POSTNUPTIAL AGREEMENTS

SEAN HANNON WILLIAMS*

* Research Fellow, Harvard Law School, Program on the Legal Profession; J.D., University of Chicago Law School. For helpful comments and suggestions, I thank Richard Epstein, Matthew Stephenson, Katherine Silbaugh, Elizabeth Bartholet, Ashish Nanda, Sonja Starr, I. Glenn Cohen, Carissa Byrne Hessick, F. Andrew Hessick, and Sam Jordan. Thanks also to the participants in the Climenko Fellowship Scholarship Workshop and to Mark Murphy for exceptional research assistance

I. INTRODUCTION

Starting in the 1970s, the legal academy felled forests to comment on the philosophical shift in marriage from a preformed status to a customizable contract. As the traditional nuclear family began to cede ground to alternative family structures, commentators began to draw upon contract theory and liberal political tradition to argue that spouses should have a role in designing the terms of their partnership.[1] This culminated in the drafting of the Uniform Premarital Agreement Act (UPAA), which gave fiancés broad control over the terms of their marriage contract.[2] The UPAA represented a giant leap toward the contractual view of marriage. But this leap was largely symbolic. Even today, twenty years after the UPAA was drafted, prenuptial agreements remain rare.[3]

Postnuptial agreements are poised to fill this gap. The concept of a postnuptial agreement is straightforward. A postnuptial agreement, like a prenuptial agreement, is an agreement that determines a couple's rights and obligations upon divorce. As its name suggests, however, a postnuptial agreement is entered into after a couple weds but before they separate.

These agreements have several practical advantages over prenuptial agreements. Fiancés are notoriously optimistic about the probability that they will live happily ever after. They are also notoriously bad at foreseeing the potential disputes that will arise during the marriage. Therefore, couples rarely write prenuptial agreements. Postnuptial agreements do not suffer from these practical infirmities. Unlike fiancés, spouses have weathered the reality of marriage. They do not need to engage in speculative forecasting but can create contracts that confront the problems that they are currently facing. For example, if a couple's first child has autism, the wife may choose to forgo a career opportunity to care for her child. A postnuptial agreement would allow her to tailor her rights upon divorce to ensure that her sacrifice is borne equally by both parents.

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1. *See, e.g.*, Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 208 (1982) (arguing that contractual tools can help create a "new synthesis of private needs and public concerns, of freedom and structure, of flexibility and formality . . . to lend dignity and legitimacy to today's diverse forms of intimate commitment").

2. UNIF. PREMARITAL AGREEMENT ACT § 3 (amended 2001), 9C U.L.A. 43 (1983). Twenty-eight states and the District of Columbia have adopted the UPAA. Dematteo v. Dematteo, 762 N.E.2d 797, 809 n.28 (Mass. 2002).

3. Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997) (estimating that five percent of couples enter prenuptial agreements).

Postnuptial agreements are a relatively new phenomenon. But because of their practical advantages, there is reason to believe that they will become the dominant form of marital contract.[4] Despite this possibility, there is little scholarship[5] and inconsistent judicial precedent[6] discussing the enforceability of such agreements. This Article begins the process of thoroughly analyzing these agreements. It starts with the presumption that prenuptial agreements are a positive addition to the legal landscape, and it avoids rehashing debates about the general costs and benefits of the contractual view of marriage.[7] Instead, this Article considers whether postnuptial agreements merit different treatment than their prenuptial counterparts. It draws upon bargaining theory and behavioral economic research to argue that postnuptial agreements are, if anything, likely to be *more* equitable than their prenuptial counterparts. Accordingly, courts should not impose additional burdens on postnuptial agreements. This conclusion runs counter to the early trend in the legal treatment of postnuptial agreements.

Of the state courts and legislatures that have addressed the issue, many have imposed procedural and substantive burdens on postnuptial agreements that they have not imposed on prenuptial agreements.[8] Their

4. In addition to their practical advantages, postnuptial agreements have also recently been the subject of several articles in high-profile publications. *See, e.g.*, Susan Berfield, *Does Your Marriage Need a Postnup?*, BUS. WK., Apr. 16, 2007, at 80; Brooke Masters, *'Postnup' Boom as Hedge Funds Seek To Trim Exposure to Spouses*, FIN. TIMES (London ed.), May 31, 2007, at 1, *available at* http://www.ft.com/cms/s/2ede400c-0f14-11dc-b444-000b5df10621.html.

5. The only scholarship directly addressing the issue is Rebecca Glass, Comment, *Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California*, 92 CAL. L. REV. 215, 254–56 (2004) (arguing that California's current approach to pre- and postnuptial agreements is insufficiently sensitive to fairness concerns and to the spouses' fiduciary duties to one another).

6. *See infra* Part II.B.

7. C*ompare* Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 518 (1998) (arguing that contract is a pernicious tool for defining marital relations because "we should question how choice is produced within heterosexual unions, where power relationships are complicated and often unequal"), *with* Jeffrey Evans Stake, *Paternalism in the Law of Marriage*, 74 IND. L.J. 801, 814, 818 (1999) (arguing that contracts can protect women from opportunism in marriage by giving them more entitlements than the state's default marriage contract).

8. Ohio, for example, bans all postnuptial contracting. OHIO REV. CODE ANN. § 3103.06 (LexisNexis 2003) ("A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation."). Other states require that the agreement meet standards of substantive fairness. *See, e.g.*, Bratton v. Bratton, 136 S.W.3d 595, 601 (Tenn. 2004) ("Because of the confidential relationship which exists between husband and wife,

concern is that the bargaining dynamics within an intact marriage are materially different than the dynamics of premarital bargaining. These differences, they claim, increase the potential for fraud and deception, often leaving the spouse with less economic leverage (usually the wife) with no choice but to sign an agreement presented by the wealthier spouse (usually the husband). Accordingly, they contend that more protections are needed in the postnuptial context. These conclusions find some support in the academic literature on informal marital bargaining and prenuptial agreements, where scholars have argued that wives tend to experience a decrease in their bargaining power over time.[9]

This Article challenges the idea that more protections are needed in the postnuptial context. It directly addresses the situation that many courts believe is most likely to produce inequitable results: when a wealthier husband presents a postnuptial agreement to his poorer wife. It argues that spousal bargaining dynamics severely limit the extent to which one spouse can take advantage of the other. In short, postnuptial agreements are largely self-regulating. Of course, any marital contract may have externalities. Courts and legislatures have unanimously required judicial approval of terms in prenuptial or postnuptial agreements that alter child support obligations, determine custody, or otherwise adversely affect children.[10] This Article does not argue against this judicial safeguard and therefore only addresses the ways that marital bargaining affects the distribution of assets between spouses.

This Article draws on two rich bodies of theoretical and empirical literature. The first is game theory and its subgenre bargaining theory.[11] The second is behavioral economic research on loss aversion and how

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postnuptial agreements are . . . subjected to close scrutiny by the courts to ensure that they are fair and equitable."); *infra* Part II.B., Appendix.

9. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 649 (1998) (noting that there is a "progressive slide of women's bargaining position" during the course of a marriage); Abrams, *supra* note 7, at 518 (noting that a contractual regime is "likely to enforce many marital contracts that are the product of inequalities in bargaining power").

10. *See, e.g.*, UNIF. PREMARITAL AGREEMENT ACT § 3 (amended 2001), 9C U.L.A. 43 (1983) ("The right of a child to support may not be adversely affected by a premarital agreement.").

11. For an excellent nontechnical introduction to bargaining theory, see generally Abhinay Muthoo, *A Non-Technical Introduction to Bargaining Theory*, 1 WORLD ECON. 145 (2000) [hereinafter Muthoo, *Non-Technical Bargaining*]. For a more mathematically adventurous treatment by the same author, see ABHINAY MUTHOO, BARGAINING THEORY WITH APPLICATIONS 42–55 (1999) [hereinafter MUTHOO, BARGAINING THEORY]. This Article analyzes marital bargaining using an alternating-offers model, which is both more realistic and more useful than most models of marital bargaining. *See infra* Part IV.

people respond to risk.[12] Once combined, these bodies of literature suggest that wives will drive harder bargains than brides-to-be and will be in a much-better position to reach an equitable agreement with their partner.

The main factors that are likely to affect bargaining power within the marital relationship are the level of information that each spouse has about the other's preferences, the relative costs to each spouse of delaying agreement, the relative risk aversion of the spouses, and the value of each spouse's fallback position in case the marriage ends. Most of these factors indicate that the spouse who is resisting the postnuptial agreement—usually the wife—will have a bargaining advantage. Contrary to the popular assumption, she is unlikely to be risk averse when faced with a postnuptial agreement and may even be risk seeking. She is also likely to experience low costs of stonewalling while having high-quality information about how much her husband values the marriage and how much he will be willing to compromise.

The largest payoff of bargaining theory comes, however, when examining the effects of a spouse's outside options—her next-best alternative to the agreement. In the postnuptial context, a spouse's next-best alternative to entering an agreement will be a divorce. Most commentators have correctly noted that wives will suffer an immense decrease in their standard of living upon divorce.[13] They then argue that because wives will fear this outcome, they will remain in the marriage at almost any cost, allowing their husbands to confiscate the lion's share of the marital surplus.[14] This argument has common sense appeal. It is contradicted, however, by the predictions of bargaining theory and the empirical evidence that supports those predictions. The undesirability of the wife's outside option will rarely impact the ultimate bargain. Instead, it is the husband's outside option that will drive the terms of the bargain. A husband who renegotiates the marriage contract will only be able to achieve a redistribution of assets that makes him marginally better off remaining married than taking his own outside option. Spousal bargaining dynamics, therefore, contain a self-regulating feature that limits deviations from the commonly held normative ideal of an equal division of assets.

To the extent that postnuptial bargaining results in the unequal distribution of marital assets, and to the extent that courts or legislatures find this inequality objectionable, they should focus their reform efforts on the rules of alimony, not on postnuptial agreements. Spousal bargaining occurs in the shadow of the entitlements that

12. *See infra* Part IV.
13. Wax, *supra* note 9, at 546–47.
14. *Id.* at 581–82 nn.153–54.

alimony law creates. Therefore, the enforceability of postnuptial agreements increases the ripple effects of whatever alimony scheme a state has adopted. If this alimony scheme illegitimately assigns ownership rights over a future income stream, the results of postnuptial bargaining will reflect that illegitimacy. Even if this is the case, regulating postnuptial agreements is an extremely underinclusive way of addressing the problem. Courts and commentators should instead focus their attention on the root of the problem: the underlying entitlements that alimony regimes create.

Part II of this Article gives an account of the circumstances under which people sign postnuptial agreements, the common terms that these agreements contain, and the relevant law. It also criticizes several approaches to regulating postnuptial contracts. Part III briefly outlines the potential benefits of postnuptial contracts. It compares postnuptial agreements to both prenuptial agreements and the states' default rules of divorce. It concludes that postnuptial agreements offer a practical means of promoting efficiency in marriage and supporting communitarian norms of cooperation, trust, and sharing. Part IV provides an overview of bargaining theory and discusses the factors most likely to affect marital bargaining. Ultimately, it concludes that postnuptial agreements should not be regulated more aggressively than prenuptial agreements because postnuptial agreements are already self-regulating and are likely to create more-equitable divisions than prenuptial agreements. Part V argues that postnuptial agreements are normatively defensible in their own right and not merely in comparison to their prenuptial counterparts. It clarifies that the availability of postnuptial agreements will benefit both spouses, addresses critiques drawn from communitarian feminist theory, and argues that the results of postnuptial negotiation are likely to be more acceptable under these theories than the results of prenuptial negotiation.

II. OVERVIEW OF POSTNUPTIAL CONTRACTING

A. An Anecdotal Overview of Common Types of Postnuptial Agreements and Common Circumstances that Lead to Them

Contractual agreements between spouses can occur at a variety of times during a marriage. They can transfer assets immediately or control the division of assets upon death or divorce. This Article focuses on a subset of these agreements—namely contracts that control the disposition of property upon divorce but that are entered into prior to any immediate plans to separate or divorce. Most courts refer to

these contracts as postnuptial agreements; however, there is some variation in terminology.[15]

Postnuptial agreements come in a variety of shapes and sizes. Some of these agreements are handwritten letters.[16] Others are more sophisticated legal documents.[17] But all postnuptial agreements have one thing in common: they are private. No state requires that spouses register their postnuptial agreements in any formal way. These agreements therefore only come to light if litigation ensues. Case law probably presents a skewed vision of postnuptial agreements because cases with more-egregious violations of fiduciary duty or cases involving a large amount of money are more likely to be litigated. Nonetheless, case law currently provides the only readily available means of examining the circumstances under which spouses create postnuptial agreements and the content of the agreements.

Postnuptial agreements are distinct from a number of other kinds of marital agreements, most of which do not contemplate divorce at all. Most seek only to control the actions of a surviving spouse.[18] These agreements normally contain mutual promises to waive elective shares or to forgo challenging a will in other ways.[19] In this way, couples in their second marriage can ensure that the bulk of their assets will go to

15. New Jersey courts, for example, refer to these as "mid-marriage agreement[s]." Pacelli v. Pacelli, 725 A.2d 56, 57 (N.J. Super. Ct. App. Div. 1999). Some courts also use the term "postnup" to refer to any contracts between spouses, even those that merely make an immediate transfer of a particular asset. Dawbarn v. Dawbarn, 625 S.E.2d 186, 188 (N.C. Ct. App. 2006). To maintain consistency with the term prenuptial agreement, however, this Article uses the term postnuptial agreement to refer to only contracts that deal with the disposition of property upon divorce.

16. Bratton v. Bratton, 136 S.W.3d 595, 597 (Tenn. 2004).

17. *See, e.g.*, Nesmith v. Berger, 64 S.W.3d 110, 114 (Tex. App. 2001) (couple drafted seven versions of a prenuptial agreement, which served as grounds for drafting a postnuptial agreement); Sheshunoff v. Sheshunoff, 172 S.W.3d 686, 688 (Tex. App. 2005) (couple negotiated a thirty-seven page modification to their original prenuptial agreement).

18. *See, e.g.*, Tibbs v. Anderson, 580 So. 2d 1337, 1338 (Ala. 1991) (postnuptial agreement provided for disposition of real estate, furniture, and paintings on the event of death); *In re* Estate of Harber, 440 P.2d 7, 8–9 (Ariz. 1969) (in banc) (childless couple chose to waive rights to each other's property so that each could leave their property to their respective family); *In re* Estate of Lewin, 595 P.2d 1055, 1057 (Colo. Ct. App. 1979) (postnuptial agreement waived surviving spouse's elective share); *In re* Estate of Gab, 364 N.W.2d 924, 925 (S.D. 1985) (couple in their second marriage promised not to revoke their respective wills); Peirce v. Peirce, 994 P.2d 193, 195 (Utah 2000) (postnuptial agreement where coal-mining wife agreed to give virtually all of her income to sheep-herding husband if he left her his estate upon his death).

19. *See supra* note 18.

their children from the first marriage and not to their new spouse.[20] Courts have uniformly enforced such agreements.[21] Another set of marital contracts does not contemplate either divorce or death; they merely transfer assets from one spouse to another.[22] These agreements are especially useful in community property states to transmute assets from community to separate property, or vice versa.

Other marital contracts specifically contemplate divorce and its accompanying division of assets. Courts and commentators have generally divided these into three separate categories: separation agreements, reconciliation agreements, and postnuptial agreements.[23] Separation agreements are divorce settlements. Like all settlements, courts favor them and often adopt their terms into a divorce decree without further scrutiny.[24] Spouses enter into reconciliation agreements to put some period of strife behind them and begin their marriage anew.[25] All states have long recognized the validity of reconciliation agreements, at least after the spouses have separated or one of the spouses has filed a divorce complaint.[26] This Article focuses on postnuptial agreements, which occur during the marriage and before the spouses separate or file for divorce.

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20. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 72 (1998).

21. *Id.*

22. Dawbarn v. Dawbarn, 625 S.E.2d 186, 188 (N.C. Ct. App. 2006) (husband transferred the deeds to three houses to his wife as a signal of his commitment to make the marriage work after his extramarital affair).

23. CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 404 (3d ed. 2006); *see also* BLACK'S LAW DICTIONARY 1206 (8th ed. 2004) (defining postnuptial agreement as an agreement made "at a time when separation or divorce is not imminent").

24. Courts impose very few limits on these agreements. Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1444 (1984).

25. *See, e.g.*, Dettloff v. Dettloff, No. 03-082567-DM, 2006 WL 3755272, at *1 (Mich. Ct. App. Dec. 21, 2006) (wife filed for divorce but then agreed to waive her claim to the family home in exchange for an attempted reconciliation); Tremont v. Tremont, 35 A.D.3d 1046, 1047 (N.Y. App. Div. 2006) (wife agreed to dismiss divorce action and cosign loan in exchange for husband's promise to sign postnuptial agreement).

26. 11 A.L.R. 283 (1921) ("A contract between husband and wife, made when the spouses are separated for legal cause, and providing for the payment of a consideration for their reunion, is, by the weight of authority, enforceable by either spouse."); 17 C.J.S. *Contracts* § 236 (1963); *see also In re* Marriage of Barnes, 755 N.E.2d 522, 525 (Ill. App. Ct. 2001) (noting that postnuptial agreements were generally held invalid as promoting divorce unless "the parties had already separated or were on the point of separating"); Flansburg v. Flansburg, 581 N.E.2d 430, 434 (Ind. Ct. App. 1991) (noting that most courts enforce reconciliation agreements like prenuptial agreements).

Postnuptial agreements often look a lot like prenuptial agreements. In both contexts, couples are trying to assure that their financial situation is certain and predictable. These agreements can benefit both the richer and the poorer spouse in this regard. For example, in *In re Marriage of Friedman*, a couple married soon after the husband was diagnosed with cancer.[27] The husband's attorney suggested a postnuptial agreement because both spouses wanted to protect the wife from the husband's future medical debt.[28] They amicably signed this agreement, and the court enforced it when they divorced nine years later.[29] Similarly, in *Pacelli v. Pacelli*, a wealthy husband sought to protect his more volatile investments from the disruption and uncertain ownership rights that would accompany divorce.[30] He requested a postnuptial agreement that would provide his wife with a substantial amount of cash but no ownership interests in his real-estate-development business.[31] This could have been a salutary contract that benefited both spouses. However, Mr. Pacelli only offered his wife a small fraction of what she would have received under New Jersey's equitable distribution rules.[32] The court refused to enforce the agreement and imposed an ongoing requirement that all postnuptial agreements result in equitable distributions.[33]

Postnuptial agreements do not always favor the wealthier spouse. In *Bratton v. Bratton*, a young wife requested that her husband sign a postnuptial agreement while he was in medical school.[34] She feared that he would lean on her for support during medical school and then divorce her once he had a degree and a stable practice.[35] They signed an agreement giving her fifty percent of his future salary in the event that he left her.[36] Nonetheless, the court found that the agreement lacked consideration and refused to enforce it.[37]

Alternatively, many postnuptial agreements attempt to use financial rewards and penalties to create incentives during a marriage that constrain the behavior of both spouses. For example, many couples have attempted to write pre- and postnuptial agreements that contain

27. *In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 414 (Cal. Ct. App. 2002).
28. *Id.* at 414–15.
29. *Id.* at 415, 418.
30. Pacelli v. Pacelli, 725 A.2d 56, 58, 60 (N.J. Super. Ct. App. Div. 1999).
31. *Id.* at 57–58.
32. *Id.* at 58.
33. *Id.* at 63.
34. Bratton v. Bratton, 136 S.W.3d 595, 598 (Tenn. 2004).
35. *Id.*
36. *Id.*
37. *Id.* at 601.

penalties if one spouse commits adultery.[38] Although some courts have viewed these agreements as an inappropriate attempt to return fault-based concepts to divorce,[39] other courts have concluded that public policy permits spouses to make such clauses, as long as the issues are amenable to judicial determination.[40]

The timing of postnuptial agreements is as varied as their subject matter. Postnuptial agreements can occur at any time during the course of a marriage. Case law shows that they can be signed anytime from two hours after the ceremony[41] to twenty years into a marriage.[42] Many postnuptial agreements began as prenuptial agreements, but the spouses did not sign the final agreement until after the wedding.[43] Even if spouses successfully negotiate an agreement before their wedding, they may modify the agreement during their marriage.[44] Other postnuptial

38. Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 495–96 (Cal. Ct. App. 2002) (postnuptial agreement provided for $50,000 adultery penalty); Hall v. Hall, No. 2021-04-4, 2005 WL 2493382, at *4 (Va. Ct. App. Oct. 11, 2005) (postnuptial agreement provided that the wife would waive $2,500 per month alimony if the husband could prove that she committed adultery); Laudig v. Laudig, 624 A.2d 651, 652 (Pa. Super. Ct. 1993) (reconciliation agreement where wife forfeited all claims to marital property in case she was unfaithful in exchange for a small amount of cash and alimony); *see also* Shultz, *supra* note 1, at 322–23 (arguing that couples could contract for liquidated damages in the event of a breach of a marital agreement).

39. *See, e.g.*, *Diosdado*, 118 Cal. Rptr. 2d at 496 (refusing to enforce prenuptial agreement providing for $50,000 adultery penalty because "this agreement attempts to penalize the party who is at fault for having breached the obligation of sexual fidelity, and whose breach provided the basis for terminating the marriage. This penalty is in direct contravention of the public policy underlying no-fault divorce").

40. *See, e.g.*, *Hall*, 2005 WL 2493382, at *1–2 (holding that adultery was within the scope of allowable discovery when postnuptial agreement included a penalty clause if the husband provided a "photographic or video representation of adultery; or a finding of guilty of adultery in a court of law" to prove that his wife committed adultery again).

41. *See, e.g.*, Tibbs v. Anderson, 580 So. 2d 1337, 1338 (Ala. 1991) (husband presented a prenuptial agreement on eve of wedding, which the wife signed two hours after the ceremony).

42. *See, e.g.*, *In re* Marriage of Richardson, 606 N.E.2d 56, 57–58 (Ill. App. Ct. 1992) (couple entered into postnuptial agreement twenty years into their marriage and divorced four years later).

43. *See, e.g.*, Nesmith v. Berger, 64 S.W.3d 110, 113–14 (Tex. App. 2001) (couple agreed before marriage that "they would execute a postnuptial agreement, which they did"); Bronfman v. Bronfman, 229 A.D.2d 314, 315 (N.Y. App. Div. 1996) (college sweethearts entered agreement after civil ceremony but before religious ceremony; *In re* Estate of Lewin, 595 P.2d 1055, 1056–57 (Colo. Ct. App. 1979) (elderly man consulted attorney about prenuptial agreement, and the couple signed postnuptial agreement two months after the wedding); Colvin v. Colvin, No. 13-03-00034-CV, 2006 WL 1431218, at *1 (Tex. App. May 25, 2006) (couple drafted agreement before marriage but did not finalize it until after marriage).

44. *See* Stackhouse v. Zaretsky, 2006 PA Super. 108, ¶ 3, 900 A.2d 383, 385 (modifying prenuptial agreement two years into marriage); Sheshunoff v. Sheshunoff,

agreements may occur at a variety of times during a marriage due to a clear triggering event like adultery,[45] adoption,[46] or a spouse's mounting debt.[47] Sometimes there is no clear triggering event.[48]

Although many people feel awkward about asking their spouse to sign a marital agreement, postnuptial agreements do not necessarily spell doom for a relationship. While case law provides some examples of marriages that ended within a year after the couple signed a postnuptial agreement,[49] other marriages have lasted for seventeen years after a couple signed one.[50] Most fall somewhere in between.[51] Some

172 S.W.3d 686, 688 (Tex. App. 2005) (couple modified prenuptial agreement nineteen years into marriage and again thirty-two years into marriage); Bradley v. Bradley, 2005 WY 107, ¶ 6, 118 P.3d 984, 988 (Wyo. 2005) (couple modified prenuptial agreement after separation but during a reconciliation).

45. Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 494–95 (Cal. Ct. App. 2002) (couple entered postnuptial agreement following husband's infidelity to "preserve, protect and assure the longevity and integrity of" the marriage); Laudig v. Laudig, 624 A.2d 651, 652 (Pa. Super. Ct. 1993) (couple agreed to postnuptial agreement as part of reconciliation following wife's extramarital relationship).

46. Bakos v. Bakos, 950 So. 2d 1257, 1258–59 (Fla. Dist. Ct. App. 2007) (couple modified prenuptial agreement six years into marriage, after husband adopted wife's child from a previous marriage).

47. *In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 414–15 (Cal. Ct. App. 2002) (couple entered postnuptial agreement to protect the wife's assets from the husband's future medical debt); *Marketplace: No Pre-nup? Try a Post-nuptial* (Amer. Pub. Media radio broadcast July 7, 2006), *available at* http://marketplace.publicradio.org/display/web/2006/07/07/post_nuptial/ (reporting on couple who salvaged their marriage by segregating their finances in the face of the husband's excessive debt).

48. *In re* Matter of Estate of Gab, 364 N.W.2d 924, 925 (S.D. 1985) (couple in their second marriage promised not to revoke their respective wills one and a half years into their marriage); Button v. Button, 131 Wis. 2d 84, 88, 90, 388 N.W.2d 546, 547–48 (Wis. 1986) (couple modified prenuptial agreements with a postnuptial agreement in the fifth year of their fourteen-year marriage).

49. *See, e.g.*, Casto v. Casto, 508 So. 2d 330, 332 (Fla. 1987) (couple signed postnuptial agreement after ten years of marriage and divorced after eleven years of marriage); Williams v. Williams, 760 So. 2d 469, 470–71 (La. Ct. App. 2000) (couple signed postnuptial agreement six months into marriage and divorced a year and a half later); *In re* Marriage of Nagy, No. 07-99-0303-CV, 2000 WL 562344, at *1 (Tex. App. May 9, 2000) (couple signed postnuptial agreement after four months of marriage and filed for divorce after six months of marriage).

50. Bratton v. Bratton, 136 S.W.3d 595, 597–98 (Tenn. 2004) (couple signed postnuptial agreement after one year of marriage and divorced seventeen years later). The case law only discusses postnuptial agreements that are litigated. Researching cases is unlikely, therefore, to reveal any instances where spouses entered a postnuptial agreement but never divorced.

51. Behrendsen v. Rogers, No. 27A02-0603-CV-247, 2006 WL 3525365, at *1 (Ind. Ct. App. Dec 8, 2006) (couple signed a postnuptial agreement five years into marriage and divorced three years later); Pacelli v. Pacelli, 725 A.2d 56, 57–58 (N.J. Super. Ct. App. Div. 1999) (couple signed agreement after ten years of marriage and

spouses even credit postnuptial agreements for saving their marriages.[52] This was probably the case in *Bratton*, where Ms. Bratton was able to feel secure in her choice to put her career on hold, and in *Friedman*, where Ms. Friedman was able to remain married without subjecting herself to liability for her husband's medical debt or jeopardizing her rights to her law practice.[53]

B. A Critical Overview of Current Law

Missouri, Virginia, and Wisconsin treat pre- and postnuptial agreements similarly by statute.[54] In the absence of a governing statute, eight state courts evaluate postnuptial agreements under the same rules as prenuptial agreements.[55] For example, the Pennsylvania Supreme Court has held that "the principles applicable to antenuptial agreements are equally applicable to postnuptial agreements."[56]

Sixteen states and Puerto Rico, however, impose greater burdens on postnuptial agreements than they impose on prenuptial agreements.[57] At one extreme, Ohio bars all postnuptial agreements by statute[58] and refuses to enforce postnuptial agreements written in other states if the couple is domiciled in Ohio.[59] Other states have taken less-drastic measures but have nonetheless imposed myriad requirements on postnuptial agreements that they do not impose on prenuptial agreements. Minnesota, for example, requires that each spouse be represented by counsel when forming a postnuptial agreement, but requires merely the opportunity to obtain independent counsel when

divorced eleven years later); Stackhouse v. Zaretsky, 2006 PA Super. 108, ¶ 3, 900 A.2d 383, 385 (couple modified prenuptial agreement two years into marriage and divorced sixteen years later); *In re* Marriage of Osborne, No. 50527-1-I, 2003 WL 23020221, at *1–2 (Wash. Ct. App. Dec. 29, 2003) (couple signed postnuptial agreements three and five years into marriage and separated nine years after the last agreement).

52. *Marketplace: No Pre-nup? Try a Post-nuptial*, *supra* note 47.

53. *Bratton*, 136 S.W.3d at 598; *In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 414–15 (Cal. Ct. App. 2002).

54. *See infra* Appendix.

55. *See infra* Appendix.

56. Stoner v. Stoner, 819 A.2d 529, 533 n.5 (Pa. 2003) (discussing Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) (rejecting special rules and applying traditional contract law principles to prenuptial agreements)).

57. *See infra* Appendix.

58. OHIO REV. CODE ANN. § 3103.06 (LexisNexis 2003) ("A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.").

59. *See, e.g.*, Brewsaugh v. Brewsaugh, 491 N.E.2d 748, 751 (Ohio Com. Pl. 1985).

forming a prenuptial agreement.[60] Several states—including Minnesota, New Jersey, and Tennessee—require that the agreement meet standards of substantive fairness both at the time it is signed and at the time it is ultimately enforced, even though they reject this requirement for prenuptial agreements.[61] In California, Minnesota, and Tennessee, the courts reduce the burden on the spouse challenging the postnuptial agreement.[62] California courts impose a rebuttable presumption that all postnuptial agreements are the result of coercion.[63] Minnesota imposes such a burden only when one spouse seeks a divorce within two years of signing the postnuptial agreement.[64] Three states limit the enforceability of postnuptial agreements by applying a stringent interpretation of consideration. In New York, a promise to remain married can be, but is not always, sufficient consideration for a postnuptial agreement.[65] Similarly, in Arkansas and Tennessee, such promises are not sufficient consideration unless the marriage is experiencing significant strife, or a spouse forgoes a specific existing career.[66]

Although the legal landscape for prenuptial agreements is quite clear today, many state courts have not squarely addressed the issue of postnuptial agreements. For example, Texas has adopted the UPAA for premarital agreements[67] but has not confronted whether this statute

60. MINN. STAT. ANN. § 519.11 (West 2006).

61. *Id.*; Bratton v. Bratton, 136 S.W.3d 595, 601 (Tenn. 2004) ("Because of the confidential relationship which exists between husband and wife, postnuptial agreements are . . . subjected to close scrutiny by the courts to ensure that they are fair and equitable."); Pacelli v. Pacelli, 725 A.2d 56, 58, 60 (N.J. Super. Ct. App. Div. 1999) (holding that a postnuptial agreement must be "fair and equitable when made *and* when it is sought to be enforced").

62. *See* MINN. STAT. ANN. § 519.11 (West 2006); *In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 418 (Cal. Ct. App. 2002); *Bratton*, 136 S.W.3d at 603 (implying that any threat of divorce to a spouse invalidates a postnuptial agreement because of "the taint of coercion and duress").

63. *Friedman*, 122 Cal. Rptr. 2d at 417–18 (rejecting analogy to premarital agreements and analyzing postnuptial agreement under California's rules governing property transfers between spouses, which impose a rebuttable presumption of coercion) (citing CAL. FAM. CODE § 721(b) (West 2004) and *In re* Marriage of Haines, 39 Cal. Rptr. 2d 673, 683 (Cal. Ct. App. 1995)). California is unique in that it imposes different burdens on pre- and postnuptial agreements, yet it is not perfectly clear which is more difficult to enforce.

64. MINN. STAT. ANN. § 519.11(1a)(d).

65. *Compare* Zagari v. Zagari, 746 N.Y.S.2d 235, 238 (N.Y. Sup. Ct. 2002), *with* Whitmore v. Whitmore, 778 N.Y.S.2d 73, 75 (N.Y. App. Div. 2004).

66. *See* Simmons v. Simmons, No. CA 06-303, 2007 WL 465889, at *2 (Ark. Ct. App. Feb. 14, 2007); *Bratton*, 136 S.W.3d at 603 (holding that wife's promise to forgo a career in dentistry was "vague and illusory" because her plans to become a dentist were too preliminary).

67. TEX. FAM. CODE ANN. §§ 4.001–.010 (Vernon 2006).

should apply by analogy to postnuptial agreements. Similarly, Texas has not yet addressed whether its statute governing property transfers between spouses[68] would govern postnuptial agreements that only transfer property contingent on a subsequent divorce. Other states that have yet to address the specific issue include Georgia, Illinois, Massachusetts, Michigan, and North Carolina.

The remainder of this Section briefly evaluates the various additional requirements that courts and legislatures have imposed on postnuptial agreements.

1. CONSIDERATION

Courts in Arkansas, New York, and Tennessee have attempted to use the doctrine of consideration to evaluate postnuptial agreements. For example, in *Bratton v. Bratton* the Tennessee Supreme Court refused to enforce a postnuptial agreement because the wife did not give adequate consideration for the agreement.[69] In so holding, the court managed to misapply its own rule of consideration while simultaneously illustrating how easily couples could elude its new requirement.

The court stated that "[c]onsideration exists when a party does something that he or she is under no legal obligation to do or refrains from doing something which he or she has a legal right to do."[70] Each spouse has a legal right to bring an action for divorce. Therefore, when one spouse promises not to bring such an action,[71] that spouse is presumably "refrain[ing] from doing something which he or she has a legal right to do."[72] The court rejected this view and instead held that Ms. Bratton's promise to remain in the marriage was not a "meaningful act" because the spouses were not having "marital difficulties" at the time they signed the postnuptial agreement.[73] The court also rejected Ms. Bratton's argument that she provided adequate consideration by promising not to pursue a career in dentistry.[74] The court held that this

68. *Id.* § 4.105(b).

69. *Bratton*, 136 S.W.3d at 601 ("Having established what is necessary for there to be a valid and enforceable postnuptial agreement, we must determine whether the agreement entered into by the parties in this case meets those requirements. We hold that it does not because it was not supported by adequate consideration.").

70. *Id.* at 602.

71. Although spouses cannot promise never to file for divorce, they can promise to work on the marriage in good faith and refrain from pursuing their legal right to divorce for a reasonable time.

72. *Bratton*, 136 S.W.3d at 602.

73. *Id.* at 603.

74. *Id.* at 603–04.

promise was "illusory" because she decided to forgo a career as a dentist before she signed the postnuptial agreement.[75]

These rulings suggest that the court injected a subjective element into the definition of consideration. The court refused to find consideration when a spouse promised to refrain from doing something she did not intend to do (file for divorce) or promised to do something that she already intended to do (forgo a career in dentistry). This novel addition would radically alter the doctrine of consideration. For example, in every settlement where one litigant releases the other from liability, the court would have to ask whether that litigant *really* intended to pursue a lawsuit.[76] Psychics, not courts, are prepared to investigate these matters.

Even if refraining from filing for divorce does not constitute adequate consideration, most lawyers should be able to find other adequate consideration. *Bratton* noted that a postnuptial agreement would contain adequate consideration if both parties "mutually release[d] claims to each other's property in the event of death."[77] Similarly, any transfer of separate property would create adequate consideration. Therefore, as long as both spouses have some nominal separate property, a crafty lawyer can draft a valid postnuptial agreement without ever addressing the court's core concern: the potentially "unjust advantage" that one spouse may have in the negotiation process.

2. ENFORCEMENT-TIME FAIRNESS REVIEW

There are two common ways to conduct fairness reviews. Courts may ask whether an agreement was fair when it was signed (signing-time fairness)[78] or whether it is fair at the time of the divorce (enforcement-time fairness).[79] This Section focuses on the latter. The next Section addresses signing-time fairness review.

Enforcement-time fairness review establishes "fairness" as an essential incident of marriage. When a court conducts an enforcement-time fairness review, it evaluates whether the outcome of an agreement is fair. As a benchmark for fairness, most courts examine the extent to

75. *Id.* at 603.

76. If a litigant's claim is valid, courts will not inquire into whether he or she intended to pursue his or her right. RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981).

77. *Bratton*, 136 S.W.3d at 604 n.2.

78. *See, e.g.*, Pacelli v. Pacelli, 725 A.2d 56, 58, 60 (N.J. Super. Ct. App. Div. 1999) (holding that a postnuptial agreement must be "fair and equitable when made *and* when it is sought to be enforced").

79. *Id.*

which the agreement deviates from an equal split.[80] The larger the deviation, the more likely a court is to invalidate the agreement. Therefore, an enforcement-time fairness review imposes a nonwaivable ongoing duty on spouses to link their fortunes together to a significant extent. The state, and the state alone, defines the scope of this obligation. The prevailing assumptions during most of the last century were that the obligation of mutual support existed for life. The American Law Institute's (ALI) *Principles of the Law of Family Dissolution* recommends that spouses' standards of living should be linked for a set-and-limited time period after marriage.[81] The ALI's proposal has had a chilly reception. Most courts today favor a clean break upon divorce.[82]

When courts conduct enforcement-time fairness reviews, however, they are refusing to allow the spouses themselves to define the terms of that clean break. Instead, they impose their own view of equity and divide the relevant assets to achieve it. In this way they reify the state's exclusive power to define the scope of the spouses' obligations to one another after divorce.

Most states do not impose any type of fairness review on prenuptial agreements. Following the UPAA, these states do not even allow courts to perform the standard unconscionability review that is generally applicable to all contracts.[83] These states refuse to impose their own view of fairness on prenuptial agreements and do not give courts the exclusive power to define the scope of spouses' obligations to one another. In this way, these states have rejected the justification that undergirds enforcement-time fairness review. Yet some of these states, including New Jersey, conduct such a review for postnuptial agreements.[84]

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80. *See, e.g.*, *In re* Marriage of Richardson, 606 N.E.2d 56, 65 (Ill. App. Ct. 1992) ("The determination of unconscionability focuses on the parties' relative economic positions . . . ."); Pacelli v. Pacelli, 725 A.2d 56, 63 (N.J. Super. Ct. App. Div. 1999) (invalidating agreement after concluding that it gave only fifteen percent of marital estate to the wife).

81. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.06 (2000).

82. Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 704.

83. UNIF. PREMARITAL AGREEMENT ACT § 6(a) (amended 2001), 9C U.L.A. 48–49 (1983). Twenty-eight states and the District of Columbia have adopted the UPAA. Dematteo v. Dematteo, 762 N.E.2d 797, 809 n.28 (Mass. 2002). They are Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.*

84. *See Pacelli*, 725 A.2d at 60.

This approach treats marriages that begin with prenuptial agreements as having no monetary essential incidents but imposes one on marriages that do not begin with prenuptial agreements. Once the marriage contract is made under the state's default terms, some of these terms become nonwaivable. Specifically, spouses are not able to waive their ongoing obligation to link their financial fortunes together. This does not make sense. The basic logic of the UPAA is that people should be able to alter the state's default terms of marriage if they are competent to do so. If spouses are competent, they should be accorded the same right to alter the terms of their marriage as fiancés, provided that the bargaining dynamics within marriages are similar to, or less normatively problematic than, the bargaining dynamics before marriage.

3. PROHIBITIONS, SIGNING-TIME FAIRNESS REVIEW, AND PRESUMPTIONS OF COERCION

States have implemented three additional mechanisms to limit the use of postnuptial agreements: prohibitions, signing-time fairness reviews, and presumptions of coercion. These mechanisms seek to accomplish the same goal—to prevent spouses from using the intimate nature of their relationship to gain an illegitimate bargaining advantage. For example, Ohio bans postnuptial agreements because:

> [M]arried persons are embroiled in a highly delicate relationship of trust and interdependence. This interdependence encompasses the most fundamental treatment of one spouse by the other, such as the provision of proper food, clothing, and shelter; abstinence from pervasive physical or psychological abuse; and the proper care of minor children. A contract entered during marriage is likely not to be entered at arms' length. There are often present very serious, though subtle, forms of duress, which influence any agreement between spouses. These factors are rarely discernible by a court and are most commonly not witnessed by a disinterested third party.[85]

Similarly, a New Jersey Supreme Court decision to invalidate a postnuptial agreement stemmed from its observation that a wife "faced a more difficult choice than the bride who is presented with

85. STANLEY MORGANSTERN & BEATRICE SOWALD, BALDWIN'S OHIO PRACTICE: DOMESTIC RELATIONS LAW § 12:17 (2003 & Supp. 2007).

a demand for a pre-nuptial agreement."[86] "[T]he dynamics and pressures involved in a mid-marriage context are qualitatively different" and "are pregnant with the opportunity for one party to use the threat of dissolution to bargain themselves into positions of advantage."[87] California appellate courts have instituted a presumption of duress based on similar concerns.[88]

Many scholars have reiterated these concerns. Professor Amy Wax has argued that "men on average have more power in the [heterosexual marital] relationship. . . . [M]en are in a position to 'get their way' more often and to achieve a higher degree of satisfaction of their preferences."[89] Similarly, Professor Kathryn Abrams has argued that courts should be wary of enforcing the choices of husbands and wives because "we should question how choice is produced within heterosexual unions, where power relationships are complicated and often unequal."[90] Marital bargaining is therefore likely to produce "marital contracts that are the product of inequalities in bargaining power."[91]

These concerns are nicely illustrated by *Pacelli v. Pacelli*.[92] The Pacellis married in 1975 when Mr. Pacelli was a forty-four-year-old real-estate developer and Ms. Pacelli was a twenty-year-old Italian immigrant.[93] After ten years of marriage, Mr. Pacelli requested a postnuptial agreement to protect his investments from the volatility of divorce proceedings.[94] He offered his wife far less than she would have received under New Jersey's equitable distribution rules.[95] He refused to negotiate, presented the offer as a take-it-or-leave-it deal, and "moved out of the marital bedroom"

86. *Pacelli*, 725 A.2d at 59.

87. *Id.* at 61–62 (internal quotations omitted) (quoting Mathie v. Mathie, 363 P.2d 779, 783 (Utah 1961)).

88. *In re* Marriage of Haines, 39 Cal. Rptr. 2d 673, 683 (Cal. Ct. App. 1995) ("When an interspousal transaction advantages one spouse, the law, from considerations of public policy, presumes such transactions to have been induced by undue influence. Courts of equity . . . view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye." (internal quotation and citations omitted)), *cited in In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 418 (Cal. Ct. App. 2002).

89. Wax, *supra* note 9, at 513.

90. Abrams, *supra* note 7, at 518.

91. *Id.*

92. *Pacelli*, 725 A.2d at 56.

93. *Id.* at 57.

94. *Id.* at 58, 60.

95. *Id.* at 62 (calculating that husband offered wife eighteen percent of the marital estate).

until she agreed to sign it.[96] Although her lawyer advised against signing it, Ms. Pacelli indicated that "she would sign anything in an effort to preserve the marriage."[97] She signed the agreement.[98] The New Jersey court refused to enforce it because it left the husband and the wife in such disparate financial situations.[99]

The marriage in *Pacelli* exhibited a number of subtle factors that affect bargaining power.[100] Ms. Pacelli may have been at a bargaining disadvantage because she valued an intact family more than her husband: she was young, she presumably had much less experience with the U.S. legal system than her husband, and she did not know how to support herself outside of the marriage because she had probably never worked.[101] Therefore, Mr. Pacelli's bargaining tactics, and the substance of his request, may have violated his fiduciary duties to his wife.

There is reason to think, however, that *Pacelli* will be the exception rather than the rule. Bargaining power in marriages is unlikely to be as skewed as many courts and commentators suggest. In fact, prenuptial agreements have the potential to create greater disparities of wealth than postnuptial agreements. Part III sets forth this claim in detail.

III. THE USEFULNESS OF POSTNUPTIAL AGREEMENTS

A. Efficiency Gains and Investment Incentives

The availability of unilateral divorce and the current judicial norms regarding the division of assets on divorce undermine efficiency. An "efficient" marriage is one that maximizes the gains of the family as a whole. Maximizing overall family welfare, however, is sometimes detrimental to one spouse's individual welfare. In a paradigmatic example, a couple may face a choice of moving to a new city where the husband's annual salary will increase by $50,000 but the wife's will

96. *Id.* at 58.

97. *Id.* This may have been influenced by her religion. Although the court does not mention this, she may have been Catholic and believed that divorce was a sin. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006, *available at* http://www.state.gov/g/drl/rls/irf/2006/71387.htm (noting that eighty-seven percent of native-born Italians are "nominally Catholic").

98. *Pacelli*, 725 A.2d at 58.

99. *Id.* at 62.

100. Abrams, *supra* note 7, at 520–22.

101. *Id.* (citing these factors as important determinants of bargaining power in heterosexual relationships).

decrease by $10,000. Although this move is efficient, it may not be in the personal interest of the wife, even assuming that the couple shares all of their joint income equally. Only when divorce is not possible do both spouses share the same incentive to maximize overall family wealth.

Yet unilateral divorce is widely available,[102] and most courts today are hesitant to award long-term spousal support after divorce.[103] Even the current proposals to reform spousal support tend to favor the higher-earning spouse.[104] Therefore, the husband is likely to retain his extra earning capacity after a divorce. Similarly, the wife is likely to bear the burden of her reduced earning capacity after a divorce. In the example outlined above, these conditions give the wife an incentive to stay, rather than to move. "[T]he strategy the spouses have adopted to reduce the financial loss flowing from marital failure also reduces the financial benefits arising from the intact marriage. Part of the husband's higher earning potential goes unrealized, to both his detriment and his wife's."[105] The above example can be generalized to numerous types of marital investment, such as supporting a spouse while he or she attends school or exits the labor market to raise children.

Conceptually, the simplest way to eliminate this disincentive is to allow the spouses to enter into an agreement that gives side payments to the wife. If the spouses can enter an agreement that shifts between $10,000 and $50,000 to the wife each year, then both spouses will be better off after the move. Courts have been hesitant, however, to enforce agreements that control spouses' behavior during marriage.[106] Therefore, couples can only write contracts that become effective upon divorce and change their rights and obligations upon exiting the marriage. Such contracts could eliminate the wife's disincentives by giving her a postdivorce right to share in her husband's increased earning capacity.

102. Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722–23.

103. Scott, *supra* note 82, at 704.

104. Kathrine C. Daniels et al., *Alternate Formulas for Distributing Parental Incomes at Divorce*, 27 J. FAM. & ECON. ISSUES 4, 19–20 (2006) (finding that under both real and proposed alimony regimes, ex-wives have a much lower income-to-needs ratio than ex-husbands).

105. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 47 (1989).

106. *See* Silbaugh, *supra* note 20, at 71.

1. ADVANTAGES COMPARED TO ALIMONY

Marital contracting, whether in the form of pre- or postnuptial agreements, has advantages over default rules of alimony or spousal support. Its main advantage is flexibility. "Contract offers a rich and developed tradition whose principal strength is precisely the accommodation of diverse relationships."[107] Default rules cannot fit every couple. Some couples are likely to be situated within a larger family context that does not reflect the traditional nuclear family. The obligations stemming from these varied kinship groups might make the state's default contract less desirable. For example, a divorcé with children who is considering a second marriage must think about how to balance his obligations to his new family with those to his old family. Even in nuclear families, spouses may wish to customize their rights and obligations to one another. This is evident in the proliferation of adultery penalties in prenuptial agreements.[108] Notably, couples are turning to such clauses even when it is not clear that courts will enforce them.[109] This again suggests that at least some couples have a strong desire to customize their marriages. Given the practical barriers to prenuptial agreements—signaling and optimism[110]—it is likely many couples that currently opt into the state's default rules of marriage might actually prefer a different contract.

In addition to increased flexibility, postnuptial agreements create more certainty than default marriage rules. Currently, most states divide marital assets and make spousal-support determinations based on broad notions of fairness and equity.[111] These equity-based decisions prevent spouses from having clear incentives during the marriage. Indeed, it is likely that the increased uncertainty leads both spouses to be overconfident in their postdivorce payoffs.[112] This will lead many couples to divorce in situations where, if they had more-accurate

107. Shultz, *supra* note 1, at 248.

108. *See supra* note 38.

109. *See* Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 495–97 (Cal. Ct. App. 2002) (refusing to enforce prenuptial agreement providing for $50,000 adultery penalty because "the agreement attempts to impose a penalty on one of the parties as a result of that party's 'fault' during the marriage, it is contrary to the public policy underlying the no-fault provisions for dissolution of marriage").

110. *See infra* Part III.A.2.

111. *See* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28, 32 (2001).

112. *See* COLIN F. CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION 159 (2003) (collecting and discussing experiments on optimism and the self-serving bias which suggest that parties to a legal case will interpret ambiguity in their favor, thereby decreasing the likelihood of settlement).

information, they would have been able to come to an amicable reconciliation. Certainty can also help prevent inefficient investment in protective measures. Because spousal support is entirely in the discretion of a single judge, spouses' postdivorce incomes are highly uncertain. Therefore, they will have an incentive to expend resources to protect themselves against postdivorce penury.[113]

Even if the default rules regarding division of assets upon divorce became rule based and predictable, postnuptial agreements could still serve a useful function. Postnuptial agreements would then allow some couples to opt out of the rule-based spousal-support regime and replace it with a discretionary one, particularly if they both prefer the results of hindsight-oriented, equity-based decision making.

Finally, postnuptial agreements give spouses control over their own futures. Even absent any proof that this control will lead to better outcomes for each spouse, control itself might be a benefit. As psychologist Daniel Gilbert has argued:

> The fact is that human beings come into the world with a passion for control, they go out of the world the same way, and research suggests that if they lose their ability to control things at any point between their entrance and their exit, they become unhappy, helpless, hopeless, and depressed.[114]

2. ADVANTAGES COMPARED TO PRENUPTIAL AGREEMENTS

Although both pre- and postnuptial agreements could eliminate inefficient disincentives and allow couples to customize their marital contract, postnuptial agreements have several practical advantages. Prenuptial agreements are rare. Spouses do not need to register prenuptial agreements, so it is not possible to get an accurate count of how many couples use them. In the only survey data on point, a mere "1.5% of . . . marriage license applicants expressed any interest in entering into a prenuptial agreement concerning postdivorce

113. Petter Lundborg et. al., *Getting Ready for the Marriage Market? The Association Between Divorce Risks and Investments in Attractive Body Mass Among Married Europeans*, 39 J. BIOSOC. SCI. 531, 540 (2007) (finding that when divorce rates are high, spouses stay more fit and attractive); Stake, *supra* note 7, at 802 (noting that spouses will take "costly (and often needless) steps to protect themselves" from a negative postdivorce lifestyle).

114. DANIEL GILBERT, STUMBLING ON HAPPINESS 21 (2006) (collecting studies of mortality, anxiety, and optimism).

finances."[115] These data are from 1992, however, and the use of prenuptial agreements has probably grown since then.[116] Based on anecdotal evidence, commentators estimate that five to ten percent of marriages begin with prenuptial agreements.[117] There are three main factors that prevent couples from entering into prenuptial agreements: perceived signaling effects, optimism, and futility. Although prenuptial and postnuptial agreements are both likely to entail negative signaling effects, postnuptial agreements are much less likely to be avoided due to optimism or futility. Therefore, all else being equal, postnuptial agreements are likely to become more common than prenuptial agreements.

First, most people believe that requesting a prenuptial agreement will indicate to their partner that they are uncertain about the marriage.[118] Because couples do not want to send this signal, they refrain from requesting prenuptial agreements. Postnuptial agreements may suffer from a similar signaling problem. Requesting a postnuptial agreement sends a signal that a spouse is unhappy enough in the marriage to consider leaving it. However, postnuptial agreements suffer far less than prenuptial agreements from the effects of optimism bias and the difficulties of anticipating future contingencies.

Second, couples are notoriously optimistic about the probability that they will live happily ever after. Although couples believe that fifty percent of marriages end in divorce, they simultaneously predict that their own chances of divorce are between zero and seventeen percent.[119]

115. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 448 (1993).

116. Lis Wiehl, *'Til Prenup Do We Part*, FOX NEWS, Feb. 19, 2007, *available at* http://www.foxnews.com/story/0,2933,252778,00.html (noting "that 80 percent of matrimonial lawyers reported an increase of prenuptial agreements in the past five years").

117. Marston, *supra* note 3, at 891 (estimating that five percent of couples sign prenuptial agreements); ARLENE G. DUBIN, PRENUPS FOR LOVERS: A ROMANTIC GUIDE TO PRENUPTIAL AGREEMENTS 15 (2001).

118. *See* Heather Mahar, *Why are there so Few Prenuptial Agreements?* 15 (John M. Olin Center for L., Econ., & Bus., Harvard Law Sch., Discussion Paper No. 436, Sept. 2003), *available at* http:// www.law.harvard.edu/programs/olin_center/ papers/pdf/436.pdf (reporting that about sixty percent of survey respondents would conclude that there was a greater possibility of divorce if their partner presented them with a prenuptial agreement).

119. Baker & Emery, *supra* note 115, at 443 (surveying couples applying for marriage licenses and finding that they accurately predicted the average divorce rate, but that the median couple also predicted that they would never divorce); Mahar, *supra* note 118, at 2 (finding that approximately twelve percent of respondents felt that they might divorce someday); Scott, *supra* note 82, at 700 n.48 (finding that less than twelve

Because couples think that they will live happily ever after, they do not make contingency plans for divorce and do not write prenuptial agreements. Postnuptial agreements should be less affected by optimism. Optimism undoubtedly wanes as the relationship progresses. The honeymoon ends, and the real trials and tribulations of marriage inevitably begin to erode spouses' faith in their futures. Indeed, marital happiness usually declines sharply in the early years of marriage and never rebounds.[120]

Finally, it is likely that any attempt to write a prenuptial agreement will also be futile. In order to write a useful prenuptial agreement, a couple must anticipate events that might occur in the distant future and must also anticipate their reactions to novel circumstances such as having a child, losing employment, or obtaining an unexpected job offer. People are notoriously bad at predicting their own futures[121] and are even worse at predicting their emotional reactions to future circumstances.[122] These factors make it difficult, if not impossible, to set out a prenuptial contract. Postnuptial agreements do not suffer from these problems. There is significantly less need to anticipate events in the far future because postnuptial agreements can react to spouses' immediate concerns.

B. Potential Efficiency Costs

Although renegotiating a marital contract can have many benefits, it is not free from costs.[123] In addition to the costs of bargaining and the costs of writing a new contract, the mere possibility of renegotiation introduces uncertainty into the relationship. This undermines one of the underlying purposes of the contract: to provide clear incentives for each spouse to invest efficiently in the marriage. Professor Ian Smith has argued that "there is a trade-off between the ex ante incentive benefits for marriage specific investments of commitment to a no renegotiation provision and the costs of foregoing welfare enhancing ex post contract

percent of college men and six percent of college women thought that they would ever get a divorce).

120. Jody VanLaningham et al., *Marital Happiness, Marital Duration, and the U-Shaped Curve: Evidence from a Five-Wave Panel Study*, 79 SOC. FORCES 1313, 1329–31 (2001) (reporting that marital happiness declines significantly in the early years of marriage and then levels off until late in the marriage, when it declines again).

121. *See* Baker & Emery, *supra* note 115, at 443.

122. GILBERT, *supra* note 114, at 175–80 (noting that people often mispredict their reactions to future events because they underestimate the degree to which they will adjust to both positive and negative events).

123. Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 207 (1997).

modifications that permit an optimal and flexible response to unanticipated circumstances."[124] Therefore, the ex ante incentive effects of renegotiation may outweigh the ex post benefits. But they may not.

There is currently no clear prediction about whether postnuptial agreements will create more uncertainty than they will prevent, or whether, broadly speaking, their costs will outweigh their benefits.[125] The UPAA, however, provides at least some initial guidance. Section five of the UPAA states that "[a]fter marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration."[126] This suggests that the drafters of the UPAA thought that the benefits of renegotiation would outweigh its costs. Renegotiation is the norm in contract law generally.[127] Further, any rule against renegotiation in the marriage context is easily circumvented. Spouses could file for divorce and then sign a reconciliation agreement which all courts would enforce. Because renegotiation is endemic and difficult to prevent, states should allow it and focus in its regulation.

IV. BARGAINING THEORY AND ITS APPLICATION TO POSTNUPTIAL AGREEMENTS

There is no data describing how couples actually negotiate postnuptial agreements. Bargaining theory, however, can provide a useful first approximation of the dynamics of these bargaining processes. Bargaining theory suggests that courts and commentators have overstated the likely disparity in bargaining power between richer and poorer spouses. The theory, as well as empirical research on bargaining and loss aversion, suggest that even in a traditional family where the husband works for wages and the wife works in the home, the husband's bargaining power will not be significantly greater than his wife's.

124. Ian Smith, *The Law and Economics of Marriage Contracts*, 17 J. ECON. SURV. 201, 218 (2003).

125. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 475–81 (1998) for an interesting debate on the merits of renegotiation occurring between the two coauthors.

126. UNIF. PREMARITAL AGREEMENT ACT § 5 (amended 2001), 9C U.L.A. 47 (1983).

127. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) (discussing modification).

Much of the early research on game theory and marital bargaining assumed that married couples acted to maximize their joint wealth.[128] The very first models assumed that all members of the family shared the same preferences and those preferences were for the maximization of joint wealth.[129] Under this common preference theory, the family was essentially modeled as a single individual. Other early models assumed that the spouses had different preferences, but that they would always costlessly bargain to rearrange the marital surplus such that any change that would increase their overall wealth would also increase each individual's wealth. For example, if a choice of where to live would increase the husband's salary but decrease the wife's salary, these models assumed that they would always negotiate compensatory side payments from the husband to the wife. The joint-maximization assumption and the common-preference model have been routinely criticized as unrealistic.[130]

Modern research on marital bargaining has acknowledged that the interests of each spouse are likely to diverge, and the spouses will therefore have to bargain with each other to determine a course of action. Instead of assuming that the spouses will reach an agreement on side payments, current research asks whether they will reach such an agreement and attempts to predict the content of that agreement.

Potentially successful bargaining occurs whenever there is a set of mutually beneficial terms of a trade, yet the spouses have conflicting individual interests about which of these mutually beneficial terms to adopt. Under bargaining models, each spouse seeks to maximize his or her own utility.[131] The concept of utility can be simplified or complicated to any degree desirable. Simple models equate utility with monetary gain. More complex calculations of utility can approximate feelings of altruism. A parent may gain utility from seeing that her child is happy, and, similarly, spouses may gain utility from knowing that the other spouse is happy. In economic jargon, these spouses have interdependent utilities: the utility of one spouse influences the utility of the other.[132] No person is purely altruistic, however, and conflicts that lead to the necessity of bargaining will inevitably arise.

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128. Martin Zelder, *For Better or for Worse? Is Bargaining in Marriage and Divorce Efficient?*, *in* THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 157, 161 (Antony W. Dnes & Robert Rowthorn eds., 2002).

129. *Id.*

130. *Id.* at 162; Wax, *supra* note 9, at 528–29 n.36 (collecting and discussing criticisms).

131. *See, e.g.*, GARY S. BECKER, A TREATISE ON THE FAMILY 112 (1991).

132. Robert A. Pollak, *Interdependent Preferences*, 66 AM. ECON. REV. 309, 310–15 (1976) (describing several notions of interdependent utility). For a criticism of interdependent utilities and the discussion of an alternate framework for understanding

Each spouse has a next-best alternative to entering the agreement. In the postnuptial context, the next-best alternative is normally divorce. Neither spouse will agree to stay married if the terms of the marriage give him or her less utility than the terms of the divorce. The utility that each spouse would obtain upon divorce therefore creates minimum demands that must be met to keep each spouse within the marriage. The minimum demands are the spouses' threat points or reservation prices.[133] A large range of terms will often meet both spouses' reservation prices. Therefore, bargaining models attempt to predict where in this range an agreement is likely to occur.

The bargaining model that most readily approximates real-life bargaining is the sequential or alternating-offers bargaining model.[134] This model envisions two rational players bargaining over how to split a pot of money.[135] These games are often referred to as "split-the-pie" games.[136] In the postnuptial context, each spouse would bargain over how to split their joint assets upon divorce. Bargaining takes place in rounds. One spouse makes an offer, which the other spouse is free to accept or reject. If the offer is accepted, then the bargaining is over. If the second spouse rejects the offer, then he or she can make a counteroffer. Either spouse can also choose to walk away from the bargaining table at any time. If the spouses come to an agreement, then each receives the share of the pie for which he or she bargained.[137] If the spouses fail to agree, each receives a fallback payment.[138] In the postnuptial context, this fallback payment will normally be the distribution of property that occurs in divorce.

Bargaining power under this model is primarily a function of the level of information that each spouse has about the other's preferences, the relative costs to each spouse of delaying agreement, the relative risk aversion of the spouses, and the value of each spouse's fallback position

altruism, see MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 65–66, 74–75 (1999).

133. Wax, *supra* note 9, at 576.

134. *See* Theodore C. Bergstrom, *Economics in a Family Way*, 34 J. ECON. LITERATURE 1903, 1929 (1996) (analyzing marital bargaining under this model and noting that its assumptions "can be much relaxed in the direction of realism without altering the main results"); CAMERER, *supra* note 112, at 161. This model was first developed by Ariel Rubinstein and later modified by Ken Binmore. *See* Ken Binmore, Ariel Rubinstein & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modeling*, 17 RAND J. ECON. 176, 176–79 (1986).

135. MUTHOO, BARGAINING THEORY, *supra* note 11, at 42–43.

136. *Id.*; Wax, *supra* note 9, at 541.

137. Ken Binmore, Avner Shaked & John Sutton, *An Outside Option Experiment*, 104 QUARTERLY J. ECON., 753, 757 (1989).

138. *Id.*

in case the marriage ends.[139] Although the term bargaining power is ill defined, it is a useful shorthand.[140] A party with more bargaining power will be able to secure a greater share of the pie.

A. Information Quality and Asymmetrical Information

In bargaining situations where each party has private information that is unknown to the other, there is a greater risk of deadlock.[141] This is because each party may misjudge the boundaries of the mutually beneficial agreements. A union, for example, may believe that a company can increase its members' wages by one dollar.[142] The company may have private information that it can only afford to increase wages by twenty-five cents. A costly delay is inevitable here. The union will strike, and the company will not give in to its demand. Each party incurs costs during the delay, and the parties' willingness to incur these costs communicates information about their reservation prices. Eventually, the union may realize that the company can only

139. Bargaining in general is often influenced by precommitment strategies. Muthoo, *Non-Technical Bargaining*, *supra* note 11, at 160–62. They are, however, unlikely to be important in the context of marital contracting. In general, precommitment tactics can effectively change a party's reservation price and can therefore alter the range of mutually beneficial bargains and the terms of the ultimate bargain. In other contexts, one party to a negotiation may be able to precommit to accepting only a narrow range of offers. For example, a national government may make public promises to its citizens that it will not accept any trade agreements that are not extremely favorable to that nation. Because this government can credibly claim that it cannot go back on its word, or at least that going back on its word would be costly, it can credibly demand that, if any agreement can be reached, it must be one that provides the government with more than fifty percent of the surplus.

Precommitment devices are unlikely to have a large effect on marital bargaining. Spouses are likely to have few opportunities to make precommitments. Spouses keep many financial matters private. A postnuptial agreement is likely to be similar. A spouse who hides the fact that he or she is considering a postnuptial agreement or hides the terms of that agreement cannot precommit.

To the extent that precommitment is possible, it is likely to favor the spouse whose position more-closely reflects prevailing moral opinion. In order to precommit, spouses must be able to inform other people of their commitment, and these other people must be able to punish them for breaching their commitment. Either spouse could inform others of his or her thoughts on a postnuptial agreement. A husband might inform his family and friends that he will not settle for anything less than protecting a certain subset of his assets. A wife may similarly tell family and friends that she cannot be in a marriage where sharing is not the guiding principle. To the extent that the wife's claim might have more moral purchase, she will find more people to support her position and more of them will support it vigorously.

140. Wax, *supra* note 9, at 543 & n.75.

141. Muthoo, *Non-Technical Bargaining*, *supra* note 11, at 162.

142. *Id.* at 163 (using a similar example).

pay twenty-five cents, but this corrected information will only emerge after costly delay.

These dynamics are likely to have a far greater impact on prenuptial bargaining than on postnuptial bargaining. Before a marriage, the couple may have limited information about how much the other person wants to get married. This could lead to stalled negotiations. These issues are significantly less likely to affect postnuptial bargaining. Couples presumably get to know one another better the longer they remain together. Therefore, married couples should know one another much better than fiancés. They are likely to have fairly accurate information about how much their spouses value the marriage, how devastated their spouses would be if the marriage ended, and how valuable they are on the remarriage market.[143] Indeed, it is hard to imagine any context where the contracting parties will have better information about one another.

B. Cost of Delay

In the postnuptial context, the spouse presented with the postnuptial agreement is likely to have lower costs associated with delaying agreement. This suggests that this spouse will have more bargaining power than the spouse who is presenting the postnuptial agreement.

Although there are potentially many rounds of bargaining under the alternating-offers model, each player experiences costs as a function of time. This puts pressure on the players to reach an agreement. These costs could come from the stress of bargaining itself, the costs of hiring an attorney, or simply from opportunity costs. In the marital context, each spouse might experience disutility if they remain deadlocked. The spouse with the larger cost of delay will have a disadvantage in bargaining because he or she will have a greater incentive to reach an agreement.

When spouses differ in their costs of delay, the model predicts that the spouse with the lower costs of delay will be able to obtain almost all of the surplus.[144] In every time period, prolonging the bargaining process hurts the spouse with the higher costs of delay more than it hurts the spouse with the lower costs of delay. If the spouse with the

143. B. Pawlowski & R. I. M. Dunbar, *Impact of Market Value on Human Mate Choice Decisions*, 266 PROC. ROYAL SOC'Y BIOLOGICAL SCI. 281, 283 (1999) (examining supply and demand in dating by looking at newspaper personal ads and concluding that both men and women are "well attuned to their market value," except for 45–49 year olds of both sexes, who, for unknown reason, tend to overestimate their market value).

144. CAMERER, *supra* note 112, at 175.

higher costs of delay were rational, he or she would accept any beneficial offer in the first time period, before his or her costs begin to snowball. Under this prediction, if spouses were bargaining over how to split $100,000 and one spouse had a slightly higher cost of delay, then this spouse would receive only a nominal amount, and the spouse with the lower cost of delay would receive almost the entire $100,000.

These stark predictions are blunted by the gravitational pull of equal division. Equal division has a strong normative appeal in all bargaining contexts. This tempers the otherwise drastic predictions of bargaining theory, but surprisingly, the theory's predictions are partially borne out in empirical studies.

In one laboratory bargaining study, subjects were asked to split a pot of thirty Israeli shekels, which is roughly equivalent to seven United States dollars.[145] Subjects were split into three groups.[146] The first group contained bargaining pairs with equal costs of delay—after each rejected offer, each person incurred the same monetary cost. The second group contained bargaining pairs with mildly different costs of delay. The third group contained bargaining pairs with vastly different costs of delay. In the group with the same costs of delay, the bargainers tended to split the pie evenly. The other two groups deviated from equal splits. When the costs of delay were mildly different, the player with the lower costs of delay received an average of seventeen shekels—fifty-seven percent of the pie. When the costs of delay were vastly different, the player with the lower costs of delay received an average of twenty-one shekels—sixty-seven percent of the pie. As the players became more experienced, the inequality grew. In the later bargaining rounds, the player with the mildly lower costs of delay received an average of twenty-two shekels—seventy-three percent of the pie. Players with vastly lower costs of delay received an average of twenty-six shekels—eighty-seven percent of the pie. This occurred because players with high costs of delay learned that they could not benefit by holding out for a better offer.[147]

These results illustrate the limitations and usefulness of bargaining theory. Bargaining theory is often incorrect in its precise predictions.

145. Amnon Rapoport et. al., *Effects of Fixed Costs in Two-Person Sequential Bargaining*, 28 THEORY & DECISION 47, 52–53 (1990), *cited in* CAMERER, *supra* note 112, at 175. Regarding the exchange rate, one U.S. dollar is worth 4.0650 Israeli shekels (as of Sept. 19, 2007). CorporateInformation.com, Exchange Rate of Israeli Shekel vs. All Currencies, http://corporateinformation.com/Site/BCTabs/Currency-Exchange-Rates.aspx?c=376 (last visited Sept. 21, 2007). Accordingly, thirty shekels is $7.38 (30 shekels ÷ 4.0650 = $7.38).

146. Rapoport et al., *supra* note 145, at 53.

147. *See* CAMERER, *supra* note 112, at 176 (noting that "[t]he horrible truth sinks in quickly" for those with high costs of delay).

However, "[t]he basic finding from these studies is that offers and counteroffers are usually somewhere between an equal split of the money being bargained over and the offer predicted by . . . game theory."[148] Therefore, both the normatively appealing equal split and the precise predictions of bargaining theory have some form of gravitational pull. Although the alternating-offers model predicts that the party with lower costs of delay can capture almost all of the pie, this should be interpreted more humbly as: the party with the lower costs of delay has more bargaining power.

In the postnuptial context, the spouse presented with the agreement is likely to have the lower costs of delay. When, for example, a husband requests a postnuptial agreement, he is seeking to alter the default marriage contract. Presumably he is unhappy with the current terms. The wife, by contrast, is likely to be happier with the status quo. This leads to differences in the costs of delay. All else being equal, the wife will benefit more from delaying the agreement, while the husband will be more anxious to finalize the new terms. This may, however, be offset by other factors. The husband probably considered a postnuptial agreement for some period of time before he shared the idea with his wife. This would give him more time to emotionally prepare for the conflict and reduce his costs of delay. There is also a simple selection effect: a husband who presents a postnuptial agreement is probably less averse to conflict than the average spouse and therefore may have a greater tolerance for it than his wife. In sum, it is not clear whether these effects will outweigh the advantage that the wife has by seeking merely to maintain the status quo. A slightly clearer picture emerges, however, in the realm of risk aversion.

C. Risk Aversion

The costs of delay are not limited to attorneys' fees and stress. They can also be probabilistic in nature. For example, there might be a chance that the pie will disappear entirely if the parties delay too long. This is always a problem when actors are not perfectly rational because players often reject beneficial offers and walk away from the bargaining table out of spite.[149] In the context of a postnuptial agreement, the bargaining process may erode spouses' trust in each other. The longer bargaining continues, the greater the risk that one spouse will decide that the damage to the relationship is beyond repair and seek a divorce.[150]

148. *Id.* at 469.

149. MUTHOO, BARGAINING THEORY, *supra* note 11, at 73.

150. *See id.*; CAMERER, *supra* note 112, at 162.

Not all people react to probabilistic costs in the same way. Spouses who are more risk averse will incur higher costs from these uncertainties than spouses who are less risk averse. In this way, risk aversion can create another cost of delay. Therefore, the spouse who is more risk averse will be at a disadvantage in bargaining because this spouse is more motivated to reach an agreement sooner. In contrast, a spouse who is risk seeking will not incur these costs of delay and will have a bargaining advantage.

Risk aversion is not merely a form of delay cost. A spouse's risk aversion also affects the offers that he or she makes and is willing to accept. A risk-averse spouse will demand and accept less because he or she will not want to risk a breakdown in negotiation.

Most courts that disfavor postnuptial agreements appear to have a specific type of agreement in mind: one where a rich husband presents an agreement to a wife who has substantially less earning capacity. There are data that, on first glance, seem to suggest that these wives will be more risk averse than their husbands and therefore have less bargaining power. There is a great deal of evidence that, in general, women are more risk averse than men.[151] This research does a poor job, however, of illuminating the dynamics of postnuptial bargaining because it deals with risk preferences when the subjects frame the outcomes in terms of positive gains, such as winning money. When outcomes are framed as monetary losses, both women and men tend to be risk seeking.[152]

In a number of general settings, women are more risk averse than men. In laboratory studies, women tend to choose less-risky gambles.[153] Using real-life investment data, researchers found that women also tend to have less-risky stock portfolios than men and choose less-risky investment allocations for pensions.[154] The presence of children in the household also tends to increase risk aversion in single women more

151. For an overview and meta-analysis of 150 studies, see James P. Byrnes, David C. Miller & William D. Schafer, *Gender Differences in Risk Taking: A Meta-Analysis*, 125 PSYCHOL. BULL. 367, 377–78 (1999) (finding that women were more risk averse than men across a number of tasks).

152. *See infra* notes 158–62 and accompanying text.

153. Catherine C. Eckel & Philip J. Grossman, *Sex Differences and Statistical Stereotyping in Attitudes Toward Financial Risk*, 23 EVOLUTION & HUM. BEHAV. 281, 290 (2002) (asserting that their experimental "results indicated that women were, on average, more risk averse than men in gamble choices.").

154. Annika E. Sundén & Brian J. Surette, *Gender Differences in the Allocation of Assets in Retirement Savings Plans*, 88 AM. ECON. REV. 207, 209 (1998); *see also* Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 ECON. INQUIRY 620, 627 (1998) (although not statistically significant, the study found that single women held fewer risky assets than single men.)

than in single men.[155] Several studies have also specifically examined the risk aversion of wives and husbands. The results of these studies mirror the results for men and women generally; they suggest that wives will be more risk averse than husbands.[156]

The above studies, however, have examined choices when people are expecting to achieve some positive gain. The only question is how much risk each person will tolerate in order to increase this gain. Women tend to take lower-risk, lower-return gambles. Men prefer higher-risk, higher-return gambles. The limitation of these studies lies in an often-verified finding of behavioral economics: people react to gains differently than they react to losses.

Behavioral economics is replete with experiments in which subjects treated perceived gains differently from perceived losses.[157] In general, subjects are risk averse when they are dealing with gains but risk seeking when they are dealing with losses.[158] For example, litigants tend to take more risks in negotiations when they feel that they are unlikely to win at trial.[159] Such litigants see the trial as a potential loss and are therefore willing to engage in risky behavior to prevent that loss. Conversely, litigants who are confident that they will win at trial are risk averse in negotiations.[160] These patterns hold across a wide range of losses, [161] and there is no clear gender difference in the degree of risk seeking once someone is presented with a potential loss.[162]

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155. Jianakoplos & Bernasek, *supra* note 154, at 627.

156. *See* Alexandra Bernasek & Stephanie Shwiff, *Gender, Risk, and Retirement*, 35 J. ECON. ISSUES 345, 354 (2001) (analyzing pension investment choices of university faculty and their spouses); Richard P. Hinz et al., *Are Women Conservative Investors? Gender Differences in Participant-Directed Pension Investments*, *in* POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY 91, 96 (Michael S. Gordon et al. eds., 1997) (finding that married women as a group invest their pensions more conservatively than married men).

157. *See, e.g.*, Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, *in* CHOICES, VALUES, AND FRAMES 159, 167 (Daniel Kahneman & Amos Tversky eds., 2000); Peter J. van Koppen, *Risk Taking in Civil Law Negotiations*, 14 LAW & HUM. BEHAV. 151, 160 (1990); Nathalie Etchart-Vincent, *Is Probability Weighting Sensitive to the Magnitude of Consequences? An Experimental Investigation on Losses*, 28 J. RISK & UNCERTAINTY 217, 223–24 (2004).

158. Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297, 306 (1992); *see also* Kahneman et al., *supra* note 157, at 166–67.

159. van Koppen, *supra* note 157, at 163.

160. *Id.*

161. Etchart-Vincent, *supra* note 157, at 222, 224 ("Behavior towards risk thus appears not to be sensitive to the magnitude of negative payoffs."). There is, however, some evidence suggesting that people will be less risk seeking when they are faced with ruinous losses. In the only study on-point, researchers asked a nonrandom study of European, Canadian, and American business managers to choose between a sure loss

Extending these studies to marital bargaining, it is reasonable to predict that wives will be risk seeking in the postnuptial context and risk averse in the prenuptial context. When spouses are entering prenuptial agreements, the poorer spouse is likely to see the marriage as a gain, regardless of actually signing the agreement. Therefore, this spouse is likely to be risk averse and perhaps will not drive a hard bargain. If a husband demands a postnuptial agreement, by contrast, the wife is likely to frame the agreement as a loss.

Consider a marriage where the husband requests a postnuptial agreement and both spouses would rather stay married than get a divorce. If the wife accepts the husband's postnuptial offer without bargaining, she will ensure that she suffers a small loss. If she bargains, she creates some risk that the marital relationship will not survive the bargaining process. This course of action would require that she accept a risk of a large loss in an attempt to avoid the small loss. Such choices are risk seeking, rather than risk averse. Research suggests that she will be risk seeking in this context.[163] Indeed, in bargaining experiments, subjects "are more willing to risk disagreement

and a risky endeavor that might allow them to avoid any losses but also had the potential to bankrupt their company. Dan J. Laughhunn, John W. Payne & Roy Crum, *Managerial Risk Preferences for Below-Target Returns*, 26 MGMT. SCI. 1238, 1241–42 (1980). They found that most managers had a lower preference for risk in these situations. *Id.* at 1245–46. When confronted with nonruinous losses, forty-four percent of the managers were risk seeking. *See id.* at 1248. When confronted with ruinous losses, only thirty-six percent of those managers were risk seeking. *See id.* Nonetheless, there are two reasons to be cautious about applying this study to the realm of postnuptial negotiation. First, the study detected a great deal of cultural heterogeneity in risk preferences for the nonruinous loss situation. *Id.* at 1246. Managers from Germany were significantly more risk seeking than managers from the Netherlands. *Id.* Similarly, managers as a whole were more risk seeking than managers in the airline industry. *Id.* These findings suggest that culture plays a large role in risk preferences and that studies of how American women deal with small losses may be more relevant than studies about how European men deal with large losses. Second, it is not at all clear that a wife presented with a postnuptial agreement would view divorce as ruinous. A wife presented with a postnuptial agreement is likely to view it as a major breach of trust. The greater the breach, the less likely it is that the wife will want to remain in the marriage and that she will view a subsequent divorce as ruinous. Finally, even if this study's predictions are perfectly applicable to postnuptial negotiations, a wife is likely to have excellent information about how her husband would react to different counter offers. This reduces the risk of bargaining and the relative importance of risk aversion. This is discussed further in Part IV.E. Although this study is approached with caution, it unequivocally indicates the need for further research into ruinous losses.

162. *See infra* notes 166–68 and accompanying text.

163. *See infra* notes 166–68 and accompanying text.

when bargaining over possible losses than when bargaining over possible gains."[164]

Although the wife will probably frame the postnuptial agreement as a potential loss, her husband will probably frame it as a potential gain. He will therefore most likely exhibit some degree of risk aversion. He will not only be hesitant to present a postnuptial agreement, but he will also not necessarily drive a hard bargain once he does present one. In a situation where the husband's gain is equivalent to the wife's potential loss, it is likely that the wife will bargain more forcefully.[165]

Even if the husband were risk seeking by nature, it is not clear whether he would be more risk seeking than his wife. Some studies suggest that women are more risk seeking than men in the face of losses.[166] Other studies reach the opposite conclusion.[167] A third group of studies finds no significant differences between men and women.[168] Overall, there is no consensus on the relationship between gender and risk aversion in the realm of losses, and thus no reason to assume that wives will be more risk averse than husbands in the postnuptial bargaining context.

Even if wives tend to be more risk averse than their husbands, it is not clear that this would greatly affect their relative bargaining power. In order for risk aversion to be relevant, a spouse must perceive that there is some risk associated with her actions. As the quality of a wife's

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164. Colin F. Camerer, *Progress in Behavioral Game Theory*, J. ECON. PERSP., Fall 1997, at 167, 172.

165. Cass R. Sunstein, *Behavioral Analysis of the Law*, 64 U. CHI. L. REV. 1175, 1179–81 (1997) (noting that people's displeasure from a loss is greater than their pleasure from an equivalent gain).

166. *See* Renate Schubert et al., *Gender Specific Attitudes Towards Risk and Ambiguity: An Experimental Investigation* 5–6 (Ctr. for Econ. Res., Swiss Fed. Inst. of Tech., Working Paper No. 17, 2000), *available at* http://www.cer.ethz.ch/research/workingpapers (finding that men are more risk averse than women in the face of losses that could produce a large range of final payoffs).

167. *See, e.g.*, Melanie Powell & David Ansie, *Gender Differences in Risk Behaviour in Financial Decision-Making: An Experimental Analysis*, 18 J. ECON. PSYCHOL. 605, 622–27 (1997); Eckel & Grossman, *supra* note 153, at 290.

168. Jamie Brown Kruse & Mark A. Thompson, *Valuing Low Probability Risk: Survey and Experimental Evidence*, 50 J. ECON. BEHAV. & ORG. 495, 500–02 (2003); Renate Schubert et al., *Financial Decision-Making: Are Women Really More Risk Averse?*, 89 AM. ECON. REV. 381, 381–83 (1999) (finding no difference between men and women when subjects were faced with a positive probability of suffering a loss and had to decide how much insurance to purchase). Professor Margaret Brinig has conducted a number of unpublished studies of the difference between women's and men's levels of risk aversion. She found that women and men exhibited similar risk aversion in a number of different contexts, such as life-insurance purchases, propensity to speed, purchases of lottery tickets, and the number of questions left blank on the SAT. Margaret F. Brinig, *Comment on Jana Singer's* Alimony and Efficiency, 82 GEO. L.J. 2461, 2475–76 (1994).

information improves, the risk that she faces often decreases. For example, if a wife knows her husband's reservation price, there is little risk in offering him that price and no more. If, on the other hand, she is uncertain about his reservation price and uncertain about how he will react to a low counteroffer, she may agree to an unfavorable bargain in order to ensure that he does not walk away from the bargaining table. This suggests that, even in those situations where a wife is more risk averse than her husband, her bargaining power may not suffer much as a result.

D. Outside Options

Bargaining outcomes are also affected by the payoffs that each spouse expects to receive in the absence of an agreement. Once spouses are married, the marital bargaining literature distinguishes between two classes of payoffs. A spouse's outside option is the utility that he or she would receive if divorced or remarried.[169] A spouse's inside option is the utility that he or she would receive if the couple reaches a bargaining impasse but nonetheless remains married.[170] Most marital disputes—such as who will pick up a child from soccer practice—do not occur in the shadow of a divorce threat.[171] Such disputes are instead negotiated in the shadow of "harsh words and burnt toast."[172] Therefore, many theorists use inside options to help predict the distribution of assets within a marriage.[173] In the context of postnuptial agreements, however, spouses are bargaining in the shadow of a divorce threat. The spouse who requests a postnuptial agreement is saying, in essence, that he or she is unhappy with the current state of the marriage and that some change is required before he or she will be happy again. In *Pacelli v. Pacelli*, for example, the husband moved out of the house until his wife signed the agreement.[174] In *Bratton v. Bratton*, the wife explicitly threatened to divorce her husband if they did not reach an agreement.[175] In each of these cases, one spouse either implicitly or explicitly threatened to divorce the other spouse absent some new agreement. Therefore, in the postnuptial context, outside options will be more salient than inside options.

169. MUTHOO, BARGAINING THEORY, *supra* note 11, at 137.

170. *Id.*

171. Bergstrom, *supra* note 134, at 1926.

172. *Id.*

173. Shelley Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988, 993 (1993).

174. 725 A.2d 56, 58 (N.J. Super. Ct. App. Div. 1999).

175. 136 S.W.3d 595, 598 (Tenn. 2004).

A spouse's outside options are primarily a function of his or her earning capacity and value on the remarriage market. Over the course of a marriage, the value of each spouse's outside option can fluctuate. These fluctuations are not random, however. Men's outside options tend to increase in value while women's outside options tend to decrease in value—or increase less quickly than their spouses' options.[176]

Most states have adopted a clean-break theory of divorce that limits the amount and duration of payments from the higher-wage earner to the lower-wage earner.[177] A spouse will therefore have the benefit of most, if not all, of his own earning capacity upon divorce. This tends to favor men. Husbands tend to have higher incomes than their wives at the beginning of marriages, and this initial disparity tends to be magnified over time.[178] This disparity is accentuated if the couple has children. Wives are much more likely to interrupt their career to care for children than husbands.[179] These interruptions reduce wives' earning capacity and reduce the value of their outside options.[180]

Another major factor in determining the value of a spouse's outside option is his or her value on the remarriage market.[181] As discussed above, men will tend to be wealthier after divorce than women.[182] This alone will skew spouses' opportunities to remarry because wealth is a sought-after quality on the marriage market.[183] Further, in current culture, age tends to reduce a woman's perceived attractiveness to men faster than it reduces a man's perceived attractiveness to women. "The

176. For a comprehensive discussion of these trends, see Wax, *supra* note 9, at 544–55.

177. Scott, *supra* note 82, at 704–05 n.64.

178. Men's wages are, on average, higher than those of women. LESLIE JOAN HARRIS ET AL., FAMILY LAW 500 (3d ed. 2005) (citing U.S. Census Bureau, Population of the United States, 2000). The disparity in income between new husbands and new wives is likely to be greater than the disparity in income between men and women in general because men tend to marry younger women and wages increase with age. Wax, *supra* note 9, at 548. These initial differences are likely to be magnified over time. Ellman, *supra* note 105, at 46 ("Whenever spouses have different earning capacities and want to plan rationally as a single economic unit, they will conclude that, where possible, they should shift economic sacrifices from the higher earning spouse to the lower earning spouse, because that shift will increase the income of the marital unit as a whole.").

179. *See* Wax, *supra* note 9, at 546–47 n.88.

180. *Id.*

181. *Id.* at 547–49; Bergstrom, *supra* note 134, at 1929 ("A satisfactory theory of bargaining between spouses should be embedded in a theory of marriage markets.").

182. For further empirical support, see Daniels et al., *supra* note 104, at 6 (collecting studies and noting that ex-wives suffer a larger financial loss at divorce, while ex-husbands realize a gain in their standard of living).

183. Ellman, *supra* note 105, at 43.

spouses' respective marriageability, if they divorce and seek new partners, follows a different pattern as they age. Prevailing social mores, relatively universal and apparently intractable, cause the woman's appeal as a sexual partner to decline more rapidly with age than does the man's."[184] Women also have shorter reproductive lives than men do.[185] Because fertility is an asset that many seek on the marriage market, older women will have fewer opportunities to remarry than men will.[186] Even when women still have many reproductive years ahead of them, many men discount their value as potential spouses once they have had children with a different partner.[187]

The value of a wife's outside option will therefore tend to decrease over time or at least increase at a slower rate than the value of her husband's outside option. How much effect will the husband's high outside option have on the postnuptial bargaining process? How much effect will the wife's low outside option have? The alternating-offers bargaining model gives counterintuitive answers to both of these questions, and these answers have some empirical support. First, the husband's outside option is useful only if it is sufficiently high. Second, the husband will never be able to bargain for significantly more than the value of his outside option. These predictions hold even if the wife's outside option is miserably low in value.

The model predicts that the husband's high outside option will only have an effect on the bargain if the value of his outside option exceeds the value that he would get in the bargaining process without this outside option.[188] If both spouses have equal costs of delay and equal levels of risk aversion, then they will probably choose to split their assets equally. For ease of illustration, suppose that a couple is dividing a set of rights and obligations worth $200,000. If they split the pie equally, the husband will gain utility equivalent to $100,000. If the value of the husband's outside option is less than $100,000, then his outside option will have no effect on the bargain. He will still receive only $100,000 because a rational husband cannot credibly threaten to leave the marriage in that situation. If he stays in the marriage he will receive $100,000 in benefits. If he leaves, he will receive less. Any attempt by the husband to reach a better bargain will be akin to an employee demanding a higher salary because he had just received a

184. *Id.*
185. Wax, *supra* note 9, at 548.
186. *Id.*
187. *Id.* at 548–49.
188. CAMERER, *supra* note 112, at 175–76.

worse job offer from another company.[189] This employee may threaten to leave his current job, but if the employer refuses to renegotiate, the employee will not carry out this threat.

But suppose instead that the value of the husband's outside option is equivalent to $150,000. This is his new reservation price. This might occur if the husband receives a promotion or suddenly loses a significant amount of weight such that his remarriage prospects are significantly enhanced. Now his divorce threat is credible. The split will no longer be equal; instead, the spouses will shift responsibilities within the marriage or shift postmarriage property rights to give the husband just barely more than $150,000 in utility. Notably, the model predicts that the husband will never be able to receive more than his reservation price. That is, he will not be able to appropriate the lion's share of the marital assets. As soon as his wife reapportions enough rights or responsibilities to meet the husband's new reservation price, any further threats to divorce are not credible and will not have an effect on the outcome.

The model predicts that the wife's low-value outside option will have only a tangential effect on the bargaining process. If the value of the husband's outside option is low, then his divorce threat is not credible. If his divorce threat is not credible, then the wife will not alter their current distribution of utility. This is so regardless of how miserable the wife's outside option may be.[190] The value of the wife's outside option will determine her reservation price. Consider the illustration above where the couple was bargaining over how to split $200,000 and the husband's outside option was $150,000. If the wife's reservation price is also $150,000, then they will divorce because there are no distributions that make both parties better off remaining married. In short, they would both be happier outside of the marriage than under any plausible agreement within the marriage. But if the wife's reservation price is less than $50,000, perhaps because her home state's courts tend to shortchange women in divorce, then they will remain married because they can redistribute the surplus in such a way that both are better off staying married. Therefore, the wife's low outside

189. This example is adapted from Muthoo, *Non-Technical Bargaining*, *supra* note 11, at 155–56.

190. Under current law and settlement practices, her outside option is indeed worth very little. At most, thirty percent of wives receive alimony and almost no divorce settlements that occur without an attorney include alimony. SCHNEIDER & BRINIG, *supra* note 23, at 329; Daniels et al., *supra* note 104, at 6 (collecting studies and noting that spousal support is only awarded in ten to fifteen percent of cases). In total, women tend to be much poorer after divorce than before. *Id.* (collecting studies and noting that ex-wives suffer a larger financial loss at divorce while ex-husbands realize a gain in their standard of living).

option is only relevant in combination with a husband's high outside option.

Professor Wax has challenged this prediction of bargaining theory.[191] She argues that outside options are likely to have a larger effect on bargaining than the theory predicts.[192] "[T]he party with the less desirable outside options will often be more reluctant to drive a hard bargain or more willing to make concessions, for fear that the other party will call the deal off."[193] Although Wax's criticism has common-sense appeal, there is theoretical and empirical support for bargaining theory's predictions.

Wax's criticism reflects her intuitions about the effects of outside options, risk aversion, and the interaction of the two. Wax's reference to fear is essentially an argument that, if a wife is risk averse, then she is likely to be more risk averse when bargaining over a potentially large loss than when bargaining over a smaller loss. Wax reiterates the centrality of risk aversion when she notes that because "'breakdown' is always possible between real people . . . the 'breakdown position' can be expected to influence the conduct of bargaining."[194]

The weakness in this argument is that the spouse resisting the postnuptial agreement is likely to be risk seeking rather than risk averse. That is, she will seek out risky strategies in order to avoid small losses.[195] Bargaining experiments confirm that people "are more willing to risk disagreement when bargaining over possible losses than when bargaining over possible gains."[196] A wife is therefore likely to be both less risk averse than her husband and less risk averse than a bride-to-be. Even if she is more risk averse than her husband, this is likely to have a minimal impact on her bargaining power. Wives will have high-quality information about their husbands; this information minimizes the riskiness of bargaining and reduces the importance of risk aversion.[197]

The predictions of the alternating-offers model also have direct empirical support. Numerous bargaining studies have shown that outside options are often useless, and even when they are useful their effect on bargaining outcomes is constrained. These results are robust across a number of different experimental designs, such as structured bargaining, unstructured bargaining, and demand games.

191. Wax, *supra* note 9, at 581.
192. *Id.*
193. *Id.*
194. *Id.* at 581 n.153.
195. *See supra* Part IV.C.
196. Camerer, *supra* note 164, at 172.
197. *See supra* Part IV.C.

In one study, subjects engaged in structured bargaining over the distribution of seven British pounds.[198] The bargaining was "structured" because the subjects had to make sequential offers and were limited in the amount that they could communicate to one another.[199] The subjects were split into three groups. In the first group, neither player had an outside option. In the second group, one player had an outside option of two pounds. In the third group, one player had an outside option of four pounds. As discussed above, the model predicts that the group with no outside options will split the seven pounds equally; each will receive three and a half pounds. The model also predicts that the two pounds outside option will not influence the bargained-for outcome because the player who possesses this outside option cannot credibly threaten to leave the bargaining table. Last, the model predicts that the subject with the four pounds outside option will receive four pounds, but no more. All of these predictions were borne out in the data. In both the first and second groups, outcomes clustered closely around an even split.[200] In the third group, by contrast, outcomes clustered around a fifty-seven to forty-three percent split, which gave about four pounds to the player with the outside option.[201]

This pattern also exists in unstructured-bargaining experiments. In these experiments, subjects are free to make offers at any time, and they can communicate freely with one another.[202] This design deviates from the alternating-offers model but is closer to the informal nature of most real bargaining situations. In one such experiment aimed at illuminating worker strikes, subjects bargained over the distribution of an income stream worth $2.40 per unit of time.[203] One player had an outside option that was worth $1.40 per unit of time.[204] This produced a potential surplus of $1. Instead of splitting this surplus equally, the player with the outside option was only able to obtain the value of his

198. K. Binmore et al., *Testing Noncooperative Bargaining Theory: A Preliminary Study*, 75 AM. ECON. REV. 1178, 1178–80 (1985), *cited in* CAMERER, *supra* note 112, at 175.

199. *Id.* at 1178–79; CAMERER, *supra* note 112, at 469 (discussing structured and unstructured bargaining experiments).

200. Binmore et al., *supra* note 198, at 1179–80.

201. *Id.*

202. CAMERER, *supra* note 112, at 469 (discussing structured and unstructured bargaining experiments). Structured bargaining is quite faithful to the alternating-offers model. *Id.*

203. Robert Forsythe et al., *An Experimental Analysis of Strikes in Bargaining Games with One-Sided Private Information*, 81 AM. ECON. REV. 253, 270–72 (1991), *cited in* CAMERER, *supra* note 112, at 179.

204. *Id.* at 181.

or her outside option plus five to ten percent.[205] This again suggests that an individual with a high outside option will realize a better outcome, but the outcome will make this individual only marginally better off then he or she would be absent any agreement.

These results were also confirmed in the context of a demand game. In a demand game, both players write down a demand that represents their share of a pie.[206] If the two demands sum to less than the value of the pie, each player gets her demand.[207] If not, each player receives nothing.[208] When the pie was $10 and one player had a known outside option of under $5, the median demand of the other player was approximately $5.[209] When the first player's outside option was above $5, the other player demanded the remainder of the pie, or slightly less than the remainder.[210] This again lends support for both quirks of outside options. They are not relevant if low, and even if they are high, they only yield a bargain that makes the holder of the option slightly better off then they would be otherwise.

These empirical findings can be illustrated by a simple real-world example: negotiating to buy a house. Suppose a buyer is considering making an offer on a house. If the owner's reservation price is $1,000,000, and a third party makes her an offer of $900,000, how would this affect the buyer's bargaining? It would not. The buyer would still have to offer $1,000,000 or more to successfully purchase the house. This illustrates how low outside options are irrelevant. But if the third party had offered $1,100,000, the owner's outside option would be relevant to the buyer's bargaining tactics. The buyer would offer marginally more than $1,100,000. This illustrates how a high outside option is relevant but also how the power of the outside option is limited: it only forces the buyer to offer the owner marginally more than the value of his or her outside option.

E. Putting it all Together

Spouses' outside options dictate their reservation prices and therefore set the boundaries of any acceptable bargain. But this is all they do. In debates on prenuptial agreements and informal marital

205. *Id.*

206. CAMERER, *supra* note 112, at 179 (discussing a demand game).

207. *Id.*

208. *Id.*

209. K. Binmore et. al., *Hard Bargains and Lost Opportunities*, 108 ECON. J. 1279, 1289–91 (1998), *cited in* CAMERER, *supra* note 112, at 179.

210. *Id.* at 1289–90.

bargaining, legal scholars have focused on the wife's outside option.[211] The value of the wife's outside option will only have a tangential effect on the ultimate bargain, however, and only when the husband's outside option is sufficiently high. What matters most is the value of the husband's outside option, yet it too only has a limited effect. It merely determines his reservation price, which in turn sets one boundary on the set of potentially acceptable bargains.

Empirical data suggests that the best a husband presenting a postnuptial agreement can hope for is to receive marginally more than his reservation price; he will never be able to bargain for more than this amount.[212] This result is potentially malleable depending on the spouses' relative costs of delay and risk aversion. These factors suggest, however, that the wife—not the husband—will have more bargaining power. Although it is not clear which spouse will experience the greater cost of delay, the wife will most likely be less risk averse. In fact, she may be risk seeking. Because the wife will frame the postnuptial agreement as a loss, she is likely to pursue risky bargaining strategies.[213] This will allow her to drive a hard bargain and give no more to her husband than his reservation price demands.

The quality of the wife's information about her husband lends further support to this conclusion. As spouses obtain more-accurate information about one another, their bargaining strategies become less risky. For example, if the wife knows that her husband's threat to divorce is not credible, there is no risk in refusing his demands. As the riskiness of a strategy decreases, the importance of risk aversion decreases. So even if the wife is not as risk seeking as the literature on loss aversion would suggest, her access to accurate information about her husband will allow her to limit his payoff to his reservation price.

Ultimately, postnuptial bargaining is likely to result in one of three outcomes. First, if both spouses have high outside options, they will divorce and seek happier lives outside of the marriage. Second, if the value of the husband's outside option is low, the wife will not sign a postnuptial agreement and the spouses will continue to split the marital surplus equally. Third, if the value of the husband's outside option is high, and the value of the wife's outside option is low, he will receive his reservation price but nothing more. Therefore, postnuptial bargaining contains built-in safeguards that limit disparity in the bargaining result.

These same limitations do not exist for prenuptial agreements, at least not to as great an extent. Fiancés are likely to have less-accurate

211. *See, e.g.*, Wax, *supra* note 9, at 581–82.
212. CAMERER, *supra* note 112, at 176.
213. *See supra* Part IV.C.

information about their partner's reservation price. Although most states require fiancés to disclose their assets before entering a prenuptial agreement, this information does not indicate how much they want to get married or how devastated they would be if the marriage fell through. Fiancés no doubt have some rough idea of their partner's feelings on these questions, but spouses are likely to have better information. Therefore, because the partners cannot discern credible threats from noncredible threats, there is more room for deception and obfuscation in the prenuptial context.

Due to loss aversion, the poorer fiancé will also be less likely than the poorer spouse to drive a hard bargain. After someone obtains a higher standard of living and gets used to the emotional and social advantages of marriage, he or she is likely to value it more than before.[214] This suggests that the costs to a spouse of losing his or her marital wealth will be greater than the costs to a fiancé of forgoing the same amount of wealth. Therefore, spouses will drive harder bargains than fiancés, and the results of postnuptial agreements will tend to be more egalitarian than the results of prenuptial agreements.

The preceding discussion undermines arguments in favor of regulating postnuptial agreements more heavily than prenuptial agreements. Postnuptial agreements cannot benefit either spouse unless couples know that the terms of their agreements will be enforced by the courts. If agreements are often altered by courts under vague standards of equity, then couples cannot reliably redistribute assets and obligations within their marriage and will simply divorce when one spouse obtains a valuable outside option. This suggests that courts should not impose signing-time or enforcement-time fairness review. The most common rules regulating prenuptial agreements—those from the UPAA—likewise eschew fairness review. The UPAA even goes so far as to limit the ability of courts to conduct a standard unconscionability review.[215] Instead, it regulates prenuptial agreements by imposing procedural requirements that help ensure informed and rational bargaining.[216] If courts and legislatures choose to regulate postnuptial agreements, the UPAA is likely to provide a good first approximation of what that regulation should look like.

214. Sunstein, *supra* note 165, at 1179–81 (noting that people's displeasure from a loss is greater than their pleasure from an equivalent gain).

215. UNIF. PREMARITAL AGREEMENT ACT § 6 (amended 2001), 9C U.L.A. 48 (1983).

216. *Id.*

V. A NORMATIVE EVALUATION OF POSTNUPTIAL CONTRACTING

The primary normative defense of postnuptial agreements is straightforward: the availability of postnuptial agreements will make each spouse better off. Of course, this would not end the normative inquiry if there were any identifiable externalities. As noted above, courts unanimously refuse to enforce terms within pre- or postnuptial agreements that alter child support obligations, determine custody, or otherwise have a substantial effect on children.[217] Therefore, courts already have the equitable tools required to address these problems. Communitarian feminists, however, have suggested that another externality may exist. They argue that enforcing postnuptial agreements sends an expressive signal that is corrosive to our shared notion of what constitutes a good relationship and may ultimately harm spouses. Part V.B. addresses this concern and concludes that it does not present a serious challenge to the normative viability of postnuptial agreements.

A. The Liberal-Feminist Defense: Both Spouses Benefit

The recent evolution of marriage law reflects a convergence upon liberal-feminist theories of marriage.[218] It is feminist in that the law no longer values the happiness and autonomy interests of the husband more highly than those of the wife. Instead the law strives to give equal weight to the interests of each spouse. It is liberal in that family law has become increasingly responsive to claims based on autonomy rather than obligation.

> In the past twenty-five years or so, the law of divorce awards has shifted to an emphasis on the external stance towards marriage. Divorce now ideally represents a "clean break" between spouses, which leaves no ongoing financial relationship between them. This rests on a vision of marriage as primarily an arrangement to promote individual happiness.[219]

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217. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 42 n.49 (2006) (noting that "aspects of [premarital] agreements that purport to resolve nonfinancial issues such as custody of children or conduct during the marriage are typically not binding").

218. Scott, *supra* note 82, at 701 ("The history of the modern law of marriage and divorce seems to be . . . a rather straightforward progression from a communitarian model of family relations to a model based on principles of liberal individualism.").

219. REGAN, *supra* note 132, at 168.

Although early common law placed many restraints upon divorce, these restraints began to diminish in 1970 when California adopted no-fault divorce.[220] Within fifteen years, every state allowed no-fault divorce.[221] By this time, the vast majority of states also allowed unilateral divorce so that one spouse could end the marital relationship without the consent of the other.[222] This shift in the law was accompanied by a shift in the meaning of marriage.[223] Marriage was no longer a lifelong commitment. Rather, it was a commitment that lasted only until one spouse decided that irreconcilable differences had cropped up in the relationship. This remains the view of marriage today:

> [T]he modern intimate relationship is characterized by increasing emphasis on negotiation, sensitivity to individual needs, and commitment conditioned on personal satisfaction. As a result, both men and women have come to regard it as more legitimate to ask whether the benefits and burdens of family life are acceptable in light of reflection on their own needs.[224]

By framing marriage as a vehicle for personal fulfillment, the liberal view of marriage uses the individual as its primary unit of analysis and uses consent as the sine qua non of imposing obligations on these individuals. Under this view, spouses should be free to leave the marriage whenever they are unhappy within it.

This ability to break the marital bond is not only consistent with liberal philosophy, but it is also integral to preventing the worst forms of marital abuse and unhappiness. The introduction of unilateral divorce

220. *Id.* at 142–45.

221. *Id.* at 144.

222. *Id.* (citing MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 68 (1987)).

223. For purposes of this Article, it does not matter whether the cultural change caused the legal change, vice versa, or whether the two changes co-occurred. The main point is a positive one: Americans' conception of marriage has changed. The current normative conception of marriage has a plausible claim to be the correct view if one believes that moral beliefs can be correct or incorrect.

224. REGAN, *supra* note 132, at 11; *see also* ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY 58 (1992) (suggesting that couples enter into relationships "for what can be derived by each person from a sustained association with another," and that they continue in a relationship "only in so far as it is thought by both parties to deliver enough satisfactions . . . to stay"); JOHN SCANZONI ET AL., THE SEXUAL BOND: RETHINKING FAMILIES AND CLOSE RELATIONSHIPS 17 (1989).

made a concrete difference in the quality of women's lives.[225] In states that adopted unilateral divorce, the female suicide rate dropped by eight to ten percent.[226] Similarly, there was a ten percent decline in the number of women who were murdered by their partners.[227] Even the incidence of domestic violence decreased dramatically, by roughly thirty percent.[228] Given that unilateral divorce is widely available and has important benefits, the question is whether policymakers should also allow less drastic means of dealing with unhappy marriages—such as giving spouses the ability to renegotiate the terms of a marriage. Indeed, states should allow such renegotiation because the availability of postnuptial agreements has the potential to benefit both spouses and does not have the potential to harm either spouse.

When a husband's outside option is sufficiently valuable to make his divorce threat credible, both spouses will be better off if they have the option to renegotiate. In these circumstances, a wife will either have to bargain with her husband or divorce him. Any rule barring postnuptial bargaining will force couples to divorce in these situations. Postnuptial agreements merely give them a milder option. From the husband's perspective, postnuptial agreements provide an option to remain married even after his outside option becomes valuable. Similarly, from the wife's perspective, postnuptial agreements create an option that is potentially preferable to divorce. If her own outside option is sufficiently valuable, then she will opt for divorce. If the wife prefers negotiating to divorcing, she will negotiate, and her husband will never be able to bargain for and receive more resources than he could receive by leaving the marriage.

When a husband's outside option is not valuable enough to make his divorce threat credible, the legal option of pursuing a postnuptial agreement will not harm either spouse. Husbands are unlikely to be able to bluff their way into a better marital contract. If their outside options are low, then their wives will probably have sufficiently accurate information and will be sufficiently risk seeking to call their bluff.[229] Therefore, postnuptial agreements are sometimes beneficial to both spouses and rarely detrimental to either when compared to their next-best option under a system of unilateral divorce.

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225. The same cannot be said of the introduction of no-fault divorce which increased the incidence of domestic violence. Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 889 (1994).

226. Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q. J. ECON. 267, 276 (2006).

227. *Id.* at 283.

228. *Id.* at 281.

229. *See supra* Part IV.C.

There is, however, one large normative caveat to this conclusion. Because a husband's outside option will drive the terms of any unequal agreement, the agreement will only be normatively acceptable if the value of his outside option is itself normatively acceptable. As discussed above, his outside option is in part a function of his postdivorce wealth, which is often closely correlated with postdivorce earning capacity.[230] Therefore, there must be a normative account of why the husband should have a given ownership interest in his postdivorce income.

The liberal shift that undergirded the move toward unilateral divorce also affected the division of assets upon divorce. In early England and America, alimony was a logical extension of the marriage contract, which could not be broken.[231] At best, a court could award a divorce "from bed and board" to allow spouses to live apart.[232] Because their marriage was unbreakable, however, the husband remained duty bound to support his wife.[233] After courts began to award true divorces, they continued to award alimony as a matter of habit.[234] In the last several decades, alimony came under fire because it was inconsistent with a purely consensual view of marriage.[235] Under this view, once the consent ends, so too should the obligation. In order to salvage alimony, scholars turned to a new justification: the Lockean labor theory of property.[236] In the marital context, this represents a view that alimony should be based on the poorer spouse's contributions to the richer

230. *See supra* Part IV.D.

231. REGAN, *supra* note 132, at 143.

232. *Id.*

233. *Id.* at 142. Enforcing this ongoing duty was vitally important because, under the common law principle of unity, the wife and the husband were one legal entity, and therefore a wife who had obtained a divorce from bed and board could still not own property or enter into contracts. Collins, *supra* note 111, at 29.

234. Ellman, *supra* note 105, at 5 ("This duty continued after 'divorce' because there was no divorce in the modern sense, only legal separation. When judicial divorce became available in the eighteenth and nineteenth century, alimony remained as a remedy."); Elizabeth S. Scott & Robert E. Scott, *Marriage As Relational Contract*, 84 VA. L. REV. 1225, 1309 (1998) ("[A]limony appears to have lost its doctrinal and conceptual moorings under the no-fault regime . . . .").

235. *See, e.g.*, Ellman, *supra* note 105, at 5 ("A theory of alimony must explain why spouses should be liable for each other's needs after their marriage has ended. Why should the needy person's former spouse provide support rather than his parents, his children, or society as a whole?").

236. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17–18 (Thomas P. Peardon ed., 1952) ("The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided . . . he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.").

spouse's earning potential.[237] The richer spouse is therefore obligated to repay the poorer spouse for contributions to his or her property or earning capacity. This idea has commonly been repeated by courts,[238] legislatures,[239] and commentators[240] and seems to partially mirror personal preferences for the distribution of marital assets.[241]

Many scholars have argued that wives should share close to half of their husband's earning capacity, at least for a certain number of years

237. REGAN, *supra* note 132, at 145–61 (discussing the trend toward contribution theories in alimony and evaluating various ways of implementing this theory); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 102–03 (2001) (analogizing marriage to a business partnership); Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership and Divorce Discourse*, 90 IOWA L. REV. 1513, 1550–51 (2005).

238. *See, e.g.*, Smith v. Smith, 778 N.Y.S.2d 188, 189 (N.Y. App. Div. 2004); Wright v. Wright, 587 S.E.2d 600, 601–02 (Ga. 2003); Flannary v. Flannary, 121 S.W.3d 647, 650 (Tenn. 2003).

239. Of the forty states that give statutory factors to guide courts in their award of alimony, twenty-seven states list factors related to a spouse's financial or nonmarket labor contributions to the marriage. Collins, *supra* note 111, at 75, 78–79. The Uniform Marriage and Divorce Act (UMDA) also mandates that courts consider the relative contributions of each spouse when dividing assets. UNIF. MARRIAGE AND DIVORCE ACT § 307 (amended 1971) (1970). The American Law Institute (ALI) goes further than the UMDA to reject need as a valid basis for alimony and rely solely on a theory of compensation for losses. AM. LAW INST., *supra* note 81, § 5.02 cmt. a. Canadian law relies heavily on a contribution model. Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L.Q. 69, 69–70 (2004) ("Canadian law, which has been heavily influenced by compensatory principles, has in large part already undergone the kind of transformation proposed by the ALI.").

240. *See, e.g.*, Ellman, *supra* note 105, at 52–56 (arguing that compensation in the form of alimony is only proper when a spouse makes a marital investment that would otherwise go uncompensated); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454 (1994) (arguing for income sharing based on the assumption that each of the "spouses make[s] equally important contributions" to the marriage); Starnes, *supra* note 237, at 1543 (arguing that "[o]ften, the spouses' combined efforts generate enhanced human capital primarily for the husband" and that therefore his earning capacity should partially belong to the wife); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2229, 2258 (1994) (noting that postdivorce income sharing is justified because "[t]he ideal-worker's salary . . . reflects the work of two adults: the ideal-worker's market labor and the marginalized-caregiver's unpaid labor"). *But see* Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 898–904 (1988) (arguing that a contribution is one important justification for alimony but implying that a woman's lost opportunity to marry a different man and her potential lost opportunities to pursue a career also justify alimony even if they do not enhance her husband's earning capacity).

241. Carole Burgoyne, *Heart Strings and Purse Strings: Money in Heterosexual Marriage*, 14 FEMINISM & PSYCHOL. 165, 169 (2004) (noting that in a study of personal spending money "a significant minority [of couples] opt[ed] to give the higher earning partner somewhat more spending money").

after the divorce.[242] They have relied primarily on the argument that the wife contributed to her husband's earning capacity and therefore has an ownership interest in it.[243] The contribution theory of property does not, however, yield clear results.[244] Of all the experiences that enabled a husband to achieve a high earning capacity, few of them will depend on his marriage. For example, the most important elements of success, such as drive, dedication, emotional stability, and amicability are probably the product of his upbringing rather than his marriage. As such, his parents may have a greater claim to his earning capacity than his wife. Even if a spouse earns a graduate degree while married, it is not clear that the accompanying increase in earning capacity should be entirely attributed to the marriage.[245] For example, that spouse's prior investments in education—such as his or her success in high school which enabled enrollment in a prestigious college—may have played a substantial role in the acceptance to and success within his or her graduate program. Based on similar reasoning, one scholar concluded that "the investment in human capital prior to marriage will be so large and essential relative to the investment after marriage that an individual's human capital should be treated as separate property."[246]

This Article does not attempt to resolve the debate surrounding alimony. The important point is that spousal bargaining occurs in the shadow of the entitlements that the law of alimony creates. Therefore, the enforceability of postnuptial agreements increases the ripple effects of whatever alimony scheme a state has adopted. If a state adopts a normatively plausible system of postdivorce income sharing, then the results of postnuptial bargaining should also be normatively

242. *See, e.g.*, Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117–18 (1989) (proposing a limited term alimony that would continue for one year for each two years of marriage); Starnes, *supra* note 237, at 1551 (urging an analogy of marriage law and the law of business partnerships and arguing that income sharing should continue until the tasks of the partnership are completed: namely, the youngest child reaches the age of majority); Williams, *supra* note 240, at 2260 (advocating for alimony payments until the youngest child leaves the home and an arbitrary number of years has passed); Milton C. Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2389 (1994) ("[S]pouses' lives have been intertwined in ways that the logic of this rhetoric cannot fully capture. The extent of this interdependence is roughly a function of how long individuals are married. As a result, we might require that ex-spouses share the same standard of living for some period of time corresponding to the length of their marriage.").

243. *See supra* notes 235–39.

244. Allen Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 443–53 (1987).

245. *Id.* at 447–48.

246. *Id.* at 448.

acceptable.[247] To the extent that this alimony scheme illegitimately assigns ownership rights over a spouse's future income stream, the results of postnuptial bargaining will reflect that illegitimacy. Yet, even if postnuptial agreements are reflecting an underlying illegitimate property right, regulating postnuptial agreements is an extremely underinclusive way of addressing the problem. Courts and commentators should instead continue debating the proper alimony regime.

B. The Communitarian Critique and a Brief Response

The previous Section considered the benefits of postnuptial agreements for the spouses within a particular marriage and bracketed the question of possible externalities. But several communitarian and feminist communitarian theorists argue that enforcing postnuptial agreements sends an expressive signal that is corrosive to our shared notion of what constitutes a good relationship. They have argued that when a state supports a contractual view of marriage in general, it sends a signal that contracts are an, or perhaps the only, appropriate way to approach marriage.[248] Others might argue that, although prenuptial agreements are widely available, the state should not exacerbate the problem by allowing postnuptial agreements as well. Formal negotiations could be limited to the premarital stage, plausibly maintaining the marriage itself as a sphere governed by the ethic of care rather than personal self-interest.

It is difficult, however, to maintain a firm distinction between the pre- and postnuptial contexts when the core challenge is grounded in a general aversion to contractual thinking. If law has a powerful, expressive force, then any differences in the law must be explained for

247. In addition to postdivorce earnings, a husband's value on the remarriage market contributes to his outside option. Unlike property entitlements, the state is not directly responsible for the biological differences between the length of men's and women's reproductive lives. *See* Wax, *supra* note 9, at 548. Under some theories of equality, however, the state may nonetheless be obligated to mitigate the costs that stem from this difference. This is beyond the scope of this Article. It is sufficient here to note that these arguments would require a large shift in the current and historical norms of state obligation.

248. GLENDON, *supra* note 222, at 113 (suggesting that our cultural and legal vocabulary is dominated by individual rights and that this prevents Americans from accurately describing and dealing with social issues); Scott, *supra* note 82, at 717 ("[T]he law's description of marriage and family distorts the aspirations and experiences of many people."). Some have argued that the use of a political and economic theory is a self-fulfilling prophecy. *See* REGAN, *supra* note 132, at 82 ("Theory is also an attempt to understand ourselves, and such understandings enter in subtle ways into our sense of who we are and why we act.").

them to persist. If fiancés can create prenuptial agreements that define their rights upon divorce in a way that violates their future moral obligations to each other, there is no principled justification for not allowing spouses to do the same.

There is a more fundamental problem with this critique as well. It is not clear whether its premise—that contracts are corrosive to communitarian values—is true. Contractual devices are not necessarily in conflict with communitarian values. Although one common vision of contracts is rooted in the market and market metaphors, this is not the only possible vision of contracts. A contract, at its heart, is a promise. Promises are fundamental to even the communitarian-feminist view of marriage and the obligations that it imposes. Although obligation can stem from interdependency alone, it is surely augmented by a promise to voluntarily assume that obligation. This is presumably part of the purpose of engagement rings.[249] Contracts provide another means of making such a promise. In this way, contracts can actually further communitarian aims by allowing spouses to enter into stronger commitments than the state's default contract provides for.[250] This is precisely what spouses are doing when they seek to impose adultery penalties on one another through pre- and postnuptial agreements. Moreover, if there is really a broad consensus about what relationships should be like, as communitarians must assume, then rational, autonomous spouses will often choose to affirm these values in their contracts.[251] "Communitarians would discount the possibility that [couples] would embrace communitarian values in choosing their ends. If commitment and responsibility are valued by many people in society, however, these qualities may shape personal ends."[252] Far from undermining communitarian values, the language of contract, broadly speaking, is consistent with the language of commitment and obligation.

249. Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 210 (1990) (analyzing demand for diamond rings in early twentieth-century America and concluding that the strongest force behind their rising popularity was the abolition of the common law breach of promise to marry action).

250. Jamie Alan Aycock, *Contracting Out of The Culture Wars: How The Law Should Enforce And Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL'Y 231, 232–33 (2006) (arguing that the state should enforce contractual terms of marriage that either increase or decrease the spouses' level of commitment in order to respect the pluralism of today's culture).

251. Scott, *supra* note 82, at 720–21. ("[I]n a liberal society, autonomous individuals often will pursue their life plans by voluntarily undertaking legally enforceable commitments to others. . . . The marriage relationship, as many understand it, fits readily into this framework. . . . Indeed, a marital relationship that contributes to personal fulfillment may be possible only with a level of trust that is conditioned on binding commitment.").

252. *Id.* at 691 n.16.

VI. CONCLUSION

There is an imminent need to address the legal status of postnuptial agreements and to determine whether they merit more or less regulation than their prenuptial counterparts. The rich theoretical and empirical literature on bargaining suggests two interrelated reasons for courts to refrain from imposing additional burdens on postnuptial agreements. First, the availability of enforceable postnuptial agreements leaves both spouses better off than they would be without the option of renegotiation. Second, the results of postnuptial agreements are likely to be more egalitarian than prenuptial agreements. Therefore, if prenuptial agreements are embraced by a legal system—as they are in the United States—then there is no good reason to reject postnuptial agreements.

The availability of postnuptial agreements will benefit both spouses. Husbands are unlikely to be able to bluff their way into a better marital contract. Wives will probably have sufficiently accurate information and be sufficiently risk seeking to call the bluff. When a husband's divorce threat is credible, a wife will either have to bargain with him or divorce him, and both may prefer to negotiate. The results of any bargain will benefit both spouses compared to their option to divorce under the state's default rules.

Postnuptial bargaining will not always lead to just results, but any injustice is likely to be the result of the spouses' default entitlements and not any defect in the bargaining process itself. To the extent that the state's default rules, such as alimony, are unjust, the results of postnuptial bargaining will be unjust. However, imposing restrictions on postnuptial agreements will prevent only a small portion of the harm that flows from that injustice. Instead of limiting the ripple effects of an unjust alimony scheme by regulating postnuptial agreements, legislatures, courts, and commentators should endeavor to create a just system of postdivorce income sharing. To the extent that the state has correctly set its alimony and property division rules, the results of postnuptial bargaining are normatively defensible because both spouses will benefit from the renegotiation compared to their next best option: divorce.

There are powerful constraints on the ability of one spouse to appropriate the bulk of the marital surplus. The spouse seeking the postnuptial agreement—often the husband—will only be able to bargain for and receive a distribution of assets and obligations that makes him slightly prefer marriage to divorce. This inherent limitation on a husband's power to appropriate marital resources is absent in the

premarital context. Therefore, a groom could potentially bargain for and receive much more than he would need simply to prefer marriage to bachelorhood. Indeed, it is likely that he will be able to do so. Brides-to-be are generally overly optimistic, risk averse, and less informed about their partners than wives. These factors prevent brides-to-be from driving hard bargains. By contrast, wives have fewer illusions about the costs and benefits of marriage, are likely to be less risk averse, and are likely to have excellent information about how much their husbands value the marriage. They will therefore be able to limit the scope of inequality that results from marital bargaining by only shifting just enough assets and obligations to make their husbands prefer to remain married. Overall, this suggests that postnuptial agreements are likely to be less, not more, problematic than prenuptial agreements.

VII. APPENDIX

States that Impose More Restrictions on Postnuptial Agreements than Prenuptial Agreements	States that Apply Same Rules to Post- and Prenuptial Agreements	States that Have Not Yet Addressed the Requirements of Postnuptial Agreements
Arizona[251]	Alabama[252]	Alaska[253]
Arkansas[254]	Florida[255]	Colorado[256]
California[257]	Hawaii[258]	District of Columbia[259]
Connecticut[260]	Indiana[261]	Georgia[262]
Delaware[263]	Kentucky[264]	Idaho[265]
Kansas[266]	Missouri[267]	Illinois[268]
Louisiana[269]	Pennsylvania[270]	Iowa[271]
Minnesota[272]	Utah[273]	Maine[274]
Montana[275]	Virginia[276]	Maryland[277]
New Jersey[278]	Washington[279]	Massachusetts[280]
New Mexico[281]	Wisconsin[282]	Michigan[283]
New York[284]		Mississippi[285]
Ohio[286]		Nebraska[287]
Oklahoma[288]		Nevada[289]
Tennessee[290]		New Hampshire[291]
Wyoming[292]		North Carolina[293]
Puerto Rico[294]		North Dakota[295]
		Oregon[296]
		Rhode Island[297]
		South Carolina[298]
		South Dakota[299]
		Texas[300]
		Vermont[301]
		West Virginia[302]

251. *Compare* ARIZ. REV. STAT. ANN. § 25-204 (2007) (enacting the UPAA), *with* Spector v. Spector, 531 P.2d 176, 182, 185 (Ariz. Ct. App. 1975) (holding that postnuptial agreements "should include the built-in safeguards that the agreement must be free from any taint of fraud, coercion or undue influence; that the wife acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable" and that the proponent of the postnuptial agreement must prove these elements by clear and convincing evidence).

252. Barnhill v. Barnhill, 386 So. 2d 749, 751 (Ala. Civ. App. 1980) (finding that the party that seeks to enforce a prenuptial agreement must show that the consideration was adequate and the entire transaction fair, just, and equitable from the other's point of view or freely and voluntarily entered into by the other party with competent independent advice and full knowledge of her interest in the estate and its approximate value), *approved by Ex parte* Walters, 580 So. 2d 1352, 1354 (Ala. 1991); Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991) ("[B]ecause the same concerns regarding the existence of undue influence or advantage by the dominant spouse in obtaining a waiver exist both before and after the marriage, we follow the same line of reasoning used in determining the validity of *prenuptial waivers*.").

253. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see Brooks v. Brooks, 733 P.2d 1044, 1049 (Alaska 1987) (holding that prenuptial agreements are enforceable and that the UPAA generally contains useful factors to consider).

254. *Compare* ARK. CODE ANN. § 9-11-405 (2002 & Supp. 2007) (enacting the UPAA), *with* Simmons v. Simmons, No. CA06-303, 2007 WL 465889, at *3 (Ark. Ct. App. Feb. 14, 2007) ("Following the guidance of the Tennessee Supreme Court in *Bratton* and our own case law holding that past consideration will not support a current promise, we hold that the parties' marriage is not adequate legal consideration to support this agreement.").

255. Casto v. Casto, 508 So. 2d 330, 333 (Fla. 1987) (holding that postnuptial agreements would be invalid if there was duress, overreaching, or unfair terms; if not, then the burden shifts to the enforcer to show disclosure of assets); Waton v. Waton, 887 So. 2d 419, 421 (Fla. Dist. Ct. App. 2004) (following *Casto* in a case dealing with prenuptial agreements).

256. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see COLO. REV. STAT. ANN. § 14-2-306 (West 2005) (enacting the UPAA).

257. California does not fit comfortably within any of the categories in this table. Although California has addressed postnuptial agreements and made a clear rule that governs them, it is not clear whether this rule is more or less burdensome than the rules relating to prenuptial agreements. *Compare* CAL. FAM. CODE § 1614 (West 2004) (enacting the UPAA), *with In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 417 (Cal. Ct. App. 2002) (imposing a presumption of coercion on postnuptial agreements but relieving them of the formal requirements of prenuptial agreements).

258. HAW. REV. STAT. ANN. § 572D-5 (LexisNexis 2005) (enacting the UPAA); Epp v. Epp, 905 P.2d 54, 59 (Haw. Ct. App. 1995) (noting that "premarital or antenuptial agreements in contemplation of marriage" are possible and "during-the-marriage agreements in contemplation of divorce" are permissible as well).

259. For the only mention of postnuptial agreements, see D.C. CODE ANN. § 16-910 (LexisNexis 2006) (acknowledging the potential validity of "ante-nuptial or post-nuptial agreement[s]" but remaining silent on whether they should be judged by different criteria). For the rules on prenuptial agreements, see D.C. CODE ANN. § 46-505 (LexisNexis 2006) (enacting the UPAA).

260. *Compare* CONN. GEN. STAT. ANN. § 46b-36f (West 2007 and Supp. 2007) (enacting the UPAA), *with* Musk v. Musk, No. FA890103046S, 1991 WL 25553, at *5 (Conn. Super. Ct. Jan. 29, 1991) (holding that remaining married is inadequate consideration for a postnuptial agreement).

261. IND. CODE ANN. § 31-11-3-7 (LexisNexis 2003) (enacting the UPAA); *see* Beaman v. Beaman, 844 N.E.2d 525, 529–30 (Ind. Ct. App. 2006) (noting that agreements "entered into in contemplation of marriage or its continuance . . . generally must be enforced as written in the event of dissolution").

262. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982) (holding that the validity of a prenuptial agreement depends on the following factors: "(1) was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (2) is the agreement unconscionable? (3) have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?").

263. *Compare* DEL. CODE ANN. tit. 13, § 325 (1999 and Supp. 2006) (enacting the UPAA), *with* Conigliaro v. Conigliaro, 1992 WL 435703, at *7 (Del. Fam. Ct. Nov. 20, 1992) (holding that remaining married is inadequate consideration for a postnuptial agreement), *and* Robert v. Ecmel, 460 A.2d 1321, 1323 (Del. 1983) (noting that marriage itself creates "a confidential or fiduciary relationship" which, in turn, "raises a presumption against the validity of a transaction by which the superior obtains a possible benefit at the expense of the inferior, and casts upon him the burden of showing affirmatively his compliance with all equitable requisites").

264. Edwardson v. Edwardson, 798 S.W.2d 941, 945 (Ky. 1990) (requiring "full disclosure" and that the prenuptial "agreement must not be unconscionable at the time enforcement is sought"); Rice v. Rice, No. 2003-CA-00409-MR, 2004 WL 362289, at *2 (Ky. Ct. App. Feb. 27, 2004) (applying a prenuptial standard to a postnuptial contract).

265. *See* Bell v. Bell, 835 P.2d 1331, 1337 (Idaho Ct. App. 1992) (briefly discussing duress in the context of a postnuptial agreement but not directly mentioning the UPAA rules, which were adopted by Idaho in IDAHO CODE ANN. § 32-924 (2006)).

266. *Compare* KAN. STAT. ANN. § 23-806 (2006) (enacting the UPAA), *with* Davis v. Miller, 7 P.3d 1223, 1229 (Kan. 2000) (citing Pacelli v. Pacelli, 725 A.2d 56, 61 (N.J. Super. Ct. App. Div. 1999) (noting that the Kansas' version of the UPAA was not intended to apply to postnuptial agreements as "[p]arties entering into a post-marital agreement are in a vastly different position than parties entering into a premarital agreement")).

267. MO. ANN. STAT. § 451.220 (2006) (requiring that a prenuptial agreement be entered into "freely, fairly, knowingly, understandingly and in good faith with full disclosure" and not be unconscionable); Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003) (rejecting the analysis in *Pacelli* and treating a postnuptial agreement like a prenuptial agreement). Missouri is considering adopting the UPAA but has not done so yet. H.B. 471, 94th Gen. Assem., Reg. Sess. (Mo. 2007).

268. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see 750 ILL. COMP. STAT. ANN. 10/1-11 (West 1999 & Supp. 2007) (enacting a statute very close to the UPAA); *In re* Marriage of Barnes, 755 N.E.2d 522, 529–30 (Ill. App. Ct. 2001) (holding that under Illinois' version of the UPAA, courts are free to award maintenance even when it is waived if denying maintenance would constitute "undue hardship in light of circumstances not reasonably foreseeable").

269. *Compare* LA. CIV. CODE ANN. arts. 2328–30 (2005) (imposing several limits on prenuptial contracting), *with* LA. CIV. CODE ANN. art. 2329 (allowing postnuptial agreements within one year of moving to Louisiana or else "only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules").

270. Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) (rejecting special rules and applying traditional principles of contract law to prenuptial agreements); Stoner v. Stoner, 819 A.2d 529, 533 n.5 (Pa. 2003) ("[T]he principles applicable to antenuptial agreements are equally applicable to postnuptial agreements.").

271. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see IOWA CODE ANN. § 596.7 (West 2001 & Supp. 2006) (enacting the UPAA).

272. MINN. STAT. ANN. § 519.11 (West 2006) (requiring that a prenuptial agreement be witnessed, in writing, with adequate disclosure and an opportunity to consult counsel, while requiring that a postnuptial agreement be witnessed, in writing, where both parties were actually represented by counsel and imposing a presumption of duress if divorce occurs less than two years after the postnuptial agreement, as well as signing-time and enforcement-time fairness review).

273. UTAH CODE ANN. § 30-8-5 (1998 & Supp. 2007) (enacting the UPAA); D'Aston v. D'Aston, 808 P.2d 111, 113 (Utah Ct. App. 1990) (following other jurisdictions and treating postnuptial agreements like prenuptial agreements) ("[A] postnuptial agreement is enforceable in Utah absent fraud, coercion, or material nondisclosure.").

274. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see ME. REV. STAT. ANN. tit. 19, § 607 (1993 & Supp. 2006) (enacting the UPAA).

275. *Compare* MONT. CODE ANN. § 40-2-607 (2005) (enacting the UPAA), *with id.* § 40-2-301. ("Either [spouse] may enter into any engagement or transaction with the other or with any other person respecting property which either might, if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the provisions of this code relative to trusts.").

276. VA. CODE ANN. § 20-153 (2004 & Supp. 2007) (enacting the UPAA); VA. CODE ANN. § 20-155 (specifically authorizing "marital agreements" and subjecting them to the UPAA).

277. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see Frey v. Frey, 471 A.2d 705, 711 (Md. 1984) (holding that prenuptial agreements must be fair and equitable in procurement and result, and that they are invalid if there was an "overreaching").

278. *Compare* N.J. STAT. ANN. §§ 37:2-31 to -41 (West 2002) (enacting the UPAA but with liberal definition of unconscionability: "Unconscionable premarital agreement means an agreement, either due to a lack of property or unemployability . . . [w]hich would provide a standard of living far below that which was enjoyed before the marriage"), *with* Pacelli v. Pacelli, 725 A.2d 56, 62–63 (N.J. Super. Ct. App. Div. 1999) (imposing signing-time and enforcement-time fairness review on postnuptial agreements).

279. *In re* Marriage of Zier, 147 P.3d 624, 629 (Wash. Ct. App. 2006) (adopting a totality of the circumstances test for validity of prenuptial agreements); *In re* Marriage of Osborne, No. 50527-1-I, 2003 WL 23020221, at *2 (Wash. Ct. App. Dec. 29, 2003) (Concluding that "agreements between spouses, such as prenuptial and postnuptial agreements, are considered conducive to marital tranquility and are regarded with favor," and analyzing a postnuptial agreement like it were a prenuptial agreement).

280. There is no clear case law or statute that addresses postnuptial agreements. Fogg v. Fogg, 567 N.E.2d 921, 922 (Mass. 1991) (explaining that "assuming, without deciding, that this type of [postnuptial agreement] agreement is valid, it must be free from fraud and coercion" and finding that the agreement was procured through fraud). For the rules on prenuptial agreements, see Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) ("[Prenuptial agreements] must be fair and reasonable at the time of entry of the judgment . . . and it may be modified by the courts in certain situations, for

example, where it is determined that one spouse is or will become a public charge . . . .").

281. *Compare* N.M. STAT. ANN. § 40-3A-6 (LexisNexis 2004) (enacting the UPAA), *with* N.M. STAT. ANN. § 40-2-8 ("A husband and wife cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing, to an immediate separation, and may make provisions for the support of either of them and of their children during their separation.").

282. WIS. STAT. § 766.58(6) (2005–06) (enacting the UPAA for both pre- and postnuptial agreements, and concluding that "[a] marital property agreement executed before or during marriage is not enforceable if the spouse against whom enforcement is sought proves any of [several factors]").

283. There is no clear case law or statute that addresses postnuptial agreements. Ransford v. Yens, 132 N.W.2d 150, 153 (Mich. 1965) (highest court equally divided as to validity of postnuptial agreement). For the rules on prenuptial agreements, see Brown v. Brown, No. 250056, 2004 WL 2674213, at *1 (Mich. Ct. App. Nov. 23, 2004) ("[A prenuptial agreement] is generally enforceable except if: (1) it was obtained through fraud, duress, mistake, misrepresentation, or nondisclosure; (2) it was unconscionable when entered into; or (3) circumstances have changed so that it is unfair and unreasonable at the time of divorce.").

284. *Compare* N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2006) ("An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."), *with* Zagari v. Zagari, 746 N.Y.S.2d 235, 238 (N.Y. Sup. Ct. 2002) (holding that remaining in the marriage was sufficient consideration), *and* Whitmore v. Whitmore, 778 N.Y.S.2d 73, 75 (N.Y. App. Div. 2004) (holding that remaining in the marriage was not sufficient consideration).

285. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see Mabus v. Mabus, 890 So. 2d 806, 818 (Miss. 2003) (holding that prenuptial agreements must be fair in their execution and that "[a] duty to disclose is also of paramount importance").

286. *Compare* Gross v. Gross, 464 N.E.2d 500, 505–06, 509 (Ohio 1984) (enforcing prenuptial agreements if entered into freely without fraud or duress and with full disclosure or full knowledge of property, as long as the terms do not promote divorce, were fair when entered into, and are not unconscionable when enforced), *with* OHIO REV. CODE ANN § 3103.06 (LexisNexis 2003) ("A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.").

287. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see NEB. REV. STAT. ANN. §§ 42-1001 to -1011 (LexisNexis 2005) (enacting the UPAA without its provision allowing the modification of prenuptial agreements).

288. *Compare* Griffin v. Griffin, 94 P.3d 96, 99–100 (Okla. Civ. App. 2004) (holding that when a disclosure of wealth is made, agreements entered into with the utmost good faith and fairness will be enforced unless affected by "fraud, duress, coercion, overreaching, and the like"), *with* Hendrick v. Hendrick, 976 P.2d 1071, 1073 (Okla. Civ. App. 1998) ("Postnuptial agreements are not authorized by Oklahoma Statutes.") (citing OKLA. STAT. ANN. tit. 43, §§ 121, 204 (2006)).

289. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see NEV. REV. STAT. ANN. § 123A.070 (LexisNexis 2004) (enacting the UPAA).

290. *Compare* Cary v. Cary, 937 S.W.2d 777, 782 (Tenn. 1996) ("So long as the antenuptial agreement was entered into freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching . . . [it] will be enforced . . . ."), *with* Bratton v. Bratton, 136 S.W.3d 595, 600, 603 (Tenn. 2004) (holding that marriage is adequate consideration for a prenuptial agreement but remaining married is inadequate consideration for a postnuptial agreement, and suggesting that courts should be quicker to find duress in the postnuptial context).

291. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see *In re* Estate of Hollett, 834 A.2d 348, 351–52 (N.H. 2003) (requiring that prenuptial agreements not be unconscionable or obtained through fraud, duress, or mistake; that the facts and circumstances have not so changed since execution as to make it unenforceable; and that spouses have time to contact an attorney and reflect upon the agreement).

292. *Compare* Seherr-Thoss v. Seherr-Thoss, 2006 WY 111, ¶¶ 5, 10, 141 P.3d 705, 710, 712 (Wyo. 2006) (holding that prenuptial agreements should be judged like any other contract but nonetheless noting that the prenuptial agreement at issue was "fair and equitable, the parties entered into the agreement knowingly and willingly, and neither party was acting under fraud or duress at the time of execution and performance"), *with* Combs v. Sherry-Combs, 865 P.2d 50, 54–55 (Wyo. 1993) (noting that, with a postnuptial agreement, an existing marriage cannot constitute consideration; there must be an "exchange of other identifiable consideration").

293. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see N.C. GEN. STAT. § 52B-6 (2007) (enacting the UPAA).

294. *Compare* Cruz Ayala v. Rivera Perez, No. RE-94-175, 1996 WL 498887 (P.R. June 11, 1996) (holding that P.R. LAWS ANN. tit. 33, § 282 (1993), which states that "[t]he spouses shall protect themselves and satisfy their needs in proportion to their conditions and fortune" does not limit prenuptial agreements), *with* Umpierre v. Torres Diaz, No. R-82-554, 1983 WL 204183 (P.R. June 28, 1983) (holding that spouses cannot modify prenuptial agreements after marriage because "[t]he prohibition to change the antenuptial agreements, known as the doctrine of immutability, has fallen in disuse . . . . However, this is the prevalent doctrine in our jurisdiction . . . until the Legislature decides to adopt the modern principle of mutability").

295. There is no clear case law or statute that addresses postnuptial agreements. Weber v. Weber, 1999 ND 11, ¶¶ 9–12, 589 N.W.2d 358, 360-61 (mentioning postnuptial agreements in passing without any apparent indication of a potentially higher standard of review). For the rules on prenuptial agreements, see N.D. CENT. CODE § 14-03.1-05 (2004) (enacting the UPAA).

296. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see OR. REV. STAT. § 108.720 (2005) (enacting the UPAA).

297. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see R.I. GEN. LAWS § 15-17-5 (2003 & Supp. 2006) (enacting the UPAA).

298. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see Hardee v. Hardee, 585 S.E.2d 501, 504 (S.C. 2003) (setting forth a three-prong test for validity of prenuptial agreement: (1) was it obtained through fraud, duress, mistake, or non-disclosure of material facts? (2) is it unconscionable? (3) have facts and circumstances changed since execution to make enforcement unfair and unreasonable?).

299. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see S.D. CODIFIED LAWS § 25-2-20 (2004) (enacting the UPAA).

300. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see TEX. FAM. CODE ANN. §§ 4.001–.010 (Vernon 2006) (enacting the UPAA).

301. There is no clear case law or statute that addresses postnuptial agreements. Allen v. Allen, 641 A.2d 1332, 1342 (Vt. 1994) (noting in dicta that the trial court analyzed the postnuptial agreement with the same standards as a prenuptial agreement but not commenting on the issue). For the rules on prenuptial agreements, see Bassler v. Bassler, 593 A.2d 82, 87 (Vt. 1991) ("The enforceability of an antenuptial agreement is governed by consideration of whether [1] 'each spouse has made fair and reasonable disclosure to the other of his or her financial status[,] [2] each spouse has entered into the agreement voluntarily and freely[,] and [3] the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse.'").

302. There is no clear case law or statute that addresses postnuptial agreements. For the rules on prenuptial agreements, see Bridgeman v. Bridgeman, 391 S.E.2d 367, 370 (W. Va. 1990) ("[A] formal, valid prenuptial agreement . . . may survive the marriage if substantially fair, [under the totality of the circumstances] entered into with full disclosure and deliberation by both parties . . . .").