in 1970.<sup>65</sup> Through the U.M.D.A., the commissioners recommended a no-fault approach to divorce, emphasized division of marital property over alimony or spousal maintenance as the major economic consequence of divorce, and encouraged a "clean break" for divorcing spouses. In their Prefatory Note to the U.M.D.A., the commissioners wrote that "[t]he distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."<sup>66</sup>

The U.P.A.A., in turn, enhances the enforceability of premarital contracts and, thus, continues the treatment of married, or about-to-be-married, persons as autonomous, rational, independent actors. The express goal of the drafters of the Act was to produce "uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances."<sup>67</sup> The drafters, however, conformed selectively to existing, often contradictory, social policies; in so doing, they formulated rules that differ significantly from the law of many states. The gradual and cautious acceptance of the antenuptial agreement in most courts resulted, in part, from the courts' self-conscious attempt to accommodate social change.<sup>68</sup> The U.P.A.A., on the other hand, may have outpaced social change by eliminating inquiries into the fairness of premarital agreements at the time of enforcement and by weakening the traditional requirement of full disclosure.<sup>69</sup> Although the Act has been in existence now for ten years, it has only been achieving widespread popularity in recent years, and judicial constructions of it are still rare.<sup>70</sup> In the following analysis, I identify what I perceive to be the Act's major shortcomings.

The Act defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon

65. See UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1987). The U.M.D.A. was amended in 1971 and again in 1973. See *id.* Historical Note.

66. UNIF. MARRIAGE AND DIVORCE ACT Prefatory Note, 9A U.L.A. 149 (1987).

67. UNIF. PREMARITAL AGREEMENT ACT Prefatory Note, 9B U.L.A. 369 (1987).

68. The court in *Williams* recognized this function explicitly: "The common law can and should be reformed when changed conditions and circumstances establish that it has become unjust or contrary to evolved public policy." *Williams*, 801 P.2d at 497.

69. In the drafting of the U.P.A.A., the most controversial part of the Act was § 6. Some commissioners wanted to impose an enforceability test that would have provided for easier challenge, while others chose to reject what they viewed as undue paternalism. A strong sentiment was appreciation of the need for people to be able to enter and rely on premarital agreements. Letter from Jeanyse R. Snow, Member of Drafting Committee (Oct. 27, 1992) (on file with author).

70. Interestingly, as with premarital agreement law generally, of 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. See *Lieberman v. Lieberman*, 587 N.Y.S.2d 107 (N.Y. Sup. Ct. 1992); *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. Ct. App. 1992); *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988); *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989); *Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992); *Winger v. Pianka*, 831 S.W.2d 853 (Tex. Ct. App. 1992); *Prevatte v. Prevatte*, 411 S.E.2d 386 (1991); *Howell v. Landry*, 386 S.E.2d 610 (N.C. Ct. App. 1989); *Tiryakian v. Tiryakian*, 370 S.E.2d 852 (N.C. Ct. App. 1988); *In re Marriage of Harris*, 828 P.2d 1365 (Mont. 1992); *Orgler v. Orgler*, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989); *Matter of Marriage of Purcell*, 783 P.2d 1038 (Or. Ct. App. 1989); *In the Matter of Estate of Crawford*, 730 P.2d 675 (Wash. 1986). Only two involved challenges by husbands to the terms of prenuptial agreements at divorce. See *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988); *Neilson v. Neilson*, 780 P.2d 1264 (Utah App. 1989). A final case involved a challenge by a husband's estate to an oral prenuptial agreement on which the widow wanted to rely. See *Hall v. Hall*, 271 Cal. Rptr. 773 (Cal. App. 1990). Most of the listed court decisions involved agreements executed before the effective date of the U.P.A.A. and therefore do not apply the Act but rather cite it by analogy or for informational purposes.



marriage,"<sup>71</sup> requires that such agreements be in writing and signed by both parties,<sup>72</sup> and provides that such agreements are enforceable without consideration.<sup>73</sup> Section 3 broadly describes the permissible subject-matter of premarital agreements, listing by way of example the modification or elimination of spousal support, the disposition of property at divorce, and a variety of other topics.<sup>74</sup> In a broadly-phrased umbrella provision, the Act allows "any other matter, including [the parties'] personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."<sup>75</sup> The Comment to Section 3 explains, somewhat ambiguously, that under the catch-all phrase and subject to its limitation, premarital agreements may provide "for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on."<sup>76</sup> In a nod to the *parens patriae* role of the courts in considering agreements relating to children, the Act does provide that "the right of a child to support may not be adversely affected by a premarital agreement."<sup>77</sup>

The heart of the Act is Section 6, setting forth the standards for enforceability. Under Section 6(a), a party may avoid enforcement of a premarital agreement by proving either that he or she did not execute the agreement voluntarily, or that the agreement was unconscionable when executed.<sup>78</sup> To escape enforcement on the basis of unconscionability, however, a party must also prove that he or she did not receive a fair and reasonable disclosure of the property or financial obligations of the other party before execution of the agreement, that the party did not waive the right to disclosure, and that the party did not have "or reasonably could not have had" adequate knowledge of the other's

71. UNIF. PREMARITAL AGREEMENT ACT § 1, 9B U.L.A. 371 (1987).

72. UNIF. PREMARITAL AGREEMENT ACT § 2, 9B U.L.A. 372 (1987).

73. *Id.* Although § 2 provides that premarital agreements are enforceable without consideration, the Comment reveals the drafters' view that the marriage itself is the consideration for such agreements. See UNIF. PREMARITAL AGREEMENT ACT § 2 cmt., 9B U.L.A. 377 (1987).

74. UNIF. PREMARITAL AGREEMENT ACT § 3(a), 9B U.L.A. 373 (1987). Some adopting states have refused to authorize agreements that limit or modify spousal support. See, e.g., CAL. CIV. CODE § 5312 (West Supp. 1992); IOWA CODE ANN. § 596 (West Supp. 1992); S.D. CODIFIED LAWS ANN. § 25-2-18 (1992).

75. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8), 9B U.L.A. 373 (1987).

76. UNIF. PREMARITAL AGREEMENT ACT § 3 cmt., 9B U.L.A. 374 (1987). In the Comment to the enforcement section, the commissioners acknowledged that agreements relating to personal rights and obligations may raise problems of enforceability. The commissioners explained that "[n]o special provision is made for enforcement of [agreements] relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable are [sic] under otherwise applicable law." UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. 377 (1987). The obvious objections to enforceability have prompted one critic to characterize the inclusion of personal rights and obligations in the permissible content as "meaningless." Younger, *supra* note 8, at 1087.

77. See UNIF. PREMARITAL AGREEMENT ACT § 3(b), 9B U.L.A. 373 (1987). Although the commissioners may have had high hopes regarding the breadth of premarital agreements, courts have uniformly applied a best interests standard to agreements impacting children. See, e.g., *In re Marriage of Wolfert*, 598 P.2d 524, 526 (Colo. Ct. App. 1979); Younger, *supra* note 8, at 1072-73. If the commissioners intended to suggest that courts will be receptive to enforcement of agreements that dictate a particular childrearing practice or a particular career choice, then here, as in § 6, the commissioners misconstrued the existing common law of premarital agreements.

78. The Comment to § 6 explains that the standard of unconscionability was drawn from § 306 of the U.M.D.A., addressing the enforceability of separation agreements, which in turn refers to "unconscionability" under the U.C.C. § 2-302. See UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. 376-77 (1987).

property or obligations.<sup>79</sup> Even if the conditions under subsection 6(a) are not met, subsection 6(b) provides an additional, though limited, avenue to avoid enforcement of agreements modifying or eliminating spousal support: if such an agreement causes one party to be "eligible for support under a program of public assistance" at the time of separation or divorce, a court may require the other party to provide support to the extent necessary to avoid that eligibility.<sup>80</sup>

The commissioners describe Section 6 as setting forth conditions that are "comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions."<sup>81</sup> The operation of section 6, however, diverges from the general common law in several respects. As explained earlier, the evolving standard for enforcement of premarital agreements in most states entails an inquiry into both procedural and substantive fairness. Procedural fairness, under the common law, has come to include a showing of voluntariness as well as full disclosure of property interests *and rights in that property*.<sup>82</sup> The U.P.A.A. preserves the role of voluntariness as an independent ground of attack; but as to the element of full disclosure, the commissioners did not include any requirement that the party to an antenuptial agreement know what rights she is waiving. Thus, lack of rudimentary knowledge, for example, about the principles of equitable distribution or community property is irrelevant. Under the U.P.A.A., a person could effectively waive all claims to marital property at divorce through a premarital agreement assigning each party's earnings to him or her as separate property, without any mention or explanation of the future rights being waived. So long as each party was aware of the other's assets, such an agreement would likely survive the U.P.A.A.'s disclosure requirement.<sup>83</sup>

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79. The following is the full text of § 6.

(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.

UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987).

80. UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987).

81. UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. 376 (1987).

82. See *supra* note 45 and accompanying text.

83. See UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9B U.L.A. 376 (1987). Importantly, the full-disclosure provision also requires the challenger to prove absence of waiver and lack of actual or constructive knowledge. See *id.* § 6(a)(2)(ii) & (iii). That additional burden of proof goes beyond the reported case law, and at least one adopting state has omitted the difficult requirement of proving that one did not have, "or reasonably could not have had," an adequate knowledge of the property. See VA. CODE ANN. § 20-151(A)(2) (Michie 1990).

Equally important, the commissioners linked the legal significance of non-disclosure to proof of unconscionability. Although under the common law each showing is an independent basis for voiding an antenuptial agreement, the U.P.A.A. requires proof of both defects to invalidate a prenuptial agreement. Under the Act, an agreement entered into without full disclosure of property holdings will remain enforceable so long as it was not unconscionable at the time of execution.<sup>84</sup>

The potential operation of this feature of the U.P.A.A. can be illustrated by reference to the facts of a recent case. In *Matter of Estate of Crawford*,<sup>85</sup> the wife successfully challenged a prenuptial agreement after the death of her husband. The agreement made no provision for the wife in the event of divorce or death but did state that the spouses would share equally in property acquired after marriage. The facts showed that the husband did not fully disclose his substantial wealth accumulated before marriage. During the 13-year marriage, the wife worked but the husband did not, and the parties apparently acquired little property after marriage.

The court ruled that if a prenuptial agreement leaves the economically subservient spouse with nothing, it can only be upheld if there is full disclosure and the wife acted in full knowledge of her rights and with advice of counsel.<sup>86</sup> Finding that the wife did not have knowledge of her rights or the benefit of legal representation, the court voided the agreement. Under the U.P.A.A., the result might very well have been different. The U.P.A.A.'s approach would nullify the agreement only if, in addition to a finding of lack of disclosure, the agreement were found to be unconscionable at the time of execution. An agreement that directs that each party keep what he or she brings into the marriage, and that each share equally in property acquired during marriage, would not on its face appear unconscionable.

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84. New Jersey, in its enacted version of the U.P.A.A., severed the full disclosure requirement from the showing of unconscionability. Under N.J. STAT. ANN. § 37:2-38 (West Supp. 1992), a person attacking a premarital agreement may show either that the agreement was unconscionable *or* that full disclosure did not occur. Similarly, in the Iowa and Nevada versions of the U.P.A.A., unconscionability and lack of full disclosure are preserved as independent grounds for challenging the validity of an agreement. See IOWA CODE ANN. § 596.8 (West. Supp. 1992); NEV. REV. STAT. ANN. § 123A.080 (Michie Supp. 1991).

Interestingly, in the Uniform Marital Property Act, promulgated in the same year as the U.P.A.A., the commissioners chose to give unconscionability and nondisclosure independent weight in challenges to the validity of "marital property agreements," but followed the approach of the U.P.A.A. with respect to agreements executed before marriage. Compare U.M.P.A. § 10(f) (marital property agreement executed during marriage is not enforceable if spouse proves agreement was unconscionable when made *or* that agreement was not executed voluntarily *or* that spouse was not provided fair disclosure of property and financial obligations of other spouse) with U.M.P.A. § 10(g) (marital property agreement executed before marriage is not enforceable if spouse proves that agreement was not executed voluntarily *or* that agreement was unconscionable when made *and* spouse was not provided fair disclosure of property and financial obligations of other spouse). Professor Oldham has speculated that this difference in standards rests on the drafters' view that prospective spouses may be more likely to conduct arms length negotiation than married persons, or that equality in bargaining power is more likely to exist between prospective spouses than between married persons. See J. Thomas Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 Hous. L. Rev. 757, 769 n.44 (1984).

85. 730 P.2d 675 (Wash. 1986).

86. *Id.* at 678.

Conversely, the U.P.A.A.'s mandatory linkage of nondisclosure and unconscionability means that unconscionability alone is insufficient to nullify a premarital agreement. In this respect, the commissioners diverged not only from the common law of antenuptial agreements<sup>87</sup> but also from general contract principles. In commercial contracts, the chameleon concept of "unconscionability" is notorious for its lack of definition, but courts often point to some combination of "procedural" and "substantive" unconscionability.<sup>88</sup> As one court explained in a frequently cited dictum, "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."<sup>89</sup> An absence of meaningful choice can result not only from lack of full disclosure but also from lack of understanding, inequality in bargaining power, and the use of "sharp practices."<sup>90</sup> The U.P.A.A., by requiring a showing of unconscionability *and* lack of full disclosure before a court may refuse enforcement of a premarital agreement, presumably would deem enforceable an antenuptial contract that was extremely unfair to one of the parties in its substantive provisions, so long as the man and woman disclosed all property and financial obligations to one another before signing the contract. Moreover, this result would seem to obtain under the U.P.A.A. even if the party challenging the contract established that gross inequality in bargaining power existed at the time of execution. In other words, the drafters of the U.P.A.A. seem to have so constrained the available challenges to antenuptial agreements that such agreements would survive in circumstances that the ordinary commercial contract would not.<sup>91</sup>

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87. As recognized by one court, "Clearly, there must be some level of 'unconscionability' which would bar enforcement of an antenuptial agreement no matter what disclosure had been made. An agreement which would leave a spouse a public charge or close to it, or which would provide a standard of living far below that which was enjoyed both before and during the marriage, would probably not be enforced by any court." *Marschall v. Marschall*, 477 A.2d 833, 840-41 (N.J. 1984).

88. See Arthur A. Leff, *Unconscionability and the Code — The Emperor's New Clothes*, 115 U. PA. L. REV. 485, 487 (1967); see generally E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 332-34 (2d ed. 1990). For a recent judicial discussion of the diversity of views on unconscionability, see *Rite Color Chemical Co. v. Velvet Textile*, 411 S.E.2d 645 (N.C. Ct. App. 1992). Professor Summers has suggested that substantive unconscionability alone ought to be sufficient to bar enforcement of a contract. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE*, § 4.3 (3d ed. 1988).

89. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

90. See FARNSWORTH, *supra* note 88, at 332-33.

91. Another illustration of the gap between antenuptial contracts under the U.P.A.A. and commercial contracts is the inclusion in the U.C.C. of a special provision for contractual clauses limiting remedies. Under U.C.C. § 2-719(2), clauses limiting remedies in contracts of sale may be voided "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose." This provision, according to commentators, addresses the enforceability of an agreement that might have been fair at the time of making but, due to unexpected circumstances, is unfair at the time of enforcement. See 1 N.Y.L. REVISION COMM'N., *STUDY OF THE UNIFORM COMMERCIAL CODE* 584 (1955); FARNSWORTH, *supra* note 88, at 336. Thus, § 2-719(2) makes clauses limiting remedies especially vulnerable to challenge and apparently has become a substitute for the doctrine of unconscionability in that context. See FARNSWORTH, *supra* note 88, at 337. Many antenuptial contracts, by analogy, might be viewed as "limiting remedies," since they often eliminate rights to community assets and limit or eliminate the availability of spousal support. Nevertheless, the altruism that is manifest in U.C.C. § 2-719(2) did not find its way into the U.P.A.A. By limiting the unconscionability inquiry to the time of execution, the commissioners tilted the scale decidedly toward enforceability and

The U.P.A.A. breaks with the common law of many states by refusing to consider the substantive fairness of premarital agreements at the time of enforcement. As summarized earlier, many courts have balanced the competing policies of preserving contractual freedom and protecting the welfare of the divorcing spouse by examining the fairness of agreements at the time of divorce, in light of circumstances not foreseen by the parties at the time of execution of the agreement.<sup>92</sup> Under that line of reasoning, courts have considered such factors as the length of the marriage, the birth of children, and a party's change of position in reliance on the marriage.<sup>93</sup>

The U.P.A.A. not only eliminates consideration of unforeseen circumstances at the time of enforcement, it also leaves little room for parties to constructively modify a contract during marriage. Under Section 5, a premarital agreement may be amended or revoked "only by a written agreement signed by the parties."<sup>94</sup> The Act in this regard again diverges from the common law. In some states, for example, parties may through their conduct (such as a commingling of assets) demonstrate an intent to revoke an antenuptial agreement.<sup>95</sup>

The U.P.A.A.'s time-of-execution measure for assessing fairness and its stringent standard for revocation may produce harsh results. For example, under the Act, a couple, contemplating a childless marriage, might sign an antenuptial agreement that waives spousal support and directs that each spouse keep his or her earnings as separate property. If during the marriage a child is born and the wife decides to take a hiatus of several years from work, her economic circumstances will be quite different from what the couple anticipated at the outset. If the parties later divorce, with the wife never having returned to work, the husband may seek to enforce the agreement. Under the U.P.A.A., unless the parties each signed a revocation or amendment of the agreement, the wife might be bound by the terms of the prenuptial contract. At least one adopting state has sought to ameliorate the harshness of the U.P.A.A. in precisely such circumstances.<sup>96</sup>

By announcing the additional, exceedingly narrow, escape for agreements eliminating spousal support, the Uniform Act imposes a standard that is at odds with prevailing common law.<sup>97</sup> The "eligibility for public assistance" test may

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eliminated any consideration of changed circumstances.

Professor Stake has observed that the law of contracts and family law seem to be headed in opposite directions in one respect: "Contract law is finding more ways to refuse to enforce agreements between parties, while family law is inventing new ways to enforce private agreements." Stake, *supra* note 18, at 415 n.82 (citations omitted) (citing MARVIN A. CHIRELSTEIN, *CONCEPTS AND THE CASE ANALYSIS IN THE LAW OF CONTRACTS* 69-77 (1990), and Younger, *supra* note 8, at 1069-70).

92. See *supra* notes 51-52 and accompanying text.

93. See *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985).

94. UNIF. PREMARITAL AGREEMENT ACT § 5, 9B U.L.A. 375 (1987).

95. See *In re Marriage of Young*, 682 P.2d 1233 (Col. Ct. App. 1984).

96. Apparently alert to this weakness in the Act, Maine added a section to its version of the U.P.A.A. that voids a premarital agreement 18 months after the parties become the "biological or adoptive parents or guardians of a minor," unless the parties reconfirm the agreement during that period in writing. See 19 ME. REV. STAT. ANN. § 146 (1992).

97. Significantly, one state has rejected the Commissioners' language and substituted a standard of "undue hardship" for the "eligibility for public assistance" test of the U.P.A.A. See ILL. COMP. STAT. ANN. ch. 750, § 10/7 (Smith-Hurd 1993) ("If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement

unduly burden the long-term homemaker who possesses skills sufficient to earn a minimum wage but whose economic circumstances would otherwise be drastically affected by a premarital agreement. For example, in *In re Marriage of Purcell*,<sup>98</sup> a wife successfully challenged a prenuptial agreement in which she had waived rights to spousal support at divorce. Finding that the wife had "no other reasonable source of support," since she lacked insurance, savings, and current employment, the court approved an award of alimony.<sup>99</sup> Under the U.P.A.A., the court would have been constrained to enforce the premarital agreement unless the wife literally would have been eligible for public assistance.<sup>100</sup>

Critics of the U.P.A.A. have recommended various changes in the law since its promulgation. The Act's elimination of any inquiry into unconscionability at the time of enforcement has generated the major criticism<sup>101</sup> and has prompted several adopting states to modify the unconscionability standard of the Act.<sup>102</sup> Observing that the Act would have its potentially harshest impact on parties to traditional long-term marriages, some critics have argued that substantive fairness in premarital agreements must take into account changed circumstances during the marriage. Professor Oldham has recommended that the Act incorporate a standard of foreseeability,<sup>103</sup> such that unforeseen material changes in circumstance during a marriage would justify non-enforcement of an agreement at

undue hardship in light of circumstances not reasonably foreseeable at the time of the execution of the agreement, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid such hardship.")

98. 783 P.2d 1038 (Ore. Ct. App. 1989).

99. *Id.* at 1039.

100. Conversely, the U.P.A.A. also may disadvantage someone who commits to a generous payment of alimony that, in light of changed circumstances at divorce, is unreasonable. For example, a prenuptial agreement may include a promise by one party to pay to the other a lump sum alimony award in the event of divorce. If during the marriage the recipient squanders the other's earnings in bad faith, enforcement of the alimony term of the antenuptial agreement may result in gross inequity. The hypothetical facts are taken from *Neilson v. Neilson*, 780 P.2d 1264, 1267 (Utah Ct. App. 1989).

101. See Younger, *supra* note 8, at 1089-90; Ronald Ladden & Robert Franco, *The Uniform Premarital Agreement Act: An Ill-Reasoned Retreat from the Unconscionability Analysis*, 4 AMER. J. FAM. L. 267, 274-77 (1990); S. Christine Mercing, Comment, *The Uniform Premarital Agreement Act: Survey of its Impact in Texas and Across the Nation*, 42 BAYLOR L. REV. 825 (1990); Suzanne Reynolds, *Premarital Agreements*, 13 CAMPBELL L. REV. 343 (1991).

102. New Jersey's version of the U.P.A.A., for example, defines "unconscionable premarital agreement" as an agreement that would render a spouse without a means of reasonable support or a public charge, or that would provide a standard of living far below that which was enjoyed before the marriage. See N.J. STAT. ANN. § 37:2-32(c) (West 1988). In addition, the New Jersey statute does not link unconscionability to lack of full disclosure; instead, it lists as separate grounds for challenge involuntariness, unconscionability measured as of the time of enforcement, and lack of full disclosure, and adds lack of consultation with independent legal counsel as a separate basis of attack. *Id.* at § 37:2-38. The Maine legislature, in contrast, apparently concerned that the birth of a child to a marriage may render the terms of a premarital agreement unfair at the time of enforcement, has provided in its version of the U.P.A.A. a section voiding any agreement 18 months after the parties become parents. See ME. REV. STAT. ANN. tit. 19, § 146 (West 1992). The North Dakota statute also diverges from the uniform version by its inclusion of a section allowing a court to refuse enforcement of all or part of a premarital agreement if the court finds that enforcement "would be clearly unconscionable." See N.D. CENT. CODE § 14-03.1-07 (1991).

103. Oldham, *supra* note 84, at 778 (recommending a standard that would bar enforcement upon a showing of "a substantial and unforeseeable change in the parties' circumstances," taking into account the duration of the marriage, the wealth of the parties; and their needs, health, and earning capacities).

divorce.<sup>104</sup> Courts likewise have suggested that factual circumstances such as extreme health problems or other inability to be self-supporting should be taken into account.<sup>105</sup> In addition, commentators have urged a relaxation of the stringent public welfare test for nullifying agreements affecting spousal support.<sup>106</sup>

The policy issues raised by the U.P.A.A. are not easily resolved, and I am sympathetic with the drafters' goal of giving uniformity and certainty to the law of premarital agreements. The U.P.A.A. wisely departs from the paternalism of the older common law, and the U.P.A.A.'s "conscionability" standard, rather than the more subjective test of "fairness" found in some case law, calls for an appropriate judicial deference to private arrangements. Nevertheless, freedom of contract is not the only value at stake in premarital negotiations.

Significantly, the Act blurs the roles of procedural and substantive acceptability in Section 6. In light of society's interest in encouraging honesty and fair dealing between premarital partners, procedural fairness, encompassing voluntariness and reasonable disclosure of one's assets, obligations, and expected earnings, should be required for all premarital contracts. I would thus decouple the legal significance of unconscionability and failure to disclose under Section 6 of the U.P.A.A. In addition, the U.P.A.A. should follow those courts that require that contracting parties *knowingly* waive future property and support rights. Such a knowing waiver could be shown by consultation with independent counsel, a recitation in the agreement, or other evidence.<sup>107</sup>

The timing of the substantive review under the Act is important. The U.P.A.A. should include a substantive "conscionability" appraisal not only as of the time of execution of the antenuptial agreement but also as of the time of enforcement. Again, the policy choice is a difficult one. On the one hand, the trade-offs under a scheme that scrutinizes the effect of an agreement at the time of divorce are diminished contractual autonomy, the concomitant loss of certainty or predictability about one's affairs, and harm to the interest of the party who married in reliance on the agreement. Moreover, if the antenuptial agreement

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104. See, e.g., *Justus v. Justus*, 581 N.E.2d 1265 (Ind. Ct. App. 1991).

105. See, e.g., *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985) (prenuptial agreements will be enforced only to extent that circumstances at time of divorce are roughly what parties foresaw at time of execution of agreement); *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984).

106. Professor Judith Younger recommended, among other changes, that the U.P.A.A. call for a review of substantive fairness at the time of enforcement for all provisions, including spousal support. See Younger, *supra* note 8, at 1089-90. In an apparent misreading, Younger also recommended that the disjunctive in § 6(a) be changed to the conjunctive to better reflect the tougher standards established by case law. *Id.* at 1089. She seems to have misinterpreted the effect of the use of "or" under subsection (a): as the Uniform Act now stands, a party challenging an agreement may prevail by proving *either* lack of voluntariness *or* unconscionability plus lack of full disclosure. The substitution of the conjunctive "and" would make more onerous the challenger's burden of proof. Interestingly, Rhode Island's version of the U.P.A.A. follows Younger's suggestion, such that an agreement is enforceable unless the challenger proves lack of voluntariness *and* unconscionability *and* lack of full disclosure. See R.I. GEN. LAWS § 15-17-6 (1992).

107. A requirement of knowing waiver is familiar to the law. An informed waiver must be shown, for example, before a court may enforce an agreement through which a spouse waives beneficiary rights in the other spouse's ERISA-covered pension. See *Hurwitz v. Sher*, 789 F.Supp. 134 (S.D.N.Y. 1992) (construing 29 U.S.C. § 1055(c) (1992)); *Zinn v. Donaldson Co.*, 799 F.Supp. 69 (D. Minn. 1992). Interestingly, in both *Hurwitz* and *Zinn*, the courts ruled alternatively that an antenuptial agreement could not constitute a valid waiver of spousal beneficiary rights under ERISA, since the statute required waiver by a contemporary beneficiary, i.e., a spouse.

directed towards divorce can be easily set aside by a court, the net effect may be to discourage marriage. As noted in *Simeone*, "[p]arties would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly enforced."<sup>108</sup>

On the other hand, a substantive appraisal at divorce in light of changed circumstances accommodates the special nature of the marriage relationship and the possibility of unforeseen occurrences during the life of a marriage. A court's enforcement of an agreement that is grossly unfair in result in order to protect one of the party's reliance interest arguably commercializes and trivializes the unique status of marriage.<sup>109</sup> Moreover, if review of the agreement's terms at the time of enforcement were limited to a showing of unforeseen circumstances, the reliance argument would be less compelling. Presumably, the party challenging enforcement would not have signed the agreement had she foreseen the change in circumstance. Recognition of the doctrine of unconscionability — either at execution or at the time of divorce in light of changed circumstances not foreseen by the parties — would seem to support the state's interest in protecting parties to a marriage without unduly infringing on contractual autonomy.<sup>110</sup>

Our laws reflect a vision of marriage as a relationship of intimacy, confidentiality, and shared responsibility.<sup>111</sup> That vision logically justifies greater scrutiny of prenuptial contracts than of ordinary commercial contracts, including a substantive review at the time of enforcement. The U.P.A.A., by mandating enforcement of prenuptial agreements without regard to changed circumstances during the marriage and by diluting the traditional roles of unconscionability and full disclosure, seems to protect the contractual reliance interest above all else.

#### IV. RELATED STATUTORY POLICIES

The problematic nature of the U.P.A.A. is all the more pronounced when the Act is juxtaposed with other public policies on marriage and divorce. The

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108. *Simeone*, 581 A.2d at 166.

109. In *Simeone*, where the court adopted a strongly contractarian approach to antenuptial agreements, a dissenting judge feared that the majority had protected "the right to contract at the expense of the institution of marriage." *Id.* at 169. He explained, "I am not willing to believe our society views marriage as a mere contract for hire." *Id.* at 168.

110. In *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989), the court adopted such a standard as a matter of common law. Observing that scrutiny of antenuptial agreements for substantive fairness at the time of execution is prompted by the possibility of overreaching, the court wrote, "We ascertain no reason why courts should not extend a similar scrutiny to challenged provisions of antenuptial agreements, if the premises upon which they were originally based have so drastically changed that enforcement would not comport with the reasonable expectations of the parties at the inception to such an extent that to validate them at the time of enforcement would be unconscionable." *Id.* at 267.

111. Many legal doctrines manifest society's unique view of marriage. For example, the marital immunity and marital communications privilege in the law of evidence, see generally CHARLES McCORMICK, *McCORMICK ON EVIDENCE* §§ 78-86 (John W. Strong et al. eds., 4th ed. 1992); the marital community theory of community property law, see generally WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971); the economic sharing theory of equitable distribution law, see, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 238-39 (1987); and the proscription, albeit diminishing, of sexual intercourse outside the marital relationship, see, generally, Note, *Fornication, Cohabitation and the Constitution*, 77 MICH. L. REV. 252 (1978), give special legal recognition to the institution of marriage. Whether or not one agrees with the terms of such doctrines, one cannot deny that they create a vision of marriage that is different from other human relationships.



efforts of the N.C.C.U.S.L. in a related area of divorce law illustrates the point. The test of "unconscionability" in Section 6 of the U.P.A.A. was drawn from Section 306 of the U.M.D.A.,<sup>112</sup> governing separation agreements; but under the two uniform laws, a spouse can avoid more easily the binding effect of a separation agreement than the enforcement of a premarital agreement. Section 306 authorizes divorcing spouses to enter into agreements providing for disposition of property, spousal maintenance, and support, custody, and visitation of children.<sup>113</sup> Freedom of contract, however, is not absolute. Agreements affecting child support, custody, or visitation remain subject to judicial scrutiny under a reasonableness standard.<sup>114</sup> More significantly, a separation agreement affecting property or spousal maintenance is not binding on a court if the court finds, after consideration of the economic circumstances of the parties and other relevant evidence, that the agreement is "unconscionable."<sup>115</sup> Unlike the U.P.A.A., unconscionability under the U.M.D.A. is not explicitly tied to a failure to disclose assets. Moreover, agreements limiting spousal support are not measured by an "eligibility for public assistance" test. Instead, the U.M.D.A. authorizes courts to consider the property and support provisions in a private agreement in light of the parties' economic circumstances at divorce.

Assuming that the difference between the U.M.D.A.'s treatment of separation agreements and the U.P.A.A.'s treatment of premarital agreements is deliberate, one must ask whether the N.C.C.U.S.L. properly drew a distinction between divorcing spouses and persons about to marry.<sup>116</sup> In justifying the U.M.D.A.'s limitation on freedom to contract, the commissioners explained:

In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with *the obligations of marital partners to deal fairly with each other*.<sup>117</sup>

The contrasting approach of the U.P.A.A. suggests that persons about to marry do not have a comparable obligation of fair dealing. As noted earlier, however, the common law of most states holds married partners as well as parties contemplating marriage to a fiduciary standard.<sup>118</sup> Moreover, separation agree-

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112. See UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. 376 (1987).

113. See UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 216-17 (1987).

114. The U.M.D.A., as promulgated, is silent on the enforcement of agreements affecting child support, custody, and visitation, but the commissioners' explanation makes clear that such agreements are enforceable only in the best interests of children. See UNIF. MARRIAGE AND DIVORCE ACT § 306 cmt., 9A U.L.A. 217-18 (1987).

115. UNIF. MARRIAGE AND DIVORCE ACT § 306(b), 9A U.L.A. 216 (1987).

116. In Texas, where the U.P.A.A. has been adopted, the legislature partially avoided this difficulty by conforming the law of post-nuptial agreements to the standards of the U.P.A.A. Compare §§ 5.41-5.50 (U.P.A.A.) with § 5.55 (partition or exchange agreements) of TEX. FAM. CODE ANN (West 1993). On the other hand, the legislature left intact certain standards of fairness governing agreements incident to divorce. See TEX. FAM. CODE ANN. § 3.631 (West 1993). The law apparently remains unclear as to whether premarital agreements prescribing consequences of divorce are subject to a standard of fairness under § 3.631. See Mercing, *supra* note 101, at 858-60.

117. UNIF. MARRIAGE AND DIVORCE ACT § 306 cmt., 9A U.L.A. 217 (1987) (emphasis added).

118. In Arizona, the view of premarital partners as fiduciaries manifested itself, in part, in the rule that the party defending a premarital agreement had the burden of proof. As the court explained in *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975), the husband had the burden of showing by clear and convincing evidence that the prospective wife acted with full knowledge of the property involved and her rights in that property.

ments typically are negotiated shortly before the time of divorce, whereas premarital agreements may precede divorce by many years. In states that have adopted both the U.M.D.A. and the U.P.A.A., the divorce courts have greater authority to void a contemporaneous agreement than an agreement entered into before marriage. While the emotional stress of divorce may lead spouses to act irrationally, the emotional intensity of the decision to marry may likewise lead to irrationality. Arguably, parties contemplating divorce have more reason to act in a self-protective, self-interested, "rational" manner than do parties contemplating marriage. In short, the greater enforceability afforded premarital agreements by the U.P.A.A., as contrasted with the U.M.D.A.'s approach to separation agreements, has little in logic or policy to recommend it.<sup>119</sup>

The U.P.A.A. strikes a similarly discordant theme when compared to another feature of contemporary family law. Theories of spousal support have undergone redefinition in recent years.<sup>120</sup> In particular, two theories have emerged alongside the traditional need-based theory of permanent alimony:<sup>121</sup> rehabilitative alimony, to enable a spouse to pursue appropriate training or educational credentials,<sup>122</sup> and reimbursement alimony, to compensate a spouse for contributing to the other's educational or career opportunities during the marriage.<sup>123</sup> While much controversy surrounds the legitimacy of these theories, they are surfacing in the courts as a judicial response to compelling circumstances at the time of divorce. In some states, the legislatures have codified the new theories.<sup>124</sup> These changes

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119. Professor Sharp, who questions the trend toward contractual autonomy in marriage, has argued that the state should exercise greater supervision over separation agreements than it does over antenuptial agreements, primarily because of her assumption that parties to separation agreements are more vulnerable to overreaching than are parties to antenuptial agreements. See Sharp, *supra* note 16, at 1406. Although the emotional stress engendered by a dissolving marriage is different from that attending a prenuptial negotiation, I am not convinced that vulnerability is greater at the time of divorce. Prenuptial contracting may occur through the lens of rose-colored glasses; at the time of divorce, the illusions are gone. In a related context, one court recently observed, "[P]arties who would never agree to a divorce settlement or death settlement without the benefit of independent counsel frequently will fail to perceive the true nature and purpose of a prenuptial contract." *In re Marriage of Foran*, 834 P.2d 1081, 1089 (Wash. Ct. App. 1992).

120. Much controversy surrounds the justifications for any award of spousal maintenance today. See Ira Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989) (proposing that a theoretical justification for alimony lies in preferred divisions of responsibility within marriage); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990) (urging caution in constructing a theory of alimony to avoid relying on normative conclusions about women and childcare); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REVIEW 539 (1990) (proposing a shared income model of spousal support as a means of assuring equality at divorce).

121. In accordance with the "clean break" ideology of the U.M.D.A., spousal maintenance could be awarded only if the court found that the petitioning spouse lacked sufficient property to provide for his or her reasonable needs and that the petitioning spouse was incapable of reasonable self-support. The intention of the U.M.D.A. was to encourage the court to provide for the financial needs of the spouses at divorce by property disposition rather than by an award of maintenance. See UNIF. MARRIAGE AND DIVORCE ACT § 308 & cmt., 9A U.L.A. 348 (1987).

122. See, e.g., *In re Marriage of Morrison*, 573 P.2d 41, 52 (Cal. 1978).

123. In *In re Marriage of Olar*, 747 P.2d 676 (Colo. 1987), for example, the court rejected the argument that a professional degree was marital property but suggested that a spouse's contribution to the other's education would be relevant in a determination of maintenance. See also *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981) (suggesting alimony as a mathematical restitution for contributions toward living expenses and educational costs).

124. Before 1987, the Arizona law governing the availability of spousal maintenance tracked the approach of the U.M.D.A. In 1987, the Arizona legislature fundamentally altered the law governing

in alimony law represent, in part, an effort to protect two types of "deserving" spouses: the working spouse who has materially contributed to the schooling of the other spouse and the traditional homemaker who has not developed a reasonable earning ability over the term of a long marriage.<sup>125</sup>

The solicitude for divorced women manifested in the evolving law of spousal maintenance contrasts starkly with the U.P.A.A.'s policy of contractual autonomy. The U.P.A.A.'s "public welfare" exception to the enforceability of premarital agreements affecting spousal support looks only to absolute need and ignores other modern justifications for spousal maintenance, such as reimbursement of a spouse for contributions to the other's earning power. Under the U.P.A.A., a woman on the eve of marriage can contract away economic rights that she does not even know she has, in an agreement that won't take effect, if ever, until some unknown future time. Contemporary alimony law is a response to economic and demographic realities. In drafting the U.P.A.A., the N.C.C.U.S.L. seemed to blink at those same realities in the name of freedom of contract.

## V. CONCLUSION

The U.P.A.A. is a recasting of substantive policy on the enforceability of premarital agreements. In strengthening premarital agreements beyond the framework of many states' common law, the Act values contractual autonomy and certainty over flexibility and individualized discretion. The U.P.A.A. constrains judicial discretion and moves the law toward a "rule" of broad enforceability.<sup>126</sup>

I do not argue here for a return to the paternalism of the early court decisions that refused, on public policy grounds, to enforce any divorce-oriented antenuptial contract.<sup>127</sup> Indeed, I applaud the U.P.A.A.'s move away from that world view. I question the wisdom, however, of a move towards a pure contractual model. The U.P.A.A. rejects any inquiry into the substantive effect of a premarital agreement at the time of enforcement, except to the extent the agreement would leave one party eligible for public assistance. Moreover, the test of unconscionability established by the U.P.A.A., with its linkage to a showing of non-disclosure, may give antenuptial agreements greater binding effect than they

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the availability of maintenance. Under ARIZ. REV. STAT. ANN. § 25-319 (1991), a court may grant maintenance upon two additional grounds: a finding that the petitioning spouse has "contributed to the educational opportunities of the other spouse" or "had a marriage of long duration and is of an age which may preclude the possibility of gaining employment adequate to support himself or herself."

125. Supporters of the amendments in Arizona, for example, testified that the legislation would help many women involved in a "mature divorce" who needed to be retrained to earn a living. *Hearings on H.B. 2120 Before the Committee on Human Resources and Aging*, Arizona State Legislature, Feb. 24, 1987 (remarks of Representative Jane Hull and Ms. Ann Howard).

126. To the extent my characterization is accurate, the U.P.A.A. represents a move that is counter to the burgeoning role of discretion in American law. See generally P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1980); Carl Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best Interest Standard*, 89 MICH. L. REV. 2215 (1991). See also Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209 (1991) (arguing for a decrease in judicial discretion in family law matters because of the demonstrated success of child support guidelines).

127. See, e.g., *Williams v. Williams*, 243 P. 402 (Ariz. 1926), discussed *supra* at note 41.

would have under ordinary contract principles.<sup>128</sup> Concomitantly, the U.P.A.A. dilutes the traditional requirement of full disclosure. In so doing, the Act announces that disclosure of one's financial circumstances to a prospective spouse is not essential if the agreement itself was not so unfair at the time of making as to satisfy a standard of unconscionability.

The U.P.A.A.'s partial abandonment of common law principles becomes more noteworthy in light of its inconsistency with existing policies in related areas of family law. Although family law today tolerates a greater degree of private ordering than in the past,<sup>129</sup> the states nevertheless have retained an active role in regulating the consequences of divorce. That role is evident in judicially-created and statutory protections for the divorcing spouse in a variety of circumstances. Such provisions of state law implicitly recognize the contributions of both spouses to a marriage, acknowledge the mutual responsibility of marriage partners, and protect the dependent spouse from an unfair settlement at divorce.

The U.P.A.A. elevates contractual autonomy above notions of responsibility and contribution. 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. State legislators considering adoption of the U.P.A.A. should carefully examine the operation of Section 6 and compare it to the relevant common law. They should be aware that numerous adopting states have softened the contractarian terms of Section 6.<sup>130</sup> Finally, they should look beyond the objective, gender-neutral language of the Act to the probability of its uneven impact on the lives of divorcing men and women.<sup>131</sup>

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128. See Recent Developments, *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), 104 HARV. L. REV. 1399 (1991) (arguing that the familiar contract doctrine of frustration, among others, justifies assessing the substantive fairness of prenuptial agreements, both at the time of execution and at the time of divorce).

129. The move to no-fault divorce is perhaps the most salient example of the law's receptivity to private will. On the virtues of private ordering at divorce, see generally Mnookin, *supra* note 18.

130. At least seven of the eighteen adopting states have opted for a less rigorous approach to enforceability. See VA. CODE ANN. § 20-151(A)(2)(1992) (relaxing burden of proof regarding nondisclosure); N.J. STAT. ANN. § 37.2-38 (West Supp. 1991) (preserving unconscionability and nondisclosure as independent grounds for challenge); IOWA CODE ANN. § 596.8 (1991) (same); NEV. REV. STAT. § 123A.080 (Supp. 1991) (same); ME. REV. STAT. ANN. tit. 19, § 146 (1987) (requiring reconfirmation of premarital agreement in the event of birth of child); ILL. COMP. STAT. ANN. ch. 750, § 10/7 (Smith-Hurd 1993) (substituting standard of "undue hardship" for "eligibility for public assistance" test of U.P.A.A.).

131. The risk of minimal legislative scrutiny of the U.P.A.A. is high. State lawmakers are apt to accept the N.C.C.U.S.L.'s representations that the Act is a step toward greater national uniformity and is in line with existing common law. Moreover, because the U.P.A.A. does not explicitly disadvantage a particular group, no counter-lobby is likely to surface. The strong pro-enforcement stance of the U.P.A.A. becomes apparent only on a close reading, and that stance won't necessarily operate to the detriment of a single population subgroup. Indeed, because the U.P.A.A. presumably applies only to agreements executed after its effective date, see UNIF. PREMARITAL AGREEMENT ACT § 12, 9B U.L.A. 380 (1987), its teeth will only be felt if and when those agreements become subject to enforcement at divorce.