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Faith H. Spencer
Faith.Spencer@chicagounbound.edu

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Expanding Marital Options: Enforcement of Premarital Contracts During Marriage

Faith H. Spencer†

Premarital agreements, though generally enforceable once a marriage is dissolved, are not enforced while the marriage is still intact.¹ The legal ordering of marriage is typically seen as a beginning or an end: The state involves itself only at initiation or divorce. The refusal to adjudicate differences between husbands and wives during marriage has been referred to as an “axiom” of family law. This broad assertion that the state will not become involved while a marriage is intact conceals a number of assumptions about the structure of marriage and the methods of dispute resolution within marriage. To say that the state is not “involved” is inaccurate; more precisely, the state chooses to involve itself only in certain ways.

This comment proposes a regime, which may be termed “marital freedom of contract,” under which parties to a marriage are governed by the terms of a private agreement, enforceable at any time in a court of law; the state's terms for marriage are considered merely default provisions. The purpose of this comment is not to argue that premarital agreements are appropriate for all marriages. Rather, it is to propose that people should be free to reject the state definition of marriage, describe marriage in their own terms, and be afforded a forum in which to resolve disputes that arise under their agreements.

Today, changing conceptions of the roles of men and women, and of the institution of marriage, suggest that the state should relinquish its monopoly on the terms of marriage—terms which may not reflect these changing conceptions. Premarital agreements allow prospective spouses, based on their own aspirations for their marriage, to shape and make explicit their obligations to one

† B.A. 1985, Stanford University; J.D. Candidate 1990, University of Chicago.

¹ Premarital agreements are also known as prenuptial or antenuptial agreements. This comment will use the term “premarital agreement.” While the term “antenuptial” seems prevalent in the legal literature, “premarital” is the term by which these agreements are most commonly understood. It is also the term adopted by the Uniform Premarital Agreement Act.
another.

This comment is specifically limited to a discussion of premarital contracts between men and women in uncontroversial marital relationships. It will demonstrate that premarital agreements may be effectively enforced during marriage. Part I argues that, before the law, marriage can easily be conceived as a contractual rather than a status-based relationship. Part II surveys the use and enforcement of premarital contracts as a means of dividing and distributing property at the death of a spouse or at divorce rather than during the life of the marriage. Courts consistently prefer not to intervene in ongoing marriages for a variety of reasons, many of which are outmoded and indefensible. In response to the arguments most often advanced in opposition to enforcement of these agreements during marriage, Part III highlights the benefits of a marital freedom of contract regime. Part IV illustrates how this nontraditional regime can be effectively and equitably enforced by courts using traditional contract doctrines.

I. MARRIAGE AS CONTRACT

The premise of the argument for the marital freedom of contract regime, though controversial, is that marriage is indeed a contractual relationship. Whether marriage is best described as status or as contract is the subject of continuing debate. Characterization of marriage as exclusively status or as purely contract arguably ignores the legal contours of contemporary marriage. It seems more accurately described today as a combination of status and contract which, ironically, lacks the benefits of both. As explained by Pro-

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2 Viewed from a purely contractual standpoint, "marriage" could include, for example, homosexual unions which the state currently does not recognize. However, this comment does not challenge the existing restrictions on the number, age, sex, or blood relation of the marital parties. For such an analysis, see Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal L Rev 207, 226 (1982). In addition, the contract model advanced by this comment may in reality apply to only a limited class of marriages, such as second marriages or marriages between couples holding significant financial resources. See, for a discussion of the increasing numbers of second and third marriages with premarital agreements, Ira H. Lurvey, Premarital Agreements: An Ounce of Prevention—and a Pound of Subsequent Battling (Some Tips and Pitfalls on an Emerging Trend), 1 Am J Family L 199 (Summer 1987). However, given careful thought and planning, couples in first marriages and with limited financial resources could benefit from premarital agreements as well. Furthermore, this comment will not address issues concerning children as they may affect premarital agreements. The interaction of state policies toward marriage with state interests in the welfare of children is an important issue, but beyond the scope of this comment.

3 Harry D. Krause, Family Law, Cases, Comments and Questions 79 (West, 1983).
Professor Lenore Weitzman:

Marriage has not moved from status to contract. It has not changed from a relationship based on status—in which rights and obligations flow from one’s position—to a contractual relationship in which rights and obligations are freely negotiated by the parties. Rather, marriage has moved from a status to a status-contract. That is, while the individuals who enter marriage have the same freedom of choice that governs entry into other contractual relations, once they make the decision to enter, the contract analogy fails, because the terms and conditions of the relationship are dictated by the state. The result is that marital partners have lost the traditional privileges of status and, at the same time, have been deprived of the freedom that the contract provides.4

She concludes, moreover, that a move toward a more pure contract model of marriage would eliminate many of the anachronistic features of modern-day marriage.5

Professor Marjorie Shultz explored the implications of the contractual ordering of marriage and also suggests the privatization of marital relations. She proposes that the state, in response to contemporary demands on marriage, leave the definition of most substantive marital rights and obligations to private parties and intervene only to the extent necessary to “resolve disputes arising under the privately created ‘legislation.’”6 According to Professor Shultz, and Professor Weitzman, as the social consensus on the meaning of marriage has seriously eroded, the state has relin-

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5 Id at xxi.
6 Shultz, 70 Cal L Rev at 212 (cited in note 2). Professor Shultz selected this method of regulation from a list of several:

- **Option One:** The state might prescribe the substance of the relationship and also act as an adjudicator of disputes arising out of those substantive directives.
- **Option Two:** The state might establish the substantive rules of marriage, but refuse any enforcement or dispute resolution between spouses in regard to those rules.
- **Option Three** [which she recommends]: The state could leave most substantive marital rights and obligations to be defined privately, but make the legal system available to resolve disputes arising under the privately created ‘legislation.’
- **Option Four:** The state might minimize both roles, refusing to prescribe conduct within marriage or to resolve marital disputes.

Id.
quished much of the control it once exerted over marriage. Thus, it is not a significant departure from current regulation of the institution for the state to permit parties to a marriage to define the terms of their union.

Nor would the enforcement during marriage of agreements containing these terms require a departure from accepted principles of contract. Professor Shultz predicts that “[e]xisting legal doctrines should resolve many of the anticipated issues” in enforcement. Such issues may require public policy exceptions; however, according to Professor Shultz, these can be “... carved out from the arena of private ordering or public dispute resolution” and can be “developed ... through ... the evolving wisdom of common law adjudication.” Thus, common law strictures are adaptable not only to the characterization of marriage as contract, but also to the enforcement of marital obligations as contractual terms.

II. CURRENT USE AND ENFORCEMENT OF PREMARITAL CONTRACTS

A. Premarital Contracts Pertaining to Death or Divorce

Premarital agreements are valid and enforceable in certain circumstances. Property arrangements between prospective spouses historically have been accepted at common law as a way of altering the marital property regime. In the United States, premarital agreements have long been recognized as affecting the division of property on the death of a spouse, replacing the state-prescribed terms on the division of estates.

More recently, courts generally have enforced premarital agreements regarding property and support arrangements at divorce. A 1970 Florida Supreme Court decision, Posner v Posner, marked the first judicial rejection of the long-held assumption that premarital contracts regulating divorce were void as against public policy. The arguments used to nullify such agreements included:

8 Shultz, 70 Cal L Rev at 332.
9 Id.
that they promoted divorce;\[^{13}\] that they commercialized marriage;\[^{14}\] or that they turned dependent spouses into public charges.\[^{15}\] The advent of no-fault divorce and the corresponding increase in the numbers of divorces effectively unraveled the first argument. Since divorce is now viewed as a common occurrence, premarital contracts today may be perceived as not undermining marriage, but as reinforcing it.\[^{16}\] Concerns about "commercializing" marriage have virtually disappeared.\[^{17}\] The argument relating to the potentially dependent spouse, however, does continue to play a role in courts' formulation of divorce provisions.\[^{18}\]

In sum, most jurisdictions recognize premarital agreements regarding the surviving spouse's share in the deceased spouse's estate, homestead rights, exempt property and family allowances, though a few limit these arrangements on the basis of public policy.\[^{19}\] Courts are more reluctant to enforce premarital agreements controlling disposition of property and support obligations at divorce—again on the basis of public policy concerns\[^{20}\]—though a growing number enforce such contracts\[^{21}\] subject to some

\[^{13}\] The general idea was that marriage was forever, and the law should not permit anything that made divorce easier. See Annotation, Validity of antenuptial agreement, or "companionate marriage" contract, which facilitates or contemplates divorce or separation, 70 ALR 826, 827 ("An antenuptial contract limiting the husband's liability to a certain sum in case of separation invites disagreement, encourages separation, and incites divorce proceedings, thereby tending to overthrow and destroy those principles of the law of marriage requiring that the husband and wife live together during their natural life . . . ").


\[^{15}\] Fricke v Fricke, 257 Wis 124, 42 NW2d 500, 502 (1950).

\[^{16}\] Void v Void, 6 Ill App 3d 386, 86 SE2d 42, 46 (1972) ("[i]t may be equally cogently argued that a contract which defines [and protects the financial] expectations . . . of the parties promotes rather than reduces marital stability").

\[^{17}\] Few courts mentioned the fear of commercialization of marriage through the use of premarital agreements. See, for glimpses at this rationale, Motley, 120 SE2d at 424; Ritchie, 35 SE2d at 415. The most that can be said for this argument is that it illustrates courts' attempts to quickly and superficially dispose of contracts dealing with marital relations.

\[^{18}\] See, for an example of a recent adoption of this rationale, Uniform Premarital Agreement Act § 6(b), 9B ULA 369 (Nat'l Conf of Commissioners on Uniform L, 1983) (providing that a court may order support whenever a provision of a premarital agreement causes one party to "be eligible for support under a program of public assistance").

\[^{19}\] See, for example, In re Estate of Meyers, 709 P2d 1044, 1047 (Oka 1985) (premarital agreement may waive spouse's right to homestead and widow's allowance if there are no minor or dependent children). For a summary of the requirements in specific jurisdictions, see Younger, 40 Rutgers L Rev at 1066 n 40 (cited in note 11).

\[^{20}\] See, for example, In re Marriage of Feisthamel, 739 P2d 474, 477 (Mont 1987) (provision in premarital agreement stipulating that property owned by the parties at the time it was executed could not be considered by a divorce court in awarding support declared void as against public policy).

\[^{21}\] See, for example, Osborne v Osborne, 384 Mass 591, 428 NE2d 810, 815 (1981) (advo-
B. Legislative Bases for Premarital Contracts

The rising popularity of premarital contracts has attracted significant legislative attention. To date, fourteen states have adopted a version of the 1983 Uniform Premarital Agreement Act ("UPAA"). This model act defines premarital agreements as "agreement[s] between prospective spouses made in contemplation of marriage and to be effective upon marriage," and sets forth eight subjects upon which the parties may contract. Six of these concern property and support rights, one concerns choice of law governing construction of the agreement, and the last provides for agreement on "any other matter, including [the parties'] personal rights and obligations, not in violation of public policy or a
cating "tolerant approach" toward premarital contracts setting property rights of the parties in the event of divorce). For a summary of cases, see Younger, 40 Rutgers L Rev at 1069 n 52 (cited in note 11).

States are divided on the ability of spouses to alter support obligations on divorce by premarital agreement. California did not adopt the portion of the Uniform Premarital Agreement Act which lists modification or elimination of spousal support as a subject for agreement. See Cal Civ Code § 5312. See also Gross v Gross, 11 Ohio St 3d 99, 464 NE2d 500, 510 (1984) (striking down maintenance provision for wife of $200 per month according to premarital agreement).


§ UPAA § 1(1).

§ 3(a) of UPAA provides, in relevant part:

Parties to a premarital agreement may contract with respect to:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the right to buy, sell, use, transfer, . . . dispose of, or otherwise manage and control property;

(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) the modification or elimination of spousal support;

(5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(6) the ownership rights in and disposition of the death benefit from a life insurance policy . . . .

UPAA § 3(a)(7).
statute imposing a criminal penalty." According to one commentator, "it is this [last] provision that provides the flexibility the drafters believed was essential for modern marriages."

The UPAA also provides guidelines for the enforcement of premarital agreements. For example, it explicitly forbids enforcement of agreements which effectively force one party to resort to public assistance at dissolution of the marriage, and carefully delineates the conditions under which a party may declare an agreement void. However, the Act is notably lacking any discussion of enforcement of agreements regarding "any other matter, including personal rights and obligations." Parties are therefore not forbidden by the UPAA from contracting over terms of the ongoing marital relationship and, arguably, are implicitly permitted to do so.

27 UPAA § 3(a)(8).
29 UPAA § 6(b) provides:
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.
30 Under UPAA § 6(a), a premarital agreement is not enforceable if the party challenging the contract shows 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.

The Act also states that "unconscionability," as used in § 6(a)(2), is to "be decided by the court as a matter of law." UPAA § 6(c).
31 The comments to the UPAA are also silent as to the enforcement of this open-ended provision. One commentator suggests that for this reason the provision should be eliminated altogether. Younger, 40 Rutgers L Rev at 1089 (cited in note 11). This omission need not be fatal, however; as legislatures become aware of the demand for agreements concerning ongoing marriages, they may add guidelines to aid courts in what should be a contractual interpretation of these agreements. Lacking guidance from the legislature, courts can turn to ordinary contract principles for interpretive tools. The official comment to § 6 of the UPAA notes that "[n]o special provision is made for enforcement of a premarital agreement 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" (citing Avitzur v Avitzur, 446 NE2d 136 (1983)). See also discussion in Section IV.
C. Judicial Treatment of Premarital Contracts in the Context of an Intact Marriage

While the language of premarital agreements does not always confine their applicability to the termination of marriage, courts consistently refuse to adjudicate disputes between parties to an intact marriage. In *McGuire v McGuire,* for example, a wife sued to force her husband to provide her with adequate money for household expenses. The court reasoned that, although at common law a husband has a duty to support his wife, this duty is not enforceable so long as the parties are still married and living together. The court concluded that the continuation of the marriage gave rise to a presumption of support:

The living standards of a family are a matter of concern to the household, and not for the courts to determine... as long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. Public policy requires such a holding.

At least one court has further stated that the husband may dictate the expenditure of this support. In *Commonwealth v George,* a wife unsuccessfully petitioned the court to order her husband to give her money each month for running the household. The court considered it the husband's right to determine how "his" money should be spent.

Monetary support is not the only issue with respect to which courts have refused to intervene during the life of a marriage. Another is the parties' choice of domicile. The court in *Isaacs v Isaacs,* for example, stated that while premarital agreements may alter the interests that either the husband or wife take in the property of the other, such contracts may not vary the terms of the "conjugal relation"—the personal rights and duties of husband and wife. Before the Isaacs married, they agreed to live in Ohio. After the marriage, however, the husband did not honor his agree-
ment and the wife subsequently sued for desertion. The court, noting that the choice of domicile was the husband's, declined to enforce the agreement and concluded that Mrs. Isaacs demonstrated not "the faintest conception of her marital duties" by refusing to follow her husband.39

Courts have also viewed premarital agreements as inherently subversive and threatening to the sanctity of the marital institution. For instance, in Mirizio v Mirizio,40 the court stated that "public policy on such a vital matter as the marriage contract should not be made to yield to subversive private agreements and personal considerations."41 In Motley v Motley42 the court declared a premarital contract relieving the husband of support obligations void as against public policy, warning that the institution of marriage must not be transformed by private agreements into a commercial enterprise.43 And in Kilgrow v Kilgrow,44 the court's refusal to recognize a premarital agreement was rooted in a rather romantic and idealistic view of marriage. Without looking at the merits of the parties' agreement, the court summarily dismissed the case, noting that:

Intervention, rather than preventing or healing a disruption, would quite likely serve as a spark to a smouldering fire . . . . One spouse could scarcely be expected to entertain a tender, affectionate regard for the other spouse who brings him or her under restraint. The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship, and usually voices the hope that the breach may somehow be healed by mutual understanding between the [parties] themselves.45

In general, courts have steadfastly refused to become involved in intact marriages by enforcing contracts altering the terms of the marital relationship. Only one case, Sanders v Sanders,46 offers an example of judicial intervention in an ongoing marriage. In Sanders, two former spouses who had been married to each other twice

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39 Id.
40 242 NY 74, 150 NE 605 (1926).
41 150 NE at 609. The court further opined that marriage is a "relationship [that] shall exist with the result and for the purpose of begetting offspring." Id at 607.
42 255 NC 190, 120 SE2d 422 (1961).
43 120 SE2d at 424, quoting Ritchie v White, 225 NC 450, 35 SE2d 414, 415 (1945).
44 268 Ala 475, 107 S2d 885 (1958).
45 107 S2d at 889.
before signed a premarital contract prior to their third marriage. The agreement provided for joint holding of all property and for the execution of a joint will naming each party the beneficiary of the other.\textsuperscript{47} In a dispute over the validity of the contract, occurring after the parties' third marriage, the court held the agreement enforceable and ordered the husband to convey the property and execute the will as agreed.\textsuperscript{48} The court appeared to be swayed by the importance of protecting and enforcing the rights of the parties, and of respecting a contract that was fairly negotiated.\textsuperscript{49} Still, the precedential force of Sanders in cases involving premarital agreements concerning obligations of parties to an ongoing marriage may be limited; the case is distinguishable as involving an agreement that concerned property rights, not the day-to-day conduct of the relationship.

In considering why courts generally have not become involved in ongoing marriages, one can identify three main concerns that have been articulated explicitly, and infer some unstated assumptions. First, at common law, a woman lost her legal identity when she married and became part of a single legal entity with her husband. This forfeiture of the woman's legal identity had a number of implications, including: interspousal immunity for tort; the inability of the wife to contract with third parties; the husband's entitlement to his wife's property and, in the event of separation, to the couple's children.\textsuperscript{50} While most of the legal disabilities once suffered by married women have been removed, it is probable that the conception of husband and wife as a single unit still remains. For example, the "public policy" referred to by the McGuire court,\textsuperscript{51} forbidding spouses from bringing disputes prior to the dissolution of marriage, may well be rooted in the common law notion of husband and wife as a legal unity.

Second, courts generally prefer that parties to a marriage work things out themselves. The court in Kilgrow hoped that the "breach may somehow be healed by mutual understanding . . ."\textsuperscript{52} The assumption here seems to be that the intimacy of marriage compels different treatment from other relations between people

\textsuperscript{47} 288 SW2d at 474.
\textsuperscript{48} Id at 480.
\textsuperscript{49} Id at 479 ("[t]here is no intimation in the record that the contract was not executed in good faith by the parties in the belief that it was valid in all its provisions . . . [t]he general rule in this state that the law favors the protection and enforcement of rights").
\textsuperscript{50} Weitzman, \textit{The Marriage Contract} at 1-3 (cited in note 4).
\textsuperscript{51} See p 288.
\textsuperscript{52} Kilgrow, 107 S2d at 889.
and renders judicial intervention inappropriate. Accordingly, the court's objective is to force marital disputes into some other forum—the home.

Third, courts fear that their intervention will exacerbate marital problems. It is assumed that, by bringing disputes into court, parties will "disrupt" the marriage and hasten its end, thereby frustrating the policy preference for encouraging and protecting marriage.44

Fourth, judges may have been, and may still be, motivated by a desire to preserve the traditional family structure as a patriarchal, male-dominated institution. Unquestionably, whether or not it was stated explicitly, decisions which advocated judicial noninvolvement in marriage upheld male power within marriage.6 Unconsciously or unconsciously, judges have been reluctant to upset one of the most basic forms of subjugation of women by men, that of the marriage relationship. This fear seems particularly obvious in Mirizio, where the court warned against "subversive private agreements;" contractual alterations to the terms of marriage have been perceived as too threatening to the empowerment of men in marriage.

Fifth, a number of courts presupposed "traditional" roles for the husband and wife: The wife provides nonpecuniary services in maintaining the household while the husband supports her finan-

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43 Id ("Intervention, rather than preventing or healing a disruption, would quite likely serve as a spark to a smoldering fire.")

44 See, for example, id ("[i]t may well be suggested that a court of equity ought to interfere to prevent such a direful consequence as divorce or separation, rather than await the disruption of the marital relationship").


46 See, for example, Commonwealth v George, 358 Pa 118, 56 A2d 228, 230 (1948) ("that the wife is not receiving that degree of control over her husband's income to which she feels entitled does not establish 'neglect' within the meaning of the law"); Isaacs v Isaacs, 99 NW 268, 270 (Neb 1904) ([p]laintiff wife was "silly" to think that the premarital agreement determining domicile was valid; "the general rule is that the domicile of the wife follows that of the husband").

47 See Catharine A. MacKinnon, Feminism Unmodified 96-97 (Harvard University Press, 1987) (arguing that the state, by "staying out of marriage and the family" under the guise of respecting privacy, "subordinate[s] women's collective needs to the imperatives of male supremacy"); Andrea Dworkin, Intercourse 158 (The Free Press, 1987) (claiming that "marriage is the legal ownership of women" by men).

48 See p 289.
cially. The decision in *Isaacs* typifies this conception of the husband as breadwinner and wife as helpmate. Furthermore, courts generally have discounted the economic value of women's contributions to the family. The court in *George* considered the husband's earnings exclusively his own, rather than a partnership pool to which the wife was equally entitled.

One court, in a relatively recent decision, ignored the conventional arguments against enforcing premarital agreements during marriage. In *Avitzur v Avitzur*, the court enforced an arbitration clause included as part of a couple's agreement prior to marriage. The couple had stipulated in its contract that a religious tribunal would have authority to resolve disputes between them in the event of separation. The husband, however, refused to honor his promise to appear with his wife at the tribunal, as required under the arbitration clause of the contract. The court, without passing on what the tribunal might decide, held that the husband must appear before the tribunal as stipulated in the premarital agreement.

Although *Avitzur* might be cited as an example of new-found judicial willingness to intervene in an ongoing marriage, such an interpretation must be approached with caution. First, the judge in *Avitzur* merely enforced the order of an arbitrator. The holding cannot be read, therefore, as encouraging parties to bring unresolved marital disputes before a court. Second, the dispute concerned the dissolution of the marriage rather than its continuation. Nevertheless, this case might represent an increased recognition by at least some courts of private ordering within marriage and an openness to different methods of resolving marital disputes.

Indeed, policy reasons favoring enforcement of contracts during marriage exist and should supersede those invoked by courts in denying such enforcement. As noted earlier, one rationale used by courts to stay out of marriage stemmed from a now-outmoded legal conception of the institution—that is, viewing the husband and wife as a single entity. The passage in the late nineteenth century...

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69 See pp 288-89
70 See p 288.
72 446 NE2d at 139.
of Married Women’s Property Acts in many states, granting married women the right to contract, sue and be sued, undermined this conception. These acts granted married women greater freedom to deal with third parties without the consent of their husbands. Since that time, the independent legal identities of men and women, regardless of marital status, have continued to grow. Thus, today such agreements between spouses are subject to challenge not because the parties are legally incapable of contracting, but rather because the subject of the contracts “change some essential incident of the marital relationship in a way detrimental to the public interest.”

It is hard to see, however, how premarital agreements operate to frustrate public policy by their very terms. Such contracts do not replace state regulation of marriage, but only modify some of its terms according to the parties’ wishes.

The second argument courts use against enforcement—that marital disputes belong in some forum other than a court, such as before a marriage counselor—is also flawed. Critics of judicial handling of marital disagreements might contend that a court is ill-equipped to handle issues of a psychological or emotional nature. While this may be true, courts nonetheless are designated the arbiters of disputes of nearly every variety, whether or not they can be discussed in purely objective terms. In any event, only parties who have made specific contracts will bring disputes to court. The enforcement of premarital contracts does not mean that on the spur of the moment, in a fit of anger, any disgruntled husband or wife will approach the court to resolve a problem; rather, he or she will ask the court to interpret the terms of a contract. Courts are well-equipped to do this.

Perhaps implicit in the argument that courts are not the proper forum for such disputes is an assumption that marital disagreements are not important enough to warrant the time and expense they consume. This assumption fails to acknowledge that the enforcement of any contract expends judicial resources. Thus, pre-

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46 Restatement (Second) of Contracts § 190 (ALI 1981).
47 Unless, of course, the contract includes provisions for sexual services or illegal activities. See Marvin v Marvin, 122 Cal App 3d 871, 557 P2d 106, 112 (1981) (“a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services”).
48 Examples of such disputes include actions for wrongful death, loss of consortium and infliction of emotional distress.
marital contracts cannot be distinguished from other contracts on this basis.

There is, however, a compelling reason to distinguish premarital agreements from other contracts: The state considers marriage an important institution which deserves protection. In view of this policy preference, courts have a compelling reason to become involved in marriage before it has reached the point where it must be dissolved. With rising divorce rates, and disturbing studies on the impact of divorce on children of divorced parents, it behooves the state to explore alternatives which might help marital partners resolve differences. Statistics further indicate that divorced women suffer systematic economic disadvantages. If courts indeed are concerned about women becoming dependent on state subsidies and to the extent that marriage is desirable for reasons of economic stability, the state should encourage any policy which may allow marriage partners to resolve differences without resorting to divorce.

A third objection to enforcement of premarital contracts centers on fears that judicial involvement will doom shaky, but intact, marriages to divorce. This argument fails due to the presumed consensual nature of premarital contracts. If parties make such agreements with full knowledge that they are judicially enforceable, there is no reason to believe that their ultimate enforcement will "break up" a happy marriage. There is always the possibility that the marriage may disintegrate after judicial enforcement of a premarital contract, but it does not follow that this probability would be any higher than in the absence of enforcement. Judicial enforcement of marital terms may not appeal to every couple considering marriage; however, courts should not impose their personal preferences or their assumptions about others' preferences on parties who choose to use the courts for dispute resolution.

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101 See p 285.
102 This comment assumes that both parties to the contract have equal bargaining power and full knowledge. Objections to this assumption are based on the assertion that women, in negotiating premarital agreements, in fact suffer from unequal bargaining power. Thus, the argument goes, women may not enter these agreements voluntarily because they are ill-matched in economic terms; in other words, they are economically and socially incapable of choosing marriage, much less dictating the terms of a marriage.
103 Professor Shultz explores the role of conflict management and public dispute resolution in marriage, arguing that intimate relationships are open to far greater negotiation than in the past when there was a more coherent social consensus on the meaning of marriage.
The additional possibility that courts, by not enforcing premarital contracts, maintain (whether consciously or unconsciously) the superior position of men within marriage is unacceptable. Courts should be vigilant, rather than acquiescent, when confronted with any position that might perpetuate prescribed and limited roles of men and women within marriage, particularly if the state wishes to encourage marriage. Marriage will not be considered by women an attractive institution if it is perceived as outdated and constrictive of their freedom.  

Finally, in order to avoid interfering with ongoing marriages, courts assume that most marriages will follow the pattern of the husband as breadwinner and the wife as the caretaker of the home and, therefore, that it is unnecessary to alter the traditional duties of the partners. If, as is often the case today, the husband and wife both work outside the home and contribute income, this assumption ignores a host of reasons why parties might want to make specific arrangements about finances or other matters.

A more severe criticism of this attitude is that it implicitly devalues the work women do in the home. In the past, husbands working outside the home were considered to be doing “real” work; the money they earned was theirs to spend, even in the realm of household expenditures, generally considered women’s domain. Since we now not only recognize the economic value of housework, but do not assume that it is a woman’s duty, women who

For many reasons, contractual ordering may help to clarify the relationship for the parties; the contract thus replaces social institutions such as churches, which once played a larger role in defining and enforcing marital obligations. Shultz, 70 Cal L Rev at 307-28 (cited in note 2).

74 “Fostering equality between the sexes, maximizing individual freedom of choice for men and women . . . and helping to insure that both have equal opportunity to develop their respective potential without being hindered by sex-stereotypic or otherwise unjustifiable limitations should be among the objectives of American family law both in theory and as applied.” Lauerman, 56 U Cinn L Rev at 493 (cited in note 55). Of course, given inequalities in the job market and the inevitable deterioration of women’s economic and social status after the failure of a marriage, the institution may remain attractive despite the inherent inequalities. See Mary E. Becker, Politics, Differences and Economic Rights, 1989 U Chi Legal F 169 (for a discussion of gender inequalities in the job market); see generally Weitzman, The Divorce Revolution (cited in note 70) (for an exploration of the effect of divorce on women’s economic status).

75 Furthermore, the assumption of the Mirizio court that children are the main reason for marriage is outdated, particularly with respect to successive marriages between older partners. See note 40 and accompanying text for discussion of the rationale in Mirizio.

76 Commonwealth v George, 358 Pa 118, 56 A2d 228, 230 (1948); Dobash and Dobash, Violence Against Wives at 127-28 (cited in note 55).

manage the household are just as much candidates for premarital contracts as those who work outside the home.  

III. THE BENEFITS OF ENFORCING PREMARITIAL CONTRACTS

Powerful reasons compel the enforcement of premarital agreements, the most important of which is to provide men and women—but especially women—more freedom within marriage. A legal document may make a woman’s insistence on not occupying a socially-prescribed role in the marriage more clear to her prospective spouse. In addition, a contract specifying the parties’ respective obligations to each other might check the problem of marked behavioral changes that are triggered by marriage. Often, the man is much more deferential to the woman’s wishes before marriage than he is after.

The institution of marriage serves as an important component of social organization. Not only does society put pressure on people to marry but in many respects it stigmatizes unmarried people. In view of the increasing numbers of people who object to traditional marital roles, if marriage is to remain a building block of society parties who choose to marry should be allowed to do so

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78 Professor Lauerman suggests that the full-time homemaker is the woman who most needs a premarital agreement, though she focuses most attention on the influence of the agreement on the woman’s position at dissolution of the marriage. No-fault divorce laws may leave women a “Hobson’s choice”: They either must invest in a career, or choose full-time mothering, with the possibility that the latter choice may work seriously to their detriment. The choice of motherhood is legitimate, and should be respected, not punished by the law. Lauerman, 56 U Cinn L Rev at 510-11 n 66-67 (cited in note 55).

79 Clearly, a woman could also choose to assume a traditional role in the marriage. However, given social mores, a premarital agreement which merely assigns such a role seems unnecessary, unless the couple wishes to assign it monetary value.

80 Dobash and Dobash, Violence Against Wives at 82 (cited in note 55) (“[t]he patterns during these three stages in the development of the couple’s relationship [activities prior to marriage, during the first year of marriage, and throughout the remaining years of married life] illustrate quite dramatically how the woman is increasingly isolated, controlled and restricted as the relationship becomes more permanent and as she takes on the status and responsibilities of a wife”).

81 In the realm of trusts and estates, for example, default provisions in statutes controlling the testamentary disposition of property focus on the decedent’s surviving spouse. See generally Uniform Probate Code § 2 (National Conference of Commissioners on Uniform State Laws, 1982).

82 Jennifer Jaff, Wedding Bell Blues: The Position of Unmarried People in American Law, 30 Ariz L Rev 207, 214-19 (1988) (noting that the law’s bias toward marriage discourages unmarried people from having children, including the adoption of children; federal public housing regulations and local zoning ordinances requiring single-family dwellings may work against unmarried people by preventing them from establishing a shared home; social security laws distinguish beneficiaries on the basis of marriage; beneficiaries of intestate succession are determined by marital status).
on their own terms.

Two examples of possible premarital contracts containing provisions enforceable during marriage will help illustrate the regime in which parties determine the terms of their marriages. In the first example, Fred and Sally, both college graduates, form a premarital agreement. Each is considering a graduate degree; each values home and family. They agree that, at the outset, Sally will manage the home while Fred pursues a career as a business executive. Fred plans to work for a few years before attending business school; during that time Sally may pursue graduate work, or she may work also. When Fred returns to business school, if there are no children Sally will work to help support the couple. If Fred and Sally have children by that time, Sally will continue her care of them at home.

The couple also agrees that all earnings of either partner are divisible in half. Neither one is bringing any significant property into the relationship. The value of either spouse's full-time contribution to the home is a function of the other's earnings; in other words, if Fred works while Sally takes care of the home, she is entitled to half his salary. After dividing the salary, Fred and Sally will contribute equal amounts to the household expenses. These expenses include the repayment of educational loans of both partners, regardless of any disproportionality in the indebtedness of the partners. Fred and Sally also agree to make equal contributions to a fund for the children's college education, in an amount agreed upon mutually. Purchases of real property, or any purchase for the home in excess of $5000 require the consent of both partners, and contribution to such purchases is to be made jointly. Sally is assigned the main purchasing responsibility for the family, subject to the above limit. Family vacations are to be planned and paid for according to this same system.

Any money that Fred and Sally have left after payment of household and other expenses is theirs to dispose of as they please. They may choose, for example, to make joint investments, use the money to help their respective families or spend it on personal items.

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83 These examples assume a jurisdiction which has adopted UPAA. For a discussion of the enforcement provisions and limitations on enforceable contracts under UPAA, see pp 286-87. As noted earlier, not all married couples will wish to form premarital agreements for the conduct of their marriages. These illustrations merely suggest situations in which premarital agreements might be desired by the parties.

84 Assume that the agreement is verified by attorneys selected independently by each spouse and is also devoid of any traces of unconscionability, fraud or duress.
Fred and Sally’s agreement also provides for separate ownership of any property either of them may inherit. They further agree that each will make a good faith effort to resolve disputes arising in their marriage but not covered by the premarital agreement. If their own efforts fail, they must seek marriage counseling. They agree to a period of trial separation of six months before either partner sues for divorce.

The conditions of their contract are enforceable, according to its terms, in a court of law. If, for example, either partner makes an unauthorized purchase, the other can seek a court order making that partner solely liable for the cost. Fred or Sally may also seek a court order if either fails to make the proper contribution to joint purchases, household expenses or other delineated items.

Under the terms of this contract, Sally is assured that if she chooses to stay in the home, her work will be valued the same as Fred’s work outside the home. She thus is recognized not only as an economic equal in the marriage, but also as the primary decision maker in all matters regarding the home. If enforced during the marriage, the premarital agreement provides her with significant bargaining power in the event of a dispute; she need not, like many dependent homemakers, choose between acquiescence to her husband’s wishes or divorce. Instead, she can choose a third means of dispute resolution pursuant to the terms of the contract.

The second example involves a second marriage for one of the partners. Rob has never been married, while Susan was married for 11 years and has three children, ages 13, 10 and 8. Each partner brings into the marriage property which is to remain entirely separate, as will each spouse’s earnings. Both partners are currently working outside the home and intend to continue to do so after the marriage. All household expenses, including after-school childcare, will be shared equally by Rob and Susan. The cost of educating the children will also be shared equally.

Rob and Susan agree that the maintenance of the home will be a joint effort. They will alternate responsibility for cooking, cleaning and shopping on a weekly basis. All duties involving the children are to be shared as well, including attendance at school functions, and overseeing the children’s extracurricular activities. Rob and Susan additionally agree to alternate the responsibility for staying home from work to take care of a sick child.

At the time of contracting, Susan is uncertain about the health and income of her mother, her only living parent, and wishes to include a provision allowing for the support of her mother in the event it becomes necessary. Rob agrees to share this responsibility
by shouldering half the cost of her mother's care.

Rob and Susan's premarital contract is binding in all respects in a court of law. In addition, they provide in the agreement that if one partner fails to perform his or her household duties, the other is entitled to hire a maid or housekeeper to fulfill those duties and assess the cost to the other partner. Each partner may seek a court order to compel the other to make financial contributions as required by the contract.

The agreement between Rob and Susan ensures that Rob will contribute equally to the support of Susan's dependents: her children, and possibly her mother. By arranging these contributions in advance to each partner’s satisfaction, future problems are more easily avoided. In addition, the provisions for maintenance of the household make explicit the division of labor between Rob and Susan. Failure to adhere to these terms results in financial loss (for example, paying a housekeeper) to the noncomplying partner in question. This potential penalty emphasizes both the monetary worth of traditionally undervalued household services and the importance of equal contributions by both spouses.

IV. ENFORCEMENT OF PREMARITAL AGREEMENTS DURING MARRIAGE

A. Enforceability of Premarital Contracts

Disagreements between spouses covered by a premarital agreement need not always culminate in litigation. One advantage of the marital freedom of contract regime is that it allows parties to choose alternative means of dispute resolution. In the hypotheticals, for example, Fred and Sally are obligated by their contract to see a marriage counselor; Rob and Susan's agreement essentially provides for liquidated damages, in the form of payment for professional housekeeping services. Such alternatives to litigation are neither uncommon nor discouraged in other contexts. One would expect, moreover, that parties to a premarital contract would not only provide for nonlitigious ways of addressing breaches of the

**Note that in the event of changed circumstances—for example, another member of Susan's family agrees to contribute to the mother’s support—Susan and Rob can amend their contract after they are married to reflect these changes. See UPAA § 5 (which provides for modification after marriage provided certain requirements are met). Even if Rob and Susan neglect to modify the contract, a court, if faced with a dispute over a term rendered impossible by the changed circumstance, can release the parties from their obligations under the doctrine of impracticability. See p 304 for a discussion of equitable enforcement.

Shultz, 70 Cal L Rev at 207 (cited in note 2).
agreement, but would try hard to resolve disputes without litigation whenever possible. The possibility of enforcement at a minimum ensures that each party will consider the other's complaint seriously.

Although in many instances parties would resolve problems without litigation, inevitably certain disputes would end up in court. Since premarital agreements are already enforced at death or divorce, courts are not without guidelines as to how to enforce similar contracts during marriage. Premarital contracts which control the disposition of property at the termination of marriage are in many ways similar to contracts which dictate the treatment of property within the life of the marriage.

This is not to say that premarital agreements in general, and those enforced during marriage in particular, warrant identical judicial treatment as "ordinary" contracts. But they should not be, as they tend to be today, approached as conventional family law questions. Rather, courts should enforce premarital contracts by using accepted principles of contract, informed by and adjusted for the similarities and differences between premarital and "ordinary" agreements.

As noted by Professor Younger, premarital agreements are different from "ordinary" contracts in three ways: subject matter of the contract; the confidential relationship of the parties; and the length of the contractual term. Because of these differences, she suggests that premarital contracts present a "dilemma" for the law: While prospective spouses should be able to make their own bargains (subject to traditional rules of contract), the state has certain interests which may conflict with these private agreements. Presumably, the state interest will also vary according to whether the premarital contract applies to an ongoing or dissolving marriage.

However, premarital contracts are similar to ordinary contracts in that they are subject to the safeguards in traditional contract law against fraud and deceit. As a preliminary matter, premarital contracts, or agreements "made in contemplation of marriage," are within the reach of the Statute of Frauds and thus

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87 See discussion at pp 301-05.
89 Younger, 40 Rutgers L Rev at 1061 (cited in note 11).
90 Id.
91 Rest (2d) of Contracts § 110(c).
must be in writing. The contracting parties must have legal capacity to contract and must mutually assent to the bargain. The premarital contract, like any other, must be supported by consideration, though in most jurisdictions the marriage itself satisfies this requirement. Despite the fact that premarital agreements are created under many of the same restrictions as standard contracts, courts that have reviewed the former for substantive and procedural fairness have strayed from traditional contract doctrine and imported notions of fairness from family law. There is no need, however, for courts to overlay family law principles of fairness onto contract doctrine when dealing with premarital agreements. The same interests the courts are trying to protect can be equally, and more predictably, served by the exclusive application of contract rules.

A recent Pennsylvania case offers an example of how the enforcement of premarital contracts according to notions of fairness derived from family law can lead to incongruous and inconsistent results. In In re Estate of Geyer, a widow attempted to exercise her statutory right to a share of her deceased husband’s testamentary estate, in spite of a premarital agreement specifying otherwise. Both Mr. and Mrs. Geyer had been married and widowed twice before. Mr. Geyer brought considerable wealth, including real estate, to the marriage, while Mrs. Geyer had relatively few assets. The Pennsylvania Supreme Court held that, in order to invalidate the agreement, Mrs. Geyer had to show both that “the agreement did not make reasonable provision for her, and that it was entered into without full and fair disclosure by the decedent.” As stated, the court’s conception of a fair premarital agreement included the notion of “reasonable provision” for the spouse, a notion more relevant in family law than in contract disputes. The court voided the agreement in part because of its fail-

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92 Some jurisdictions impose other requirements such as notarization or acknowledgement or execution of the agreement within a certain number of days before marriage. These requirements may also be modified by state statutes regulating premarital agreements.
93 Rest 2d of Contracts § 12, 17.
94 Rest 2d of Contracts § 71.
95 Younger, 40 Rutgers L Rev at 1063 (cited in note 11).
97 The premarital agreement provided that in the event of Mr. Geyer’s death, Mrs. Geyer would receive, out of his estate, only the family home and a lump sum of $20,000. Id at 425.
98 Id at 427 (emphasis omitted).
99 The concept of adequate support and reasonable provision for a spouse guides family law courts in determining such issues as the maintenance of a former spouse after divorce.
ure to make reasonable provision for Mrs. Geyer.\textsuperscript{100}

The court would have reached the same result had it applied only contract principles and invalidated the agreement if “it was entered without full and fair disclosure by the decedent.”\textsuperscript{101} The court noted that full and fair disclosure “must include the general financial picture of the parties involved;”\textsuperscript{102} indeed, the contract specified that there had been full disclosure of assets. The trial court found, however, that the decedent had misrepresented to Mrs. Geyer his ownership of certain property. Given this misrepresentation, the contract was void. What this alternative analysis of \textit{Geyer} suggests is that the use of conceptions of fairness from family law may be unnecessary to, and may make more complicated and unpredictable, the enforcement of premarital agreements.

As a general matter, a more consistent and predictable assessment of the fairness of a disputed premarital contract should go as follows: In examining the procurement of the agreement, the court should first consider the relationship of the parties. Under contract law, prospective spouses stand in “such a relation of trust and confidence” as to expect disclosure.\textsuperscript{103} In this context, parties are required not only to disclose but are also forbidden from failing to disclose a known fact.\textsuperscript{104}

Second, in evaluating the fairness of both procurement and content of the premarital agreement, the court should apply doctrines of misrepresentation and unconscionability. Under the former doctrine, the contract may be voided whenever, upon examination of the circumstances surrounding the formation of the contract, the misrepresentation is found to be both fraudulent and

\textsuperscript{100} It is also worth noting that such a holding may have been inconsistent with the intent of the parties at the time the contract was formed. While “reasonable provision” for the widow was measured at the time of death of her spouse, the provisions in the contract were shaped with her anticipated needs in mind.

\textsuperscript{101} \textit{Geyer}, 533 A2d at 427 (emphasis omitted). As noted by a concurring judge in the case, contracts not bargained for at arms length require heightened scrutiny. Id at 430.

\textsuperscript{102} Id at 429-30.

\textsuperscript{103} Rest 2d of Contracts, comment f to § 161. Thus, the duty of prospective spouses to disclose does not rise to the level of parties in a fiduciary relationship. See Rest 2d of Contracts § 173 (parties in a fiduciary relationship must exercise “utmost good faith and full and fair disclosure”).

\textsuperscript{104} When the parties are in a “relation of trust and confidence,” the nondisclosure of a known fact may be equivalent to an assertion that the fact does not exist. Rest 2d of Contracts § 161.
Additionally, a premarital contract or term thereof that is unconscionable at the time it was made may be voided. The unconscionability of a contract is determined by inadequacy of consideration, defects in the bargaining process, and other factors. More specifically:

... [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Finally, in enforcing premarital contracts, courts may be guided by the related contract doctrines of undue influence or duress. In those states with statutes regarding premarital contracts, courts are further guided in their construction of these agreements.

Concededly, this marital freedom of contract regime would work hardship on some parties. In the case of Gross v Gross, for example, a woman signed a premarital agreement providing for $200 per month in alimony in the event of divorce; at the time of divorce, her husband’s assets were valued at approximately $8,000,000. Although there was no evidence that the agreement was in any way unfairly negotiated, the court held it void. Invoking family law principles of fairness, the court found the contract unconscionable at the time it was executed because it would be “significantly difficult” for the former wife to retreat from her “op-

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106 Rest 2d of Contracts § 162 (for the principle of misrepresentation); see generally § 159 et seq.
107 Rest 2d of Contracts §§ 175, 176.
108 Rest 2d of Contracts § 162 (for the principle of misrepresentation); see generally § 159 et seq.
109 Rest 2d of Contracts § 208.
110 Rest 2d of Contracts comment d to § 208.
112 464 NE2d at 503.
113 See pp 301-02 (discussing the use of fairness as defined by family law in Geyer).
ulent standard of living."¹¹⁴ Under a strict contract analysis, by
contrast, if this contract indeed was a fairly negotiated—that is,
without fraud, coercion or duress—the court would respect the
parties' allocation of risk. Accordingly, the court would uphold the
contract, to the woman's detriment.

Nonetheless, in many cases, contract doctrines such as mutual
mistake and impracticability may mitigate unjust results.¹¹⁶ Under
the doctrine of mutual mistake, parties will not be held to a con-
tract in which their bargain was based on erroneous assumptions
or misunderstandings.¹¹⁶ An example based on one of the hypo-
thetical agreements discussed in Section III might be that Susan's
mother, unbeknownst to Susan and Rob when they made their
contract, was financially independent due to a large inheritance. A
court could refuse to enforce the provision regarding support of
Susan's mother on the ground that both parties were mistaken as
to her financial situation. The doctrine of impracticability¹¹⁷ would
prove important in the event of unanticipated and changed cir-
cumstances—for example, serious illness or accident suffered by
one of the parties to the agreement. Of course, a less drastic alter-
native to invalidation of the contract in such cases is modification
of the agreement.

It is unclear whether the principles borrowed from family law
truly advance the position of those they are meant to protect, at
least in the case of a contractual relationship. The premise of fam-
ily law standards of fairness seems to be that women cannot bar-
gain effectively with a prospective spouse. Although this supposi-
tion may be true in certain cases, such a generalization may
operate to harm other women. As noted by the dissent in Geyer:
"... [W]e do not serve the cause of true equality by creating legal
fictions, even when those fictions are designed to protect against
... inequities."¹¹¹⁸

There is, moreover, a logical inconsistency in assuming that
women cannot bargain effectively (and thus the resulting contract
is unconscionable) and nonetheless enforcing the contracts that
emerge from unequal bargaining. The proposition that because of
economic and social disabilities women cannot press their own in-

¹¹⁴ 464 NE2d at 510.
¹¹⁶ Rest 2d of Contracts § 152.
¹¹⁷ Rest 2d of Contracts comment a to § 261 ("a principle broadly applicable to all
types of impracticability").
¹¹⁸ Geyer, 533 A2d at 434.
terests is a reasonable one, but demands a complete rejection of premarital contracts rather than a partial one. To the extent such agreements are enforced, they should be enforced as evenly and predictably as possible. This is better achieved under a strict contract regime, which assumes equal bargaining power and thus discourages a paternalistic view of women. Under this regime, women who choose to allow the state to "protect" them may do so by not entering premarital agreements.119

Enforcing premarital agreements upon termination of the marriage, then, should be governed by the law of contracts, not an amalgam of contract and family law. The arguments for a contract regime apply to the enforcement of premarital contracts during marriage as well as at the end of marriage. The enforcement of these agreements in ongoing marriages according to traditional contract principles achieves the dual purpose of effecting the intentions of the parties and alleviating concerns about the difficulties of enforcing obligations between spouses.

B. Remedies

Assuming a premarital agreement is enforceable, the question becomes one of appropriate remedies for breach of the contract.120 One of the less traditional remedies, but one which could be important in the context of premarital contracts, is enforcement of arbitration awards granted pursuant to the terms of the spouses' agreement. A couple might contract to submit to binding arbitration for certain disputes;121 clearly, this agreement is most effective if the arbitration award is judicially enforceable. The court in Avitzur upheld such an award, stating:

There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable. Similarly,
an agreement to refer a matter concerning marriage to
arbitration suffers no inherent invalidity.\textsuperscript{122}

A second, and more conventional remedy, is that of damage
awards. Damages are easiest to assess with respect to monetary ar-
rangements between the parties. For example, parties who had
agreed to make certain contributions to household or educational
expenses could show breach of contract by presenting accounting
records that evince inadequate payment by one party. The party
who did not follow the terms of the contract would be assessed
damages in the amount they failed to contribute, including some
calculation of interest the money would have earned.

Provisions for liquidated damages are particularly appropriate
in premarital contracts. These agreements lend themselves to liq-
uidated damages clauses because proving loss under certain cir-
cumstances is very difficult. For instance, given an agreement al-
lowing one spouse to choose where the couple lives, a breach of
that provision might best be remedied through liquidated dam-
ages, which the parties, rather than a court, assess according to
their subjective evaluation of the harm. The court’s role is thus
limited to examining the relevant damages clause for reason-
ableness.\textsuperscript{123}

There are some limitations on remedies for breach of contracts
relating to the conduct of the parties during marriage. Punitive
damages generally are not awarded for breach of contract unless
the breach is also tortious.\textsuperscript{124} Such claims seem unlikely, however,
by parties interested in continuing their relationships.

A court also will not order specific performance of a contract
for personal services.\textsuperscript{125} If, for example, a couple agreed to certain
arrangements regarding household tasks, a suit for specific per-
formance would have to be changed to one for monetary damages
owed by the breaching party. The enforcement of the contract in
this manner might awaken the breaching party to the value of the
contract and induce him or her to adhere to the bargain in the
future.

Although breaches of certain provisions of premarital agree-

\textsuperscript{122} Id at 138.

\textsuperscript{123} Liquidated damages must be reasonable in light of the anticipated or actual loss
cauused by the breach, and the difficulty of proof of loss. Rest 2d of Contracts § 356. The
courts scrutinize very large amounts of damages to ensure they reflect these factors and are
not actually disguised penalties for breach of contract.

\textsuperscript{124} Rest 2d of Contracts § 355. An example in the context of premarital agreements is
the tort of intentional infliction of emotional distress.

\textsuperscript{125} Rest 2d of Contracts § 367.
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ments cannot be remedied with orders for specific performance, there are instances in which specific performance might be appropriate. In Sanders, the court declared the premarital agreement enforceable and ordered the husband to execute the will and convey the real estate as prescribed by the agreement. The court cautioned that specific performance is not a matter of right under a contract, but is one of judicial discretion. It is safe to assume, therefore, that when dealing with the enforcement of premarital contracts during marriage, judges, given their proven reluctance to interfere with the marital relation, would rarely, if ever, grant specific performance.

CONCLUSION

One may conclude from the lack of cases seeking to enforce premarital contracts during marriage either that there is no need for judicial involvement in an ongoing marriage or that the certainty of losing such cases prevents them from ever being brought. There are several reasons to believe the latter explanation. For one, although premarital contracts have become more common in recent years, the dramatic rise in the number of agreements has not generated a corresponding increase in the number of suits for enforcement.

Even if, however, one assumes that premarital agreements regarding obligations during marriage have not been tested in court by the parties' choice, it does not follow that such agreements must never be enforced. Premarital contracts on the whole are consensual, voluntary agreements. Their enforcement imposes no burdens on innocent or unsuspecting parties. Not everyone need make such agreements, and those who choose not to remain unaffected. There is no reason to assume that if parties to premarital agreements currently stay out of court by choice, self-regulation of these agreements will end once courts begin enforcing them during marriage.

Premarital contracts are subject to relatively strict contractual construction, modified by dictates of statute. There remains, as in the judicial enforcement of any contract, the possibility that the contract may not be enforced on grounds of public policy. However, premarital contracts currently are subjected to unreasonable

126 Sanders v Sanders, 40 Tenn App 20, 288 SW2d 473 (1955).
limitations grounded in outmoded conceptions of the nature of marriage; removing these limitations, without sacrificing protection of the parties' interests, is desirable and possible through the adoption of the marital freedom of contract model.

Finally, allowing the enforcement of premarital contracts during marriage could enhance the institution itself by providing an alternative mechanism for dispute resolution, an intermediate step between the complete acquiescence of one party and divorce. Premarital contracts, if enforced during marriage, would help adapt the institution of marriage to more accurately reflect today's changing relations between men and women.